Reforming Corporate Fraud Regulation in the UK:
A Model of Manifest Liability

Alison Louise Cronin

A thesis submitted in partial fulfilment of the requirements of
Bournemouth University
for the degree of Doctor of Philosophy

2015

Reforming Corporate Fraud Regulation in the UK: A Model of Manifest Liability

Alison Louise Cronin

Abstract

Under the common law 'identification principle' criminal fault can only be attributed to a corporation if a sufficiently senior individual, typically a director, is guilty of the offence in question. This is problematic in itself given the typically complex and decentralised organisational structures of large companies. However, it is particularly ill-suited to address instances of pervasive and systemic corporate fraud, such as may have been evidenced in the recent widespread mis-selling scandals. In response to the difficulties associated with the 'identification principle', various alternative approaches have been mooted. Whilst the realist nature of organisations is now widely acknowledged, proposals for reform implicitly perceive the need to prove criminal mens rea as problematic and therefore construct an altogether different basis of fault, such as negligence or the 'failure to prevent' model. However, whereas the negligence-type model fails to express adequately the deceptive nature of fraud, the 'failure to prevent' construct is equally ill-suited in that fraud is peculiar, it is not an activity in itself but the way in which an activity is performed. This thesis makes an original contribution to knowledge by identifying the legal principles and evidential mechanisms through which mens rea can be attributed directly to an organisation such that a corporate prosecution under the Fraud Act 2006 can be sustained without the need to identify individual criminality. Further, the proposed return to a manifest approach to fault attribution does not disturb the actus reus / mens rea construct of criminality and neuro-scientific advances made in relation to mirror neurons provide a radical new understanding of how fault can be ascertained in both individual and collective action. Accordingly, the perception that the manifest approach to fault is incompatible with the subjectivist ideology of the criminal law melts away with exciting implications for a theory of corporate criminality generally.

Contents

Acknowledgements

I would like to thank Professor Christopher Harding whose contribution to the area of organisational criminal liability largely inspired this work. His kindness, wisdom, humour and generosity of spirit have been a real source of encouragement. Above all, I am grateful for the reminder that this research stuff should always be fun!

Thanks also to Dr. Stephen Copp, Associate Professor, and, in particular, for his patient attention to detail and all that I learnt whilst working together on our off balance sheet finance project.

Author's Declaration

The invitation to join the Forum for Legal and Historical Research at their symposium on Law, Technology, Industry and Social Change at Reading University in June 2014 provided a wonderful opportunity to deliver my research relating to Viscount Haldane L.C. entitled, 'The Judicial Contribution to Theorising Criminal Corporate Responsibility'. Attributed with having first articulated the so-called 'directing mind and will' or 'identification' theory, the findings provide some of the the context for the analysis of the landmark case itself. Sincere thanks to Professor Christopher Harding who inspired the paper, this aspect of the research and who made its presentation possible.

The project on the banking crisis and off balance sheet finance provided much of the economic case for using the criminal law in preference to regulation as an anti-fraud measure. Co-authored with Dr Stephen Copp, an early version of the paper, 'Off-balance Sheet Finance and the 2008 Financial Crisis: The Case for Deterrence Evaluated' was presented at the Banking and Finance Stream of the Socio-Legal Studies Association Annual Conference (Robert Gordon University, 2014). Thereafter, 'The failure of criminal law to control the use of off balance sheet finance during the banking crisis' was published in the Company Lawyer in March 2015, (2015) 36 The Company Lawyer, Issue 4, 99. The contribution made entailed the criminal law aspect of the paper, its use as an early response to the problem of fraud in the 19th century, its development and the analysis and evaluation of the current criminal provisions for fraudulent financial reporting.

In April 2015, 'Corporate Fraud: The Case for a Manifest Approach to Liability' was presented at the Banking and Finance Stream of the Socio-Legal Studies Association Annual Conference (Warwick University). This provided a valuable opportunity to showcase the essence of the doctoral findings and proposal.

Table of Cases

Table of Legislation

Statutory instruments

Australia

1. Introduction

1.1 The need for a new model of corporate liability for fraud

Whilst fraud is a global problem,[1] it is estimated to have cost the UK economy alone £52 billion during 2013.[2] Although frauds perpetrated by individuals have demonstrated how devastating this particular crime can be,[3] such instances are dwarfed by widespread and systemic fraud committed in the corporate context. For example, reporting in January 2015, the Financial Ombudsman observed that it will be years before the scandal of mis-selling personal protection insurance will be over.[4] In an activity dating back to the 1990s, an estimated £50 billion worth of protection policies have been sold by hundreds of different financial businesses, resulting in millions of complainants and around £22 billion paid out in compensation thusfar.[5] Whilst the mis-selling of this particular financial product accounts for 74% of complaints, others relate to interest rate hedging schemes, packaged accounts, interest only mortgages, investments and other insurance products.[6]

Although some of the frauds perpetrated in the commercial context are readily identifiable as the acts of particular individuals, who would therefore attract personal criminal culpability, other corporate activities are so systemic and pervasive that it is

[1] It is suggested that the Global Financial Crisis of 2008-9 cost $11.9 trillion, one-fifth of global output and a significant contributing factor was the USA's sub-prime mortgage market in which borrowers and lenders alike were dishonest as regards the capacity to repay the loans. As mortgagors inevitably defaulted, the seeds of the financial crisis were sown, see Geoffrey Smith and others, *Studying Fraud as White Collar Crime* (Palgrave Macmillan 2011) 2.

[2] <http://www.gov.uk/government/publications/annual-fraud-indicator--2> accessed 31 October 2014, National Fraud Authority publication, 6 June 2013. It was previously estimated to have cost the UK economy £73 billion during 2011, see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118532/annual-fraud-indicator-2011.pdf accessed 7 May 2015.

[3] For example, Bernard Madoff pleaded guilty to a $65 billion investment fraud in March 2009. He pleaded guilty to 11 offences related to his wealth management company, including securities fraud, wire fraud, mail fraud, money laundering, making false statements and returns to the US Securities and Exchange Commission. He operated the world's largest ever 'Ponzi' scheme.

[4] <http://www.bbc.co.uk/news/business-30695720> accessed 6 January 2015.

[5] <http://www.financial-ombudsman.org.uk/contact/PPI-your-case.html> accessed 22 January 2015. The matter is far from over with 2.1 million initial enquiries made in 2012-13 which represents a 92% increase in new cases received by the financial ombudsman, see <http:// www.financial-ombudsman.org.uk/news/speech/2013/CW-BILA-conference.pdf> accessed 22 January 2015.

[6] www.financial-ombudsman.org.uk/news/speech/2013/CW-BILA-conference.pdf> accessed 22 January 2015.

impossible to locate fault with the exactness that individual liability requires. For example, if the mis-selling conduct described above was to be considered fraudulent in the criminal sense, importing the recognition that it was a dishonest practice,[7] the prosecution of individual junior members of staff, involved directly in the selling, would not necessarily be appropriate. It is conceivable that the honesty of such employees is unlikely to be in doubt in circumstances where, for example, the product sold was a constituent of the range of products authorised by the organisation and the sales conduct was a normal and encouraged part of the company activity, consistent with the corporate policy and part of a company-wide and seemingly industry-wide practice. Similarly, whilst the behaviour might be pervasive throughout the organisation, the identification of criminal fault in individual senior members of staff, as orchestrators of the dishonest corporate practice, may be equally problematic and/or unlikely. However, the lack of an identifiable individual perpetrator or perpetrators does not diminish the gravity of the conduct or make it any less blameworthy. In such a case, it may be intuitively more appropriate to blame the organisation itself, as the corporate actor, rather than an individual employee.[8] Indeed, the fact that the Financial Conduct Authority, in the performance of its regulatory remit, imposes penal sanctions on corporate bodies, as well as individuals, accords with this intuition and it does not, of itself, attract controversy.[9]

However, if systemic misconduct of this nature were to be perceived as the fault of the corporate entity itself, in the absence of an identifiable individual wrongdoer, the substantive criminal law, as it now stands, is rendered ineffective. Notwithstanding the potential gravity of the wrongdoing in such circumstances, the criminal law remains hopelessly rooted in the individualist paradigm which exclusively

[7] Fraud Act 2006, ss 2(1)(a), 3(a) and 4(1)(b).

[8] Corporations are a succession or collection of persons having a legal existence and rights and duties distinct from those of the individual persons who form them; they enjoy perpetual succession, can sue and be sued, Co Litt 250a; 1 Bl Comm 468; *Salomon v Salomon* [1897] AC 22 (HL). The term 'legal person' is not confined to business corporations or companies and can be applied to any entity that is legally distinct from its owners or members, eg states, local authorities, universities.

[9] Replacing the Financial Services Authority, the Financial Services Act 2012 established a new regulatory regime for the industry comprising the Financial Conduct Authority, the Prudential Regulatory Authority, the Financial Policy Committee (a subsidiary of the Bank of England) and HM Treasury providing various powers, including the power to impose fines.

recognises the human actor as the natural unit of agency, capable of moral and legal responsibility.[10] Thus, for criminal law doctrine, the real difficulty lies in the imposition of liability on a corporate form where the offence is considered 'truly criminal' in the sense that it is the moral wrongdoing that justifies the imposition of blame.[11] Whilst the civil law and regulatory regimes have no problem attributing rights and liabilities to the corporation itself, the criminal law still lacks the sophistication and the general conceptual tools to do so.[12] Whilst the current financial climate continues to be ripe for fraud,[13] this crime receives little attention in comparison to the traditional conceptions of criminality[14] and it remains under-researched.[15]

1.2 Mens rea and metaphysics: the stumbling block of the criminal law

The foundation of criminal liability has long been expressed in the Latin maxim *'actus non facit reum nisi mens sit rea'*[16] which is crudely interpreted as 'whatever the deed a man may have done, it cannot make him criminally punishable unless his doing of it was actuated by a legally blameworthy attitude of mind'.[17] Conforming to utilitarian and enlightenment thinking, it is therefore the blameworthy mental state, the 'mens rea' element as described in the offence definition, which acts as the modern hallmark of moral culpability. Furthermore, the individualist ideal demands that the state of mind is a matter of subjective assessment in preference to an

[10] Christopher Harding, *Criminal Enterprise, Individuals, Organisations and Criminal Responsibility* (Willan 2007); see too Andrew Ashworth, *Principles of Criminal Law* (6th edn, OUP 2009) who observes that continued adherence to the subjectivism associated with the individualist approach means that the criminal law has remained 'trapped' in the mindset of individual autonomy and moral responsibility.

[11] Elsewhere described as 'mala in se', some academics distinguish categories of criminal offences in terms of 'mala in se' and 'mala prohibita'. The distinction is elusive and many theorists seem to have abandoned the distinction altogether. Husak's account sees an instance of malum prohibitum when the conduct proscribed is not wrongful prior to or independent of the law, Douglas Husak, *Overcriminalization, the Boundaries of the Criminal Law* (OUP 2008).

[12] Celia Wells, 'Corporations: Culture, Risk and Criminal Liability' (1993) Crim LR Aug 551-566.

[13] <http://www.inhouselawyer.co.uk/index.php/fraud-and-corporate-crime/8264-fraud-forgotten-but-not-gone> accessed 7 May 2015 and quoting Enron, WorldCom and Madoff by way of example; Steven Box, *Recession, Crime and Punishment* (Macmillan 1987).

[14] Eg violent crime, drugs offences, anti-social behaviour, burglary.

[15] Alan Doig, *Fraud* (Willan 2006); Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007) 272.

[16] See eg Lord Kenyon CJ in *Fowler v Padget* (1798) 7 TR 509; Lord Goddard CJ in *Harding v Price* [1948] 1 KB 695.

[17] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) vol 1.

assessment of the defendant by reference to an objective standard of behaviour.[18] One particular consequence of this metaphysical approach to individual culpability is that the corporate body, absent of any mental state upon which liability can be established, has come to be viewed as a fiction. The fiction theory views the corporation exclusively as a legal entity with no transcendent reality:[19]

> The artificial legal person called the corporation has no physical existence. It exists only in contemplation of law. It has neither body, parts, nor passions. It cannot wear weapons or serve in the wars. It can be neither loyal, nor disloyal. It cannot compass treasons. It can be neither friend nor enemy. Apart from its corporators it can have neither thoughts, wishes, nor intentions, for it has no mind other than the minds of the corporators.[20]

This 'individualistic anchor' has been the real 'stumbling block to corporate liability',[21] with the attendant perception that there is 'no soul to damn; no body to kick'.[22] Thus, in the criminal law, the fictionist view has prevailed over the realist theory of organisations such that they are never perceived as autonomous, responsibility-bearing actors in their own right. It is nonetheless surprising that no overarching unified scheme or doctrine has ever developed to address the growth of fraud in the corporate context.[23] Indeed, the first corporate frauds can be dated to the

---

[18] A recent example of the subjectivist tendency can be found in the criminal damage case of *R v G* [2004] 1 AC 1034 (HL) in which the objective test of recklessness was replaced in favour of a subjective test.

[19] Hart HLA, 'Definition and Theory in Jurisprudence' (1954) 70 LQR 37.

[20] See Buckley LJ's dissenting judgment in *Daimler Co Ltd v Continental Tyre and Rubber Co (GB) Ltd* (1915) 1 KB 893 (CA) 916.

[21] Law Commission, *Criminal Liability in Regulatory Contexts (*Law Com No 195, 2010) C Wells, app C, para C.47. Further, Celia Wells argues that it is the shifting vocabulary that obscures the relevant questions about corporate liability and she goes on to suggest that attempts to define a company, eg by saying it is a mere fiction or that it has no mind with which to intend, confuses the issue, paras C.1 – C.18. See too Andrew Ashworth, *Principles of Criminal Law* (6th edn, OUP 2009). The difficulty is that the corporation is neither exclusively a 'person' nor a 'thing' and there is a person/thing duality that explains the confusion as to the essence of a corporation. Put another way, there are two forms of property relation, the shareholders own the company whilst the company owns the corporate assets, Katsuhito Iwai, 'Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance' 47 Am J Comp L (1999) 583.

[22] John Collins Coffee Jnr, 'No Soul to Damn, No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment' (1981) 79 Mich L Rev 386.

[23] In this respect it is suggested that the criminal law can only be understood by reference to historical contingencies in the political, social and economic context. For recent proponents of this view see for example RA Duff and others, *The Boundaries of the Criminal Law* (OUP 2010); R Dagger, 'Republicanism and the Foundations of Criminal Law' in RA Duff and S Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011). This lack of coherence may therefore be typical of a body

early 1700s[24] whilst fraud as a widespread problem emerged in the Victorian era, going hand in hand with the rise of industrial capitalism, funded by joint stock projects.[25] Responding to this new challenge, it was believed that the mechanism of incorporation would deter financial crime, with the company registration and the publicity that it required.[26] However, the shortcomings of this approach are well documented and indeed illustrated by the numerous subsequent piecemeal reforms that have followed.[27] It is now also evident that there was a societal consciousness demanding a tough response to deal with real fraud, albeit misconduct of this nature represented uncharted waters. Thus, in the employment of the criminal law, the narratives of the time show sensitivity to the tension between business, respectability and crime, extreme care being taken to ensure that the criminal law was only used against business men for whom it was wholly appropriate.[28] Notwithstanding the early decision to criminalize and the growing body of company law, the use of the regulatory regime, through which standards of commercial behaviour are prescribed,

---

of law that has developed over time, subject to the influence of historical contingency, and/or demonstrate a lack of prosecutorial will, see Stephen Copp and Alison Cronin, 'The Failure of Criminal Law to Control the Use of Off Balance Sheet Finance During the Banking Crisis' (2015) 36(4) Co Law 99.

[24] See the accounts given by John Carswell, *The South Sea Bubble* (Crescent Press 1960); Virginia Cowles, *The Great Swindle* (Collins 1960); GP Gilligan, 'The Origins of UK Financial Services Regulation', (1997) 18(6) Co Law 167.

[25] George Robb, *White Collar Crime in Modern England, Financial Fraud and Business Morality 1845-1929* (Cambridge University Press 1992). The Bubble Act 1720 was enacted after the South Sea Bubble and although it remained on the statute book until 1825, only one prosecution was brought under it, *R v Caywood* (1723) 1 Stra 472; 2Ld Ray 1362, see too John Carswell, *The South Sea Bubble* (Crescent Press 1960); Virginia Cowles, *The Great Swindle* (Collins 1960). See too, for example, HA Shannon, 'The Coming of General Limited Liability', (1930-1) J Econ Hist 2 269; HA Shannon 'The Limited Companies of 1866-1883', (1933) J Econ Hist 4 295; George Robb, *White Collar Crime in Modern England, Financial Fraud and Business Morality 1845-1929* (Cambridge University Press 1992); RW Kostall, *Law and English Railway Capitalism 1825-75* (Clarendon Press 1994): GR Searle, *Morality and the Market in Victorian Britain* (Clarendon Press 1998).

[26] Select Committee on Joint Stock Companies First Report, BPP, VII 1844 the *'Gladstone Committee Report'.*

[27] Select Committee on the Financial Aspects of Corporate Governance (1992), known as the *'Cadbury Report'* para 1.9 'Had a Code such as ours been in existence in the past, we believe that a number of the recent examples of unexpected company failures and cases of fraud would have received attention earlier. It must, however, be recognised that no system of control can eliminate the risk of fraud without so shackling companies as to impede their ability to compete in the market place.'

[28] James Taylor, *Boardroom Scandal: The Criminalization of Company Fraud in Nineteenth-Century Britain* (OUP 2013) discussed further in Sarah Wilson, *The Origins of Modern Financial Crime: Historical Foundations and current problems in Britain* (Routledge SOLON Explorations in Crime and Criminal Justice Histories 2014).

has grown exponentially over the last century or so.[29] With an ethos that views prosecution as a last resort, regulatory agencies prefer to obtain their objectives by education and persuasion.[30] Whilst this continues to be the case, it is of note that the scale of non-compliance with regulations by our financial institutions has recently been described as truly spectacular.[31]

Accordingly, the civil and regulatory approaches are supplemented by a patchwork of criminal laws enacted to respond specifically to the problem of corporate

[29] 'Very broadly, a regulatory context is one in which a Government department or agency has (by law) been give the task of developing and enforcing standards of conduct in a specialised area of activity'. Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) para 1.9, Regulation and Criminal Liability. Regulations are typically backed up by the threat of criminal sanction for breach.

[30] Carolyn Abbot, *Enforcing Pollution Control Regulation* (Hart Pubs 2009) cited by N Garoupa and others, 'The Investigation and Prosecution of Regulatory Offences: is there an economic case for integration?' (2011) 70(1) CLJ 229-259. A rough estimate, based on an analysis of categories of offences dealt with in the criminal courts in 2008, is that only 1.5% to 2% of the 89,000 defendants tried in the Crown Court and about 10% of the 1.64 million tried in the magistrates courts, are tried for an offence arising out of regulatory contexts (exc. motoring offences). See Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) app D, Impact Assessment, para D.34. The range of sanctions available to regulators has been enhanced by the Regulatory Enforcement and Sanctions Act 2008, following the recommendation of the Macrory Review of Penalties, Richard B Macrory (Better Regulation Executive), *Regulatory Justice: Making Sanctions Effective, Final Report* (Nov 2006). Whilst many agencies have powers to prosecute, see R Baldwin, 'The New Punitive Regulation' (2005) MLR 351, it is accepted that few prosecutions are brought to implement regulation, see James Gobert, 'Corporate Criminality: New Crimes for the Times' (1994) Crim LR 722; Keith Hawkins, *Law As Last Resort* (OUP 2002); Law Commission*, Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) app A, para A.12-13. Even where successful, the average fine imposed is modest, see Law Commission, *Criminal Liability in Regulatory Context (Law Com No 195*, 2010) app A, para A.15. Consequently, it is a fact that a business can make a profit through non-compliance with the law, see Law Commission, *Criminal Liability in Regulatory Contexts (*Law Com No 195, 2010) app A, para A.16; Philip Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement, Final Report* (London, 2005) para 2.80 – 2.81 and it is even suggested that targeting the individual directors or senior managers in addition to the company itself has little deterrent effect, see Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) app A, para A.19; R Baldwin, 'The New Punitive Regulation' (2005) MLR 351; Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993). This reluctance can be dated to our earliest attempts to deal with corporate fraud, see the early company legislation e.g. Joint Stock Companies Act 1844 and see too Douglas Hay, 'Property, Authority and the Criminal Law' in Douglas Hay and others (eds), *Albion's Fatal Tree* (Penguin 1975); M Foucault, *Discipline and Punish: The Birth of A Prison* (Penguin 1977): WR Cornish and G Clark, *Law and Society in England 1750-1950* (Sweet and Maxwell 1989); KJM Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957* (Clarendon Press 1998); Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2nd edn, Cambridge University Press 2001).

[31] See for example *Re Lehman Bros International (Europe) (in admin) v CRC Credit Fund Ltd* [2012] UKSC 6, [2012] BLR 667. Lehman had used "Repo 105" transactions to temporarily remove $49.102 billion and $50.383 billion from its balance sheets at the first and second 2008 quarter year ends, succeeding by doing so in reducing its net leverage by 1.9% and 1.8% respectively, Valukas Report (March 2011) 18 – 20 discussed in Stephen Copp and Alison Cronin, 'The Failure of Criminal Law to Control the Use of Off Balance Sheet Finance During the Banking Crisis' (2015) 36(4) Co Law 99.

misconduct.[32] This includes the enactment of offences which are drafted in 'strict liability' mode such that they do not involve the problem of requiring proof of any mental elements.

However, as regards offences considered 'truly criminal' and which, therefore, do contain mens rea elements, the courts have struggled to find a mechanism by which the necessary mental element might be attributed to the artificial person. Of note, fraud is once such offence.[33] Accordingly, as a response to the 'metaphysical obstacle' to corporate conviction, the common law developed a doctrine by which a corporation can only be held criminally culpable if the individual who is deemed to be its 'directing mind and will' is himself guilty of the offence in question.[34] Where this is the case, the individual's guilt can also be considered the guilt of the associated company. However, the 'identification principle' has proved problematic in many cases, not least in instances where the organisation is inherently criminogenic. Illustrative of the difficulties was the unsuccessful prosecution of P & O Ferries following the sinking of the Herald of Free Enterprise in 1987, notwithstanding the organisation was found to be infected with an 'attitude of sloppiness' from top to bottom.[35] Continued adherence to the 'identification principle' means that large companies with typically complex organisational structures and decentralised responsibility are likely to evade prosecution. In contrast, smaller companies, with directors more likely to be involved in the day to day activities of the company, seemingly offer 'low-hanging fruit' for prosecution.[36] It is therefore suggested that the current test of corporate responsibility 'works best

[32] Described by the Law Commission as being 'resonant of a collection of cut out pieces waiting to be sorted and sewn together to make a coherent structure', Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) app C, para C. 99 (C Wells); Christopher Harding, *Criminal Enterprise, Individuals, Organisations and Criminal Responsibility* (Willan 2007).

[33] Fraud Act 2006.

[34] Attributed to Viscount Haldane, *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).

[35] For example the industry wide safety failures illustrated by the Herald of Free Enterprise sinking and the following unsuccessful corporate prosecution, *P & O European Ferries (Dover) Ltd* (1990) 93 Cr App R 72. Although the inquiry into the tragedy found that P&O was 'from top to bottom infected with the disease of sloppiness' prosecution was impossible as it could not be proved that any of the 5 senior managers should have known of the risks of sailing with an open bow, see James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) 63. See also *R v Kite & OLL Ltd*, 8 Dec 1994, *R v Jackson Transport (Ossett) Ltd, R v Roy Bowles Transport Ltd*, 10 Dec 1999.

[36] Eg see the prosecution of the small company in *R v Kite & OLL Ltd*, 8 Dec 1994. Woolf T, 'The Criminal Code Act 1995 (Cth) - Towards a Realist Vision of Corporate Criminal Liability' (1997) Crim L J 257.

in cases where it is needed least [small businesses] and works worst in cases where it is needed most [big businesses]'.[37] As an approach to criminalisation, it clearly underestimates the complexity and subtlety of corporate action, imposing an already simplified biological model on an equally simplified appreciation of corporate management and internal behaviour.[38] In practice, policy and decision-making is often decentralised or the product of other corporate policies and procedures rather than the result of individual decisions.[39] Therefore, as a method of liability attribution, 'it fails to reflect the reality of the modern day large multinational corporation ... [and] it produces what many regard as an unsatisfactory narrow scope for criminal liability'.[40] Furthermore, the need to identify the criminality of an individual of sufficient seniority, as a precursor to corporate prosecution, incurs evidential problems which increase as the size of the company increases.[41] In any event, it is suggested that the identification principle cannot reflect corporate blameworthiness since proof of fault on the part of one sufficiently senior individual serves merely to demonstrate his personal fault and not that of the company.[42] Indeed, the deficiency of this anthropomorphic model has been conclusively illustrated in 2 other areas of corporate wrongdoing, in the context of corruption and corporate manslaughter where widespread criticism of the existing law[43] has led to

[37] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) 63. See also *R v Kite & OLL Ltd*, 8 Dec 1994; *R v Jackson Transport (Ossett) Ltd, R v Roy Bowles Transport Ltd*, 10 Dec 1999.

[38] Christopher Harding, *Criminal Enterprise, Individuals, Organisations and Criminal Responsibility* (Willan 2007) ch 9.

[39] See CMV Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' [1996] MLR 557, 561.

[40] David Ormerod*, Smith & Hogan's Criminal Law* (12th edn, OUP 2008) 249, a view shared by Gobert, see James Gobert, 'Corporate Criminality: four models of fault' (1994) 14(3) LS 393, 395.

[41] Mark Hsaio, 'Abandonment of the Doctrine of Attribution in favour of Gross Negligence Test in the Corporate Manslaughter and Corporate Homicide Act 2007' (2009) 30(4) Co Law 110, 111.

[42] Brent Fisse and John Braithwaite, *Corporations: Crime and Accountability* (Cambridge University Press 1993) 47.

[43] The shortcomings of the identification principle were perhaps most clearly articulated in relation to its application in the highly publicized corporate manslaughter cases. For a considerable period in the 1980s and 1990s, it was the specific offence of corporate manslaughter that became the narrow focal point of discussion about corporate criminality generally. This was ostensibly driven by public and media outcry in the face of a number of corporate tragedies and the significant criticism that the law attracted at the time in its failure to convict the companies themselves. These tragedies resulted in numerous fatalities, to both employees and members of the public. In March 1987, 187 people were killed in the Herald of Free Enterprise disaster. 167 died on Piper Alpha in July 1988 and, just 5 months later, 35 rail passengers lost their lives at Clapham. Over the years, the names Kings Cross, Marchioness, Southall, Paddington, Hatfield and Potters Bar added to the public chorus, demanding that profit-driven corporate perpetrators to be brought to account for the manslaughter offence in preference to some nominal health and safety breach. Previously the criminal law employed the common law offence of gross negligence manslaughter and invoked the identification

statutory intervention and the enactment of bespoke statutory offences to deal with the corporate offender.[44]

Notwithstanding the general dissatisfaction with the 'identification principle' of corporate fault attribution, the criminal law's response to the specific problem of fraud adds yet more complexity.[45] In addition to the common law conspiracy to defraud,[46] the statute book reveals a highly fragmented approach to conduct amounting to fraud. This may be symptomatic of the early tendency to highly particularised drafting of offences and it is of note that, until the enactment of the Fraud Act 2006, there was no single codified offence or even a definition of criminal fraud.[47] Indeed, whilst the Law Commission's 2002 Report on Fraud highlighted government's commitment to addressing major commercial fraud,[48] its recommendation was that, 'introducing a single crime of fraud would dramatically simplify the law of fraud,[49] [and] ... a general offence of fraud would be aimed at encompassing fraud in all its forms'.[50] Accordingly, when the Act came into force

---

principle as against corporations. In the wake of the sinking of the Herald of Free Enterprise came *P & O European Ferries (Dover)Ltd (1990)* 93 Cr App R 72, the first case to recognise that manslaughter was an offence that could be committed by a company. With public emotion at a high at the deficiency of the law, the incoming Labour Government of 1997 pledged to consider the implementation of a new offence of corporate manslaughter. Even before the election victory, the Law Commission had already considered corporate liability for manslaughter in its consultation paper 135 of 1994 in its exercise to devise a statutory criminal code, Law Commission *Criminal Law: Involuntary Manslaughter* (Law Com No 135, 1994). Ministry of Justice, *A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007*, Oct 2007, 3.

[44] Eg the common law approach to corporate manslaughter was replaced by the Corporate Manslaughter and Corporate Homicide Act 2007. The Organisation for Economic Co-operation and Development Report 2008 recognised the limitation of the identification principle in attributing corporate blame in its consideration of anti-bribery measures, discussed in The Law Commission, *Reforming Bribery* (Law Com No 185, 2008) app D, D5.

[45] See the Fraud Act 2006 which sets out a general offence of fraud which is supplemented by specialist context-specific offences, for example the forgery and counterfeiting offences set out in the Forgery and Counterfeiting Act 1981, ss 1 - 5 and ss 14 - 19 and other documentary frauds eg false accounting in the Theft Act 1968, s 17; the tax evasion offences, eg Value Added Tax Act 1994, s 72 and the common law offence of cheating the revenue; fraudulent trading in the Companies Act 2006, s 993(1); misleading market practices in Financial Services Act 2012, ss 89, 90, 91.

[46] The offence is expressly preserved by the Criminal Law Act 1977, s 5(2).

[47] Coming into force on 17th January 2007 the new general fraud offence replaces the detailed and particularized deception offences eg Theft Act 1968, s 15 obtaining property by deception; s 15A obtaining a money transfer by deception; s 16 obtaining a pecuniary advantage, s 20 procuring the execution of a valuable security; Theft Act 1978, s 1 obtaining services, s 2 inducing a creditor to wait for or forego payment by deception.

[48] It sought to respond to the public recognition that 'those responsible for major crimes of the commercial sphere have managed to avoid justice', Law Commission, *Report on Fraud* (Law Com No 276, July 2002) Introduction.

[49] Law Commission, *Report on Fraud* (Law Com No 276, July 2002) 3, para 3.

[50] Law Commission, *Report on Fraud* (Law Com No 276, July 2002) 3, para 4.

on the 17th January 2007, it built on the early understanding of fraud expressed by Stephen,[51] and created a generic offence of remarkably broad scope.[52]

The essence of the fraud offence is that a person is guilty[53] if he dishonestly[54] makes

(a) a false representation,[55] or
(b) fails to disclose information that he is under a legal duty to disclose,[56] or
(c) abuses a position in which he is expected to safeguard the financial interests of another,[57] and

he thereby intends to make a gain for himself or another or to cause loss to or expose another to a risk of loss.[58]

However, although s. 12 explicitly recognises that the fraud offence can be perpetrated by the corporate actor,[59] the corporate conviction for fraud still rests on the application of identification principle, with its attendant difficulties. Similarly, whilst the provisions have been applauded for their simplicity, the Law Commission dismissed their applicability to corporate frauds, deferring instead to the regulatory

[51] Stephen J F, *A History of the Criminal Law of England* (Macmillan 1883) vol 2. The classic statement of the nature of fraud is Stephen's: 'I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy'. The definition for contract law derives from the common law authority of *Derry v Peek (1889)* 14 App Cas 337 (HL) 374 (L Herschell) such that 'fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false'.

[52] Since no deception needs result from the conduct, nor any loss or gain, this is a substantive crime drafted in inchoate mode with the 'broad-brush' approach favoured by the Law Commission in its recommendations in its *Report on Fraud* (Law Com No 276, 2002).

[53] S 1(1) Fraud Act 2006

[54] See ss 2(1)(a), 3(a) and 4(1)(b)

[55] S 1(2)(a) and s2

[56] S 1(2)(b) and s3

[57] S 1(2)(c) and s 4.

[58] S 2(1)(b)(i) and (ii), s3(b)(i) and (ii), s4(1)(c)(i) and (ii).

[59] Fraud Act 2006, s 12 deals with the liability of company officers for fraud offences committed by the company. Schedule 1 of the Interpretation Act 1978 also stipulates that where an act refers to a 'person' this is taken to include a body of persons corporate or unincorporate.

regime, stating that 'many other offences which can be described as frauds'[60] are 'usually seen as specialist branches of fraud, which require separate consideration'.[61] It is thus somewhat of a paradox that the new generic fraud offence continues to sit alongside the numerous alternative legislative provisions which address different types of commercial fraud expressed in highly particularised form. These include offences set out under the Theft Act 1968 such as false accounting,[62] making false statements by officers of a company,[63] offences under the Forgery and Counterfeiting Act 1981, the Trade Marks Act 1994, the Trade Descriptions Act 1968, the Companies Acts,[64] the Financial Services Act 2012 and the Insolvency Act 1986. The complexity of the structure of anti-fraud law is further exacerbated by the number of bodies involved in the investigation of fraud[65] and those involved in its prosecution.[66]

1.3 Addressing corporate fraud: the carrot and the stick!

The initial optimism that the Fraud Act would provide an important new weapon in the fight against major financial crime appears to have been misplaced, with evidence that corporate fraud continues to be viewed as a specialist regulatory area rather than mainstream crime.[67] Although the Fraud Act has been in force for over 8

[60] Law Commission, *Report on Fraud* (Law Com No 276, 2002) 11, para 2.26.
[61] Law Commission, *Report on Fraud* (Law Com No 276, 2002) 12, para 2.27. The explanation given was that the decision to keep 'specialist branches of fraud' separate followed consultation between regulator and regulated in the context of misleading market practices to help draw the line between sharp practice and criminal practice.
[62] Theft Act 1968, s 17 and subject to the provisions of s 18 regarding liability of company officers.
[63] Theft Act 1968.
[64] In accordance with Companies Act 2006, s 2, this also includes the provisions of the Companies Act 1985 still in force and pt 2 Companies (Audit, Investigation and Community Enterprise) Act 2004.
[65] Eg these have included, Her Majesty's Revenue and Customs, The Department for Work and Pensions, The Police, Local Authorities, National Health Service, Serious Fraud Office, Department of Trade and Industry, Financial Conduct Authority, Office of Fair Trading, Serious Organised Crime Agency.
[66] Eg these have included the Crown Prosecution Service, the Serious Fraud Office, The Revenue and Customs Prosecution Office, DWP Solicitors Branch, Local Authorities, Financial Conduct Authority, The Pensions Regulator, Office of Fair Trading.
[67] This prosecutorial reluctance may be explained in part by the historical reluctance of local justices of the peace to prosecute local traders, a matter remedied by the Factories Act 1833 which created a central government agency with the power to make rules and initiate prosecutions, WG Carson, 'Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation (1970) 33 MLR 396; WG Carson, 'White-Collar Crime and the Enforcement of Factory Legislation' (1970) 10 Brit. J. Criminology; WG Carson 'The Conventionalisation of Early Factory Crime' (1979) 7 Int'l J Soc Law 37. As this regulatory approach became the standard pattern for businesses, their criminal

years, it is still the case that corporate frauds are rarely brought before the criminal courts and continue to hover somewhere between civil sanction for regulatory breach and civil private action. With regulatory agencies perceiving their role as the encouragement of voluntary compliance with codes,[68] rather than the suppression of undesirable conduct by punishing wrongdoing,[69] corporate fraud continues to attract

---

prosecution was no longer considered mainstream. See N Garoupa and others, 'The Investigation and Prosecution of Regulatory Offences: is there an economic case for integration?' (2011) 70(1) CLJ 229, 233; HW Arthurs, *'Without the law': Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto 1985); Royal Commission on Practices and Proceedings of the Courts of Common Law, 5th Report (1833-4). The Factories Act 1833 also provided that the central agency had to power to act as both prosecutor and magistrate with sanctions of fines and imprisonment available. The legislation of 1844 removed the judicial authority by the agency retained the power to prosecute and issue remedial orders, PWJ Bartrip and PT Fenn, 'The Administration of Safety: the enforcement policy of the early factory inspectorate, 1844-1804', (1980) 58 Pub Adm 87.

[68] Criminal prosecution is just one instrument amongst many for gaining compliance, Jeremy Rowan-Robinson and Paul Q Watchman, *Crime and Regulation: A Study of the Enforcement of Regulatory Codes* (1990). See also Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2nd edn, Cambridge University Press 2001).

[69] Genevra Richardson, 'Strict Liability for Regulatory Crime: The Empirical Evidence' (1987) Crim LR 295-306. Carolyn Abbot, *Enforcing Pollution Control Regulation* (Oxford 2009) cited by Nuno Garoupa and others, 'The Investigation and Prosecution of Regulatory Offences: is there an economic case for integration?' (2011) 70(1) CLJ 229-259. A rough estimate, based on an analysis of categories of offences dealt with in the criminal courts in 2008, is that only 1.5% to 2% of the 89,000 defendants tried in the Crown Court and about 10% of the 1.64 million tried in the magistrates courts, are tried for an offence arising out of regulatory contexts (exc. motoring offences), see Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) app D, Impact Assessment at para D.34. The range of sanctions available to regulators has been enhanced by the Regulatory Enforcement and Sanctions Act 2008, following the recommendation of the Macrory Review of Penalties, Richard B Macrory (Better Regulation Executive), *Regulatory Justice: Making Sanctions Effective*, *Final Report* (Nov 2006). Whilst many agencies have powers to prosecute, see R Baldwin, 'The New Punitive Regulation' (2005) MLR 351, it is accepted that few prosecutions are brought to implement regulation, see Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) app A, Para A.12 and A.13; James Gobert, 'Corporate Criminality: New Crimes for the Times' (1994) Crim L R 722; K Hawkins, *Law As Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002). Even where successful, the average fine imposed is very low, see Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) app A, para A.15. Consequently, it is a fact that a business can make a profit through non-compliance with the law, see Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) app A, para A.16; Philip Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement, Final Report* (London, 2005) para 2.80 – 2.81 and it is even suggested that targeting the individual directors or senior managers in addition to the company itself has little deterrent effect, see Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) app A, para A.19; R Baldwin, 'The New Punitive Regulation' (2005) MLR 351; Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press1993). This reluctance can be dated to our earliest attempts to deal with corporate fraud, see the early company legislation eg Joint Stock Companies Act 1844 and see too D Hay, 'Property, Authority and the Criminal Law' in D Hay and others (eds), *Albion's Fatal Tree* (Allen Lane 1975); WR Cornish and G Clark, *Law and Society in England 1750-1950* (Sweet & Maxwell 1989); M Foucault, *Discipline and Punish: The Birth of A Prison* (Penguin 1977); KJM Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957* (OUP 1998); Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2nd edn, Cambridge University Press 2001).

a different moral compass.[70] Similarly, the tendency to draft the so-called regulatory offences for non-compliance in terms of strict liability[71] perpetuates the perception that corporate wrongdoing is not really criminal but a matter of mere technical infringement.[72] Whilst the economic case for criminalisation in preference to regulation has been made elsewhere, and is therefore beyond the scope of this research,[73] others have raised serious doubt as to the efficacy of the regulatory approach[74] with the recognition that companies are inherently criminogenic,[75] and arguably more suited to the stick of prosecution than the carrot of the regulatory approach. However, in this respect it must also be acknowledged that there are a variety of potential disincentives to criminal proceedings for corporate fraud which

[70] Of note, when the Royal Commission provided the recommendations that formed the basis of the new Crown Prosecution Service in 1981, the ambit of the report was confined to mainstream crime' Royal Commission on Criminal Procedure (The Phillips Commission) 1977, reported in 1981, *The Investigation and Prosecution of Criminal Offences in England and Wales: the law and procedure* (Cmnd 8092-I and II, 1980/81). The Commission gave little attention to the non-police agencies, commenting that 'prosecution is the weapon of final resort because they prefer to obtain their objectives by education and persuasion'.

[71] Discussed in *Lim Chin Aik v The Queen* [1963] AC 160 (PC), Singapore.

[72] Gerry Johnstone and Tony Ward, *Key Approaches to Criminology: Law and Crime* (Sage 2010).

[73] Stephen Copp and Alison Cronin, 'The Failure of Criminal Law to Control the Use of Off Balance Sheet Finance During the Banking Crisis' (2015) 36(4) Co Law 99. See too Gary S Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 J Pol Econ 169; Kenneth G Elzinga and William Breit, *The Anti-trust Penalties: a Study in Law and Economics* (Yale University Press 1976); John Collins Coffee Jnr, 'Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions', (1980) 17 Am Crim L Rev 419-76; Richard A Posner, 'An Economic Theory of the Criminal Law' (1985) 85 Colum L Rev 1193-231; Kenneth G Dau-Schmidt, 'An Economic Analysis of the Criminal Law as a Preference-Shaping Policy' (1990) Duke Law Journal 1 - 38, Pat O' Malley, 'Risk, Power and Crime Prevention' (1992) 21 Economy and Society 252; Richard A Posner, *Economic Analysis of Law* (Aspen 2007).

[74] See for example James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003); M Levi, *Regulating Fraud* (Tavistock 1987); Michael Levi, *The Economic Cost of Fraud Report for the Home Office* (London, NERA 2000); Michael Levi, 'The Roskill Fraud Commission Revisited: An Assessment' (2003) JFL 11(1), 38-44; Michael Levi, *The Phantom Capitalists* (Ashgate 2008); Levi Michael and others, *The Nature, Extent and Economic Impact of Fraud in the UK* (London: ACPO 2007); The Royal Commission on Criminal Justice *The Investigation, Prosecution and the Trial of Serious Fraud*: (London, HMSO 1993); JE Parkinson, *Corporate Power and Responsibility, Issues in the Theory of Company Law* (Clarendon 2000); D Sugarman, 'Law Economy and the State in England 1750-1914: Some Major Issues' in D Sugarman (ed,) *Legality, Ideology and the State* (Academic Press 1983); Edward S Herman, *Corporate Control, Corporate Power* (Cambridge University Press 1981); Gary Slapper and Steve Tombs, *Corporate Crime* (Longman 1999); GP Gilligan, 'The Origins of UK Financial Services Regulation', (1997) 18(6) Co Law 167-176; SP Shapiro, 'Collaring the Crime, Not the Criminal: Reconsidering the Concept of White Collar Crime' (1990) 55 Am Soc Rev 346-65; Gary Scanlan, 'Dishonesty in Corporate Offences, A Need for Reform?' (2002) 23(4) Co Law 114-119; Gary Scanlan, 'Offences concerning directors and officers of a company – fraud and corruption in the United Kingdom – the future' (2008) 29(9) Co Law 264 – 271; JL Masters, 'Fraud and Money Laundering: the evolving criminalization of corporate non-compliance' (2008) JMLC 103.

[75] This view accords with the emerging contemporary criminal law literature which views crime as the norm rather than deviance, see for example Lucia Zedner, *Criminal Justice* (OUP 2004).

may operate in tandem with the doctrinal obstacle identified specifically in this work.[76] For example, the evident judicial and political reluctance to prosecute may also be explained on the basis of lack of resources, the relative complexity of fraud trials, the lobbying power of large corporations or the perception that shareholders may be the innocent victims of any corporate sanction. Whilst these perspectives merit investigation, an evaluation of their influence is not within the scope of this research which is concerned primarily with a narrow examination of the substantive law with a view to potential law reform. In a similar vein, the question of how corporations might be punished is not within the remit of this work with various detailed propositions having already been advocated elsewhere.[77]

1.4 The case for a general anti-fraud rule

The economic case for the employment of a general anti-fraud rule is further supported by the recent adoption of a zero tolerance approach to financial crime in the context of corruption, explained on the basis of the harm it inflicts on economic markets.[78] Indeed, the recently enacted Bribery Act 2010 established liability for corruption with offences that were designed to 'reinforce ethical conduct in the commercial world and society generally'.[79] Of note, the 2010 Act also supplemented

[76] Corporate crime has ceased to be considered mainstream crime and thus subject to prosecution by the CPS, Archibald Bodkin, 'The Prosecution of Offenders: English Practice' (1928) 1 Pol J 354 – 5; Howard Pendleton, *Criminal Justice in England: A Study in Law Administration* (MacMillan 1931) vol 1; Joshua Rozenberg, *The Case for the Crown: The Inside Story of the DPP* (Thorsons 1987).

[77] _ _ 'Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions' (1979) 92 Harv L Rev, 1227; Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 S Cal L Rev 1141-246; James P Bonner and Beth N Forman B, 'Bridging the Deterrence Gap: Imposing Criminal Penalties on Corporations and their Executives for Producing Hazardous Projects', (1993) 20 San Diego Justice Journal 1:1; Brent Fisse and John Braithwaite, *Corporations, Responsibility and Corporate Society* (Cambridge University Press 1993); Mary Kreiner Ramirez, 'The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty' (2005) 47 Ariz L Rev 933-1002.

[78] Law Commission, *Reforming Bribery* (Law Com No 185, 2008) app D, para D.5 and citing Peter W Alldridge, 'The Law Relating to Free Lunches' (2002) 23 Co Law 264, 267. Another example is the approach taken to address money laundering in the Proceeds of Crime Act 2002, s 330.

[79] Ministry of Justice, Impact Assessment of the Bill on Reform of the Law of Bribery, <https://www.justice.gov.uk/downloads/legislation/bills-acts/bribery-bill-ia.pdf> accessed 24 April 2015. See the Bribery Act 2010 which takes a zero tolerance approach to corporate corruption; The Secretary of State for Justice, then Jack Straw, when addressing the 5th European Forum on Anti-corruption in June 2009, "A strong legal architecture is necessary in tackling corruption ...Ultimately our aim must be to bring about behavioural change within businesses themselves, creating corporate cultures in which no form of corruption is tolerated."

the 'identification principle' mechanism and recognises the corporate body as a responsibility-bearing actor, distinct from its individual members, with the creation of the bespoke corporate offence of failing to prevent bribery.[80] This shift away from the traditional fiction theory of the organisation, towards a realist account of corporate liability, is significant albeit that the 'failure to prevent' model of organisational fault is problematic in the context of fraud. The essence of fraud poses unique challenges, given that fraud is not an activity in itself, unlike bribery, but the way in which an otherwise lawful activity is performed.[81] Since dishonesty is the determinative factor, the regulatory model is also an unsuitable approach in that it is entirely possible that conduct constituting regulatory compliance can also amount to a criminal fraud.[82]

As regards the conception of criminalising fraud, other peculiarities must be acknowledged, not least the uncomfortable dichotomy that results from a continued commitment to individualism. On the one perspective, individualism requires criminal responsibility to be based on the subjective fault of the autonomous fraudster whilst, on the alternative perspective, it demands adherence to the principle of *caveat emptor* such that the responsibility for loss must lie with the equally autonomous victim. Thus, the individualist paradigm is both at the heart of the criminal law's idealogy of subjective responsibility and its reluctance to criminalise fraud. Further, in the context of corporate fraud, the incompatibility of the subjectivist model of fault attribution with the fictionist understanding of organisations exacerbates the difficulties. These issues are compounded further when it becomes clear that the emergence of the corporate form went hand in hand with a meteoric rise in fraud.[83]

---

[80] Bribery Act 2010, s 7.

[81] Paul McGrath, *Commercial Fraud and Civil Practice* (OUP 2008) 3.

[82] Stephen Copp and Alison Cronin, 'The Failure of Criminal Law to Control the Use of Off Balance Sheet Finance During the Banking Crisis' (2015) 36(4) Co Law 99. One consequence of *R v Hinks* [2001] 2 AC 241 (HL) is that dishonesty becomes determinative of criminality, absent of any otherwise unlawful behaviour, where that behaviour conforms to the offence definition. The effect of this controversial decision was not lost on the Law Commission who recognised that *"(a)ctivities which would otherwise be legitimate can therefore become fraudulent if a jury is prepared to characterise them as dishonest*", Law Commission *Report on Fraud* (Law Com No 276, 2002) para 3.8, 14.

[83] _ _ 'Causes of the Increase of Crime' (Jul – Dec 1844) 56 Blackwood's Edinburgh Magazine 7-8; David Morier Evans, *The Commercial Crisis 1847-1848* (First pub Letts Son & Steer 1848, Nabu 2010); Herbert Spencer, 'Railway Morals and Railway Policy' (1854) 100 Edin L R 426-7; David Morier Evans,

Having acknowledged that there is a case for the employment of the Fraud Act provisions to prosecute instances of corporate fraud, the substance of this work addresses the problematic identification principle mechanism that it is necessary to invoke. Accordingly, this research identifies a suitable model by which organisations can be prosecuted in instances where a criminogenic and fraudulent culture is evident, such as in the mis-selling cases, but where the conduct cannot necessarily be attributed to one senior individual. Thus, an analysis of the white collar ilk is also beyond the scope of this research since criminology typically seeks to explain the conduct of individual white collar offenders.[84] As the law currently stands, an organisation characterised by pervasive and systemic fraudulent conduct typically stands beyond the reach of the criminal courts. However, by stripping away the mask of the black letter law and revealing the various influences which have altered its development, the assumptions upon which the law is now based can be questioned.

1.5 The research objectives

The aim of this dissertation is to argue for corporate fraud to be more effectively controlled by the law by reconstructing two key criminal law doctrines, together with the evidential presumptions they invoke. Such reform will be shown to provide the means by which dishonesty and intention can be attributed directly to an organization such that the corporation can be convicted of fraud without reliance

---

Facts, Failures and Frauds: Revelations Mercantile Commercial Criminal (First pub Groombridge & Sons 1859, Augustus M Kelly 1968); Walter E Houghton, *The Victorian Frame of Mind* (Yale University Press 1957); Virginia Cowles, *The Great Swindle* (Collins 1960); Henry Parris H, *Government and the Railways* (University of Toronto Press 1965); Rob Sindall, 'Middle Class Crime in 19th Century England' (1983) 4 Crim Just Hist 23-40; George Robb, *White Collar Crime in Modern England, Financial Fraud and Business Morality 1845 -1929* (Cambridge University Press 1992); RW Kostall, *Law and English Railway Capitalism 1825 – 75* (Clarendon 1994); Lobban M, 'Nineteenth Century Frauds In Company Formation: Derry v Peek in Context' (1996) 112 LQR Apr, 287-334; GR Searle, *Morality and the Market in Victorian Britain* (Clarendon 1998); Sarah J Wilson, 'Law, Morality and Regulation: Victorian Experiences of Financial Crime' (2006) Brit J Criminol 1073.

[84] Tim Newburn, *Criminology* (Willan 2007) ch 18; Edwin Sutherland, *White Collar Crime* (New York, Holt 1949): Carson WG, 'White-Collar Crime and the Enforcement of Factory Legislation' (1970) 10 Brit. J. Criminology: Frank Pearce, *Crimes of the Powerful* (Pluto 1976); Gilbert Geis and Ezra Stotland (eds), *White Collar Crime* (Sage 1980); Rob S Sindall, 'Middle Class Crime in 19th Century England' (1983) Crim Just Hist 4, 23-40; Michael Levi, *Regulating Fraud* (Tavistock 1987); Michael Gale and others, *Fraud and the plc* (Butterworths 1999); Alan Doig, *Fraud* (Willan 2006); Sarah Wilson S, 'Collaring the Crime and the Criminal: Jury Psychology and Some Criminology Perspectives on Fraud and the Criminal Law' (2006) JCL 75; Geoffrey Smith and others, *Studying Fraud as White Collar Crime* (Palgrave Macmillan 2011).

upon the identification principle. Accordingly, it will:

(a) Evaluate the traditional canons of criminal fault, the extent to which the current law departs from the orthodox approach and the consequent implications for the attribution of fault to organisations.

(b) Evaluate the role of medical science in determining how criminal fault is assessed.

(c) Evaluate the origins of the identification doctrine and the extent to which it has application where misconduct is alleged in the corporate context.

(d) Apply the model of manifest liability to corporate fraud to identify what reforms might be implemented and how.

1.6 Methodology

The foundation of the research involves the discovery of a theory of corporate criminality through a corrective reinterpretation of the traditional canons of fault. Whilst redetermining the relative boundaries of the actus reus and mens rea doctrines, with attendant implications for way in which fault is attributed, the overall framework of the criminal construct will remain undisturbed.[85] As the primary aim is therefore a rational reconstruction of the law,[86] the success of the proposal will be measured by reference to 'black letter law'[87] such that existing legal concepts and

[85] Traditional legal scholarship comprises 'identifying existing legal concepts and categories and considering their capability to accommodate for new developments... in such a way that the integrity and coherence of the legal system is preserved', Pauline C Westerman, 'Open or autonomous? The debate on legal methodology as a reflection of the debate on law', in M van Hoecke (ed), *The Methodologies of Legal Research* (Hart 2011) ch 5.

[86] Rational reconstruction is not carried out for its own sake, but is a means to an end. For the legal researcher at the end consists of proposing a coherent, meaningful and workable new arrangement. Recommendations are drawn up in order to fit in these novelties in the legal system in such a way that the integrity and coherence of the legal system is preserved, Pauline C Westerman, 'Open or Autonomous? The debate on legal methodology as a reflection of the debate on law', in Mark van Hoecke (ed), *The Methodologies of Legal Research* (Hart 2011) 88.

[87] According to the black letter approach, the role of legal research is to identify and give an exposition of the underlying principles of law, this requires researches to re-impose a supposedly native order and system and to rationalise a large body of case law into a manageable shape, Robert

categories will be considered as regards their capability to accommodate for new developments.[88] Largely deductive, this method seeks to reveal the presence of a series of rules which are based upon a smaller number of general axioms such that the law can be interpreted as a broadly rational and coherent system.[89] This qualitative,[90] positivist analysis is consistent with traditional legal scholarship which views the law itself as an internal self-sustaining set of principles.[91] On this analysis, the law is not only the object of research but it is also the theoretical perspective from which that object is studied. [92]

Whilst the proposal itself will be tested for compatibility with existing legal principle, it is widely accepted that the criminal law is the product of a piecemeal response to the ongoing challenge of social control in changing eras.[93] However, the primary sources do not advert to any external factors which have shaped the law, or provide a context for its evolution, and the black letter law analysis also ignores the

---

Goff, 'The Search for Principle' (1983) 69 Procs Brit Acad 169,171; Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

[88] C Westerman, 'Open or Autonomous? The debate on legal methodology as a reflection of the debate on law', in M van Hoecke (ed), *The Methodologies of Legal Research* (Hart 2011) 88.

[89] Twining, William, *Blackstone's Tower: the English Law School* (Stevens & Sons 1994); Michael Salter and Julie Mason, *Writing Law Dissertations* (Pearson 2007); Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar 2012).

[90] In contrast to quantitative (numerical) research. Doctrinal research is the process of selecting and weighing materials taking into account hierarchy and authority as well as understanding social context and interpretation, for this reason it is argued that doctrinal research is qualitative. To describe doctrinal legal research in this way recognises that law is reasoned and not found, Mike McConville and Wing Hong Chui (eds), *Research Methods for Law*, (Edinburgh University Press 2007).

[91] See for example, M McConvill and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press 2007).

[92] Pauline C Westerman, 'Open or autonomous? The debate on legal methodology as a reflection of the debate on law' in M van Hoecke (ed), *The Methodologies of Legal Research* (Hart 2011).

[93] Alan Norrie, *Crime, Reason and History* (2nd edn, Butterworths 2001). Lindsay Farmer opines that Norrie's approach, studying law in its social context, does not go far enough. He says that in recognising the historical contingency, it looks neither to the contingency as the distinction between form and content, nor between the law and its context. Thus while arguing that the law is structured to manage its own contingency, Norrie's critique simply reproduces the structure whereby that contingency is contained, see L Farmer, 'The Obsession With Definition: The Nature of Crime and Critical Legal Theory' (1996) S & LS 5:57; L Farmer, 'Bringing Cinderella to the Ball: Teaching Criminal Law in Context' (1995) MLR 58(5) 756 reviewing Alan Norrie's, *Crime, Reason and History*. See too Duff, RA and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011); D Husak, *Overcriminalization, The Limits of the Criminal Law* (OUP 2008). In his seminal text printed in 1978, Fletcher suggests that the criminal law is a polycentric body of principles and each of the major patterns of liability must be appreciated on its own terms, the temptation to reduce the criminal law to a single formula should be resisted, George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Co 1987); see too Lucia Zedner, *Criminal Justice* (OUP 2004).

role played by acts of subjective interpretation.[94] Furthermore, language provides the framework for the law and language interprets that framework.[95] The dependence of law on language presents a fundamental problem in that language has a fluid and contextual nature which conflicts with the objective image of legal decision-making.[96] It has long been noted that an understanding of the law will not be improved by considering ancient authorities unless the influences under which they were written can be appreciated together with the real significance of the legal conceptions of that period and what the writings meant to the readers for whom they were written.[97] Thus, to counterbalance the empirical shortcomings of the black letter law approach, a combination of complementary approaches has been employed, in particular to expose the changing use and meaning of legal terminology and the orthodox approach to the attribution of fault. Accordingly, this research incorporates inter-disciplinary and socio-legal methods[98] to reveal the wider context in which the law developed.[99] Understanding the current law as a product of linguistic and doctrinal evolution invites both an historical and a theoretical analysis

[94] Sharon Hanson, *Legal Method, Skills and Reasoning* (3rd edn, Routledge 2010). If the plain or literal meaning is in doubt with respect to statutes, there can be an appeal to the 'original intentions' of Parliament, considered as if this institution possessed a collective 'mind', J Bell, 'Conceptions of Public Policy' in Peter Cane and Jane Stapleton (eds), *Essays for Patrick Attiya* (Clarendon 1991).

[95] Reza Banaker and Max Travers (eds), *Theory and Method in Socio-legal Research* (Hart 2005) 133; see too Peter Goodrich, *Legal Discourse Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan 1986); Brian Bix, *Law, Language, and Legal Determinacy* (OUP 1996) and Alfred Philips, *Lawyers' Language: the Distinctiveness of Legal Language* (Taylor and Francis 2002); Sharon Hanson, *Legal Method, Skills and Reasoning* (3rd edn, Routledge 2010).

[96] Reza Banaker and Max Travers (eds), *Theory and Method in Socio-legal Research* (Hart 2005) 133; see Peter Goodrich, *Legal Discourse Studies in Linguistics, Rhetoric and Legal Analysis* (London, Macmillan 1986); Brian Bix, *Law, Language, and Legal Determinacy* (Oxford, OUP 1996); Alfred Philips, *Lawyers' Language: the Distinctiveness of Legal Language* (Taylor & Francis 2002); Sharon Hanson, *Legal Method, Skills and Reasoning* (3rd edn, Routledge 2010).

[97] JWC Turner, 'The Mental Element in Crimes at Common Law', in L Radzinowicz and JWC Turner (eds), *The Modern Approach to Criminal Law* (Macmillan1948) 195.

[98] Socio-legal and empirical scholarship is seen as complementary to doctrinal research and can be used simultaneously, see J Baldwin and G Davis, 'Empirical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2003) 881; Anthony Bradney, 'Law as Parasitic Discipline' (1998) 25 Journal of Law and Society, 71. Of note, there are many incompatible views as to what constitutes socio-legal research and different definitions as to the range and scope of relevant source materials, Roger Cotterell, 'Subverting Orthodoxy, Making Law Central: A View of Socio-legal Studies (2002) 29 Journal of Law and Society 632; see also P Thomas, 'Curriculum Development In Legal Studies' (1986) 20 Law Teach 110, 112; Bridget Hutter and Sally Lloyd Bostock, 'law's relationship the social science: the interdependence of theory, empirical work and social relevance in socio-legal studies' in Keith Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (OUP 1990).

[99] The socio-legal approach can include perspectives such as the law's social origins, history and ideological factors. J Baldwin and G Davis, 'Empirical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2003) 881; A Bradney, 'Law as Parasitic Discipline' (1998) 25 Journal of Law and Society, 71.

and this provides the basis for which the nature of the current law can be explained and any reform may be justified.[100] The genealogies of particular legal concepts have been traced to analyse how the significance might shift over time and how the development of a particular offence is shaped by changes in enforcement, prosecution or punishment.[101] History, with a consciousness of multiple influences provides an additional approach to understanding[102] and as regards historical contextualisation, 'lawyers' legal history' and the 'history of law and society'[103] will converge. The former allows the significance of the current law to be considered internally, in the context of its development through judicial reasoning and legislative enactment. It acts as a counterweight to the problem of language dependence associated with "black letter" analysis. The cross-referencing of different clusters of authoritative cases and texts provides elucidation as to the problem of changing language and legal concepts[104] by reference to temporal context.[105] Further, the history of law and society encompasses external factors[106] which place the law as a component part of wider social and political structure[107] and thus inform the reasons for and the nature of its development. The historic approach

[100] David Sugarman, 'Introduction: Histories of Law and Society' in David Sugarman (ed), *Law in History: Histories of Law and Society* (New York University Press: International Library of Essays in Law and Legal Theory 1996) vols I and II, xiii – xiv; Sugarman has concluded that, 'Law and history have always been closely intertwined', quoted in Copp, SF, 'The Early Development of Company Law in England and Wales: Values and Efficiency' (Bournemouth University, unpublished PhD thesis, Dec 2003).

[101] Marcus D Dubber, 'Historical Analysis of Law', Law & Hist Rev (1998) 16 159; Marcus D Dubber and Lindsay Farmer (eds), *New Trends In the History of Criminal Law (*Stanford University Press 2007).

[102] Melanie L Williams, 'Coercion and the Labour Contract: Revisiting Glasbrook Brothers and the Political Friction of Lewis Jones' (2012) 8 Int JLC 1-25. See too Anthony Musson and Chantal Stebbings, *Making Legal History: Approaches and Methodologies* (Cambridge University Press 2012) who claim that legal history research is moving to answer how law works rather than what law is, emphasizing the external influences on the law.

[103] David Sugarman, 'Introduction: Histories of Law and Society' in David Sugarman (ed), *Law in History: Histories of Law and Society Vols I and II* (New York University Press: International Library of Essays in Law and Legal Theory 1996) xiii.

[104] David M Rabban, 'Methodology in Legal History'in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press 2012) ch 7, 88.

[105] See Peter Goodrich, *Legal Discourse Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan 1986); Brian Bix, *Law, Language, and Legal Determinacy* (OUP 1996) and Alfred Philips, *Lawyers' Language: the Distinctiveness of Legal Language* (Taylor & Francis 2002); Reza Banaker and Max Travers (eds), *Theory and Method in Socio-legal Research* (Hart 2005) 133.

[106] Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press 2012).

[107] See for example, Philip Thomas, 'Curriculum development in legal studies' (1986) 20 Law Teach 110, 112; Roger Cotterell, 'Subverting orthodoxy, making law central: a view of socio-legal studies' (2002) 29 Journal of Law and Society 632.

has already been employed to reveal the origins of widespread financial crime and it provides the context in which the law's response can be understood.[108] It has demonstrated that fraud and free market capitalism go hand in hand and that there was an intrinsic link between the growth of the corporate form and the growth in opportunities for fraud.[109] Extrinsic detail of this nature hints heavily at the fact that the early 'white collar'[110] offenders were typically of the middle and upper class ranks and that there was a desire to construct anti-fraud measures that would not criminalise them.[111] Thus, historical analysis has also pointed to the political influence of the incorporators[112] and also provided the context in which the regulatory regime and the notion of social welfare offences emerged.[113] Whilst this informs generally, only the historic approach can chart the evolution of the law and, in particular, its changing language and meaning.

Close reference has been made to additional legal materials, specifically practitioner texts and legal commentaries which arguably have an authoratitive quality of their

[108] David Morier Evans, *The Commercial Crisis 1847-1848* (First pub Letts Son & Steer 1848, Nabu 2010); Herbert Spencer, 'Railway Morals and Railway Policy' (1854) 100 Edin L R 426-7; David Morier Evans, *Facts, Failures and Frauds: Revelations Mercantile Commercial Criminal* (First pub Groombridge & Sons 1859, Augustus M Kelly 1968); Walter E Houghton, *The Victorian Frame of Mind* (Yale University Press 1957); Virginia Cowles, *The Great Swindle* (Collins 1960); Henry Parris H, *Government and the Railways* (University of Toronto Press 1965); Rob Sindall, 'Middle Class Crime in 19th Century England' (1983) 4 Crim Just Hist 23-40; George Robb, *White Collar Crime in Modern England, Financial Fraud and Business Morality 1845 -1929* (Cambridge University Press 1992) RW Kostall, *Law and English Railway Capitalism 1825 – 75* (Clarendon 1994); Lobban M, 'Nineteenth Century Frauds In Company Formation: Derry v Peek in Context' (1996) 112 LQR Apr, 287-334; GR Searle, *Morality and the Market in Victorian Britain* (Clarendon 1998); Sarah J Wilson, 'Law, Morality and Regulation: Victorian Experiences of Financial Crime' (2006) Brit J Criminol 1073.

[109] D Morier Evans, *Facts, Failures and Frauds: Revelations Mercantile Commercial Criminal* (First pub Groombridge & Sons 1859, Augustus M Kelly 1968); GR Searle, *Morality and the Market in Victorian Britain* (Clarendon 1998).

[110] The phrase was coined by Edwin Sutherland, *White Collar Crime* (Holt 1949).

[111] WG Carson, 'Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation (1970) 33 MLR 396; WG Carson, 'White-Collar Crime and the Enforcement of Factory Legislation' (1970) 10 Brit. J. Criminology; WG Carson 'The Conventionalisation of Early Factory Crime' (1979) 7 Int'l J Soc Law 37; Martin J Weiner, *Reconstructing the Criminal: Culture, Law and Policy in England 1830 – 1914* (Cambridge University Press 1990); Clive Emsley, *Crime and Society in England 1750 – 1900* (3rd edn, Pearson Longman 2005); Jeffrey Reiman, *The Rich Get Richer and the Poor Get Prison: Ideology, Class, Criminal Justice* (8th ed, Pearson 2006).

[112] EV Morgan and WA Thomas, *The Stock Exchange: Its History and Functions* (Elak Books 1962); George P Gilligan, 'The Origins of UK Financial Services Regulation' (1997) 18(6) Co Law 167; GR Searle *Morality and the Market in Victorian Britain* (Clarendon 1998); JE Parkinson, *Corporate Power and Responsibility, Issues in the Theory of Company Law* (Clarendon 2000).

[113] Francis Sayre, 'Public Welfare Offences' (1933) 33 Col LR 55; AH Manchester, *A Modern Legal History of England and Wales 1750 – 1950* (Butterworths 1980); JL Barton, 'Liability for Things in the 19th Century' in JA Guy and HG Beale (eds), *Law and Social Change in British History* (Royal Historical Society 1984.

own.[114] In this respect the sources include Archbold's Criminal Pleading,[115] Kenny's Cases on Criminal Law[116] and Outlines of Criminal Law,[117] Radzinowicz and Turner's Modern Approach to Criminal Law,[118] Russell on Crime,[119] Williams Criminal Law, The General Part,[120] Smith and Hogan's Criminal Law[121] and Blackstone's Criminal Practice.[122] In particular, the work of JW Cecil Turner features prominently in the analysis, providing the touchstone for the early understanding of the mental elements in crime.[123] This is not only because he wrote extensively about the general principles of criminal law as they were developing over the successive decades in question, but also because of the particularly high respect his work commanded.[124]

Similarly, in relation to the traditional theory of corporations, close reference is made to FW Maitland and the work he inspired.[125] Widely acclaimed as the greatest legal

[114] David Sugarman, 'Introduction: Histories of Law and Society' in David Sugarman (ed), *Law in History: Histories of Law and Society* (New York University Press: International Library of Essays in Law and Legal Theory 1996) vols I and II, xiii – xiv; Sugarman has concluded that "Law and history have always been closely intertwined", quoted in Copp, SF, 'The Early Development of Company Law in England and Wales: Values and Efficiency' (Bournemouth University, unpublished PhD thesis, Dec 2003).

[115] Eg William Feiden Craies & Henry Delacome Roome, *Archbold's Criminal Pleading: Evidence and Practice* (24th edn, Sweet & Maxwell 1910); Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading: Evidence and Practice* (30th edn, Sweet & Maxwell 1938); TR Fitzwalter Butler and Marston Garsia, *Archbold's Criminal Pleading, Evidence and Practice* (32nd edn, Sweet & Maxwell 1949).

[116] Courtney Stanhope Kenny, *A Selection of Cases Illustrative of English Criminal Law* (8th edn, Cambridge University Press 1935).

[117] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (17th edn, Cambridge University Press 1958); JW Cecil Turner, Kenny's *Outlines of Criminal Law* (18th edn, Cambridge University Press 1962); JW Cecil Turner, *Kenny's Outlines of Criminal Law* (19th edn, Cambridge University Press 1966).

[118] L Radzinowich and JWC Turner, *The Modern Approach to Criminal Law* (Macmillan 1945).

[119] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) vols 1 and 2.

[120] Glanville Williams G, *Criminal Law: The General Part* (2nd edn, Stevens & Sons 1961).

[121] JC Smith and Brian Hogan, *Smith and Hogan Criminal Law* (4th edn, Butterworths 1978); JC Smith and Brian Hogan, *Smith and Hogan Criminal Law: Cases and Materials* (3rd edn, Butterworths 1986).

[122] Peter Murphy, *Blackstone's Criminal Practice* (OUP 1994).

[123] JW Cecil Turner, **'**The Mental Element in Crimes at Common Law' (1936 – 1938) 6 CLJ 31, 81.

[124] Regarding Turner's work, Prof. Sir John Smith QC in his Annual Lecture 2002 for the Judicial Studies Board, 'Judge, Jurist and Parliament' said, 'When a case of fundamental importance in the criminal law, DPP v Smith [1961] AC 290 came before the House of Lords in 1960 it was argued for four days and the House reserved judgment for four weeks but the only authority other than case law cited in the single speech was OW Holmes, *The Common Law*, published in America in 1882, expressing a view contrary to that of Fitzjames Stephen in this country and generally rejected in the United States. Those English jurists who had written extensively on the subject must have felt they were wasting their time'. Of note, Turner is the one example he gave and, in particular, his article, **'**The Mental Element in Crimes at Common Law' (1936 – 1938) 6 CLJ 31, 81.

[125] Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Yorke prize essay for the year 1902, Cambridge University Press 1905).

historian ever to write in the English language, Maitland produced an unprecedented body of work on the history of English law. He collected, meticulously corrected, translated and published from the original manuscripts he located and also wrote interpretative histories derived from these sources.[126] The black letter law analysis of the origins of the identification doctrine has therefore been rehearsed against the wider theoretical environment prevailing at the time and this has provided the basis upon which a reconsideration of the landmark cases is justified.

Although historiography is unlikely to identify all external factors that influenced the development of the law, a combination of historiographical methods may reduce any deficiency.[127] The necessary simplifications and subjective perspectives inherent in any particular analysis will always leave room for more than one defensible interpretation of the sources but will at least illuminate different aspects and possibilities of past realities.[128] One of the advantages of historical reconstruction of the law is the discovery that many reforms or supposedly new approaches re-enact aspects of long forgotten initiatives from past centuries and this is particularly pertinent to the overall aim of this research.[129]

Whilst legal history provides an analysis of legal evidence and contextualisation, it is criticised for being too inward looking and self referential. With its traditional reliance on formal sources of law it fails to supply the holistic and interdisciplinary perspective which is considered increasingly desirable in modern research.[130] As to a theoretical evaluation, there were a number of perspectives that could have been adopted. For example, there are the Marxist and Critical Legal Studies analyses

[126] David M Rabban, 'Methodology in Legal History' in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press 2012) ch 7, 88.
[127] Melanie L Williams, 'Coercion and the Labour Contract: Revisiting Glasbrook Brothers and the Political Friction of Lewis Jones', (2012) 8 Int JCL 1-25. See too Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press 2012) who claim that legal history research is moving to answer how law works rather than what law is, emphasizing the external influences on the law.
[128] Marcel Senn, 'The Methodological Debates in German-speaking Europe (1960 – 1990)' in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press 2012) ch 8.
[129] David M Rabban, 'Methodology in Legal History' in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press 2012) ch 7, 88.
[130] David M Rabban, 'Methodology in Legal History' in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press 2012) ch 7, 88.

which are concerned with power relations.[131] Whilst the political lobbying power of corporations has not gone unnoticed, its evaluation is not the aim of this research, although it may form the basis of future research.[132] Similarly, comparative analysis of other legal jurisdictions has been rejected as it is inconsistent with the aim of a rational reconstruction of English law. Systems that are not common law in nature are unlikely to assist and existing common law jurisdictions unlikely to have anything novel to offer.[133] Further, in the specific context of fraud, cultural attitudes differ as to how business should be done.[134] Comparison with Australian law, as a common law jurisdiction, is more useful but is not readily comparable in that although corporate culture as a basis for criminalization has been recognised, it is only applied in limited circumstances and only in relation to federal offences perpetrated against Commonwealth entities.[135]

Given that it is the criminal element of mens rea that has been the stumbling block to the imposition of corporate liability, enquiry into the actus reus / mens rea construct of crime is of more relevance. It is widely acknowledged that criminal fault came to be fashioned in this way largely due to enlightenment thinking, with its emphasis on

---

[131] David M Rabban, 'Methodology in Legal History' in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press 2012) ch 7, 88.

[132] See for example Edward S Herman, Corporate Control, Corporate Power (Cambridge University Press 1982) 184; David Marsh and Gareth Locksley, 'Capital in Britain, Its Structural Power and Influence over Policy' (1983) 6 (2) West European Politics 36, 59; George P Gilligan, 'The Origins of UK Financial Services Regulation' (1997) 18(6) Co Law 167; Parkinson JE, *Corporate Power and Responsibility, Issues in the Theory of Company Law* (Clarendon 2000); Gobert J and Punch M*, Rethinking Corporate Crime* (Butterworths 2003).

[133] Literature in this area also demonstrates that there is already a body of comparative analysis of various jurisdictions, eg Colin Howard, 'Strict Responsibility in the High Court of Australia' (1960) 76 LQR 547; Michael E Tigar, 'It Does the Crime But Not the Time: Corporate Criminal Liability in Federal Law' (1990) 17 Am J Crim Law 211; Jennifer Arlen and Reinier Kraakman, 'Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes' (1997) 72 NYUL Rev 687; Michael L Benson and Francis T Cullen, *Combating Corporate Crime: Local Prosecutors at Work* (Northeastern University Press 1998); Richard Mays, 'The Criminal Liability of Corporations and Scots Law: Learning the Lessons of Anglo-American Jurisprudence' (2000) 4 Edin LR 46; James Gobert and Ana-Maria Pascal, European Developments in Corporate Criminal Liability (Routledge 2014).

[134] D Hyde, 'In Practice: Practice Points: "Grease" is the Word' (2013) LS Gaz 17 June, 24. Writing in relation to the recent anti-bribery legislation with which fraud has clear parallels, Hyde points out that it lacks global harmonisation and there are differences not only between the UK and the US but also between EU Member States; Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar 2012) 40.

[135] The Australian states continue to employ the 'identification principle'. The Australian Criminal Code 1994, part 2.5 set out a corporate liability regime that may be based on corporate culture which, if established, allows intention, knowledge or recklessness to be imputed to the corporate body. Part 7 deals with fraud offences and, of note, these require proof of dishonesty as a mens rea element in addition to those that may be imputed.

subjective individualism. However, in that the strict division of the mental and the physical also accorded with the then prevailing Cartesian dualist philosophy, a contemporary philosophical perspective has been employed to evaluate the traditional canons of criminality. The theory of mind and action is thus the perspective taken and this particular selection is further supported by inter-disciplinary reference to recent discoveries in mainstream neuroscience. The medical findings underpin the argument for a reconstruction of the orthodox basis of criminal fault attibrution and the case for a manifest approach to liability is tested against the neuroscientific knowledge.

Finally, as a creature of black letter law methodology, it is fitting that the same methodology that is used to unmask the the 'identification doctrine' itself and to provide the means by which the principle can be distinguished in future cases of corporate wrongdoing.

Towards that end, the following chapter commences the process of unpicking the evolution of criminal law doctrine, starting with an historical evaluation of the orthodox canons of criminal fault.

1.7 Chapter outlines

The remainder of this introductory chapter provides a discussion of the literature in the area of corporate liability and establishes that there is widespread agreement that organisations can and should be criminally accountable. The bases upon which it has been suggested that fault might be attributed are analysed and rejected, being incapable of capturing the true nature of corporate fraud. Accordingly, this research makes an original contribution to knowledge through the identification of a model of liability which facilitates the means by which criminal intention can be attributed directly to a corporation without employing alternative bases of fault such as negligence. In the context of fraud, this means that an organisation can be convicted for the substantive offence in circumstances where the use of the identification principle is inappropriate.

Chapter 2 starts the reconstruction process by revealing how the concept of mens rea

has altered and, given its metaphysical association, how this has frustrated the development of a theory of corporate liability. It will reveal that 'voluntariness' was the traditional primary determinant of fault in all cases whereas the limited concept of mens rea, narrowly defined as the foresight of specified consequences, was confined to the common law offences. Judicial ambivalence as to the use of the term will be evidenced such that mens rea will be seen to have become almost a 'short-hand' to refer to voluntariness, foresight of specified circumstances and indeed any other blameworthy mental state. It will be seen that the linguistic ambivalence was the precursor to doctrinal change, mens rea becoming upgraded as its conceptual boundaries gradually expanded. This chapter discloses a further consequence of the changing language which has also had fundamental implications for the way in which fault is attributed. It will show that where previously 'voluntariness' of action was presumed as a matter of evidence, the 'presumption of voluntariness' was replaced by reference to the 'presumption of mens rea'. The presumption that the defendant had acted voluntarily was thus replaced with the presumption that the prosecution needed to prove that the defendant had mens rea. In essence, this meant that the evidential presumption, which had aided the prosecution, was displaced by a presumption of substance, which favoured the defendant. The practical implication of the linguistic imprecision was that the primary enquiry as to blameworthiness came to focus on the defendant's subjective mental state where previously it looked first to his voluntariness, by reference to the overt appearance of the act. In accordance with the subjectivist ideal, this manifest assessment of conduct was then subject to the defendant giving evidence to the contrary if he sought to refute the appearance of his act. This chapter demonstrates that the reinstatement of the full doctrine of voluntariness constitutes the first step to facilitating a general model of corporate responsibility and provides the means by which a corporation can be identified as a responsibility-bearing entity.

Whilst chapter 2 reveals the demise of voluntariness and the accompanying evidential presumption, chapter 3 exposes the similar fate of the presumption of intention. It makes the case for the re-acknowledgement of this presumption whose disappearance from the narrative of the criminal law was the coincidental result of the silencing effect of heightened judicial focus on the level of foresight required before a murderous intention could be found. This shift away from the evidential

presumptive mechanism had broader implications such that the manifest assessment of guilt, identifying fault by primary reference to the overt act, was replaced by the need to prove fault by primary reference to the internal mental state of the actor. This has had obvious repercussions in the context of corporate fault attribution. This chapter makes the case that the presumption of intention has been inadvertently silenced and should now return, voce forte, to the dialogue of the criminal law.

The black letter law analysis of chapters 2 and 3 reveals the development of the law in relation to both doctrine and the evidential presumptions and how, over time, they suffered gradual erosion through a series of decisions culminating in an unforeseen, and perhaps unforeseeable, disappearance. Where the presumption of voluntariness was erroneously taken to reverse the burden of proof, the presumption of intention was first taken to challenge the whole subjectivist edifice and then lost amidst the heightened attention that the issue of oblique intention attracted in the context of murder. Aside from the black letter law reconstruction advocated, chapter 4 provides further support for a return to the orthodox presumptive approach with a review of contemporary mind / action philosophy and knowledge emerging in the field of neuro-science. It will be demonstrated that whilst they are external to the black letter law framework, these are complementary perspectives and provide a nuanced understanding of the mind / body relationship generally and, in particular, evidence of the legitimacy of the manifest approach to fault attribution. Whilst demonstrating the ontological flaws of the bifurcated actus reus / mens rea understanding of criminality, a rehearsal of the advancements made in relation to the mirror neuron system of the brain provides credence to the proposition that the manifest assessment of the conduct of another provides the observer with direct knowledge of that conduct. This has startling implications for the subjectivist account of criminal law and the way in which fault can be attributed. These implications are not confined to the assessment of individual action but extend to explain the reality of group action and the way in which the observer also gains direct knowledge of that.

Whilst modern neuroscience supports the recognition of distinct collective action, the realist theory of organisations is not new. Indeed, what is now identified as the landmark legal authority for the emergence of the fiction theory, *Lennard's Carrying*

Co Ltd v Asiatic Petroleum Ltd [1915] was decided in the midst of prevailing realist ideology.[136] Indeed, Viscount Haldane L.C. is attributed with the first articulation of the fictionist 'identification principle' and it will be shown that this is particularly surprising in that he was very much attuned to realist philosophy[137] and not bound by precedent. Accordingly, chapter 5 sets out the philosophical and legal context in which the *Lennard's* case was decided. Revealing not only a strong realist view of group activity at the time, it also provides an illustrative account of the courts' readiness to attribute corporate criminal liability, albeit on the basis of existing principles derived from the law of agency and that of master and servant.

Chapter 6 deals specifically with the emergence and development of the identification principle, revealing that when *Lennard's*[138] was decided, it was not taken to decide anything remarkable or to develop any new principle of liability. Even if it had, the 2 evidential presumptions were fully operational in the criminal law at this time and the primary focus of enquiry would have been the manifest appearance of fault. This chapter demonstrates that the landmark status now afforded to the judgment was due to its subsequent elevation in *Tesco v Nattrass [1972]*,[139] by which time both presumptions had been largely discredited and there was a growing judicial reluctance to convict in the absence of a blameworthy state of mind.[140] With the now expanded notion of mens rea and the shift to the primacy of the metaphysical enquiry, the notion of the 'directing mind and will' provided a convenient solution to the practical and ideological difficulties of corporate prosecution whilst its attribution to the earlier authority legitimated the progeny. Further, the analysis reveals that the earlier cases involved instances where the misconduct of an individual employee was identified and, therefore, the question in these cases was whether this liability could be attributed to the company.

---

[136] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).

[137] In 1883, he published *Essays in Philosophical Criticism*, and in the same year, his translation of Schopenhauer's *The World as Will and Idea*. Other philosophical works include *Pathway to Reality* (1903), *Reign of Relativity* (1921), *The Philosophy of Humanism* (1922) and *Selected Addresses and Essays* (1928), see David Kahan's introduction to Richard Burdon Haldane's 1902-1904 Gifford Lectures: The Pathway to Reality at <http://www.giffordlectures.org/Browse.asp?PubID=TPTPTR&Volume=O&Issue=O&ArticleID=6> accessed 15 May 2014. Richard Burdon Haldane, *The Pathway to Reality: Being the Gifford Lectures Delivered in the University of St Andrews in the Session 1902 – 1904* (Ulan Press 2012).

[138] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).

[139] *Tesco Ltd v Nattrass* [1972] AC 153 (HL).

[140] Something already evidenced in *Sweet v Parsley* [1970] AC 132 (HL).

Accordingly, the black letter law analysis in this chapter indicates that cases involving widespread and pervasive conduct, not necessarily indicative of individual wrongdoing, can be distinguished.

The concluding chapter draws from the findings of the combination of legal theoretical analysis, mind / action philosophy as it is now supported by discoveries in modern neuro-science, and the black letter law and historical unpicking of the formation of criminal law doctrine. The case for a manifest model of corporate liability is premised on a number of propositions, many of which rest on the assertion that the course of the law never did run smooth. Going further than suggesting that the development of the criminal law was largely a response to historical contingency, as has been mooted previously, the overall picture revealed is of a criminal law which has evolved randomly as the coincidental culmination of a series of misguided turns combined with some particularly haphazard judicial interventions over a considerable period. This applies equally to the orthodox canons of criminal fault generally as it does to the development of the identification principle specifically. Consequently, the case is made for a rational reconstruction of the criminal law with a renewed recognition of the orthodox doctrine of voluntariness, its accompanying evidential presumption, and the evidential presumption of intention. Effecting a subtle shift away from the metaphysical prominence, inherent in the expanded mens rea doctrine, in favour of the manifest approach, facilitated by the evidential presumptions, the conclusion to be drawn is that both capacity and criminal intent can be attributed directly to a corporation. Accordingly, in appropriate circumstances, a corporation can be found dishonest and to have the necessary intention to be convicted of the generic fraud offence.

1.8. Corporate liability: the literature

The literature deals with two broad areas of law in which criminal sanctions may be applied to organisations: first, regarding the use of 'regulatory offences' to enforce standards of conduct in specialised areas of business activity and, second, the theories underlying the imposition of corporate culpability for what might be considered 'truly criminal' behaviour. It is the second category that is central to this research.

The literature review proceeds on the basis of wide acknowledgment of the weaknesses of the identification theory but there is recognition that it accords with focus on the individual generally, an approach that became pervasive with the Enlightenment. It is clear that whilst the criminal law remained committed to the individualist analysis, other disciplines began to identify the influence of groups on individual behaviour. Beyond that, it is now widely accepted that companies can gain a momentum and dynamic of their own which transcends the actions of individuals. This is important in that it marks the shift from liability based on the fiction that individual fault equates to corporate fault in certain circumstances and recognises the realist theory of organisations, that they can act autonomously and incur liability directly. However, the basis of liability that is currently proposed is either of a negligence-type, comprising non-compliance with some prescribed standard of corporate behaviour, or the 'failure to prevent' approach, where the organisation has failed to adequately police the criminal activities of its staff members. Of note, these models are largely premised on the notion that there is a culpable omission or failure to act and in this respect the widespread view is that the liability incurred by corporations differs from the liability incurred by individuals. However, whilst both bases avoid the mens rea requirement typical of individual fault attribution, they also fail to capture the real nature of corporate misconduct in the context of systemic fraud, appearing closer to a regulatory non-compliance than the mark of truly criminal conduct. Similarly, it will be demonstrated that both of the approaches mooted continue to turn on the ability to reduce the misconduct to a level of individual criminality and neither are suited to the peculiar nature of the fraud offence with its defining element of dishonesty. Ultimately, the review reveals that the literature in this area lacks any challenge to the actus reus / mens rea paradigm itself, it is this lacuna that this research fills with a reconstruction of the traditional canons of fault.

The Allens Arthur Robinson Report of 2008 identified the fundamental issues that any scheme of corporate criminal liability must address.[141] The literature deals with

[141] Allens Arthur Robinson (for the United Nations Special Representative of the Secretary – General on Human Rights and Business), 'Corporate Culture as a basis for the criminal liability of

the considerations identified which include whether liability should be generic or specific,[142] the nature of the relationship between the individual actor and the corporation, on whose fault the liability is based and the relationship between the prosecution of the corporation and any individual. As regards the first issue, contemporary academic work in this area has not been confined to the consideration of specific, discreet offences that have been viewed as particularly problematic. However, whilst the literature examines models of generic liability there has been some tendency to focus on conduct that is dangerous in terms of health and physical welfare.[143] Arguably, this tendency is a reflection of the particularly troubling problem of corporate manslaughter which dominated the debate for some years prior to the enactment of the Corporate Manslaughter and Corporate Homicide Act 2007. It was in this context that the common law identification doctrine[144] was shown to severely limit the potential to prosecute organisations for wrongdoing.[145] A series of high-profile cases involving numerous transport fatalities were publicised[146] and the overwhelming academic view continues to acknowledge the problems with the law that were highlighted at that time. Consequently, the literature contains reference to

---

corporations' (Feb 2008) <http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf> accessed 24 April 2015, 62.

[142] Most European jurisdictions operate a scheme of general corporate liability, see S Adam and others (eds), *Corporate Criminal Liability in Europe* (La Charte 2008) and Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No, 2010) app C at C.36. Some are generic such that the chosen model is applied to every offence, whatever its nature, this model has been adopted in the USA, Austria, Belgium, France and South Africa; others have general liability but apply different models according to the fault element of the offence, for example in Australia (C'th) and Canada.

[143] Celia Wells, 'Corporations: Culture, Risk and Criminal Liability' (1993) Crim L R Aug 551; Celia Wells, 'Corporate Liability for Crime: the Neglected Question' [1995] 14(4) IBFL 42; Celia Wells 'The Law Commission Report on Involuntary Manslaughter: the Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity' [1996] Crim LR 545; Celia Wells, 'Corporate Manslaughter: Why Does Reform Matter?' (2006) SALJ 646.

[144] This doctrine is now employed in all instances save for manslaughter and corruption, see also the Bribery Act 2010.

[145] In addition to the shortcomings identified at ch 1 above, the principle is said to be both over- and under- inclusive. A company may be found criminally liable even where its senior officer was acting against the interests of the company but a company will not be criminally liable where a less senior employee has acted within the scope of his employment and in the interests of the company, see *Moore v Bresler Ltd* [1944] 2 All ER 515. The Law Commission, *Codification of the Criminal* Law (Law Com No 143, 1985) ch 11 recommended a change of law such that the inequitable result said to have resulted in *Moore v Bresler* would not be repeated, here the company was culpable even though it was the victim of the employees' fraud. James Gobert, 'Corporate Criminality: four models of fault' (1994) 14(3) LS 393, 400; Christopher Harding, *Criminal Enterprise, Individuals, Organisations and Criminal Responsibility* (Willan 2007).

[146] For example, in March 1987, 187 people were killed in the Herald of Free Enterprise disaster. 167 died on Piper Alpha in July 1988 and 5 months later 35 rail passengers lost their lives at Clapham. Over the years, the names Kings Cross, Marchioness, Southall, Paddington, Hatfield and Potters Bar have been added to the list.

an alternative version of corporate liability which was mooted in the Herald of Free Enterprise case, *P & O European Ferries Ltd (1990)*.[147] Described as the 'aggregation principle' it is the mechanism of aggregating the acts, omissions and mental states of more than one person in order to determine the actus reus and mens rea of the organisational whole. Suggested as a means to capture the full extent of company wrongdoing, it avoids the problem of locating just one 'guilty' individual at the senior level required.[148] Specifically, the suggestion was that the negligence of a number of individuals could be aggregated to amount to gross negligence on the part of the company. In the event, whilst acknowledging that a company could be guilty of manslaughter, the prosecution in *P & O Ferries* failed. The finding accorded with Devlin J's analysis in an earlier case in which he had said, 'You cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind'.[149] Put differently in *ex parte Spooner (1988)*[150], a judicial review arising out of the same facts, it was held that a case against one defendant cannot be fortified by evidence against another defendant. Thus, as far as the common law was concerned, the door to development by aggregation of fault was closed[151] and the Law Commission also refused to acknowledge the possibility of aggregation as a basis of corporate liability.[152] That being said, the Corporate Manslaughter and Corporate Homicide Act 2007, which was subsequently enacted,

[147] *P & O European Ferries (Dover) Ltd* (1990) 93 Cr App R 72.

[148] Indeed, federal judges in the US have accepted the aggregation model where the mens rea element is knowledge, taking the sum of the knowledge of each member of staff, *US v Bank of New England* 821 F 2d 844 (1st Cir) cert. denied 484 US 943 (1987).

[149] *Armstrong v Strain* [1952] 1 KB 232 (CA).

[150] *R v HM Coroner for East Kent, ex p Spooner* (1989) 88 Cr App R 10.

[151] At the time of the P&O case, negligence manslaughter was going through a period in which it was known as 'reckless manslaughter', it comprised 2 elements: first, a person was reckless if he did an act which in fact creates and obvious and serious risk of causing physical injury and he has either failed to give any thought to the possibility of the existence of such a risk or has recognised some risk and has nonetheless gone on to do it. In the circumstances, the judge decided to halt proceedings and direct acquittals of the 7 defendants on trial, finding that none had been reckless. See Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001) ch 5. Wells submits, however, that there was a clear failing to consider what was meant by risk. The fact that the system of sailing with bow doors open had operated without incident for more than 7 years with more than 50,000 sailings was not the point, the question should have been whether a prudent ferry operator would have sailed in this manner and no evidence was brought from any other operator.

[152] Law Commission, *A Criminal Code for England and Wales* (Law Com No 177, 1989) vol 1, para 30(2) and the discussion in Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and the Search for Self-Identity' [2001] Buff Crim L R 642.

appears in substance to create a version of aggregate liability.[153]

1.9 From individualism to holism: the spectrum of responsibility

Whether aggregate or not, it is the individualist account of criminality that continues to pervade the criminal law and this brings clear implications for any regime of corporate liability.[154] Focus on the individual in the analysis of socio-economic phenomena generally is longstanding and an approach that became prominent with the Enlightenment.[155] The basic elements comprise the assumption of rationality and what is called 'methodological individualism'.[156] Elaborated and introduced as a precept for the social sciences, Max Weber claimed that social phenomena must be explained by showing how they result from individual actions.[157] Such action must then be explained by reference to the intentional states that motivate the actor and this broadly equates to the need to examine subjective mens rea in the criminal law's treatment of the individual. However, whilst the criminal law theory appears to have become ever more entrenched in the individualist paradigm, as a methodology used primarily in economic theory, Popper and his student, Joseph Agassi, made notable contributions which recognised group behaviour.[158] In accordance with this development, sociologists have gone on to address the issue of interdependence where, 'people are not always independent actors, but are members of groups, and

[153] S 1(3) refers to activities that are managed or organised by an organisation's 'senior management' and at s 1(4)(c) these are described as 'persons who play significant roles...'.
[154] Christopher Harding, *Criminal Enterprise, Individuals, Organisations and Criminal Responsibility* (Willan 2007) 273; Richard Mays, 'The Criminal Liability of Corporations and Scots Law: Learning the Lessons of Anglo-American Jurisprudence' (2000) 4 Edin LR 46.
[155] Seen in the works of, for example, John Locke, John Stuart Mill and Jeremy Bentham, see Geoffrey M Hodgson, 'Meanings of Methodological Individualism' (2007) Journal of Economic Methodology, 14 (2) June, 211 – 26. It was also prominent in the Austrian School of Economics, see Robert Ahdieh, 'Beyond Individualism in Law and Economics' (2011) 91 BUL Rev 43, 43 citing Lars Udehn, 'The Changing Face of Methodological Individualism' (2002) 28 Ann Rev Soc 479, 484.
[156] Robert Ahdieh, 'Beyond Individualism in Law and Economics' (2011) 91 BUL Rev 43.
[157] M Weber, *Economy and Society* (University of California Press 2013) originally published posthumously in 1922. The phrase was originally coined by his student, Joseph Schumpeter in *Das Wesen und der Hauptinhalt Der Theoretischen Nationalokonomie* (1908) and in English the following year, Joseph Schumpeter, 'On the Concept of Social Value' QJ Econ (1909) 213,231. See too Robert Ahdieh, 'Beyond Individualism in Law and Economics' (2011) 91 BUL Rev 43, 49.
[158] Karl R Popper, *The Open Society and Its Enemies* (Routledge & Kegan Paul 1945) 2 vols; Joseph Agassi, 'Methodological Individualism' (1960) 11(3) British Journal of Sociology, Sept 244-70; Joseph Agassi 'Institutional Individualism' (1975) 26(2) British Journal of Sociology, June 144-55.

[that] such membership can sometimes affect their actions'.[159] Agassi described this as 'institutional individualism', in recognition that institutional structures exist and affect individual choices, while only individuals have aims and responsibilities. This account acknowledges that the influence of group and social structures can produce types of collective intention[160] albeit they are not evaluated as direct causes of phenomena.[161]

Whilst sociological theory was developing in this way, theorising in the criminal law was not completely dormant. For example, the jurist Winn made the following observation in the context of the law and corporate activity in the 1920s:

> Corporations have no thoughts of their own, for they have no brains to which thought images may pass; the brains of the corporators are their own brains and not the corporations. But the minds of the corporators, thinking in meeting assembled, exert a mutual influence which makes the definite purpose and firmness of attitude; when nine men of the like opinions unite to prove to attend the infallibility of their position, each will be strengthened, confirmed and rendered more obdurate by the support of others. Mutually stimulated they will go to excesses from which alone they would have shrunk. It is an inexplicable but plainly demonstrable phenomenon of the human mind that men do not think their own thoughts within groups; each mind contributes something to the group, and is influenced by the thought impulses which are in play around it.[162]

Winn's contribution arrived after a period of intense legal theorising at the start of the 20th century which was very much at pace with other disciplines.[163] Moving to

---

[159] Kenneth G Dau-Schmidt, 'Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law' (1997) Wis L Rev 389, 419; Robert Ahdieh, 'Beyond Individualism in Law and Economics' (2011) 91 BUL Rev 43.

[160] See Karl R Popper, *The Poverty of Historicism* (Routledge & Kegan Paul 1957); JWN Watkins, 'Historical Explanation in the Social Sciences' (1957-8) British Journal for the Philosophy of Science 104; John R Searle, *The Construction of Social Reality* (Penguin 1996); Valerie P Hans, *Business on Trial* (Yale University Press 2000).

[161] Robert Ahdieh, 'Beyond Individualism in Law and Economics' (2011) 91 BUL Rev 43, 57.

[162] Winn CRN, 'The Criminal Responsibility of Corporations' (1927-1929) 3 CLJ 398, 406.

[163] There was much support for the realist theory of organisations as seen in the works of FW Maitland, 'Moral Personality and Legal Personality' and 'Trust and Corporation' in HAL Fisher (ed) *The Collected Papers of Frederick William Maitland* (Cambridge University Press 1911) vol 3, 210-

more recent analysis, within the last couple of decades Sullivan has added his theory of organisational 'collective intention' in which he observed that individual intention flows downwards from the collective[164] and Wells also refers the practical reality that people do not think as individuals but act as part of a group as a result of institutional and cultural constraints.[165] Similarly, Lee's account of corporate criminal liability is based upon the conceptualisation of the corporation as a team of individuals who play a part in the pursuance of shared goals.[166] On this account moral agency rests on team participation in which team members share in both the achievements and failures of the team as a whole. Thus, when a participant commits a crime motivated by the corporate norms, the individual wrongdoer deserves punishment as does the corporation itself as a matter of opprobrium upon the organisation's norms and to influence the behaviour of the individuals who contribute to the creation of those norms. However, the recognition of the distinct nature of group behaviour has not crystallised in the criminal law and the point is still moot. Accordingly, the current models of corporate criminal liability continue to be based on the nominalist perspective which views the company as nothing more than a collection of individuals[167] and the criminal law remains entrenched in the individualist paradigm.

In this respect it is widely agreed that the criminal law will continue to lack the conceptual tools necessary to confront corporate liability for as long as it continues to be viewed as a derivative of individual liability.[168] Indeed, this view is largely borne out by the fact that Parliament has seen fit to enact statutory offences in the areas of both corporate manslaughter and corruption, each with a bespoke model of

---

319; Cecil Thomas Carr, *The General Principles of the Law of Corporations* (the Yorke prize essay for 1902, Cambridge University Press 1905).

[164] G R Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55(3) CLJ 515.

[165] Celia Wells, 'Corporations: Culture, Risk and Criminal Liability' (1993) Crim LR, Aug, 551-566

[166] Ian B Lee, 'Corporate Criminal Responsibility as Team Member Responsibility' (2011) 31(4) OJLS 755-781.

[167] Neil Cavanagh, 'Corporate Criminal Liability: An Assessment of the Models of Fault' (2011) 75 JCL 414.

[168] Celia Wells, 'Corporations: Culture, Risk and Criminal Liability' (1993) Crim LR Aug 551-56; Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 Sydney L Rev 468. Similarly, Harding points out that in a society that is increasingly characterised by the presence and impact of organisations and organisational structures, the dominant role of the classic individualist model may now be doubted, Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).

corporate fault attribution.[169] The literature is rich in its discussion of alternative constructs of liability and these extend beyond notions of group responsibility and move towards a 'holistic' analysis of the nature of the corporation as an autonomous actor. There is wide recognition of a subtle inter-dynamic between the individual and the organisation as a whole such that a scale or spectrum of liability can be ascertained, ranging from fault that is wholly attributable to the individual at one end to wholly organisational culpability at the other.[170] In other words, it is suggested that organisational responsibility starts where individual responsibility ends and as the contradictory to methodological individualism it is referred to as 'metaphysical holism'.[171]

In accordance with this thinking, Ashworth acknowledges that whilst the law may be right to focus on the acts of individuals, individual actions can often only be explained fully by reference to the social and structural context in which they took place, for example, the structure and policies of a company.[172] Furthermore, he accepts that companies can gain a momentum and dynamic of their own which temporarily transcends the actions of individual officers. At this point the company itself is capable of both civil and criminal liability because, he suggests, it is the company which creates the structure and context for the individual's conduct.[173] Concurring with Harding, the underlying issue is therefore one of ontology, rather than methodology, and whether it is possible to attribute responsibility to an organisation rather than to its individual members.[174]

There is wide academic support for the holist view that the organisation can become an autonomous actor, whose behaviour 'transcends specific individual

[169] Corporate Manslaughter and Corporate Homicide Act 2007; Bribery Act 2010.
[170] Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan Pubs 2007). In agreement with Harding see also Peter A French, *Collective and Corporate Responsibility* (Columbia University Press 1984) and also discussed in Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001).
[171] May Brodbeck, 'Methodological Individualisms: Definition and Reduction' (1958) 25 Philosophy of Science 1, 3- 4 which is considered by Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).
[172] Andrew Ashworth, *Principles of Criminal Law* (6th edn, OUP 2009). Ashworth adds that individual autonomy is not lost in the process.
[173] Andrew Ashworth, *Principles of Criminal Law* (6th edn, OUP 2009).
[174] Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).

contributions'[175] and whose personality is unique.[176] However, what is now described as the'holist' or 'self-identity' model[177] seemingly rebrands what was described as the 'realist' theory of corporations popular over a century ago.[178] The seeds of this conception may be located in the early realist or natural entity theory associated with Gierke's work on legal and political philosophy in which he seemed to suggest the phenomena of a group psyche.[179] The thinking was widely endorsed

[175] Peter A French, 'The Corporation as a Moral Person' (1979) 16 Am Phil Q 207, 211 and Peter A French, *Collective and Corporate Responsibility* (Columbia University Press 1984); Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001) ch 4; James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003); Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007) 226, 227; Philip N Pettit, 'Responsibility Incorporated' (2007) 117 Ethics 171, 172; Law Commission, *Criminal Liability in Regulatory Contexts (*Law Com No 195, 2010) app C, para C.26 – C.28. This view is similar to acceptance of the state as an organisational actor in its own right in international law, see too R Scruton, 'Corporate Persons' (1989) Proceedings of the Aristotelian Society (supplementary series) 239; JA Quaid, 'The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis (1998) 423 McGill LJ 67, 78; Wells C and Elias J, 'Catching the Conscience of the King: Corporate Players on the International Stage' in Philip Alston (ed), *Non State Actors and Human Rights* (OUP 2005) 155; Hegel, *The Philosophy of Right* (trans TM Knox, OUP 2010) 279-283.

[176] Jonathan Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18 Crim L F 267, 275 – 76. Clough states that the personality arises from various identifiable characteristics which include the corporate structure, goals, training provisions, compliance systems, reactions to past violations, incentives and remedial steps, '(t)hese are all matters which are under the control of those who manage the organisation'; in French's language the 'conglomerate' replaces the 'aggregate' collective actor, suggesting that the attribution of agency applies to the former but not the latter since the conglomerate group actor is defined as being more than a sum of its parts, Peter A French, 'The Corporation as a Moral Person', (1979) 16 Am Phil Q 207 reprinted as ch 9 in Larry May and Stacey Hoffman (eds), *Collective Responsibility, Group Based Harm and Corporate Rights* (University of Notre Dame Press 1987) discussed by Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007) ch 9; Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 Minn L Rev 1095, 1124; Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993).

[177] See the discussion in Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Limitation toward Aggregation and the Search for Self-Identity' [2001] Buff Crim LR 642.

[178] Neil Cavanagh, 'Corporate Criminal Liability: An Assessment of the Models of Fault' (2011) 75 JCL 414 refers to the realist-based models.

[179] Otto von Gierke, *Political Theories in the Middle Age* (trans FW Maitland, Cambridge University Press 1913) and FW Maitland's introduction vii – xiv. It is suggested that von Gierke's views were employed in fascist political theory to justify the dictatorial fascist state as an organism superior to the individuals of whom it is composed, see E Barker's Introduction in Gierke's *Natural Law and the Theory of Society 1550-1800 (*trans E Barker, Cambridge University Press 1934) lxxxiv – lxxxvii. It is also suggested that the recent re-emergence of the notion of the company as its own entity with a distinct personality is simply the application of the political philosophy of communitarianism to companies, Daniel J Morrissey, 'Toward a new/old theory of corporate social responsibility' (1989) 40 Syracuse L Rev 1005, 1033-6, discussed in D French and others, *Mayson, French and Ryan on Company Law* (27th edn, OUP 2010). See also G Teubner, 'Enterprise corporatism: new industrial policy and the 'essence' of the legal person' (1988) 36 Am J Comp Law 130 in which Teubner says that the autopoietic, self-creating theory and its real personality derives from the fact that it is called a 'unit'.

at that time, for example Maitland wrote, 'if n men unite themselves in an organised body, jurisprudence, unless it wishes to pulverize the group, must see n + 1 persons'.[180] Dicey also stated, "it is a fact which has received far too little notice from English lawyers, that, whenever men act in concert for a common purpose, they tend to create a body which, from no fiction of law, but from the very nature of things, differs from the individuals from whom it is constituted'.[181] Arguably, this thinking only fell out of favour as a matter of historical contingency at the start of the 20th century and, had that not been so, a fully-fledged theory of corporate liability may well have developed at that time.

However, in accordance with the realist philosophy, today's 'holist' model focuses on the primary liability of the corporation itself which it is not dependent upon mechanisms of fictional attribution of blame, either by vicarious liability or the derivative liability associated with the identification doctrine. The renewed interest in collective theories looks to identify groups with their own defining features, obligations and rights[182] and is accompanied by the growth of inter-disciplinary research and insights from extra-legal disciplines.[183] Of note, the fact that members of highly structured organisations develop different norms and mores as organisation members than those they hold outside the organisational environment is a feature well-documented in sociology.[184] Translated into the language of corporate law,[185] the holist or 'self-identity' model does not require that the corporate veil be lifted in order to find a suitable individual whose criminal behaviour can be attributed to that

[180] FW Maitland, 'Moral Person and Legal Person' in HAL Fisher (ed), *The Collected Papers of Frederick William Maitland* (Cambridge University Press 1911) 304, 316. See also the discussion in D French and others, *Mayson, French and Ryan on Company Law* (27th edn, OUP 2010).

[181] AV Dicey, 'The Combination Laws as illustrating the relation between law and public opinion in England during the 19th century' (1904) Harv L Rev 511, 513; AV Dicey, *Law and Opinion in England* (2nd edn, Macmillan 1914) referred to by Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).

[182] For example the critical legal studies movement, feminism, communitarianism, see Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and The Search for Self-Identity' [2001] Buff Crim LR 642.

[183] Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and The Search for Self-Identity' [2001] Buff Crim LR 642.

[184] Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007) and referring in support to Peter A French, 'The Corporation as a Moral Person' (1979) 16 Am Phil Q 207 reprinted as Ch 9 in Larry May and Stacey Hoffman (Ed), *Collective Responsibility, Group Based Harm and Corporate Rights* (University of Notre Dame Press 1987).

[185] Criminal law academics tend not to use this expression but see Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and The Search for Self-Identity' [2001] Buff Crim LR 642.

of the corporation.

As to the emergence of the corporate personality, whilst organisational rationality has its origin in human activity, Harding asserts that it is essentially the product of a process of human interaction that transforms the character of the rationality.[186] Accordingly, human interaction is to be distinguished from individual human contributions and the interaction itself has a transformative dynamic that produces a collective culture which then becomes the commanding determinant of organisational action.[187] Put another way, May and Hoffman suggest that the process of organisations and individuals engaging in group activity may generate an autonomous activity which need not be identified anthropocentrically or in terms of the sum of its parts.[188] Box also asserts that the essence of corporate crime is the behaviour of corporations, not individuals, and, therefore, the level of intervention has to be organisational rather than individual if it is to be effective. [189] According to Harding, the decision-making capacity of some groups moulds the individual intentions into a corporate intention that is often different from the intentions of any of the individual members. Since act and intention are best attributed to the group rather than the individual members, responsibility can also be attributed to the whole group.[190] Harding also points to an 'organisation emergence' of a collective interest which can replace an original individual interest. The mystery, he says, is in the location of the tipping point at which the balance shifts from an individual to a collective centre of gravity, i.e. the point at which the collective interest takes control.[191] From that point the company is autonomous, possessing an existence and

[186] Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007) and see Larry May and Stacey Hoffman, *Collective Responsibility: 5 Decades of Debate in Theoretical and Applied Ethics* (Roman & Littlefield 1991).
[187] Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).
[188] Larry May and Stacey Hoffman, *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics*, (Roman & Littlefield 1991).
[189] Steven Box, *Power, Crime and Mystification* (Tavistock 1983] 70.
[190] Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).
[191] At the interface of methodological individualism and holism, Harding identifies 3 major questions: first, the issue of ontology, can an organisation be regarded as an independent actor for the purpose of allocating legal and moral responsibility? If answered positively, where and how should the line be drawn between organisational and individual responsibility generally or in particular contexts and how much remains of human responsibility? This is the question of allocation of responsibility. Finally, in what ways should the criminal liability of individuals when acting within an organisational context be affected by their role within the organisation? This is the organisation impact question.

personality distinct from identifiable employees such that it can be held responsible in its own right. There is wide agreement that the 'decision-making personality' is the hallmark of 'organisations' generally.[192] So, while criminal law theorists have tended to consider corporate liability in the context of a company engaged in commercial activity,[193] Harding observes that organisations can possess moral agency, irrespective of incorporation.[194] Accordingly, whilst this research focuses on the specific problem of fraud committed in the corporate context, it must be recognised that realist theory applies equally to other forms of collectives and terms such as 'corporation', 'organisation' and 'group' are therefore used interchangeably throughout this work.

Although there is much academic support for a model of holistic liability for corporations, there is no general consensus as to the specific mechanism and various alternatives have been mooted. While all aim to avoid trying to 'squeeze corporate square pegs into the round holes of criminal law doctrines devised with individuals in mind',[195] the basis upon which fault may be attributed is a matter of debate.[196] In this respect, there remains a concern as to the way in which the entity may be said to behave with any human characteristic or sentiment such as may attract moral blameworthiness.[197]

Harding recognizes that in some contexts we might say that corporate person does not exist as such, its ability to act is wholly determined by human beings and its actions should therefore be explained by reference to the activities of human agents. This view is endorsed by Valerie P Hans, *Business on Trial* (Yale University Press 2000) who says that some corporate cases cannot be easily analogized to an individual equivalent – the presence of multiple actors with different agendas, the complexities of group decision making and the inefficiencies in organisation and communication all challenge the application of an individual template to corporate deliberations and actions.

[192] Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).

[193] Brent Fisse and John Braithwaite, *Corporations: Crime and Accountability* (Cambridge University Press 1993); Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001); James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003).

[194] His is an important commentary recognising that the decision-making personality applies equally to government and the state. Drawing clear parallels with notions of corporate liability, Harding notes that, in the context of state action and the International Criminal Court, international lawyers have no problem with the concept of state responsibility for a range of illegal actions, Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).

[195] James Gobert, 'Corporate Criminality: New Crimes for the Times', (1994) Crim LR 722.

[196] Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001) citing Anon 'Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions' (1979) 92 Harv L Rev, 1227.

[197] See for example GR Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55(3) CLJ, Nov 515, 532, 537 and his reference to Peter Arenella, 'Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability' (1992) 39 UCLA Rev 1511; S

Whilst intentionality is at the heart of most philosophical justifications of individual liability, its applicability as a mark of corporate culpability has been questioned.[198] Even as a matter of linguistics, there are limitations in ascribing corporate fault because the language of responsibility is itself framed with individualism in mind. Wells in particular has recognised that notions such as rationality and autonomy, and the use of words such as 'person', are metaphysically limiting[199] and analysis of crime in terms of actus reus and mens rea immediately marginalises corporate behaviour.[200] Casting off the metaphysical limitations, Wells argues that organisations do have 'souls to damn and bodies to kick'[201] albeit they do not have the same material form as humans.[202] However, the problems associated with the language of responsibility do not necessarily translate to limitations in the language of blame. For example, Fisse and Braithwaite note that when people blame organisations they are not blaming the 'ox that gored, or pointing the finger at individuals behind the corporate mantle, they condemn the fact that the organisation either implemented a policy of non-compliance or failed to exercise its capacity to avoid the offence for which blame attaches'.[203] Similarly, Gellner's analysis supports the holistic account of organisations, otherwise many descriptions would be lacking and, for example, 'The team played well' illustrates far more than any accurate account of each individual's performance.[204]

Whilst it is suggested that the language of responsibility might be hard to apply in the context of corporate liability, there is clear academic support for the proposition

---

Wolf, 'The Legal and Moral Responsibility of Organisations' in J Rowland Pennock and John W Chapman (Eds*) Criminal Justice* (Lieber-Atherton 1985) 276 - 279.

[198] See the discussion in Ian B Lee, 'Corporate Criminal Responsibility as Team Member Responsibility' (2011) 31(4) OJLS 755, 761.

[199] Celia Wells, 'Corporations: Culture, Risk and Criminal Liability' (1993) Crim LR Aug 551-566.

[200] Celia Wells, 'The Decline and Rise of English Murder: Corporate Crime and Individual Responsibility' (1988) Crim LR Dec 788. Harding also suggests that this has resulted in the anthropocentric mind-set which is at the heart of the individualist / holist impasse, Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).

[201] Edward Thurlow, 1st Baron Thurlow, quoted in John Poynder, *Literary Extracts* (1844) vol 1, 268.

[202] Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001).

[203] Brent Fisse and John Braithwaite, *Corporations: Crime and Accountability* (Cambridge University Press 1993) 25.

[204] Gellner E, 'Holism versus Individualism' in Brodbeck, May (ed), *Readings in the Philosophy of the Social Sciences* (Macmillan 1968) 258, referred to by G R Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55 CLJ 515, 538.

that corporations can and do act intentionally.[205] Pettit, for example, submits that the group agent not only acts intentionally but it can also form 'evaluative beliefs'.[206] He argues that because the organisation can make value judgments and can then act in consequence, it can be held responsible for its acts in the same way that any individual actor can.[207] Fisse and Braithwaite concur, suggesting that corporations lack intention only in the sense that they do not have the capacity to entertain a cerebral mental state, moreover, they certainly do exhibit their own special kind of intention, namely corporate policy[208] and it is of significance that corporations have the capacity to change both their policy and their procedures.[209] On this view, the moral responsibility of corporations relates essentially to social process rather than elusive attributes of personhood.[210] This view clearly resonates with the 'decision-making personality' identified by others. Whilst corporations lack feelings and emotions it is widely agreed that this absence does not negate the quality of autonomy.[211] On the contrary, it is argued that the lack of emotions and feelings

[205] For a contrary view see Eli Lederman, 'Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle', (1985) 76 J Crim L and Criminology 285-340; Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and the Search for Self-Identity' [2001] Buff Crim LR 642, 690. As to the distinct characteristics of the corporate identity that shape it as an autonomous individual, Lederman points to the organisational structure, the board's function, the effectiveness of monitoring systems, the aims and policies of the company and an examination of the training and supervision provided, compliance with ethical codes, regulations and laws. He also points to the corporation's methods of employee remuneration and incentives to promote proper legal behaviour. Lederman argues that 2 mutually linked assumptions must exist for the link between the corporate identity and the concept of liability to be made. First, the corporation influences its compliance with the law by establishing mechanisms of control and monitoring in addition to the general work ethos. Second, the general characteristics are dynamic and can be shaped and modified. In this way he suggests that the corporate identity can be linked to the concept of self-control and the notion of legal liability. He then argues that the modification of the self-identity is entirely contingent on the efforts of those in the higher managerial ranks who have the power to influence the corporate hierarchy, thus he concludes that criminal liability should be exclusively individual.

[206] Philip Pettit, 'Responsibility Incorporated' (2007) 117 Ethics 171, 186 - 87.

[207] Philip Pettit, 'Responsibility Incorporated' (2007) 117 Ethics 171, 192. Lee challenges Pettit's account suggesting that it is not fair 'to assume that anyone or anything that makes value judgments is a member of our moral community, such that moral rights and duties subsist between us and them, the violation of which would be the kind of 'bad value judgment' that rightly attracts blame', Ian B Lee, 'Corporate Criminal Responsibility as Team Member Responsibility' (2011) 31(4) OJLS 755-781 at 764.

[208] Peter A French, *Collective and Corporate Responsibility* (Columbia University Press 1984); Brent Fisse and John Braithwaite, *Corporations*, *Crime and Accountability* (Cambridge University Press 1993) 26.

[209] Warner M, *Organisational Choice and Constraint* (Saxon House 1977).

[210] Brent Fisse and John Braithwaite, *Corporations: Crime and Accountability* (Cambridge University Press 1993) 24.

[211] Michael McDonald, 'The Personless Paradigm' (1987) 37 UTLJ 212; Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993) 30-31.

promote rather than hinder considered rational choice and in this respect the corporation may be a paradigm responsible actor.[212] Continuing in this vein, McDonald notes that a large corporation has available and can make use of far more information than is possible for one individual to compute.[213] In addition, he opines that the corporate form is 'immortal' in that it is characterised by perpetual succession and it is therefore better able to bear responsibility for its deeds than humans, whose sins die with them.[214] Lederman's commentary specifically recognises that the 'holistic' or 'self-identity' model of corporate criminal liability is a theoretically logical conclusion in that it is consistent with the basic principles of corporate theory and company law which stress the independence of the corporate entity as distinct from the individuals associated with it.[215]

As to the identification of a distinct corporate personality, Fisse and Braithwaite[216] suggest there are 2 crucial elements, namely functional autonomy and a distinct ethos.[217] Functional autonomy is most clearly expressed through the idea of the corporation's ability to dispense with human actors or its capacity to survive irrespective of human composition. This phenomenon is described by Coleman as the 'irrelevance of persons'[218] which conveys the fact that where particular individuals are irrelevant to the survival or operation of an organisation, its

[212] Michael McDonald, 'The Personless Paradigm' (1987) 37 UTLJ 212; Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993) 30-31.
[213] Michael McDonald, 'The Personless Paradigm' (1987) 37 UTLJ 212.
[214] Michael McDonald, 'The Personless Paradigm' (1987) 37 UTLJ 212.
[215] Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and The Search for Self-Identity' [2001] Buff Crim LR 642.
[216] Writing about the American experience, Fisse and Braithwaite start on the premise that corporate prosecutions undermine individual accountability and it is therefore in some way a shortcut by the prosecution, see Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993) and considered in Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007). See too John Collins Coffee Jnr, 'No Soul to Damn, No Body to Kick, An Unscandalised Enquiry into the Problem of Corporate Responsibility' (1981) 79 Mich L Rev 386, 459; thereafter corporations are supposed to react by using internal disciplinary systems, see Richard A Posner, 'An Economic Theory of the Criminal Law' (1985) 85 Colum L Rev 1193, 1227 - 29. Fisse and Braithwaite perceive the problem as one of non-prosecution of individuals and the non-assurance of internal corporate accountability. Accordingly they propose a more responsive programme for achieving accountability. They do, however, refer to the situation in England and describe corporate criminal liability as having little practical significance compared with individuals.
[217] Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993 and considered in Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).
[218] James S Coleman, *The Asymmetric Society: Organisational Actors, Corporate Power and the Irrelevance of Persons* (Syracuse University Press 1982).

endurance through change of personnel is the mark of a separate identity. This identity can also manifest itself as a controlling ethos determining the conduct of individuals who perform an organisational role different from their role as individuals.[219] According to Fisse and Braithwaite, it is the second element, the ethos or distinctive culture that gives meaning to attribution of corporate responsibility.[220] Bucy also moots the Aristotelian idea of ethos as a basis for corporate responsibility[221] and this is also reflected in the Australian Criminal Code in which the concept of corporate culture is adopted as a means of reflecting the principle of corporate blameworthiness.[222] Specifically, contained at part 2.5 of the 1995 Code, s. 12.2 imposed vicarious liability on a corporation for the physical elements of the offence. Section 12.3(1) states that 'if intention, knowledge or recklessness is a fault element (...) [it] must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence. Further, s. 12.3(2)(c) provides that a corporation will be taken to have authorised or permitted the commission of a criminal offence if it is proved that a 'corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with a relevant provision'. Section 12.3(2) (c) deals with where the corporation failed to 'create and maintain a corporate culture that required compliance with the relevant provision'. Corporate culture is defined in s. 12.3(6) as 'an attitude, policy, rule, course of conduct or practice existing within the body

[219] James S Coleman, *The Asymmetric Society: Organisational Actors, Corporate Power and the Irrelevance of Persons* (Syracuse University Press 1982).

[220] Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993) and considered in Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).

[221] [221] Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 Minn L Rev 1095, 1124 considered in Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).

[222] Australian Criminal Code 1995, pt 2.5. S 12.2 imposes vicarious liability on a corporation for the physical elements of the offence. S 12.3(1) states that 'if intention, knowledge or recklessness is a fault element (...) {it] must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence. Further, s 12.3(2)(c) provides that a corporation will be taken to have authorised or permitted the commission of a criminal offence if it is proved that a 'corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with a relevant provision'. S 12.3(2)(c) deals with where the corporation failed to 'create and maintain a corporate culture that required compliance with the relevant provision'. Corporate culture is defined in s 12.3(6) as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place. See too Australian Standing C'ttee of Attorneys-General, Criminal Law Officers C'ttee, Model Criminal Code, Discussion Draft, Ch2 General Principles of Criminal Responsibility 501.3.1, 501.3.2, discussed in Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).

corporate generally or in the part of the body corporate in which the relevant activities takes place'. Punch describes the idea of culture in these terms, 'specific companies, and parts of companies, have often a separate style of doing things manifested in subtle, semi-conscious ways of thinking and acting. The corporate ethos is the functional equivalent of attitude that in human actors are used as bases for moral judgment'.[223]

Harding suggests organising the criteria of agency into 2 main types, one relating to structure and the capacity for autonomous action, the other relating to role.[224] The structure and capacity for autonomous action would link with the individual human members in a purposeful activity such that it would distinguish the corporation from the crowd or a random collectivity. The structural conditions would comprise a decision making process, organisational apparatus and an identity over time, characterised by an irrelevance of persons, and producing a functional autonomy of action in addition to a representative role in the pursuit of a common purpose.[225] Harding argues that stressing the representational aspect of the identity and including it as one of the criteria of organisational agency facilitates an appreciation of both the 'driving force and ethos' of the organisation and the way in which it presents itself as a legitimate actor. The purposive element of identity gives meaning to the behaviour of the organisation such that it can be distinguished from the individual members and it may produce a culture or ethos, with patterns of behaviour and certain expectations within the organisational structure. This enables the actor to be viewed as a moral or legal agent in the sense that it would be appropriate and meaningful to consider it responsible, rather than individuals.[226] Harding supports his thesis with reference to the work of Virginia Held[227] and Earnest Gellner[228] who similarly argue that the

[223] Maurice Punch, *Dirty Business: Exploring Corporate Misconduct* (Sage 1996) following Ouchi WG, 'Organisational Culture' (1985) Annual Review of Sociology 457, both considered in Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).
[224] Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).
[225] Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).
[226] Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).
[227] Virginia Held, 'Can A Random Collection of Individuals Be Morally Responsible?' (1970) J Phil 68 reprinted as Ch 6 in Larry May and Stacey Hoffman (eds), *Collective Responsibility, Group Based Harm and Corporate Rights* (University of Notre Dame Press 1987).

moral responsibility of individuals is not logically derivable from the attribution of moral responsibility to a collectivity.

The impact of a controlling corporate ethos has been recognised elsewhere as the basis upon which fault may be based.[229] In this respect both French and Pettit supplement intentionality to expand the scope of corporate criminal liability.[230] For French, the 'Corporation's Internal Decision Structure'[231] provides the framework for the expression of corporate intention which transcends the intention of individuals or group of individuals when corporate decisions are taken that accord with the corporation's 'established policies'.[232] Theories of organisation support the internal decision structure approach in that corporations tend to have intricate configurations which place responsibility for specific aspects on different departments.[233] French's work in this area identifies key features that characterise a corporation that is acting autonomously, namely the existence of an internal decision-making procedure, the enforcement of standards of conduct of individuals

---

[228] Gellner E, 'Holism v Individualism' in Brodbeck, May (eds), *Readings in The Philosophy of the Social Sciences* (Macmillan 1968) 258.

[229] Larry May and Stacey Hoffman (eds), *Collective Responsibility, Group Based Harm and Corporate Rights* (University of Notre Dame Press 1987) 81 - 82; Maurice Punch, *Dirty Business: Exploring Corporate Misconduct* (Sage 1996) ch 5.

[230] Peter A French, 'The Corporation as a Moral Person' (1979) 16 Am Phil Q 207, 211; Peter A French, *Collective and Corporate Responsibility* (Columbia University Press 1984); Philip Pettit, 'Responsibility Incorporated' (2007) 117 Ethics 171, 172.

[231] A phrase coined by French, Peter A French, *Collective and Corporate Responsibility* (Columbia University Press 1984) 41. French identifies 3 elements that comprise the 'Corporate Internal Decision Structure', an organisational flow chart, procedural rules and corporate policies. Erskine refines the concept suggesting that the conglomeration must also have a conception of itself as a unit, T Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and "Quasi-states"' in T Erskine (ed) *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (Palgrave Macmillan 2003). Dan-Cohen provides an account similar to French but goes on to make the claim that the reality of the structure need not depend on any human association; a humanless corporation can exist as intelligent, computer-directed decision-making system, Mier Dan-Cohen, *Rights, Persons and Organisations: A Legal Theory for a Bureaucratic Society* (California 1986) discussed in GR Sullivan's 'The Attribution of Culpability to Limited Companies' (1996) 55(3) CLJ, Nov 515, 534. Whether system-guided responses can be taken to be states of mind cognate with human states is a contested philosophical question, see Daniel C Dennett in 'Intentional Systems' in Daniel C Dennett (ed) *Brainstorms: Philosophical Essays on Mind and Psychology,* (MIT Press 1978); John R *Searle, Intentionality: An Essay in the Philosophy of Mind* (Cambridge University Press 1983); Daniel C Dennett, *The Intentional Stance* (MIT Press 1987).

[232] Peter A French, 'The Corporation as a Moral Person' (1979) 16 Am Phil Q 207, 213; Peter A French, *Collective and Corporate Responsibility* (Columbia University Press 1984) 44. It must be said that Sullivan is highly critical of this approach, he says it is not obvious why one should look for culpability within the company structure rather than among the individuals responsible for maintaining that structure, GR Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55(3) CLJ, Nov 515-546, 536.

[233] Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001).

in the group and the fact that the corporation's identity remains unchanged despite changes in individual personnel.[234] Bonner and Forman offer a more nuanced account recognising that criminal harm can result from the complex interplay between managers, standard operating procedures, corporate priorities, market demands and various other forces at work within corporations, rather than simply the influence of a particular individual.[235] The recognition of organisations as possessing the capacity for autonomous action is now far from controversial.

1.10 Attributing fault – what basis of corporate liability?

As to a basis of liability, French suggests the employment of what he calls the 'extended principle of accountability'[236] and the 'principle of responsive adjustment'.[237] The extended principle imposes liability for the unintended effects that the company 'was willing to have occur as a result ...of his actions'[238] whilst the responsive adjustment principle looks to measures taken to prevent the recurrence of an untoward event caused by it.[239] He argues that where the internal decision structure has contributed to the realisation of a risk, an appropriate legal mechanism should be found in response.

However, as regards a liability which is based on the unintended effects of actions or a failure to respond to harm, it would seem counter-intuitive to describe either principle in terms of 'intention', the classic hallmark of blameworthiness. The language of intention does not appear suited to either of the models proposed by French, both of which appear more closely aligned to notions of negligence. This approach accords with the pervasive tendency, evidenced throughout the literature,

[234] See for example, Peter A French, 'The Corporation as a Moral Person' (1979) 16 Am Phil Q 207, 211; Peter A French, *Collective and Corporate Responsibility* (Columbia University Press 1984). French's account is criticised by GR Sullivan who argues that company procedures do not arise spontaneously and are not the equivalent of a virgin birth, Sullivan GR, 'The Attribution of Culpability to Limited Companies' (1996) 55(3) CLJ 515-546, 536. He says that the organisational structure is ultimately the product of human agency, however sophisticated and automated the company's procedures might be.

[235] J Bonner and B Forman, 'Bridging the Deterrence Gap: Imposing Criminal Penalties on Corporations and their Executives for Producing Hazardous Projects' (1993) 20 San Diego Justice Journal 1,1 cited in Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001).

[236] Peter A French, *Collective and Corporate Responsibility* (Columbia University Press 1984) 134.

[237] Peter A French, *Collective and Corporate Responsibility* (Columbia University Press 1984) 156.

[238] Peter A French, *Collective and Corporate Responsibility* (Columbia University Press 1984) 134.

[239] Peter A French, *Collective and Corporate Responsibility* (Columbia University Press 1984) 156.

to recommend the attribution of corporate fault by reference to conduct falling below some objective standard, or by some failure to comply with a particular duty. For example, Fisse and Braithwaite suggest that the predominant form of corporate fault is more likely to be negligence than intention if an anthropomorphised notion of corporate intention is not at the heart of responsibility.[240] Sullivan also proposes that appropriate standards of corporate behaviour should be formulated and corporate behaviour could then be assessed in terms of compliance or non-compliance with the prescribed standards.[241] Alternatively, Lederman advocates a model which perceives the concept of mens rea unconventionally with objective and constructive elements such that liability is premised on the gap between the social expectation of the corporate behaviour and its actual conduct.[242] Gobert also suggests that mens rea is only one way of getting at the issue of blameworthiness, an alternative may be to ask whether the company could have taken steps to identify and avoid the occurrence of harm, whether it was reasonable to do so, whether it in fact did so or whether it acted with due diligence. One proposition he makes is that liability might be predicated on an implied duty, namely a duty incumbant upon the company to prevent crime. This duty arises on the basis that the state allows companies to carry on business for profit under the protective umbrella of its laws and in exchange for being able to operate within the legal structure created and enforced by the state. Consequently, the company has a duty not to conduct its business in a way that exposes innocent individuals to the dangers of harms proscribed by that same state's criminal laws.[243] Together, Gobert and Punch argue that the most promising conceptualisation of corporate criminality is in terms of what they describe as 'organisational fault' with the suggestion that companies should bear the responsibility for the consequences that follow from the way they have organised their business operation.[244] According to them:

> organisational fault inheres when a company has organised its business in

[240] Brent Fisse and John Braithwaite, *Corporations*: *Crime and Accountability* (Cambridge University Press 1993) 29.
[241] G R Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55(3) CLJ 515.
[242] Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and The Search for Self-Identity' [2001] Buff Crim LR 642.
[243] James Gobert, 'Corporate Criminality: New Crimes for the Times', (1994) Crim LR 722. Gobert refers to LH Leigh 'The Criminal Liability of Corporations and Other Groups' (1977) 9 Ottawa L Rev 247, 287.
[244] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) 80, ch 5.

> such a way that persons and property are exposed to criminal victimisation or the unreasonable risk of harm, when the company has failed to devise and put in place systems for avoiding criminological risk, when its monitoring and supervision of those whom it has put in a position to commit an offence or cause harm is inadequate, and when the corporate ethos or culture is such as to tolerate or encourage criminal offences.

They argue that corporate crime is often perpetrated by an omission, where there is an obligation to put systems in place that would avert crime and that the failure to do so is a reflection of the way that the company has chosen to do its business.[245] The 'failure to prevent' model of corporate criminality they advocate is reinforced by the suggestion that the prosecution of an employee would not preclude the prosecution of the company for failing to prevent the offence of the employee. Conversely, where the company is at fault, it would be liable in its own right, regardless of whether there is also a natural person who can be prosecuted for a separate offence. Accordingly, it may be that the offences for which the company and individual would be liable would not be the same, thus while the individual culpability would be for a substantive offence, the company's would be for the blameworthy failure to prevent the commission of that crime. A version of this mechanism has now been enacted in the context of corruption. Sections 1, 2 and 6 of the Bribery Act 2010 concern offences that are committed by individual persons, namely bribing another person, being bribed and bribing a foreign official.[246] However, s. 7 introduces this innovative model of corporate culpability which is as yet peculiar to the Bribery Act. This section criminalises the failure of organisations to prevent bribery where a person associated with it bribes another person intending to obtain or retain business or a business advantage for the organisation. An associated person is defined simply a person who performs services for or on behalf of the organisation[247] and could be, for example, an employee, agent or subsidiary.[248] The offence is far reaching in that the individual offender need not even have been prosecuted for, let alone convicted

[245] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003).
[246] Interestingly it is the statutory corporate killing offence that Gobert and Punch identify with their vision of organisational liability, as well as the Italian model addressing financial and property crime, James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) ch 5 referring to the now enacted Corporate Manslaughter and Corporate Homicide Act 2007.
[247] Bribery Act 2010, s 8(1).
[248] S 8(3).

of, any bribery for the organisational liability to arise.[249] There is, however, a statutory defence available to the organisation if it can prove that it had adequate procedures in place designed to prevent persons associated with it from undertaking such conduct.[250] As for liability, it is submitted that this model is not wholly committed to the notion of organisational fault since there must first be an underlying bribery offence committed by an individual member of staff, albeit that the staff member need not be prosecuted or convicted. In this respect the model still relies upon individuals acting criminally within the company and there is no real departure from the individualist paradigm.[251] In contrast, in the context of systemic corporate fraud, it may be that there is no dishonesty on the part of individual employees of the company.

1.11 Fault attribution and the peculiar problem of fraud

It is clear that there is overwhelming academic support for the 'realist' or 'holist' approach to organisations which recognises that the structure of the contemporary corporation is complex, with multiple centres of power which typically fails to conform to the traditional, clearly delineated, pyramid-like hierarchical echelons of authority.[252] However, the literature bears out the apparent truth of Harding's reasoning, namely that once over the tipping point, organisations commit different offences from individuals[253] and the outcome is therefore something distinctive in terms of role, offending conduct and identity of the actor.[254] The acknowledgement

[249] S 7(3)(a).
[250] S 7(2).
[251] Cavanagh argues that since corporate fault is 'qualitatively different from human fault' the failure to prevent approach, formulated in this way, is not a suitable means to impose criminal liability on a corporation, Neil Cavanagh, 'Corporate Criminal Liability: An Assessment of the Models of Fault' (2011) JCL 75 (414).
[252] Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and The Search for Self-Identity' [2001] Buff Crim LR 642, however, Fisse and Braithwaite suggest that it is an obvious and uncontroversial aspiration to define legal principles of responsibility for corporate crime consistently with the way that organisations actually make decisions but this theory posits such diversity in the way that organisations make decisions that a positivist organisation theory can never give clarity, Brent Fisse and John Braithwaite, *Corporations*: *Crime and Accountability* (Cambridge University Press 1993) 131.
[253] This is necessarily so in order to delimit individual responsibility, Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).
[254] In addition to the possibility of different sanctions used to convey judgments of responsibility, Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).

of the distinctiveness of the corporate wrongdoing is useful. It provides a justification for employing an alternative mechanism of fault attribution, neatly sidestepping the actus reus / mens rea construct of crime that has always proved so problematic in its application to the non-human actor.

The 'failure to comply with prescribed standards' model avoids the tricky issue by constructing liability on a negligence-type basis. Negligence is not a mental state but necessitates an objective assessment of behaviour measured by reference to standards of reasonableness. As an approach to corporate misbehaviour it attracts little criticism. However, as a mark of criminality, it arguably fails in its expressive function in that it conveys far less opprobrium than the notions traditionally employed, for example intentionality and subjective recklessness. In this respect the breach of prescribed standards looks more like regulatory non-compliance than true criminality and it would arguably lack the deterrent bite of the threat of conviction for 'real' crime. Significantly, individuals are not subject to criminal sanction on the basis of negligence and a more blameworthy state of mind is required before the criminal law is invoked. If the criminal law regime is to acknowledge the realist approach to organisations, offence definitions must capture the true nature of the organisational criminality and do so by reference to a culpable standard comparable to individual liability.

As a basis of criminal liability, negligence is controversial and, of note, is arguably more readily associated with a failure to act or to take sufficient care when acting. In the context of corporate fraud, neither the 'failure to comply' nor the negligence-type model is satisfactory. The suggestion that a company can commit fraud through negligence fails to express adequately the true nature of fraud which typically involves the making of some false or misleading statement. Furthermore, the fact that a statement may be both true and at the same time misleading undermines any approach which does not encompass the element of dishonesty.[255] It must be noted that fraud is peculiar in that it defies definition, it is not an activity in itself but the way in which an activity is performed.[256] Since most fraud is perpetrated

[255] Stephen Copp and Alison Cronin, 'The Failure of Criminal Law to Control the use of Off Balance Sheet Finance During the Banking Crisis' (2015) 36(4) Co Law 99.
[256] Paul McGrath, *Commercial Fraud and Civil Practice* (OUP 2009) 3.

intentionally and with dishonesty, any negligence based model of culpability is ill-suited to address, or adequately express, wrongdoing of this nature.

The 'failure to prevent' model attracts much of the same criticism. In addition, this model cannot be said to be based on realist conceptions of organisations at all since it implicitly requires an underlying offence to have been committed by an employee.[257] In this respect the model still relies upon individuals acting criminally within the company and the failure to prevent approach, formulated in this way, is not always suitable for attributing corporate liability.[258] As regards fraud, it may be that along the spectrum of behaviour there are individuals who are perpetrating offences independently or subject to some group influence. In such circumstances, a corporation might well be considered culpable by virtue of a failure to supervise. However, recent examples of corporate conduct, particularly in the financial services industry, have attracted legal intervention as a result of sharp practice and more readily point to the possibility of a corporate culture of fraud, not reducible to individual dishonesty. These examples include the now highly publicised practices of mis-selling payment protection plans and interest rate swap agreements which have been endemic within the industry. In such cases dishonesty cannot necessarily be located in individual directors or in the thousands of individual employees involved in the practice. The dishonest culture may well have emerged, for example, as a result of various corporate and individual sales targets, sales policies and risk aversion strategies, all at some point overlapping and ultimately culminating in the reprehensible conduct itself. In such a case, an individualist approach to criminality may serve only to inculpate carefully selected scapegoats, the criminogenic organisation itself remaining unscathed and undeterred. The 'failure to comply' and 'failure to prevent' models both avoid corporate prosecution for the substantive offence. Hence, in this sort of context, the organisation would not have a conviction for fraud but for an altogether different nature of wrongdoing, neither approach truly acknowledges that companies themselves can commit fraud.

The 'corporate culture model' adopted in Australia is preferable in that it adheres to the realist analysis of corporations. It provides the means by which to attribute the necessary mens rea to the company, where there is evidence of a blameworthy

[257] Albeit that the individual does not necessarily need to be prosecuted or convicted.

[258] Neil Cavanagh, 'Corporate Criminal Liability: An Assessment of the Models of Fault', (2011) JCL 75 (414).

corporate culture, and the actus reus element of the offence is attributed by the simple principle of vicarious liability. However, since the code only provides the mechanism to attribute intention, recklessness and knowledge to a corporation, an analysis of its use in the context of dishonesty offences is frustrated.[259]

What remains consistent across the literature is the acceptance that the actus reus / mens rea construct of crime is not a suitable mechanism with which to establish corporate liability. Accordingly, underlying the realist approaches suggested to date has been the need either to provide an alternative mechanism for the attribution of mens rea to the organisation or an altogether different basis of fault, such as the negligence-type or the 'failure to prevent' model. Although Wells argues that the assumption that corporations cannot act intentionally or recklessly is faulty,[260] it is clear that other bases for fault attribution have been suggested with a view to avoid the perceived mens rea problem in the context of the corporate actor. Thus, whilst acknowledgement is given to the limitations of the language of metaphysical responsibility and anthropomorphism, there has been no challenge to the validity of the actus reus / mens rea construct itself, as it is now understood. Having accepted this paradigm without further enquiry, the literature in this area therefore lacks analysis of the fundamental blocks used to determine criminality per se. Notably absent is any suggestion that the conduct of organisations might be adjudged by reference to what could be an emotively evocative adjective, such as dishonesty, as this appears to be uncomfortably close to the requirement of a subjective state of mind. It is that lacuna that this research fills. It will be shown that acceptance of the 'realist' nature of corporations together with a corrective re-interpretation of the actus reus / mens rea doctrine facilitates corporate convictions for the substantive offence of fraud without the need to rely on the unsatisfactory identification principle, where not appropriate, or to defer to alternative bases of liability such as negligence.

[259] Australian Criminal Code 1995.
[260] Celia Wells, 'The Decline and Rise of English Murder: Corporate Crime and Individual Responsibility' (1998) Crim LR, Dec 788.

2. Substantive law and the attribution of criminal fault.

2.1 Mens rea: the hallmark of moral fault today

This chapter will demonstrate not only that the concept of mens rea has altered over time, but also that its dominance as the signature of fault in the criminal law rests on an unsatisfactory foundation. Analysis of early authoritative work and case law, dating back to the 19th and early 20th centuries, reveals that the Latin maxim, '*actus non facit reum nisi mens sit rea',* which is said to articulate the basis of criminality, was understood in an altogether different way and that the current assumptions about liability are the result of a linguistic and conceptual misinterpretation of common law doctrine. In particular, mens rea has evolved to assume an unprecedented meaning and status and, because of its metaphysical association, this has had problematic consequences for the development of a theory of corporate liability. Moreover, the analysis reveals that it was the notion of 'voluntariness', not mens rea, which was the constituent plank of fault in all offences, whether of common law or statutory origin. As it was traditionally understood, voluntariness encompassed the notions of acting freely and doing so in knowledge of the circumstances. Furthermore, that the defendant's action was voluntary was a matter of evidential presumption, subject to his denial. The common law offences were also subject to the presumption of mens rea by which it was presumed that proof of the defendant's foresight of particular consequences was required before moral fault could be attributed. Whilst voluntariness had a wide definition, which included physical and metaphorical non-voluntariness, mens rea, in contrast, was narrowly defined. However, judicial ambivalence in the use of the term mens rea, to refer also to voluntariness, and indeed any other mental state, has ultimately resulted in the displacement of the orthodox act doctrine of which voluntariness was at the heart. The down-grading of voluntariness corresponded with the ever increasing scope of the mens rea doctrine. Furthermore, the incorrect articulation of the 'presumption of voluntariness' as the 'presumption of mens rea', where the term had been used synonymously, has meant that the evidential presumption, which had aided the prosecution, has been displaced by a substantive presumption, which favours the defendant. Thus, the presumption that the defendant had acted voluntarily was replaced with the presumption that the prosecution needed to prove that the defendant had mens rea, in the broad sense of

any mental state specified in the offence definition. Whilst the requirement of voluntariness had applied in all cases,[261] the latter only applied to common law crimes, statutory offences requiring altogether different consideration. The practical implication of the linguistic imprecision was that the primary enquiry as to blameworthiness has now come to focus on the defendant's subjective mental state where previously it focused first on his voluntariness, by reference to the appearance of the overt act. Steering through the conceptual confusion, this chapter will show that a renewed recognition of the doctrine of voluntariness constitutes the first step to facilitating a general model of corporate responsibility. Since it is the characteristic of voluntariness that asserts the capacity of the actor, it thus provides the means by which a corporation can be identified as a responsibility-bearing entity. Further, since the orthodox doctrine operates by way of evidential presumption, it obviates the need to prove the specific mental states which have been so problematic in the prosecution of corporations. It is, therefore, of practical application in the attribution of corporate fault whilst preserving the opportunity for a representative of the defendant company to deny the voluntariness of the corporate action.[262]

2.2 The 2 mental states: voluntariness and mens rea

The classic basis of criminality is said to be contained in the Latin maxim '*actus non facit reum nisi mens sit rea',*[263] which has been crudely paraphrased as 'whatever the deed a man may have done, it cannot make him criminally punishable unless his doing of it was actuated by a legally blameworthy attitude of mind'.[264] Whilst the maxim appears simply to bifurcate the physical and mental elements, referring to actus reus and mens rea, the common law recognised 2 distinct mental states until

[261] Although a couple of exceptional cases demonstrate that Parliament can even dispense with this requirement if it so chooses, *R v Larsonneur* (1934) 24 Cr App R 74 (CCA); *Winzar v CC Kent* (1983) The Times, 28 March.

[262] Should the law develop in this way, it may provide the opportunity for some novel defences to evolve in the corporate context by analogy with defences more suited to the conduct of individuals.

[263] Expressed in this way by Coke, 3 Inst 6, it derives from St Augustine's words, 'ream linguam non facit nisi mens rea' which were later used as the test of guilt in the crime of perjury in Leges Henrici Primi 5, s 28. JW Cecil Turner provides this detail in *Kenny's Outlines of Criminal Law* (17th edn, Cambridge University Press 1958) 13.

[264] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) vol 1, 22, 'the word *reum* is an adjective which does not qualify the noun *actus* but does qualify the implied noun *hominem:* it is therefore a subjective epithet and signifies legally guilty, punishable as a criminal (...) on the other hand the word *rea* does qualify the noun *mens* but not in the same subjective sense (hence the grammatical clumsiness of the whole maxim ...)'.

well into the 20th century. The first of these states is 'voluntariness', the second 'mens rea', then narrowly defined to mean that the defendant must have foreseen some particular consequence of his act.[265]

In relation to the 2 mental states, it is widely acknowledged that voluntariness was the primary determinant of criminal fault in the criminal law.[266] In its earliest period, when the law simply regulated the payment of compensation for harm caused, there was no need to establish any blameworthy mental state whatsoever.[267] However, when the idea of punishment developed, it was agreed that liability should depend on moral guilt, namely that the individual knew that he was doing wrong.[268] Initially decided by objective standards, the defendant's mind, actual or presumed, became relevant.[269] First, it was recognised that moral guilt could not be attributed to a man who acted involuntarily since there was no culpable mental state. Thereafter, an advance was made when the accused was allowed to plead that his act was harmless in itself and that he had not foreseen that it would cause the harm that it did. Finally, it was recognised that although the act was harmful, a defendant could plead that he had not foreseen that it would cause harm.[270] The development of the canons of fault was a gradual process.[271]

The fundamental distinction between the 2 mental states, voluntariness and foresight of consequences, narrowly defined as mens rea, formed the subject of Turner's seminal work of 1936 which was published in the Cambridge Law Journal.[272] Of

[265] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31, 32.
[266] See for example John Austin (1790 – 1859), John Austin, 'The Province of Jurisprudence Determined' (1832) in John Austin and Robert Campbell (eds), *Lectures on Jurisprudence* (orig pub 1874, Kissinger Legacy 2010). Austin's early 19th century analysis of criminal responsibility had involved 2 mental states, the first concerning bodily action, the second the effects of such actions. Fragments of the Austinian thinking appeared in the analysis provided by the Criminal Law Commission Fourth Report of 1839 which identified that one element was the actor's mental state in relation to his act, the second his mental state in relation to its consequences, Criminal Law Commission Fourth Report of Her Majesty's Commissioners on Criminal Law 1839 (168) XIX.
[267] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31, 34.
[268] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (17th edn, Cambridge University Press 1958) 13.
[269] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31, 35.
[270] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31, 35 - 36.
[271] Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory' (2001) 64 MLR 350-71; Nicola Lacey 'Responsibility and Modernity in Criminal Law' (2001) 9 Journal of Political Philosophy 249-77; Nicola Lacey 'Space, Time and Function: Intersecting Principles of Responsibility across the Terrain of Criminal Justice' (2007) 1 Criminal Law and Philosophy 233-50.
[272] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31.

note, Turner's analysis was limited to an examination of the common law offences since the basis of criminality articulated in the Latin maxim had no application to the statutory offences, which Parliament was free to draft in any way it chose.[273] The distinction between common law and statutory offences was so marked at this time such that the interpretation of statutes was the subject of an altogether separate publication in the same journal.[274] The only mental state implicit in the statutory offences was that of voluntariness, although, exceptionally, Parliament had constructed crimes without even that.[275] As regards Turner's exposition, 3 elemental rules were identified which were determinative of criminal liability at common law:

1. It must be proved that the conduct of the accused caused the actus reus.
2. It must be proved that the conduct was voluntary and,
3. It must be proved that the accused must have foreseen that certain consequences were likely to follow on his acts or omissions.[276]

Whereas rule 1 dealt solely with causation, rules 2 and 3 required evidence as to the defendant's state of mind. Whilst acknowledging that it had often been overlooked, Turner emphasised that the distinction between the 2 mental states was an essential one. While Turner's rule 2 required voluntariness of conduct, rule 3 set out what was specifically referred to as mens rea. As regards mens rea, he observed that the extent to which the foresight must have gone was fixed by law and that it differed in the case of each particular crime. This meant that a lawyer needed to know specifically the consequences that were appropriate to each crime.[277] In the

[273] RM Jackson, 'Absolute Prohibition in Statutory Offences' (1936 -1938) 6 CLJ 83.
[274] Indeed, in his article Turner acknowledges the work of RM Jackson, in the same edition, dealing with the mental element as regards statutory offences, RM Jackson, 'Absolute Prohibition in Statutory Offences' (1936 – 1938) 6 CLJ 83.
[275] Parliament could exclude the need to prove even this primary mental element and did so, albeit controversially, in *R v Larsonneur* (1934) 24 Cr App R 74 (CCA); *Winzar v CC Kent* (1983) The Times, 28 March, DC in which the defendant was convicted of being found drunk on a highway, contrary to s 12 Licensing Act 1872, having been taken there by the police. Although Parliament had exceptionally dispensed with even this requirement in these cases it is not clear whether this exceptional case had reached the judicial and academic consciousness at the time of the Cambridge Law Journal's publication is a moot point since it did not feature in the 1935 edition of Courtney Stanhope Kenny, *A Selection of Cases Illustrative of English Criminal Law* (8th edn, Cambridge University Press 1935) or Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading, Evidence and Practice* (30th edn, Sweet & Maxwell 1938).
[276] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 – 1938) 6 CLJ 31, 32 – 33.
[277] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 – 1938) 6 CLJ 31, 33.

accompanying publication, Jackson stated that, 'The state of a man's mind is relevant to finding out, first, if the act he did is to be imputed to him, and secondly, if he realised the probable consequences. It is the second enquiry which decides whether he had common law mens rea'.[278] Voluntariness, denoting imputability, thus went to capacity and served as the hallmark of the responsibility-bearing actor.

As to what then constituted mens rea, Turner's detailed explanation centred on *Prince (1875)*.[279] It is of note that today, with the altered conception of mens rea, this is described as a case concerning a strict liability offence, and thus not requiring proof of mens rea at all.[280] The facts of *Prince* were that, reasonably believing a girl to be over the age of 16, he had taken the girl who was in fact under that age, out of the possession and against the will of her father. His conviction was affirmed by the Court for Crown Cases Reserved on the interpretation of s. 55 Offences Against the Person Act 1861.[281] Turner observed that all the judges in the case were agreed in refusing to read into the section any words such as 'with knowledge that she is under 16', however, they differed as to the exact mental element required in the offence .[282] Turner said that there was no justification for this and that:

> Their dicta on these points were entirely obiter and it is a pity that so much prominence has been given to them in textbooks as though they were authoritative expositions of general principles to be applied in all criminal cases. In reading the judgments it is necessary to avoid confusing the two

[278] RM Jackson, 'Absolute Prohibition in Statutory Offences' (1936 – 1938) 6 CLJ 83, 91.
[279] *R v Prince* (1872 - 75) LR 2 CCR 154.
[280] Glanville Williams, *Criminal Law, The General Part* (Stevens & Sons 1961) 153 and David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 58.
[281] Offences Against the Person Act 1861, s 55 'Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour (...)'.
[282] Of the judgments that discussed the subject of mens rea at length, all agreed it was an essential element but, nonetheless, they differed as to what exact mental element this required. Bramwell B thought it necessary to establish that the accused intended to do what was morally wrong whereas Brett J held that the accused must have 'knowingly' done 'acts which would constitute a crime if the result were as he anticipated, but in which the result may not improbably end by bringing the offence within a more serious class of crime'. Denman J agreed with Bramwell but added a definition of the word 'unlawfully' which occurred in the section in question. He spoke of the prisoner having 'wrongfully and knowingly violated the father's rights'. So, all agreed that words as to knowledge of the age of the girl could not be read into the section but Bramwell wanted to read in 'with knowledge that his conduct was contrary to morality', Brett the words 'with knowledge that his conduct amounted to a crime' and Denman the words 'with knowledge that his conduct was a violation of the father's rights'.

> different points set out in our rules 2 and 3. It was certainly necessary to prove that Prince voluntarily incited the girl to come away (rule 2). But his foresight of the consequences of his incitement was merely that she would come with him, and was not affected by his knowledge of her age, or of the criminal law, or of morality.[283]

Turner went on to say that even if the word 'knowingly' or the like could be read into the statute, this would not affect the mens rea of the accused, but would merely add another necessary fact to the actus reus, namely the offender's knowledge of the girl's age.

2.3 Voluntariness

It was recognised that the conduct of the accused must be voluntary at an early stage in the law, long before the recognition that he must also have foreseen the consequences of his conduct.[284] Since voluntariness is presumed,[285] in practice the issue is raised in the form of the defendant's claim of involuntariness. Expressed in the negative form, 'involuntariness' is taken to describe the state in which bodily movement is uncontrolled such that the very authorship of the act is negated. Well-rehearsed examples given in the criminal law are where the accused is unconscious, asleep, afflicted by St Vitus' dance, disabled from driving a vehicle whilst under the attack of a swarm of bees[286] and other instances of reflex action where the actor physically experiences a 'total destruction of voluntary control'.[287] The act cannot be said to be voluntary or willed if a person is unable to physically control it[288] and in such circumstances, the defendant's claim is one of automatism.[289] Whilst claims of this nature are rare in practice, they do not attract controversy. However, it is

[283] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 – 1938) 6 CLJ 31, 46 - 47.
[284] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31, 34 - 35.
[285] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31; Ashworth and Horder describe this in terms of the 'normal presumption of free will', Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 24.
[286] *Hill v Baxter* [1958] 1 QB 277, 286.
[287] *A-G's Reference* (No 2 of 1992) [1993] 99 Cr App R 429; see too the discussion in David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 58.
[288] HLA Hart, *Punishment and Responsibility* (Clarendon 1968) 181.
[289] This is more fully described as non-insane automatism.

clear that the orthodox act doctrine encompassed the notion of involuntariness, as the converse of physical voluntariness, and also 'non-voluntariness' in the wider sense which operated to deny mental volition. It is submitted that the distinction between literal involuntariness and metaphorical non-voluntariness was a refinement of the early concept[290] and examples of involuntary behaviour included acts performed whilst unconsciousness or asleep whereas instances of the latter type included actions performed under mistake, duress or by necessity. Whilst such claims are now considered either as a separate defence or the denial of mens rea,[291] it is submitted that early reliance on either state was essentially a claim that the particular act was not performed voluntarily. The scope of the act doctrine was addressed by Turner in his historical analysis and he found evidence of the early recognition of the wider doctrine in case reports, dating as far back as as 1471.[292] Further support for the recognition of non-voluntariness as a part of the orthodox voluntariness doctrine can be taken from early institutional texts and authorities which equate examples of involuntariness with those of non-voluntariness.

For example, in the 1935 edition of Kenny's this occurs in the discussion of *R v Tolson (1889)*.[293] The now infamous facts of the case were that Martha Tolson appealed her conviction for bigamy, a statutory offence drafted in strict liability terms,[294] on the basis of her reasonable belief that her husband was dead. It will be recalled that the only mental state implicitly required in statutory offences was voluntariness, a fact recognised by Stephen J. in the case itself. In Cave J.'s judgment it was said that a reasonable belief in the existence of circumstances which, if true, would make the act for which a prisoner was indicted an innocent act had

[290] KJM Smith and William Wilson, 'Impaired Voluntariness and Criminal Responsibility: Reworking Hart's Theory of Excuses – the English Judicial Response' (1993) 13 OJLS 69.
[291] David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 58.
[292] Indeed, in his seminal work, Turner identified a case dating to 1664 which appeared to reject the notion of non-voluntariness. The facts were that a man accidentally shot his wife after taking all reasonable precautions to ascertain that his pistol was unloaded and, according to the report of Kelynge, the defendant was convicted of her manslaughter. However, Turner noted the unease expressed by Kelynge as regards the conviction and that it was subsequently echoed by Foster, who observed that the judgment was not 'strictly legal'. Notably, in support of the wider doctrine, Turner pointed to Hale who described a 1471 case in which a servant who had shot his master in mistake for a trespasser was acquitted. JWC Turner, 'The Mental Element in Crimes at Common Law', in L Radzinowicz and JWC Turner (eds) *The Modern Approach to Criminal Law* (2nd edn, Macmillan 1948) 212, fn 2 citing Kelynge 41 and Foster, CC & CL 264-65, fn 3.
[293] *R v Tolson* (1889) 23 QBD 168, cited in Courtney Stanhope Kenny, *Cases on Criminal Law* (supplement by E Garth Moore, 8th edn, Cambridge University Press 1935).
[294] The offence is set out at Offences Against the Person Act 1861 (24 & 25 Vict c 100), s57.

always held to be a good defence. Furthermore, he observed that an 'honest and reasonable mistake stands in fact on the same footing as absence of reasoning faculty, as in infancy or perversion of the faculty, as in lunacy'.[295] That this reasoning related to capacity, rather than foresight, is supported by Stephen J.'s judgment in which he said that:

> In all cases whatever, competent age, insanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined (...) With regard to knowledge of fact, the law, perhaps, is not quite so clear, but it may, I think, be maintained that in every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity.[296]

Of significance, he continued:

> To take an extreme illustration, can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in the state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he's doing (...) [297]

Thus, Stephen J. explicitly equated acts done in a state of somnambulism with those done without knowledge of fact or circumstances. Put another way, metaphysical non-voluntariness was as exculpatory as literal involuntariness. Addressing the seemingly problematic authority of *Prince*[298] on this point, Stephen J. concurred with Brett J.'s submission in that case, namely that it was a general principle that a mistake of fact on reasonable grounds would make a prisoner guilty of no offence and this excuse is implied into every criminal offence. Recognising that the majority had not dissented from the principle, he explained it had simply been the case that it had not been held to apply fully to each part of the section in question since the

[295] *R v Tolson* (1889) 23 QBD 168, 181 (Cave J).
[296] *R v Tolson* (1889) 23 QBD 168, 187 (Stephen J).
[297] *R v Tolson* (1889) 23 QBD 168, 187 (Stephen J) and set out in Courtney Stanhope Kenny, *Cases on Criminal Law* (supplement by E Garth Moore, 8th edn, Cambridge University Press 1935) 19.
[298] *R v Prince* (1872 - 75) LR 2 CCR 154.

legislature had intended that some of the prohibited acts were done at the peril of the person. Accordingly, mistake as to the girl's age would not exculpate, however, a mistaken belief of the father's consent or not knowing that she was in anyone's possession would.[299]

The 1938 edition of Archbold[300] also stated that the capacity to commit crime presupposes an act of understanding and an exercise of will, quoting Stephen J. in *Tolson*.[301] Further, as to incapacity in the context of insanity, Archbold's stated that:

> Every person at the age of discretion is, unless the contrary is proved, presumed by law to be sane, and be accountable for his actions. But if there is an incapacity, or defect of the understanding, as there can be no consent of the will, the act is not punishable as a crime. This species of non-volition is classified by Coke (Litt. 247) and Hale (1 Hist PC 29) as either natural, accidental, or affected (...) [302]

Whilst the act of a drunk or person of unsound mind was described in terms on non-volition, Archbold's also asserted that the same principle applied to those who act under compulsion or coercion, who act 'not as a result of an uncontrolled free action proceeding from themselves'.[303] The text then gave one of the classic examples of physical involuntariness, where 'A by force takes the hand of B in which is the weapon, and therewith kills C, A is guilty of murder, but B is excused' [304] and this was considered the equivalent of a compulsion or coercion, exemplary of mental non-voluntariness.[305]

---

[299] *R v Tolson* (1889) 23 QBD 168, 190 (Stephen J).
[300] Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading: Evidence and Practice* (30th edn, Sweet & Maxwell 1938) 11.
[301] *R v Tolson* (1889) 23 QBD 168, 187 (Stephen J).
[302] Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading: Evidence and Practice* (30th edn, Sweet & Maxwell 1938) 13.
[303] Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading: Evidence and Practice* (30th edn, Sweet & Maxwell 1938) 20.
[304] Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading: Evidence and Practice* (30th edn, Sweet & Maxwell 1938) 20.
[305] Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading: Evidence and Practice* (30th edn, Sweet & Maxwell 1938) 20.

Although the earlier student and practitioner texts[306] were notably absent of any discussion about actus reus or express reference to 'voluntariness', by 1958 Kenny's Outlines, edited by J.W.C. Turner, contained a section dedicated to actus reas principles. Of note, voluntariness was also mentioned and any denial of it said to amount to a denial of responsibility for the actus reus,[307] although the discussion took place under the heading of 'mens rea'.[308] The text also recognised that pleas of no actus reus were sometimes alluded to as matters of justification and excuse, or 'defences' in today's terminology.[309] However, in the discussion relating to the emergence of the subjective standard, non-voluntariness was implicitly equated to involuntariness. It was said that if:

> a man was honestly mistaken as to the facts upon which he took action or was so insane as not to understand what he was doing, or was compelled by overpowering physical force to be a helpless instrument in another person's misdeed he could not reasonably be regarded as a transgressor of the moral code. In such circumstances criminal guilt was often negatived in the courts by the argument that what had been done was 'not the prisoner's act'.[310]

Further, since the lack of voluntariness in either form constituted a denial of the act itself, it is submitted that the reference to examples of both forms was evidence of the continued recognition of the wide doctrine. Were any further support be required, the relationship between the 2 concepts, involuntariness and non-voluntariness, was further supported in Turner's footnote at this point in which he also referred to sleepwalking.[311] Similarly, in relation to mistake in particular, the text cited Hale who had said, 'but in some cases ignorantia facti doth excuse, for such an ignorance many times makes the act itself morally involuntary'.[312]

---

[306] Courtney Stanhope Kenny, *A Selection of Cases Illustrative of English Criminal Law* (8th edn, Cambridge University Press 1935); Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading, Evidence and Practice* (30th edn, Sweet & Maxwell 1938); JW Cecil Turner and A LL Armitage, *Cases on Criminal Law* (Cambridge University Press 1953).
[307] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (17th edn, Cambridge University Press 1958) 27.
[308] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (17th edn, Cambridge University Press 1958) 26.
[309] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (17th edn, Cambridge University Press 1958) 16.
[310] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (17th edn, Cambridge University Press 1958) 24.
[311] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (17th edn, Cambridge University Press 1958) 24, fn 4.
[312] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (17th edn, Cambridge University Press 1958) 52, citing 1 Hale PC 42.

Furthermore, as regards compulsion:

> In the old authorities statements are to be found to the effect that there may be circumstances in which a man may be excused for deeds which he has done not of his own free volition but under compulsion (...), in other words, pleads that his conduct was not voluntary. Compulsion can take other forms than physical force (...). [313]

Whilst Turner was frank in his observation that the notions of actus reus and mens rea had not always been clearly distinguished, something that he sought to remedy in his work, there is ample evidence that the orthodox act doctrine was a wide one, encompassing the notions of both physical involuntariness and mental non-voluntariness.

It is also clear that the act doctrine operated on the basis of an evidential presumption of voluntariness. As Turner explained, this was presumed by reference to the defendant's outward behaviour since, 'It is obvious that it is impossible really to know for certain what was passing in the mind of the accused person; it can only be surmised by a process of inference from what is known of his conduct'.[314] The presumption of voluntariness thus operated to obviate any prosecutorial need to prove the combination of characteristics which, taken together, amounted to voluntariness.[315] By leaving it to the defendant to raise any claim that his conduct was not voluntary, the law avoided the difficulties that would be associated with the development of a positive conception of voluntariness. As to a positive notion, there has never been consensus as to how volition, deliberateness or intentionality of physical movement can be defined.[316] Considered in the negative form, as a result of the operation of the presumption, the evidential burden was placed on the actor himself in relation to the specific claim that he was making. As a matter of evidence,

[313] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (17th edn, Cambridge University Press 1958) 24.
[314] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31.
[315] It would seem that Ashworth and Horder describe this in terms of the 'normal presumption of free will', Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 24.
[316] P H Robinson, 'Should the Criminal Law Abandon the Actus Reus – Mens Rea Distinction?' in Stephen Shute and others (eds), *Action and Value in Criminal Law* (Clarendon 1993) 195; *Hill v Baxter* [1958] 1 QB 277. Anthony Duff explores the difficulties surrounding the concept of intention in his seminal work, RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and Criminal Law* (Basil Blackwell 1990).

and indeed procedural efficiency, this approach was plainly the preferable.

2.4 Voluntariness – freedom of choice and the presumption of knowledge

The recognition that acting under a mistake rendered the action metaphorically non-voluntary has further implications for the scope of the first mental element. At the heart of voluntariness is the idea of the free agent and his capacity to choose,[317] indeed, Ashworth and Horder observe that to 'proceed to conviction without proof of voluntary conduct would be to fail, in the most fundamental way, to show respect for individuals as rational, choosing beings'. [318] Accordingly, it is submitted that voluntariness must go significantly further than just requiring that the individual is sane and above the age of infancy. The very notion of rational choice imports ideas of choosing between options, calculating or weighing up potential courses of conduct. It must surely follow that the process of weighing up implicitly assumes that the actor has some perception of the circumstances in which he does his mental calculation. Choice simply cannot take place in the abstract. Further, the individual's perception of both external circumstances and internal factors will always bear on the choices made. Whilst the subjective perception of the circumstances in which one acts may be impaired or flawed, it is the individual's understanding of the circumstances in which he acts that determines whether or not moral culpability attaches. This aspect, of course, relates directly to the doctrine of mistake for it is the individual's perception or subjective 'knowledge' of the circumstances in which he acts that defines the character of the conduct itself.[319] If mistake, or ignorance, can render an act metaphorically non-voluntary,[320] then voluntariness must encompass that the act is done in knowledge of the circumstances since 'the capacity to commit crime presupposes an act of understanding and an exercise of will.[321] Support for this proposition can be found in the early cases of,

[317] Which itself accords with Hart's fair opportunity principle.
[318] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 86.
[319] *Toppin v Marcus* [1908] 11 KB (Ir) 423 (Palles CB).
[320] Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading, Evidence and Practice* (30th edn, Sweet & Maxwell 1938) 21.
[321] Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading, Evidence and Practice* (30th edn, Sweet & Maxwell 1938) 11.

for example, *Marsh (1824)*[322] and *Sleep (1861)*[323] and these point, more specifically, to the recognition of a presumption of knowledge, namely that the defendant had knowledge of the surrounding circumstances.[324] Indeed, Lord Diplock's dicta in *Sweet v Parsley (1969-70)*[325] supports this construction, in that:

> the jury is entitled to presume that the accused acted with knowledge of the facts, unless there is some evidence to the contrary originating from the accused who alone can know on what belief he acted and on what ground the belief, if mistaken, was held.[326]

Arguably, this analysis accords with Duff's seminal work on the philosophy of action.[327] Whilst Duff articulated in terms of intention rather than voluntariness, he noted that actions and events are identified and individuated only by descriptions of them and that they can be described in various ways, drawing different distinctions between the action and its circumstances or consequences. Depending upon the description, an agent may act intentionally under one description of the action, but not under others. The action-description is critical to the issue of what Duff called intentionality, and he provided examples, 'I intentionally pull the trigger but, not realising that the gun is loaded, shoot Pat unintentionally. I intentionally drink the wine but, not knowing that it is poisoned, drink poison unintentionally'.[328] It is submitted that what Duff terms 'intention', as regards the act but not its outcome, is expressed in the broad notion of voluntariness. Moreover, in accordance with the idea of rational calculation, it is submitted that knowledge must be an integral component of voluntariness. That being so, it would also be a characteristic presumed in the defendant and the presumptive mechanism overcame problems that would arise if actual knowledge was a specified matter that needed to be proved by

[322] *Marsh* (1824) 2 B & C 717 [722] (Bayley CJ) in relation to a carrier's unlawful possession of game.
[323] *Sleep* (1861) Le & Ca 44 in relation to the unlawful possession of naval stores.
[324] As a presumption it is a matter than can be rebutted by a defendant. Of course, this can be dispensed with as a matter of strict or absolute liability by Parliament and subject, of course, to judicial interpretation of the particular statutory offence, see *Parker v Alder* [1899] 1 QB 20.
[325] *Sweet v Parsley* [1970] AC 132 (HL).
[326] *Sweet v Parsley* [1970] AC 132 (HL) 164, (Diplock L).
[327] Anthony Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and Criminal Law* (Basil Blackwell 1990).
[328] In support Duff refers to E D'Arcy, *Human Acts* (OUP 1963) ch 1 and Joel Feinberg, 'Action and Responsibility' in Max Black (ed), *Philosophy in America* (Ithaca 1964).

the prosecution to the usual standard.[329]

2.5 Misuse of mens rea to describe both mental states

Notwithstanding the distinction between the 2 mental elements, it is of note that both Turner and Jackson explicitly recognised that the term mens rea had been used generically to refer to both mental states in legal literature and case reports.[330] Jackson, in particular, provided particularly detailed evidence of the growing tendency to use the term mens rea to describe both mental states:

> If, for instance, the butcher in a fit of somnambulism exposes tainted meat for sale in his shop, presumably he will not be liable for the offence, because the act is not considered in law to be imputed to him. It must be established that he knew he was exposing the meat for sale although it is irrelevant whether he knew, or could have known, that the meat was tainted. It has become common for judges when dealing with absolute prohibitions to make statements such as 'the prisoner had done the thing which was forbidden by the statute and that it was not necessary to prove any further mens rea'. That is only another way of saying that the act must be one which can in law be imputed to the accused, and that that imputation is properly made when the accused intended to do what he did. In this use (better described as a misuse) of the expression mens rea, our hypothetical somnambulist butcher would have the defence that mens rea was absent (i.e. that the act was not imputed to him) although the offence does not require mens rea in the usual meaning of that term.[331]

Other instances of the linguistic confusion pervade the literature and case reports. For example, in Kenny's 1933 edition of Outlines of Criminal Law the explanation given of absolute prohibitions was that 'ordinary mens rea is still necessary. That is to say, the offender must have actually known that he went through the act [of

[329] KJM Smith, *Lawyers, Legislators and Theorists* (OUP 1998) 210.
[330] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 – 1938) 6 CLJ 31, 32; RM Jackson, 'Absolute Prohibition in Statutory Offences' (1936 -1938) 6 CLJ 83, 91.
[331] RM Jackson, 'Absolute Prohibition in Statutory Offences' (1936 – 1938) 6 CLJ 83, 91.

selling]'.[332] In this respect, Jackson observed, 'the term mens rea is being used in a peculiar sense, not in its common law sense as regards foresight of consequences, but in the 'voluntariness' context of the actus reus'. He identified better phraseology in *Law Society v United Service Bureau Ltd (1933)* in which Avery J had said:

> [I]t has been laid down over and over again that where a statute absolutely prohibits the doing of an act it is sufficient to show that the person accused did the forbidden act intentionally, and that it is not necessary to go further and show what is commonly known as mens rea or any intention other to do the thing forbidden.[333]

Notwithstanding the ambiguous use of the term mens rea, its relative position to the concept of voluntariness was restated by Turner in 1948, with the addition that 'in some crimes emphasis is laid upon a specific *intention* on the part of the offender'.[334] In that respect, he stated that there was no divergence from the Latin maxim's mens rea requirement since that which a man intends to bring about he obviously foresees.[335] Accordingly, mens rea was deemed to include the two states of mind, intention and foresight, where intention equated to a desire to bring about the consequences.[336]

---

[332] Courtney Stanhope Kenny, *Outlines of Criminal Law* (14th edn, Cambridge University Press 1933) 45.

[333] *Law Society v United Service Bureau Ltd* (1933) 90 8JP 33, 36 (Avery J). However, according to Jackson, even this formulation was not free from objection. First, it incorrectly suggested that the accused must have known the thing was forbidden and second, it should clarify that the word 'intentionally' meant no more than that the act must be imputable to the accused. RM Jackson, 'Absolute Prohibition in Statutory Offences' (1936 - 1938) 6 CLJ 83, 92.

[334] JWC Turner, 'The Mental Element in Crimes at Common Law', in L Radzinowicz and JWC Turner (eds), *The Modern Approach to Criminal Law* (2nd edn, Macmillan 1948) 205.

[335] He continued that the mens rea rule therefore covered expressions such as malice aforethought, or combinations of the words negligence and vague adjectives as wicked, gross, culpable, complete, clear, criminal and so on.

[336] JWC Turner, 'The Mental Element in Crimes at Common Law', in L Radzinowicz and JWC Turner (eds), *The Modern Approach to Criminal Law* (Macmillan 1948) 206. Intention was equated to a desire to bring about the possible consequences whereas recklessness encompassed foresight of possible consequences with no desire. The best definition of recklessness, he said, came from an Equity case which described "an attitude of mental indifference to obvious risks", *Hudston v Viney* [1921] 1 Ch 98, 104.

2.6 The shifting boundaries of actus reus and mens rea

The analysis provided by Turner almost 2 decades later, in 1964, remained consistent in the respect that the mental elements at common law were (i) that the accused person's conduct was voluntary and (ii) that it was actuated by mens rea.[337] As he had done earlier, Turner further elucidated the meaning of mens rea in terms of an awareness that certain specified harmful consequences could follow and more precisely that, 'What these consequences are is a matter of law. Mostly they consist of the event itself which constitutes the actus reus'.[338] However, the 1964 edition of Russell on Crime evidenced a fundamental change in Turner's approach to the actus reus / mens rea distinction.[339] At pains to maintain the 'sharp' physical / mental contrast made in the maxim,[340] Turner stated that reference to actus reus would denote only the physical result of conduct and this would keep it distinct from any mental element that the law may require. This categorisation was completely at odds with his own earlier analysis, set out in his discussion of Prince, in which he had said if the word 'knowingly' could be read into the offence, it would add an extra element to the actus reus, not the mens rea.[341] Of note, Turner's re-drawing of the actus reus / mens rea boundaries was in contrast to the analysis provided by Glanville Williams who was still asserting the orthodox view, namely that the actus reus constituted 'the whole definition of the crime with the exception of the mental element - and it even includes a mental element in so far as that is contained in the definition of an act'.[342] Thus, on Turner's analysis, the very concept of mens rea had widened to encompass territory traditionally occupied by actus reus which now described only the elements

[337] He went on to state that if any definition of actus reus were to be adopted which involves a coincidence of it with either or both of (i) or (ii), then arguments and conclusions based thereon "would assume a complexity likely to bewilder simple minds", JW Cecil Turner, *Russell on Crime* (12th ed, Stevens & Sons 1964) vol 1, 25.

[338] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) vol 1, 40, fn 10.

[339] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) vol 1, 25.

[340] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) vol 1, 25.

[341] In his 1936 exposition of *R v Prince (1875)* LR 2, CCR 154 Turner had stated that foresight of the consequences of his incitement was merely that the girl would come with him, and this was not affected by his knowledge of her age, or of the criminal law, or of morality. Writing at that time, it will be recalled that he had said that knowledge was not intention and even if the word 'knowingly' or the like could be read into the statute, this change would not affect the mens rea of the accused, but that it would merely add another necessary fact to the actus reus, namely the offender's knowledge of the girl's age. JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31, 46 – 47.

[342] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) vol 1, 25, fn 24; Glanville Williams, *Criminal Law, The General Part* (2nd edn, Stevens & Sons 1961) 16.

in the offence definition that were not mental states.[343] Thus, although the Latin maxim itself, as a statement of principle, has remained unchallenged over the centuries,[344] it is clear that the relative scope and meaning of the basic planks of fault have not been consistent.[345]

As it is constructed in the present day, the criminal law continues to adhere to the maxim '*actus non facit reum nisi mens sit rea'* and, in accordance with Turner's modified analysis, the elements are typically categorised by reference to either their physical or mental qualities.[346] Accordingly, criminal liability is determined by the formulaic approach which considers whether the elements of the actus reus and mens rea are made out, each being considered in isolation,[347] where mens rea is now taken to describe all the mental elements expressed in the offence definition, whether of common law or statutory source, including 'intention', 'knowledge', 'belief' and 'recklessness'.[348] Almost exclusive focus on the mental elements expressed in offence definitions has meant that the implicit mental requirements, fundamental to the common law doctrine, have all but disappeared from the legal narrative. The 2 mental states, voluntariness and mens rea, in its original narrow form, simply have no frame of reference. The actus reus concept is now residual in nature and is taken to refer to any non-mental element.[349] Thus, a typical exposition of actus reus in the educational and practitioner texts of today explains the inclusion of circumstances and consequences, deals with liability for omissions and then rounds up the field with a discussion of causation issues and the principle of *novus actus interveniens*.[350] Voluntariness tends to feature only briefly, usually in the limited context of the automatism 'defence'.[351] With its appearance confined to the associated issue of

[343] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) vol 1; ACE Lynch, 'The Mental Element in the Actus Reus' (1982) 98 LQR 110.
[344] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) vol 1, 22.
[345] In 1982, Lynch turned his attention to the construction of crime and concluded that the terms 'actus reus' and 'mens rea' had been employed ambiguously, ACE Lynch, 'The Mental Element in the Actus Reus' (1982) 98 LQR 109.
[346] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013).
[347] *Lawrence v MPC* [1972] AC 626 (HL), (Megaw LJ); *DPP v Gomez* [1993] AC 442 (HL) 495 (Browne-Wilkinson L); *R v Hinks* [2001] 2 AC 241 (HL). Alternatively, criminal liability is constructed by reference to the addition of the actus reus and mens rea and, further, the absence of a defence.
[348] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 83. Ormerod also includes 'wilfully' in his list of mens rea expressions, David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011).
[349] Janet Dine and others, *Criminal Law: Cases and Materials* (6th edn, OUP 2011) 61.
[350] David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 46ff.
[351] David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 59.

automatism, involuntariness remains but the non-voluntariness aspect of the orthodox doctrine is no longer visible.

Conversely, it is clear that the use of mens rea as a generic term for any blameworthy mental state has had substantive consequences such that the mens rea doctrine has expanded well beyond its original conception. However, since the expanded concept is tacit as regards the notion of voluntariness, what remains of this distinct mental element has become submerged within the actus reus doctrine. Whilst this has some attraction in that voluntariness is inherently linked to the act, and not its consequences, the fact that it is a mental requirement makes it something of a misfit in the contemporary actus reus camp. It is perhaps small wonder that this element is now generally given little more than a passing glance in the texts. The displacement of voluntariness as a central plank of liability is thus consequent upon the expansion of the mens rea notion and the apparent inability of the bifurcated model to accommodate the 3 rules identified in the orthodox account of the basis of criminal fault.

2.7 The fall of metaphorical non-voluntariness

Whilst the 1960's saw Turner redrawing the actus reus / mens rea boundaries, he remained committed to his analysis of the implicit mental states at common law. However, at odds with the orthodox exposition, Glanville Williams was now challenging the voluntariness doctrine altogether, suggesting that an assertion of ignorance or mistake of fact might as well be a denial of mens rea. 'At the present day the exemption from responsibility, such as it is, given by the "act" doctrine could, in respect of the requirement of will, just as well be put on the ground of absence of mens rea'.[352] Further, whilst Williams recognised that there was a mental requirement for an act, described by him as 'a willed movement',[353] he explicitly excluded metaphorical non-voluntariness from its ambit.[354] However, his analysis was far from straight-forward, for example, he suggested that voluntariness spliced

[352] Glanville Williams, *Criminal Law: The General Part* (2nd edn, Stevens & Sons 1961) 12.
[353] Glanville Williams, *Criminal Law: The General Part* (2nd edn, Stevens & Sons 1961) 16.
[354] Glanville Williams, *Criminal Law: The General Part* (2nd edn, Stevens & Sons 1961) 12, 18, stating that the act does not suppose 'free' will.

part of the mental element onto the physical element and also said that to classify absence of will as absence of an act made the legal distinction between act and state of mind a jagged one[355]. Since the modern interpretation of the Latin maxim requires all the components of an offence to be 'pigeon-holed' as either actus reus or mens rea, the inelegant result is evident in the modern texts, with involuntariness said to bear upon the actus reus whereas non-voluntariness is a denial of mens rea or a claim of some other excuse or justification.[356] The resulting conceptual confusion is no more clearly witnessed than in the contemporary approach to insane and non-insane automatism. Taking the oft-cited example of the somnambulist, this claim may now be either a denial of actus reus or mens rea, depending on the cause of the somnambulism.[357] Given that the common denominator is essentially a denial of voluntariness, it is not surprising that this area of law has been subjected to criticism.[358] What can be said is that the orthodox concept of mens rea, the foresight of specified consequences, could not accommodate notions of non-voluntariness such as duress, there being no relationship between the principles. Accordingly, the development in relation to metaphorical non-voluntariness constituted a further expansion of the mens rea doctrine into territory traditionally occupied by the voluntariness doctrine.

Inconsistency in the treatment of involuntariness and non-voluntariness continues to be a cause of undoubted doctrinal tension. Further, there is no universal agreement as to whether the voluntariness notion now constitutes a basic plank of liability or an excuse.[359] It is, however, still accepted that a notion of wilfulness encompasses a

[355] Glanville Williams, *Criminal Law: The General Part* (2nd edn, Stevens & Sons 1961) 12, 14.
[356] David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 58.
[357] An external cause would amount to a claim of automatism whilst an internal cause would come within the insanity principle.
[358] See for example David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 286, 295, 298; RD Mackay, 'Non-Organic Automatism' [1980] Crim LR 350.
[359] See KJM Smith and William Wilson, 'Impaired Voluntariness and Criminal Responsibility: Reworking Hart's Theory of Excuses – the English Judicial Response (1993) 13 OJLS 69 and P H Robinson, 'Should the Criminal Law Abandon the Actus Reus – Mens Rea Distinction?' in Stephen Shute and others (eds), *Action and Value in Criminal Law* (Clarendon 1993) 195; Glanville Williams, 'Offences and Defences' (1982) 2 LS 233. Historically, it is suggested that in the early 1800s the relationship of defences to concepts of mens rea or involuntariness was of little judicial concern and, later, during the 1870s fault concepts involved the use of terms such as 'wilful' which were laden with moralistic tones but confused the distinction between the two, KJM Smith, *Lawyers, Legislators and Theorists* (OUP 1998) 160, 257. Glanville Williams has opined that the actus reus should be conceived as including an absence of excuse or justification whereas Dine argues that clarity is promoted by discussing excuse and justification in the distinct context of defences, rather than as

core expectation of criminal responsibility, shaped in the individualist paradigm, namely that the agent is free-acting. If we do not enjoy freedom of choice, we cannot be morally responsible for our actions.[360] In line with Turner's exposition of the mental elements of crime, Lord Denning in *Bratty v AG for Northern Ireland [1963]* observed that, 'a voluntary act is essential (…) in every criminal case. No act is punishable if it is done involuntarily'.[361] Similarly, Lord Diplock in *R v Shepherd [1980]* stated that, 'even in absolute offences (…) the physical act relied on as constituting the offence must be wilful in the limited sense, for which a synonym in the field of criminal liability that has now become the common term of legal art is "voluntary"'.[362]

2.8 The rise of mens rea

It has been established that all offences, whatever their source, contained the mental element Turner referred to as voluntariness. In addition, common law offences were presumed to require proof of mens rea. Mens rea simply meant that to incur criminal responsibility the defendant had to have been aware of the possible consequences of his act.[363] Whereas consequences are now typically associated with 'result' crimes, the limited extent of the orthodox foresight requirement was illustrated by Turner's exposition of *Prince*, set out above.[364] What the mens rea required in relation to the act was simply that the defendant foresaw the possibility that the girl would go with him.

Of note, *Prince* concerned a statutory offence and, as such, was a matter of statutory interpretation not common law doctrine.[365] However, Turner was acutely aware of

---

part of the actus reus, Glanville Williams, 'Offences and Defences' (1982) 2 LS 233; Janet Dine and others, *Criminal Law, Cases and Materials* (6th edn, OUP 2011) 61.

[360] KJM Smith and William Wilson, 'Impaired Voluntariness and Criminal Responsibility: Reworking Hart's Theory of Excuses – the English Judicial Response' (1933) 13 OJLS 69.

[361] *Bratty v Attorney General for NI* [1963] AC 386 (HL) 409.

[362] *R v Shepherd* [1981] AC 394 (HL), [1980] 3 All ER 899, 904. Arguably, here Lord Diplock is referring to strict liability rather than absolute liability since the cases of Larsonneur and Winzar are examples of absolute liability.

[363] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31.

[364] *R v Prince* (1872 - 75) LR 2 CCR 154, discussed in JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31; see above at 2.2.

[365] *R v Prince* (1872 - 75) LR 2 CCR 154. In his article, Jackson included an explanation of the way in which the common law presumption had impacted on statutory interpretation, RM Jackson

the need to distinguish the sources of law and refused to attempt to formulate general principles of mental elements that might apply equally to both. In the 1964 edition of Russell he observed:

> that task is (...) futile, for it leads to a situation in which a clear picture of the common law principles becomes obscured amongst the tangles statutory crime. It should not be forgotten that criminal law is the instrument of criminal policy, and that statutes creating new crimes are the attempts of the legislature to give effect to the criminal policy of the moment. The legislature is therefore primarily concerned to find the best method of dealing with the particular mischief which it is at that moment seeking to repress, and its decisions (...) are not as a rule reached by any careful regard for general principles of an abstract kind. The result is that, as things are, the statutory crimes as a whole mass, cannot be brought under a simple scheme of general principles of criminal liability.[366]

'Absolute Prohibition in Statutory Offences' (1936 -1938) 6 CLJ 83. Jackson was clear in stating that the rule requiring a culpable mental element did not hold good in statutory offences; these were an altogether different matter and parliament could determine that a person may be liable for doing an act whether or not he did, or could, have foreseen the consequences. Significantly, he concluded that statutory offences required nothing more and nothing less than a careful reading and the proper application of the rules of construction. As to the construction of penal statutes, he identified just 2 rules: the first, attributed to Blackstone, *Commentaries on the Laws of England 1765 – 69*, required that the statute must be construed strictly according to the letter. This strict rule of construction had been used to mitigate the harsh state of the common law when capital offences were numerous and, although praiseworthy from a humanitarian perspective, it meant that judges often did violence to the clear wording of the statutes. Thereafter, with the reduction in the number of statutory capital offences in the 19th century, methods of interpretation were more akin with general principles of the construction of documents, citing Peter Benson Maxwell, *Interpretation of Statutes* (7th edn 1929) 229ff. However, where there were two reasonably possible meanings in a penal statute, the court would continue to adopt the more lenient one, see *Remmington v Larchin* [1921] 3 KB 404 (CA) 408 (Bankes LJ), and construe the statute in favour of the accused but, where there was no doubt, the court would not find ambiguity in the language. On this point Lord Devlin says that judges looked for the philosophy behind the Act and found a Victorian Bill of Rights, favouring (subject to the observance of the accepted standards of morality) the liberty of the individual, the freedom of contract, and the sacredness of property, and which was highly suspicious of taxation, P Devlin, *Judge* (OUP 1981) 15. Then, acknowledging that statutes could override any rule of common law, Jackson noted a sense in which statutes were still 'controlled' by it, and he referred to the 'well-established rule' that statutory provisions should, if possible, be construed so as not to abrogate the common law's settled rules. Quoting Byles J in *R v Morris* (1867) LR 1 CCR 90, 95, he said, 'It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law'.

[366] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) vol 1, 64 - 65.

Although earlier statutes had been interpreted to conform to common law principles, during the late 19th century Parliament began the more detailed regulation of social life with the creation of numerous summary offences which imposed relatively light punishment. With this development the courts interpreted the failure to specify a mental element in an offence as a decision to impose strict liability[367] and a proliferation of 'public welfare' offences emerged in areas such as health and safety, building, pollution, the sale and preparation of drugs and food, alcohol and tobacco.[368] Of note, *Prince*[369] was identified as the point at which the judiciary tended away from the presumption of mens rea and towards having sole regard to the words of the statute.[370]

However, the displacement of voluntariness in favour of the language of mens rea also occurred in the context of statutory construction.[371] Consequently, the mental requirement for criminal fault in statutory offences has been mis-stated and, as a result, substantively misconceived. Thus, where both mental elements have been described generically as 'mens rea', there are cases in which discussion about the presumption of mens rea appears more likely to have been reference to the presumption of voluntariness. This is no small matter in that it confuses the

[367] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (19th edn, Cambridge University Press 1966) 46 citing, inter alia, *Fowler v Padget* (1798) 101 ER 1103, 7 TR 509, 514; *R v Prince* (1875) LR 2 CCR 154, 163 (Brett J).

[368] Leigh LH, *Strict and Vicarious Liability* (Sweet & Maxwell 1982). See for example, the Factory Act 1878, Licquor Licensing Act 1872, Food and Drugs Act 1875, Public Health Act 1875, Rivers (Pollution Prevention) Act 1876 and 1893, the Regulation of Railways Act 1868, the Adulteration of Food and Drugs Act 1872. A raft of statutes were enacted in the spirit of public health and safety, others in relation to prohibited behaviour on licensed premises, others to uphold standards of morality. Different policy considerations applied in different contexts. Similarly, the territory covered by strict liability offences spanned across conduct typically performed in a personal capacity and conduct performed in the course of business. The consideration of wrongdoing in the commercial environs necessarily encroached on established principles that have already emerged in that legal environment. Therefore, the criminal law can be seen to have steered a path which often touched on existing principles of master and servant law and that of principal and agent. Accordingly, different influences have shaped the legal response and any search for principles of general application is futile.

[369] *R v Prince* (1872 - 75) LR 2 CCR 154. According to Turner it is not easy to say what the proper interpretation of Prince was but the commonly accepted defence was wrong, namely bona fide mistake of fact was denied as the accused knew he was doing an immoral act, JW Cecil Turner & A LL Armitage, *Cases on Criminal Law* (Cambridge University Press 1953).

[370] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (19th edn, Cambridge University Press 1966) 46.

[371] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (19th edn, Cambridge University Press 1966) 50, here he also cites in support *R v Maughan* (1934) 24 Cr App R 130 (CCA) 132; *Cotterill v Penn* [1936] 1 KB 53; *Nichols v Hall* (1873) LR 8 CP 322; *Harding v Price* [1948] 1 KB 695. *R v Wheat and Stocks* (1921) 15 Cr App R 134 (CCA) 135 (Shearman J) is just one example identified by Turner as a modern instance in which the words mens rea were used to indicate voluntariness.

presumption of legal substance, favouring the defendant, with a presumption of evidential nature, which favours the crown. The result is an unprincipled muddle which has served to undermine the orthodox basis of fault attribution.

In the present day, the modern restatement that there is a presumption of mens rea in statutory offences is largely associated with the 1969 case of *Sweet v Parsley*[372] which concerned the meaning of the provisions of the Dangerous Drugs Act 1965. In this respect, it is submitted that, contrary to its subsequent interpretation, the judgments in *Sweet v Parsley*[373] did not mark a sea-change in thinking. Rather, they simply restated, albeit in imprecise language, that in every case the defendant's conduct must be voluntary, in the wide orthodox sense. Accordingly, Ms Sweet's defence of no knowledge was not a denial of mens rea, as is now suggested, but simply the claim that there was no actus reus.[374] It will be demonstrated that the presumption in question was that of voluntariness and that, taken as a landmark case, this misinterpretation has had significant implications for the criminal law. However, the violence done to the voluntariness doctrine in *Sweet v Parsley*[375] does not end there and it will be shown that, through a misinterpretation of the *Woolmington* judgment,[376] the presumption of voluntariness was deemed to shift not just the evidential burden but the burden of proof itself to the defendant. On such a view, the continued existence of the presumption went beyond contemplation and it could not be tolerated in a regime committed to the principle that the prosecution must prove its case. Not only was the term 'voluntariness' displaced by 'mens rea' but the presumption upon which the orthodox doctrine had operated was also discarded.

2.9 *Sweet v Parsley*: a re-interpretation of the 'revitalised Presumption'[377]

The state of the law at the time when the House of Lords were called upon to decide

[372] See for example, Dennis J Baker, *Glanville Williams' Textbook of Criminal Law* (3rd edn, Sweet & Maxwell 2012) in relation to *Sweet v Parsley* [1970] AC 132 (HL).
[373] *Sweet v Parsley* [1970] AC 132 (HL).
[374] ACE Lynch, 'The Mental Element in the Actus Reus' (1982) 98 LQR.
[375] *Sweet v Parsley* [1970] AC 132 (HL).
[376] *Woolmington v DPP* [1935] AC 462 (HL).
[377] David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 162.

Sweet v Parsley [1969][378] was set out by Turner in the 1966 edition of Kenny.[379] Still firmly distinguishing the concept of voluntariness from the notion of mens rea, he opined it was not possible to form any general principle by which to decide the extent that mens rea was a constituent in statutory offences. There was still a strong presumption that there was no liability for the consequences of involuntary conduct, voluntariness continuing to be the essential element in every offence. Accordingly, statutory crimes, and even those described as strict liability, still required that the act could be imputed to the defendant through voluntariness, the primary determinant of fault.[380] In addition to the strong presumption of voluntariness, Turner acknowledged that there was a much weaker presumption that the mens rea requirement in common law offences also applied to statutory offences. However, the presumption that mens rea, the foresight of specified consequences, had to be proved was so much weaker that it was, he observed, often held to be rebutted by straightforward words of prohibition.[381] Notwithstanding the clarity of Turner's exposition, the judgments in *Sweet and Parsley*[382] make no express mention of voluntariness, exclusively employing the terminology of mens rea as regards the mental element. Taken on its face, the case has consequently become the modern touchstone and leading authority for the presumption of mens rea in statutory offences, apparently bearing no relationship to the voluntariness doctrine.[383]

The facts were that Stephanie Sweet, the non-resident 'landlady', did not know that her 'beatnik' lodgers were smoking cannabis resin at the house she let to them; nonetheless she was convicted at trial under s. 5(b) of the Dangerous Drugs Act 1965.[384] Section 5(b) created an offence of 'being concerned in the management of premises used for the purpose of smoking cannabis'. The questions for the House of Lords were:

---

[378] *Sweet v Parsley* [1970] AC 132 (HL).
[379] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (19th edn, Cambridge University Press 1966) 55.
[380] Exceptionally this element had been excluded by parliament, as it was in the controversial cases of *R v Larsonneur* (1933) 24 Cr App R 74 (CCA) and *Winzar v CC Kent* (1983) The Times, 28 March.
[381] JWC Turner, *Kenny's Outlines of Criminal Law* (19th edn, Cambridge University Press 1966) 55.
[382] *Sweet v Parsley* [1970] AC 132 (HL).
[383] Eg Dennis J Baker, *Glanville Williams' Textbook of Criminal Law* (3rd edn, Sweet & Maxwell 2012).
[384] Dangerous Drugs Act 1965, s 5, 'If a person - (a) being the occupier of any premises, permits those premises to be used for the purpose of smoking ... cannabis resin ... or (b) is concerned in the management of any premises used for any such purpose as aforesaid; he shall be guilty of an offence against this Act.'

(1) Whether section 5(b) of the Dangerous Drugs Act, 1965, creates an absolute offence.
(2) What, if any, mental element is involved in the offence; and ...
(3) Whether on the facts found a reasonable bench of magistrates, properly directing their minds to the law, could have convicted the appellant.

In reaching its decision, it is of note that the House approved just one case, *R v Tolson (1889)*,[385] although it did consider *Warner [1969]*[386] which had come to the House 7 months earlier.[387] Whilst the older case of Tolson concerned an altogether different charge of bigamy,[388] *Warner*,[389] like *Sweet*,[390] had been a case requiring the interpretation of the statutory drugs offences.[391] Whilst different in the offences they dealt with, it is of note that both authorities concerned the voluntariness doctrine and not mens rea.[392]

[385] *R v Tolson* (1889) 23 QBD 168.
[386] *Warner v MPC* [1969] 2 AC 256 (HL).
[387] Common to the judicial panels in both cases were Lords Reid, Morris, Pearce and Wilberforce.
[388] Contrary to the Offences Against the Persons Act 1861, s 57; *R v Tolson* (1889) 23 QBD 168.
[389] *Warner v MPC* [1969] 2 AC 256 (HL).
[390] *Sweet v Parsley* [1970] AC 132 (HL).
[391] Drugs (Prevention of Misuse) Act 1964.
[392] It was from Warner that the following proposition was taken, 'The absence of mens rea consists in "an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent"', *Warner v MPC* [1969] 2 AC 256 (HL) 276 (L Reid), quoting from *Bank of New South Wales v Piper* [1897] AC 383, 389 - 390 (PC) Aus. However, where Warner quoted this statement from Bank of New South Wales [1897], a case concerning malicious prosecution, it failed to advert to the preceding sentences in that case and the context in which that assertion was made. In its full expression, Sir Richard Couch in the Bank of New South Wales had said, 'but the questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of mens rea in the accused, are questions entirely different, and depend upon different considerations. In cases when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent', 388. Evidently, Sir Richard Couch was alive to both mental states and the difference in the evidential burden. However, by quoting the shortened passage, the result of Warner is seemingly to equate mens rea, foresight of specified consequences, with what is clearly the orthodox voluntariness doctrine rather than recognise the distinction between those mental states. That the mental state being identified in Warner was voluntariness is supported by the substance of Lord Guest's reasoning which is much along the lines of Jackson's somnambulist butcher example of imputability. He said that there must, 'in relation to possession, be some conscious mental element present. The sleeper who has a packet put into his hand during sleep has not got possession of it during sleep, but if when he wakes up he grasps the article, it is then in his possession. If someone surreptitiously puts something into my pocket, I am not in possession of it until I know it is there', 299. Similarly, the other examples provided by Lord Pearce, 303, and Lord Wilberforce can only be identified as illustrations of metaphorical involuntariness.

Tolson[393] had given rise to much academic and judicial discussion, indeed Turner examined it in depth in his 1964 edition of Russell on Crime.[394] It is submitted that his explanation of the case is significant, given that an altogether different interpretation has subsequently been attributed to both it and *Sweet v Parsley*.[395] Turner's analysis started with a statement of general principle, explaining that the language of a statute may be such as to reject the defence of mistake of fact. He said that, 'where the statute excludes a mental element then the presence or absence of that element is irrelevant and the guilt of the accused person is not affected by any mistake of fact which may have led him to suppose that he was not doing the forbidden thing.'[396] However, he went on to say that even in these cases a mistake of fact may be admitted to establish that the act in question is not to be imputed to the accused. *Tolson*,[397] he observed, could have been dealt with under this principle without further discussion as to the mental element required by the particular section of the statute. Mrs Tolson had believed, with good reason, that her husband had died and she had married again during his lifetime. On appeal, the Court for Crown Cases Reserved had interpreted the provision as not being one of absolute prohibition in the situation where the facts fell within the second proviso of the section and, Turner said, this must be taken to mean that belief in the spouse's death, whether arising from 7 years' silent absence or from other facts, rendered a second marriage non-felonious. Further, with this belief found as fact, she had been entitled to have her case decided on this fiction and had her husband been dead then the second marriage would not have constituted the actus reus of bigamy. Therefore, the trial had to regard the husband as dead and, therefore, it was immaterial that in addition she was not conscious of doing anything that was wrong.[398] On Turner's analysis, Tolson's mistake had thus denied the voluntariness of the act and mens rea was simply not an issue.[399]

---

[393] *R v Tolson* (1889) 23 QBD 168.
[394] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) 78.
[395] *Sweet v Parsley* [1970] AC 132 (HL).
[396] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) 78 and citing the following cases in support: *R v Bishop* (1880) 5 QBD 259; *R v Wheat & Stocks* (1921) 15 Cr App R 134 (CCA); *R v Maughan* (1934) 24 Cr App R 130 (CC); *Cotterill v Penn* (1935) 1 KB 53, 153 LT 377.
[397] *R v Tolson* (1889) 23 QBD 168.
[398] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) 78, 79.
[399] However, Turner did go on to acknowledge that the court had discussed the issue of mens rea and had concluded that Mrs Tolson did not have it. This discussion, although technically superfluous,

Turner's explanation of *Tolson* is borne out by a close reading of the judgments in the case. Cave J, for example, stated that an, 'Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy ... or lunacy'.[400] Similarly, according to Stephen J,

> The full definition of every crime contains expressly or by implication a proposition as to a state of mind (...) In all cases whatever, competent age, sanity and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined. (...) in every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity. To take an extreme illustration, can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know was he was doing. (...) it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence. [401]

Stephen J. went on to say that mental elements such as age, sanity and freedom from compulsion are presupposed in every case and that there was no statute which specified these elements of criminality in the definition of any crime. Using the words 'wilfully' or 'maliciously' makes knowledge of fact implicit in the statutory definition but in some cases it cannot be said.[402]

Accordingly, the aspects to which the dicta refer, such as freedom from coercion, competent age, sanity and sleepwalking, are the classic stuff of voluntariness, going

---

would have been expected in 1889 when there was still a judicial leaning to read common law mens rea into statutes, a tendency which was not now present. Turner also pointed to the later case of *R v Wheat and Stocks* [1921] 2 KB 119 in which, 30 years later, the Court of Appeal had interpreted the third proviso of that section in another way, and as an instance of absolute prohibition, refusing the admit the 'defence' of mistake.

[400] *R v Tolson* (1889) 23 QBD 168, 181 (Cave J).

[401] *R v Tolson* (1889) 23 QBD 168, 187 - 188 (Stephen J).

[402] *R v Tolson* (1889) 23 QBD 168, 189 (Stephen J).

to the denial of capacity. As the only authority approved in *Sweet v Parsley*[403] and, in substance, a case turning on a denial of metaphorical voluntariness, it follows that *Sweet* simply provided a restatement that voluntariness, in the full sense, was necessary in all cases. That the term mens rea was being used to describe voluntariness was not unusual, its use as a catch-all term having already been well-documented.[404] Indeed, Lord Diplock implicitly recognised as much in his judgment, he observed:

> mens rea itself also lacks precision and calls for closer analysis than is involved in its mere translation into English by Wright J. in Sherras (...) as 'evil intention or a knowledge of the wrongfulness of the act' - a definition which suggests a single mental element common to all criminal offences.[405]

The judgment clearly alluded to the othodox doctrine of voluntariness with reference to insanity, somnambulism, duress and inevitable accident.[406] Lord Diplock also nodded at *Tolson*[407] and the general principle that a necessary element of every criminal enactment was the absence of a belief, held honestly and upon reasonable grounds, in the existence of facts which, if true, would make the act innocent.[408]

However, what was hitherto an innocuous confusion of language, escalated in gravity in *Sweet v Parsley*[409] to the point of undermining the very substance of criminal liability. This violation to the orthodox principles was the result of

---

[403] *Sweet v Parsley* [1970] AC 132 (HL).
[404] Jackson RM, 'Absolute Prohibition in Statutory Offences' (1936 - 1938) 6 CLJ 83; JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31.
[405] *Sweet v Parsley* [1970] AC 132 (HL) 162.
[406] 'The mere fact that Parliament has made the conduct a criminal offence gives rise to some implication about the mental element of the conduct proscribed. It has, for instance, never been doubted since *M'Naghten's Case* (1843) 10 Cl. & F. 200, that one implication as to the mental element in any statutory offence is that the doer of the prohibited act should be sane within the M'Naghten rules; yet this part of the full definition of the offence is invariably left unexpressed by Parliament. Stephen J. in *Reg v Tolson (1889) 23 Q.B.D. 168* suggested other circumstances never expressly dealt with in the statute where a mental element to be implied from the mere fact that the doing of an act was made a criminal offence would be absent, such as where it was done in a state of somnambulism or under duress, to which one might add inevitable accident.' *Sweet v Parsley* [1970] AC 132 (HL) 162 - 63.
[407] *R v Tolson* (1889) 23 QBD 168.
[408] *Sweet v Parsley* [1970] AC 132 (HL) 163 (L Diplock) referring to the Privy Council in *Bank of New South Wales v Piper* [1897] AC 383 (PC) Aus, 389 - 90.
[409] *Sweet v Parsley* [1970] AC 132 (HL).

reference to another 19th century case, *Sherras v De Rutzen [1895]*,[410] and its analysis in the light of *Woolmington [1935]*.[411] In *Sherras*[412] the conviction of a publican for selling drink to a constable on duty was set aside because the accused had reasonably believed that the officer was not on duty.[413] Whilst a claim of absence of knowledge was simply one way to refute voluntariness, as demonstrated in *Tolson*,[414] Day J. in Sherras had reasoned that where a different subsection of the same act[415] had included reference to the word 'knowingly', its omission in the following subsection had the 'only' effect of shifting the "burden of proof" to the accused.[416] Whilst this construction had been approved in a number of cases,[417] Devlin J. had argued against it half a century later in *Roper v Taylor's Central Garages [1951]*[418] as had the Privy Council in *Lim Chin Aik v The Queen [1963]*.[419] The disapproval arguably lay in the terminology employed by Day J. since the notion of a shift of this nature, was not an unfamiliar one. It will be remembered that where rebuttable presumptions operated in the criminal law, such as with the presumption of voluntariness, the various characteristics encompassed by that notion, such as free will and absence of mistake, were not required to be proved by the prosecution. If the accused denied culpability on the basis of a lack of voluntariness, the evidential burden shifted to him. However, by framing his analysis in terms of shifting the 'burden of proof', rather than the 'burden of evidence', Day J. had provided what was to become a fatal objection to the doctrine of voluntariness. Such a consequence was unlikely to have been foreseen at the time of his judgment since was not until a couple of years later, in 1898, that an accused could give sworn evidence on his own behalf[420] and it is therefore likely that the presumptions operating before that watershed would have had a force more akin to legal presumption.[421] This may well account for Day J. referring to a burden of

[410] *Sherras v De Rutzen* [1895] 1 QB 918.
[411] *Woolmington v DPP* [1935] AC 462 (HL).
[412] *Sherras v De Rutzen* [1895] 1 QB 918.
[413] Licensing Act 1872, s 16.
[414] *R v Tolson* (1889) 23 QBD 168.
[415] S 16(1).
[416] *Sherras v De Rutzen* [1895] 1 QB 918, 921.
[417] *Gaumont British Distributors Ltd v Henry* [1939] 2 KB 711 (Humphreys J); *Harding v Price* [1948] 1 KB 695 (Singleton J); *Reynolds v Austin* (GH) & Sons Ltd [1951] 2 KB 135.
[418] *Roper v Taylor's Central Garages* [1951] 2 TLR 284, 288.
[419] *Lim Chin Aik v The Queen* [1963] AC 160 (PC) Singapore 173.
[420] Criminal Evidence Act 1898.
[421] JWC Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) 33.

'proof' in place of 'evidence'.

However, it was not until much later, in *Woolmington v DPP [1935],*[422] that the crucial distinction between the 'burden of proof' and the 'burden of evidence' was to become a live issue. With that in mind, *Sweet and Parsley*[423] may have had an altogether different outcome had Day J. articulated in terms of the 'burden of evidence'. What did happen in *Sweet v Parsley*[424] was that the Law Lords used the term mens rea loosely to describe voluntariness. For example, Lord Diplock stated:

> It is a general principle of construction of any enactment which creates a criminal offence that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element, they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and on reasonable grounds, in the existence of facts which, if true, would make the act innocent.[425]

Lord Morris of Borth-y-Gest added that:

> it has frequently been affirmed and should unhesitatingly be recognised that it is a cardinal principle of our law that mens rea, an evil intention or a knowledge of the wrongfulness of the act, is in all ordinary cases an essential ingredient of guilt of a criminal offence. It follows from this that there will not be guilt of an offence created by statute unless there is mens rea or unless Parliament has by the statute enacted that guilt may be established in cases where there is no mens rea.[426]

Furthermore, Lord Reid alluded to 2 mental states, 'Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another'.[427] He also observed, now infamously, that:

[422] *Woolmington v DPP* [1935] AC 462 (HL).
[423] *Sweet v Parsley* [1970] AC 132 (HL).
[424] *Sweet v Parsley* [1970] AC 132 (HL).
[425] *Sweet v Parsley* [1970] AC 132 (HL) 163.
[426] *Sweet v Parsley* [1970] AC 132 (HL) 152.
[427] *Sweet v Parsley* [1970] AC 132 (HL) 148.

> there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. This means that, whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.[428]

Read in the light of Turner's seminal exposition, their Lordships' judgments accord with his analysis of the 2 mental states whilst equally according with his observation that the term mens rea was employed ubiquitously to denote voluntariness. Having established the inter-changeability of the terms, it is submitted that the 'presumption of voluntariness' is also likely to have been described as the 'presumption of mens rea'.

2.10 The inter-relationship of the 3 presumptions

At the time of the *Sherras* judgment[429], there were 3 relevant presumptions in play: 1 seemingly in favour of the accused whilst the other 2 favoured the prosecution. First, in all cases it was presumed that the accused had acted voluntarily. Second, in the common law offences, the 'presumption of mens rea' meant that guilt turned on the defendant having foreseen the specified consequences of his act. In this respect the Crown was assisted by the third presumption, that the accused was presumed to have intended the natural consequence of his act. In practice, the determination of 'natural consequences' was taken be an objective assessment of them and also, therefore, the defendant's mental state. Furthermore, the direction given to juries had the effect of elevating the status of the presumption, from a matter of evidence to a rule of law. So, whilst individualism insisted upon the subjective assessment of both mental states, voluntariness and foresight of consequences, in practice they were presumed to inhere in the defendant, subject to his refuting such an appearance.

[428] *Sweet v Parsley* [1970] AC 132 (HL) 148 (L Reid).
[429] *Sherras v De Rutzen* [1895] 1 QB 918.

Having confused the terminology of fault, the appellate court in *Sweet v Parsley*[430] then turned its attention to the dicta of Viscount Sankey, in *Woolmington*.[431] He had said that, 'Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to matters as to the defence of insanity and subject also to any statutory exception.'[432] Accordingly, on the facts of the *Sweet* prosecution,[433] knowledge of circumstances, an integral element of the orthodox doctrine voluntariness, was left in a precarious position. Day J. had earlier confused the burden of proof with the burden of evidence and,[434] further to *Woolmington*,[435] it was said that a defendant could not be required to prove his innocence.[436] On this interpretation of *Woolmington*[437] and Day J's expression in *Sherras*,[438] the presumption of voluntariness could no longer be explicitly recognised, it now seemed to require the abhorrent, namely that a defendant had to prove his innocence.[439] Indeed, some of the dicta in *Sweet v Parsley* went as far as to distinguish the earlier authorities that had turned on the absence of voluntariness on the basis that they were cases preceding the *Woolmington* statement.[440] Whilst the explicit reference to voluntariness had been in decline, the presumption of voluntariness, understood in this light, would have been incompatible with a basic tenet of the criminal law and it would need to be discarded with haste. As to the resulting lacuna, the advancing language and notion of mens rea was the obvious 'filler' to replace the now discredited primary basis of fault. Accordingly, the mental element identified in the Dangerous Drugs statute had to be described as mens rea. The presumption of mens rea was thus re-introduced as a weighty presumption in statutory construction where the requisite mental element, voluntariness, no longer bore scrutiny.

[430] *Sweet v Parsley* [1970] AC 132 (HL).
[431] *Woolmington v DPP* [1935] AC 462 (HL).
[432] *Woolmington v DPP* [1935] AC 462(HL) 469.
[433] *Sweet v Parsley* [1970] AC 132 (HL).
[434] *Sherras v De Rutzen* [1895] 1 QB 918.
[435] *Woolmington v DPP* [1935] AC 462.
[436] Albeit on the balance of probabilities and save for the exceptional insanity defence and any other provided by statute.
[437] *Woolmington v DPP* [1935] AC 462 (HL).
[438] *Sherras v De Rutzen* [1895] 1 QB 918, 921.
[439] *Sweet v Parsley* [1970] AC 132 (HL) 150 (L Reid), 158 (L Pearce).
[440] *Sweet v Parsley* [1970] AC 132 (HL) 158 (L Pearce).

2.11 The problem – erroneous reasoning and the revitalised presumption

It is submitted that the Law Lords reasoning, on the basis of their analysis of *Sherras*[441] and *Woolmington*,[442] was itself questionable. Counsel for *Sweet* had argued that whilst it fell to the defendant to raise the 'defence' of lack of guilty knowledge, the burden of proof lay firmly on the prosecution.[443] He cited in authority the cases of *Tolson*[444] and Dixon J.'s decision in the Australian High Court case of *Proudman v Dayman (1941)*,[445] both of which appeared to be entirely consistent with the presumption of voluntariness expounded by Turner[446] and Jackson[447] earlier.[448] Dixon J. had said:

> The burden of establishing honest and reasonable mistake is in the first place upon the defendant and he must make it appear that he had reasonable grounds for believing in the existence of the state of facts, which, if true, would take his act outside the operation of the enactment and that on those grounds he did so believe. The burden possibly may not finally rest upon him of satisfying the tribunal in case of doubt.[449]

Bearing in mind the force of this submission, it is curious that the judgments in *Sweet*[450] made reference to *Woolmington*[451] but were overwhelmingly silent as to the

---

[441] *Sherras v De Rutzen* [1895] 1 QB 918.
[442] *Woolmington v DPP* [1935] AC 462 (HL).
[443] *Sweet v Parsley* [1970] AC 132 (HL) 141.
[444] *R v Tolson* (1889) 23 QBD 168.
[445] *Proudman v Dayman* (1941) 67 CLR.
[446] JWC Turner, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31.
[447] RM Jackson, 'Absolute Prohibition in Statutory Offences' (1936 -1938) 6 CLJ 83.
[448] Thus, 'as a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence. The strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered (...) ', *Proudman v Dayman* (1941) 67 CLR 536, 539 – 40. Further, 'There may be no longer any presumption that mens rea, in the sense of the specific state of mind, whether of motive, intention, knowledge or advertence, is an ingredient in an offence created by a modern statute; but to concede that the weakening of the older understanding of the rule of interpretation has left us with no prima facie presumption that some mental element is implied in the definition of any new statutory offence does not mean that the rule that honest and reasonable mistake is prima facie admissible as an exculpation has lost its application also', 551.
[449] *Proudman v Dayman* (1941) 67 CLR 536, 551.
[450] *Sweet v Parsley* [1970] AC 132 (HL).

subsequent re-interpretation of it. Of note, none of their Lordships specifically referred to *Mancini v DPP [1942]* which had corrected the point about the shift in the burden of proof.[452] In this respect, *Woolmington*[453] had also been discussed at length by Turner in the 1964 Russell on Crime and he had also clarified the manner in which the presumptions operated.[454] Although *Woolmington*[455] had originally been expressed to hold that, 'where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental', Turner explained that:

> as soon as mens rea had become subjective the burden of proof on the prosecution was a heavy one. It was discharged by relying upon the old assumption of intention, which then became the well-known legal presumption that a man is deemed to have intended the natural consequences of his acts (...) . The result of judges putting the presumption in simple terms to juries was that it gradually moved from a rule of evidence into a rule of law as an objective test of mens rea.[456]

In this respect, *Woolmington*[457] had operated as a corrective[458] but it had been modified subsequently in *Mancini v DPP [1942]*[459] which provided a rule of general application to all criminal charges. In it Viscount Simon L.C. observed, 'Woolmington's case is concerned with explaining and reinforcing the rule that the prosecution must prove the charge it makes beyond reasonable doubt, and, consequently, that if, on the material before the jury, there is reasonable doubt, the prisoner should have the benefit of it'.[460] Consequently, the presumption placed no heavier burden on the defence than to put, or to point to, evidence before the court,

---

[451] With the suggestion that the presumptions work to destroy the 'golden thread', *Woolmington v DPP* [1935] AC 462 (HL).
[452] *Mancini v DPP* [1942] AC 1 (HL).
[453] *Woolmington v DPP* [1935] AC 462 (HL).
[454] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) 24, 33-36, 73, 102, 123, 453, 494, 508, 510, 684, 849.
[455] *Woolmington v DPP* [1935] AC 462 (HL).
[456] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) 34.
[457] *Woolmington v DPP* [1935] AC 462.
[458] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) 34.
[459] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) 35, citing *Mancini v DPP* [1942] AC 1 (HL).
[460] *Mancini v DPP* [1942] AC 1 (HL) 11.

on which the jury could inform reasonable doubt as to the accused person's guilt.[461]

Williams' seminal work of 1961 concurred with this analysis and that the 'defence' of automatism placed the 'evidential burden' on the defendant.[462] Furthermore, as regards the operation of the presumption of voluntariness, he stated that:

> the object of placing this on the defendant is twofold: first to save the prosecution the trouble of meeting the defence unless it is first raised by the defendant and, second, where the matter relates to the defendant's state of mind to force the defendant to go into the witness box and give evidence if he wishes to deny a state of mind where the fact that would normally be inferred from circumstantial evidence. By giving evidence, he subjects himself to cross-examination.[463]

Additionally, 'The fact of killing does not raise a persuasive presumption that the killing was intentional and unprovoked, [but] it does raise an evidential presumption to this effect so that the onus of introducing some reasonable evidence in rebuttal is on the accused.'[464]

Although Lord Diplock alluded to the voluntariness doctrine and was clear as to the true effect of *Woolmington*,[465] *Sweet v Parsley*[466] was to be incorrectly identified as the modern revitalisation of the presumption of mens rea[467] and not as a statement of

---

[461] JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) 36.
[462] Glanville Williams, *Criminal Law, The General Part* (2nd edn, Stevens & Sons 1961) 886.
[463] Glanville Williams, *Criminal Law, The General Part* (2nd edn, Stevens & Sons 1961) 887.
[464] Glanville Williams, *Criminal Law, The General Part* (2nd edn, Stevens & Sons 1961) 891.
[465] *Woolmington v DPP* [1935] AC 462 (HL), Lord Diplock recognised that it 'did not decide anything so irrational as that the prosecution must call evidence to prove the absence of a mistaken belief by the accused in the existence of facts which, if true, would make the act innocent, any more than it decided that the prosecution must call evidence to prove the absence of any claim of right in a charge of larceny'. He observed that, 'the jury is entitled to presume that the accused acted with knowledge of the facts, unless there is some evidence to the contrary originating from the accused who alone can know on what belief he acted and on what ground the belief, if mistaken, was held. What Woolmington's case did decide is that where there is any such evidence the jury after considering it and also any relevant evidence called by the prosecution on the issue of the existence of the alleged mistaken belief should acquit the accused unless they feel sure that he did not hold the belief or that there were no reasonable grounds upon which he could have done so, *Sweet v Parsley* [1970] AC 132 (HL) 164 (L Diplock).
[466] *Sweet v Parsley* [1970] AC 132 (HL).
[467] David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 162.

the orthodox presumption of voluntariness. The disappearance of voluntariness as a distinct doctrine at around this time is evident from the extra-judicial writing of Sir Patrick Devlin. Writing about the statutory offences in 1958, Devlin considered the issue of silence as to mens rea and he suggested that, rather than accepting absolute liability, the courts could choose to presume that Parliament required the act to be done deliberately, and that an involuntary act should not be punishable. He suggested that this would work as an easy method of construction because you would simply read into the act 'wilfully' or 'knowingly' as the case may be.[468] Arguably, this was precisely how the law was stated until the *Woolmington* confusion.[469] Where voluntariness once formed the central plank of criminal liability in all cases, it was now displaced in favour of the modern notion of mens rea which was, and still is, taken to refer to altogether different states of mind than that originally conceived.

2.12 Voluntariness, capacity and the corporate actor

The examination of the orthodox doctrine of voluntariness has provided a fruitful line of enquiry as to a central plank of criminal fault that might be applied to the corporate actor. A return to the explicit recognition of voluntariness as the hallmark of criminal fault in all cases would not only restate the law as traditionally conceived, it would also provide a step towards the facilitation of a general model of corporate liability. Voluntariness as a concept continues to constitute an appropriate determinant of fault and the return to a fully acknowledged presumption of voluntariness is of practical application as regards evidential matters in the corporate context. Without the need for the prosecution to prove specific mental states, it would be open for a representative of the organisation to raise evidence of any denial that the corporate conduct was voluntary. Since voluntariness, conceived in its wider sense, is indicative of the capacity of the actor, it would provide the means by which the corporation could be recognised as a responsibility-bearing entity in its own right. Of significance, a return to this analysis would not cause any change or detriment in cases alleging the criminal conduct of individuals.

[468] Sir Patrick Devlin, 'Statutory Offences' (1958) JSPTL 206.
[469] *Woolmington v DPP* [1935] AC 462 (HL).

Whilst voluntariness underpins recognition of capacity to act, the attribution of other mental states to the corporate actor remains to be considered. If the Fraud Act 2006 is to be employed in instances of systemic fraud, both dishonesty and an intention need to be proved. The following chapter will demonstrate how these other mental characteristics can be attributed to the criminogenic organisation.

3. Evidence and the attribution of criminal fault

3.1 Mens rea and manifest assessment

The way in which the law has developed in relation to fault-attribution has had a profound effect in relation to the development of theories of corporate criminality. The combined effect of the demise of the presumption of voluntariness and the expanded concept of mens rea has led to the primary enquiry focusing on the defendant's state of mind, a metaphysical mind that the fictional corporate entity simply cannot possess. However, given that the need to prove mens rea has been the real hurdle to corporate prosecution, typical academic accounts of the development of corporate criminality fail to acknowledge that 'mens rea' has not been constant in terms of either its substantive meaning or the way in which it is proved. Whilst chapter 2 addressed the former dynamic and the presumption of voluntariness, this chapter addresses that lacuna in the context of other mental states.

It will be recalled that proof of the orthodox canons of liability turned upon the operation of 2 evidential presumptions. Chapter 2 identified the combination of factors which led to the demise of the presumption of voluntariness and this chapter will reveal how the presumption of intention suffered a similar fate. According to this presumption, a defendant was presumed to have intended the natural consequences of his act. This conclusion was based on the assumption that an act foreseen was an act intended and, further, that the defendant had the mental capacity of a reasonable man such that he would have foreseen what were deemed its natural consequences. The presumption of intention of natural consequences, like that of voluntariness, presupposed that an initial consideration of the appearance of the conduct had taken place. The act and its consequences were inferential of the defendant's state of mind, namely that the conduct was both voluntary and that the resulting harm was intended. In this respect it might be said that if the appearance is outwardly or 'manifestly' criminal, the presumptive mechanism then affords the defendant an opportunity to refute the inference by giving evidence of his own mental state.

However, when this evidential presumption came to be mistaken for a presumption

of law, this mode of fault assessment became uncomfortably objective in nature. Thus, whilst the presumption of voluntariness seemed to offend one basic tenet of criminal law, reversing the burden of proof, the presumption of intention seemingly offended the whole principle of subjective individualism.

Although s. 8 of the Criminal Justice Act 1967 was enacted to remedy any remaining misperception,[470] and placed the factual presumption on a statutory footing,[471] the language it perpetuated was subsequently subjected to a fierce judicial onslaught in the context of murder and the requisite intention for this particular offence.[472] That a jury could infer a murderous intent if the defendant had foreseen serious bodily harm or death as a natural consequence of his action was considered 'unsafe and misleading'.[473] Although the legal territory attracting such heightened interest was narrow, it will be shown that the silencing of the language of natural consequences, and its associated presumption, was more general in effect. Further, as explicit references to the 2 presumptions of fault progressively diminished in the narrative of the criminal law, the term 'mens rea' assumed greater prominence in the discourse. Used in its enlarged catch-all sense, the notion of mens rea began to encompass the idea that the blameworthy mental state needed to be positively proved. Whilst the presumption of innocence and the burden of proof had not been in doubt,[474] the practical effect was a gradual move from a position in which fault was presumed by reference to the appearance of the act, subject to the defendant's rebuttal, to a position in which it was presumed that the culpable mental state needed to be examined and specifically proved. Thus, the diminution in the use of the presumptions resulted in a further conceptual shift in the nature of the enquiry, from the manifest and the directly observable to the internal and the unobservable. It was arguably this conceptual re-ordering and the disappearance of the evidential presumptions that necessitated a mechanism by which the corporate mind could be identified.

---

[470] The provision made it clear that the presumption of intention should not operate to exclude regard to the totality of the evidence.

[471] David Ormerod, *Blackstone's Criminal Practice* (OUP 2015) F3.63

[472] See for example *Hyam v DPP* [1975] AC 55 (HL); *R v Moloney* [1985] AC 905 (HL); *R v Hancock and Shankland* [1986] AC 455 (HL); *R v Woollin* [1999] 1 AC 82(HL).

[473] *R v Hancock and Shankland* [1986] AC 455 (HL), 473 (L Scarman).

[474] Described as "the most important of the disputable presumptions of law in criminal cases", William Feilden Craies and Henry Delacombe Roome, *Archbold's Criminal Pleading, Evidence and Practice* (24th edn, Sweet & Maxwell 1910) 404.

This chapter will expose the way in which this evidential mechanism shrank from the discourse and the various influences on its disappearance. Accordingly, it charts the shift away from the objective and manifest approaches to fault attribution to the subjective model and the evidential problems this incurred. Having demonstrated how the presumptions bridged the evidential gap, it will reveal the fatal confusion between the evidential issue of the presumption of intention and the nature of intention itself. The case for the full acknowledgment of presumption of intention will be made.

3.2 The shift to subjective individualism

There are two narratives relevant to this conceptual shift, the first being the transition from the manifest assessment of blameworthiness by reference to the defendant's overt conduct and his known character. The second is the move from the objective consideration of foreseeability of consequences, by reference to an external standard, to the subjective enquiry of the defendant's own mental state. Both strands are inevitably interwoven, influenced by the fact that an accused could not give evidence on his own behalf at trial until the enactment of the Criminal Evidence Act 1898. Consequently, until this time, the actual intention with which a suspect had done the act in question could only be established as a matter of inference arising from the evidence of other witnesses as to what the accused had said or done. Further, in drawing any inference, it was necessary to presume that the accused had the mental capacity of a 'reasonable man' such that he could be said to have intended everything that was the probable consequence of his act. Thus, whilst the modern criminal law institution was concerned with the mental attitude of the accused himself, and whether he attracted moral opprobrium by virtue of his capacity and foresight of potential harm, in practice this enquiry necessitated the employment of both the manifest assessment of the conduct and the objective test of foreseeability.

This approach to the determination of fault was a longstanding feature of the criminal law institution. The Prisoners' Counsel Act 1836 had entitled a defendant to be represented by lawyers at every stage of his trial but, prior to the 18th century,

fault was determined through what has been described as 'manifest assessment'.[475] Manifest liability, in this sense, looked first to the overt conduct of the suspect and then considered the outward appearance of the act by reference to his known character and standing in the community.[476] This process was called 'character-vouching' and was thus indicative of a criminal regime that was largely arbitrary in nature.[477] There was little professional policing prior to 1830 and, even until the late 1800's, criminal prosecution was generally a private matter with little involvement of lawyers.[478] Accordingly, most crimes were dealt with locally by informal processes which were dependent upon hierarchical social relations and the authority of the local landowners to maintain order and settle disputes.[479] This informal arrangement facilitated discretion and encouraged settlements between victim and offender in less serious cases.[480] However, whereas informal penal sanctions included dismissal or chastisement by employer, pressure from priest or land-owner, arbitration or ostracism,[481] the formal criminal justice institution was maintained through the threat of violence tempered by the discretionary use of mercy.[482] In

[475] Manifest liability therefore seems to mean that it took account of all the evidence save for that of the defendant himself, Lucia Zedner, *Criminal Justice* (OUP 2004); Gerry Johnstone and Tony Ward, *Key Approaches to Criminology: Law and Crime* (Sage 2010).

[476] Lucia Zedner, *Criminal Justice* (OUP 2004); Gerry Johnstone and Tony Ward, *Key Approaches to Criminology: Law and Crime* (Sage 2010).

[477] The criminal law, as we would recognise it today, was still of marginal importance at this time because of the lack of public agencies to enforce and prosecute, WR Cornish and G Clark, *Law and Society in England 1750-1950* (Sweet & Maxwell 1989).

[478] WR Cornish and G Clark, *Law and Society in England: 1750-1950* (Sweet & Maxwell 1989). If a formal prosecution was sought, the expenses involved in both the criminal investigation and the prosecution were borne by the victim himself which meant that the availability of the criminal justice system was limited to the wealthier classes or at least those who could subscribe to a private prosecution association, see Allen Steinberg, 'The Spirit of Litigation; Private Prosecution and Criminal Justice in 19th Century Philadelphia' (1986) 20 Journal of Social History 243; Les Johnston, *The Rebirth of Private Policing* (Routledge 1992). See also the accounts given in Douglas Hay, 'Property, Authority and Criminal Law' in Douglas Hay and others (eds), *Albions Fatal Tree*, *Crime and Society in 18th Century England* (Penguin 1975); Michael Foucault, *Discipline and Punish*: *The Birth of A Prison* (Penguin 1977); A Schubert, 'Private Initiative in Law Enforcement: Associations for the Prosecution of Felons' in Victor Bailey (ed), *Policing and Punishment in 19th Century Britain* (Croom Helm 1981); B King, 'Prosecution Associations and Their Impact in 18th Century Essex' in Douglas Hay and Frances G Snyder (eds), *Policing and Prosecution in Britain 1750 – 1850* (Clarendon 1989); Marcus D Dubber and Lindsay Farmer, *New Trends In the History of Criminal Law* (Stanford University Press 2007).

[479] Lucia Zedner, *Criminal Justice* (OUP 2004).

[480] Les Johnston, *The Rebirth of Private Policing* (Routledge 1992).

[481] Les Johnston, *The Rebirth of Private Policing* (Routledge 1992).

[482] The early view of crime was that it constituted a sin and this had a number of consequences, imbuing the law with a moral significance, and deliberate disobedience invited God's wrath. Wrongdoing of this nature demanded a response that would reclaim the offender's spirituality and this involved the making of amends to the injured party and also some form of penance. In turn

these circumstances character-vouching was important, involving reliance on character evidence provided by those higher in the social scale. This might be followed by the use of pardon[483] or, if mercy was not to be shown, the infliction of public degradation, violence or the public killing of the offender in a carnival-type atmosphere.[484] This pre-modern institution, infamous for its 'bloody, penal code', lasted into the 19th Century.[485]

Condemnation of this barbarity is said to be linked to the enlightenment philosophy that was starting to emerge in the 18th century. This began to focus on principles of liability and also the notion of the autonomous individual capable of rational calculation.[486] At the same time new problems of crime were emerging, consequent

---

came the idea of purging by pain and the pre-modern institution, which lasted into the 19th Century. Although England had abolished absolutism in the 17th Century, it was replaced by a political and social regime termed 'Old Corruption', and the whig oligarchy of 18th Century England operated the criminal law institution as if absolutism still existed such that the bloodiness of the law increased substantially in this period, Gerry Johnstone and Tony Ward, *Key Approaches to Criminology, Law and Crime* (Sage 2010).

[483] Alan Norrie, *Crime, Reason and History* (2nd edn, Butterworths 2001) justice was dispensed by the ruling class, reinforced the social hierarchy and old feudal ties.

[484] Deportation was also a method of dealing with offenders from the mid 17th Century. Historical accounts are given by Leon Radzinowicz, *The History of the English Criminal Law* (Stevens 1948) vol 1; Douglas Hay, 'Property, Authority and the Criminal Law' in D Hay and others (eds), *Albion's Fatal Tree, Crime and Society in 18th Century England* (Penguin 1975); Michael Foucault, *Discipline and Punish*: *The Birth of Prison* (Penguin 1979); Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983); Philip Corrigan and Derek Sayer, *The Great Arch: State Formation, Cultural Revolution and the Rise of Capitalism* (Blackwell 1985) 87; Alan Norrie, *Crime, Reason and History* (2nd edn, Butterworths 2001); Lucia Zedner, *Criminal Justice* (OUP 2004); Gerry Johnstone and Tony Ward, *Key Approaches to Criminology, Law and Crime* (Sage 2010).

[485] Although England had abolished absolutism in the 17th Century, it was replaced by a political and social regime termed 'Old Corruption', and the whig oligarchy of 18th Century England operated the criminal law institution as if absolutism still existed such that the bloodiness of the law increased substantially in this period, Gerry Johnstone and Tony Ward, *Key Approaches to Criminology, Law and Crime* (Sage 2010).

[486] For the development of the shift from manifest to the individualist account of criminal liability see Jeremy Bentham, 'An Introduction to the Principles of Morals and Legislation' in John Bowring *Collected Works of Jeremy Bentham* (Russell 1962) vol 1; CB MacPherson, *The Political Theory of Possessive Individualism* (OUP 1962); JWC Turner, *Kenny's Outlines of Criminal Law* (18th edn, Cambridge University Press 1962); Heath J, *18th Century Penal Theory* (OUP 1963); Cesare Beccaria, *On Crimes and Punishments* (Bobs Merrill 1966); Harold Perkin, *The Origins of Modern English Society 1780-1880* (Routledge 1969); David J Rothman, *The Discovery of the Asylum* (Little Brown and Co 1971); Jeremy Bentham, *Theory of Legislation* (Oceana 1975); D Philips, 'A New Engine of Power and Authority: The Institutionalisation of Law Enforcement in England 1780 – 1830' in VAC Gattrell and others (eds), *Crime and the Law: The Social History of Crime in Western Europe Since 1500* (Europa 1980); A Schubert, 'Private Initiative in Law Enforcement: Associations for the Prosecution of Felons' in Victor Bailey (ed), *Policing and Punishment in 19th Century Britain* (Croom Helm 1981); S Spritzer, 'The Rationalisations of Crime Control in Capitalist Societies' in Stanley Cohen and Andrew Scull (eds), *Social Control and the State: Historical and Comparative Essays* (Basil Blackwell 1983); JA Sharpe, *Crime in Early Modern England 1550-1750* (Longman 1984); B King,

on the then novel conditions created by urbanisation and industrialisation. For the first time a mobile and anonymous society had come into existence and as a result of this, and the associated poor living conditions,[487] there was an increase in crime in an environment where crime was easier to commit.[488] The growth of industry and the market economy had undermined the traditional informal controls.[489] Significantly, local knowledge of individual character was lost within this new community and, consequently, the hitherto central role of character-vouching was largely extinguished.[490] The criminal justice system became the primary tool for maintaining social order.[491] Indeed, Parliament's first Report on criminal law in 1834 expressed the new-felt chaos of the common law and recognised that a new methodology was required for identifying criminal conduct.[492] It also became apparent that deterrence through terror would not work where there was little chance of being detected. Accordingly, it was recognised that an effective institution demanded professional policing[493] with a higher detection rate and a system that was

---

'Prosecution Associations and Their Impact in 18th Century Essex' in Douglas Hay and Francis G Snyder (eds), *Policing and Prosecution in Britain 1750 – 1850* (Clarendon 1989); Les Johnston, *The Rebirth of Private Policing* (Routledge 1992); Lindsay Farmer, 'The Obsession With Definition: The Nature of Crime and Critical Legal Theory' (1996) S & SL 5:57; Lindsay Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law: 1747 to Present* (Cambridge University Press 1997) ch 4; Jonathan Simon, 'Governing Through Crime' in Friedman and Fisher (eds), *The Crime Conundrum: Essays on Criminal Justice* (Westview Press 1997) 174; George P Fletcher, *Basic Concepts of Criminal Law* (OUP 1998); Robert Reiner, *The Politics of the Police* (3rd edn, OUP 2000); Alan Norrie, *Crime, Reason and History* (2nd edn, Butterworths 2001); Lucia Zedner, *Criminal Justice* (OUP 2004); Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001); Charles de Montesquieu, *The Spirit of the Laws* (Forgotten Books 2010).

[487] Alan Norrie, *Crime, Reason and History* (2nd edn, Butterworths 2001)

[488] The Victorians believed that one of the reasons for the increase in crime was that, *"the restraints of character, relationship and vicinity are ...lost in the crowd ...multitudes remove responsibility without weakening passion",* Anon, 'Causes of the Increase of Crime' (Jul – Dec 1844) 56 Blackwood's Edinburgh Magazine 7-8; Gerry Johnstone and Tony Ward, *Key Approaches to Criminology, Law and Crime* (Sage 2010).

[489] Martin J Weiner, *Reconstructing the Criminal, Culture: Law and Policy in England 1830 – 1914* (Cambridge University Press 1990).

[490] See too Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory' (2001) 64 MLR 350-71

[491] David J Rothman, *The Discovery of the Asylum* (Little Brown and Co 1971). In order to process the increased numbers of cases, a more expeditious mode of summary trial was introduced with little adversarial lawyerly involvement, little concern for rules of evidence and, of significance, scant concern as to whether the suspect had what we would now call mens rea, see Lindsay Farmer, 'The Obsession With Definition: The Nature of Crime and Critical Legal Theory' (1996) S & LS 5:57; Lindsay Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law: 1747 to Present* (Cambridge University Press 1997) ch 4.

[492] George P Fletcher, *Rethinking Criminal Law* (Little Brown and Co 1978)

[493] Charles Reith, *A Short History of the British Police* (OUP 1948); Les Johnston, *The Rebirth of Private Policing* (Routledge 1992), public policing came to dominance from 1880-1950. The formation of new police forces after 1829 signalled a shift from private to public enforcement. See

transparent, systematic and humane.[494] This brought changes to the trial procedure and the law of evidence with the origination of the adversarial criminal trial.[495]

At the same time, cognitive and volitional capacity theories were emerging with the growth of the psychological and social science disciplines, and this was conducive to the development of a subjective theory of mens rea.[496] The utilitarian system was thus conceived on the basis of certainty of law and punishment and the underlying ideology that individuals, as rational calculators, would determine that the cost of punishment would outweigh the benefit of crime.[497] Furthermore, the ascription of criminal responsibility to mental states was consistent with both the dualistic philosophy of Descartes and also the idea that the interior world of the human individual could be proved as a matter of fact at trial, on the basis of the evidence of

---

too David Philips 'Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England 1760 – 1860' in Douglas Hay and Francis G Snyder (eds), *Policing and Prosecution in Britain 1750-1850* (Clarendon Press 1989); Barry Godfrey and Paul Lawrence, *Crime and Justice 1750-1950* (Willan 2005).

[494] Robert Reiner, *The Politics of the Police* (3rd edn, OUP 2000). However, it was only when the formal police forces were established in the mid-19th Century that the state assumed responsibility as the primary provider of crime control. There is evidence of organised and uniformed private policing from the 16th Century when wealthy Londoners paid retainers to watch over their property, see Hilary Draper, *Private Police* (Harvester 1978) and a number of voluntary and subscription forces, see Robert Storch, 'Policing Rural Southern England Before the Police: Opinion and Practice 1830- 56' in Dougals Hay and Francis G Snyder (eds), *Policing and Prosecution in Britain 1750 – 1850* (Clarendon Press 1989)

[495] David J A Cairns, *Advocacy and the Making of the Adversarial Criminal Trial* (Clarendon 1998); John H Langbein, *The Origins of Adversary Criminal Trial* (OUP 2003).

[496] At the same time came the idea that if the function of the criminal law institution was to protect social interests, was futile to wait until harm or damage had occurred. Thus, the 18th Century theorists also emphasised prevention of harm and the first cases recognising a doctrine of attempts emerged later that century. This development was in itself influential in the gradual move from manifest criminality to a pattern of subjective liability. See for example, W Blackstone, *Commentaries on the Laws of England* 1765 – 69 (University of Chicago Press 1979) 4, 251; Douglas Hay, 'Property, Authority and the Criminal Law' in Douglas Hay and others (eds), *Albion's Fatal Tree, Crime and Society in 18th Century England* (Penguin 1975); George P Fletcher, 'The Metamorphosis of Larceny' (1976) 89 Jan, Harv L Rev 3; JKN Smith, *Lawyers, Legislators and Theorists* (OUP 1998); Alan Norrie, *Crime, Reason and History* (2nd edn, Butterworths 2001).

[497] See Jeremy Bentham, 'An Introduction to the Principles of Morals and Legislation' in John Bowring (eds), *Collected Works of Jeremy Bentham* (Russell 1962) vol 1; Cesare Becarria, *On Crimes and Punishment* (Bobs Merrill 1966); Charles de Montesquieu, *The Spirit of the Laws* (Forgotten Books 2010) 108 – 10. In addition, the Victorians used the law to educate the lower orders in standards of behaviour and provide guidance, for example contract law was also developed in this period as a means of imposing important rules of behaviour, eg that one must keep one's promise. The utilitarian theories were populised by for example by Bentham and Beccaria: Jeremy Bentham, 'An Introduction to the Principles of Morals and Legislation' in John Bowring (eds), *Collected Works of Jeremy Bentham* (Russell 1962) vol 1; Cesare Beccaria, *On Crimes and Punishment* (Bobs Merrill 1996). Expressed in Bentham's words, "men calculate some with less exactness, indeed some with more: but all men calculate", Jeremy Bentham, *Economic Writings* (For the Royal Economic Society, Allen and Unwin 1952-54) III, 434.

the accused himself.[498] Culpability therefore came to be based on this different form of knowledge which could be found within the mind of the individual.[499] Accordingly, the doctrine of mens rea in the wide sense, and with it the recognition of associated defences,[500] met both the contemporary practical challenges and the need to legitimise the basis of criminal culpability.[501]

3.3 Individual responsibility, subjectivity and the problem of proof

As the notion of individual responsibility became established, the doctrine of mens rea necessitated enquiry of the defendant's mind and the problem of proof arose. The criminal law responded with the use of the evidential presumption which held that a man must have intended the necessary consequence of his acts. The linking of the observable outcome with the internal mental state is well-established and longstanding, for example, reference to this approach can be found in the

---

[498] Nicola Lacey, 'Responsibility and Modernity in Criminal Law' Journal of Political Philosophy (2001) 9, 249 – 277.

[499] Nicola Lacey, 'The Resurgence of Character: Responsibility in the Context of Criminalization' in Duff RA and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011).

[500] Nicola Lacey, 'The Resurgence of Character: Responsibility in the Context of Criminalization' in Duff RA and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011); Lindsay Farmer, *Tradition and Legal Order: Crime and the Genius of the Scots Law: 1747 to Present* (Cambridge University Press 1996); Nicola Lacey, 'Contingency and Conceptualism: Reflections on an Encounter Between Critique and Philosophical Analysis of Criminal Law' in RA Duff (ed), *Philosophy and Criminal Law*; *Principle and Critique* (Cambridge University Press 1998); Nicola Lacey, 'Space, Time and Function: Intersecting Principles of Responsibility Across the Terrain of Criminal Justice', Criminal Law and Philosophy (2007) 1:233, 235.

[501] Zedner suggests that by reference to historical contingency, it can be demonstrated that individualism is *"simply an artifice constructed in order to legitimate holding individuals to account"* Lucia Zedner, *Criminal Justice* (OUP 2004). Similarly, Lacey opines that the development of ideas of individual responsibility are responses to problems of co-ordination and legitimation of the law, Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64 MLR 350-71. In the same paper she states that it is also clear that these problems change according to the environment and in the light of political interests, economic power, and, inter alia, the cultural and intellectual environment. Weiner also suggests that the ideology of the responsible individual, exercising free choice, is the central myth of the criminal law institution. The individual, as constructed by the enlightenment reformers, was an ideal one, Martin J Weiner, *Reconstructing the Criminal: Culture, Law and Policy in England 1830 – 1914* (Cambridge University Press 1990). Norrie describes, 'an abstract juridical individual, existing in a universe of equally responsible individuals, regarded in isolation from the real world and their social and moral contexts', Alan Norrie, *Crime, Reason and History* (2nd ed, Butterworths 2001). He suggests that the logic, and arguably the genius, of abstract individualism, introduced in the concept of subjective mens rea, was that it masked the reality that the judges and those seeking the protection of the criminal law were of a different social class from the offenders.

institutional texts as early as the 1700's,[502] although it was not until the enactment of the 1898 Act that a defendant was permitted to give sworn evidence on his own behalf to refute the appearance of blameworthiness.[503] Previously, a defendant had been neither a competent nor a compellable witness at any stage in the proceedings because of the maxim, *nemo tenetur seipsum prodere*, which protected both him and all witnesses from having to answer incriminating questions.[504] Presumably, this would also have prevented him from refuting the presumptions of voluntariness and intention. However, even after the enactment of the Criminal Evidence Act, the inescapable truth remained, in that although the defendant might give evidence, his mental state was still not directly observable. Turner articulated the problem in this way:

> A great difficulty arises (...). We cannot enter a prisoner's mind, and therefore we can only surmise the state of it by inference from his acts, i.e. through his declarations, or other conduct of his own. That is to say, the test of whether a man's state of mind be one of intention, or recklessness (...) must necessarily be objective.[505]

Thus, whilst the separation of the physical and mental enquiry was philosophically appealing to both individualism and Cartesian dualism, which sharply distinguished mind and body, it was still the case that the defendant's state of mind was a matter of

---

[502] For example, Sir Michael Foster, *Foster's Crown* Law (2nd edn, 1776) 255, 'In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth'. See too the expression used in *R v William Farrington* (1811) Russell & Ryan 207; 168 ER 763.

[503] David Bentley, *English Criminal Justice in the Nineteenth Century* (Hambledon 1998) referred to by Lindsay Farmer 'Criminal Responsibility In the Proof of Guilt' in Marcus D Dubber and Lindsay Farmer (eds), *Modern Histories of Crime and Punishment* (Stanford University Press 2007) ch 2. It is said that one consequence was to facilitate the task of securing conviction on the basis circumstantial evidence and the defendant would then need to give evidence to try to give an innocent explanation. Criminal Evidence Act 1898, s 1 also set out what would now be described as bad character provisions.

[504] William Feilden Craies & Henry Delacombe Roome, *Archbold's Criminal Pleading, Evidence and Practice* (24th edn, Sweet & Maxwell 1910) 457.

[505] JWC Turner, 'The Mental Element in Crimes at Common Law', in L Radzinowicz and JWC Turner (eds), *The Modern Approach to Criminal Law* (2nd edn, Macmillan 1948) 208.

manifest assessment.[506] The result of the enactment of Criminal Evidence Act was therefore to add the defendant's demeanour and behaviour at trial to the other available evidence as regards his capacity to commit crime. In this respect, publications such as Gross's Manual on Criminal Psychology tutored legal professionals on topics such as how to interpret mental states from the outward appearances of witnesses and suspects.[507] Thus, notwithstanding the irrevocable changes made to the trial itself, the presumption that the accused must have intended the natural consequences of his act remained central to the process.

3.4 The presumption of intention

The presumption was therefore of fundamental importance in that it provided the crucial bridge between the new subjective conception of mens rea and the old manifest approach which had been premised on the assumption that one would recognise crime when one saw it.[508] The presumption of intention was itself premised on another presumption, namely that the individual was endowed with the mental capacity of a reasonable man. Accordingly, he was taken to have foreseen as a possible consequence anything which, in the ordinary course of events, might result from his act. Thus, the inference provided the infrastructure for the operation of the presumption of intention and, of itself, clearly resonated with the assumptions of individualism – namely that the actor was possessed of the capacity for rational calculation. However, whilst being seen to provide the necessary gateway to the subjective mental state, the use of the presumptions brought implications that were inconsistent with the prevailing theory. Given that the defendant was disqualified from giving sworn evidence at his own criminal trial until the end of the 19th century, the reality of the presumption in practice may well have been that it was

[506] Anthony Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and Criminal Law* (Basil Blackwell 1990) 28.
[507] Hans Gross, *Criminal Psychology: A Manual for Judges, Practitioners and Students* (Translated into English in 1911, Little Brown 1911) referred to by Lindsay Farmer 'Criminal Responsibility In the Proof of Guilt' in Marcus D Dubber and Lindsay Farmer (eds), *Modern Histories of Crime and Punishment* (Stanford University Press 2007) ch 2. See also Hugo Munsterberg, *On the Witness Stand: Essays on Psychology and Crime* (Doubleday, Page 1909); George Frederick Arnold, *Psychology Applied to Legal Evidence and other Constructions of Law* (2nd edn, Thacker, Spink 1913).
[508] Nicola Lacey, 'Responsibility and Modernity in Criminal Law' (2001) 9 Journal of Political Philosophy (2001) 249 – 277; Nicola Lacey, 'In Search of the Responsible Subject' (2001) 64 MLR 350 – 371.

closer to an irrebuttable, fixed rule of law.[509] Accordingly, the presumption would have blurred the conceptual distinction between subjective and objective principles of mens rea[510] although, in most cases, the individual's foresight would correspond with what was objectively foreseeable such that it could be described as the natural or probable consequence. That being so, it was then presumed that a natural consequence was an intended one and this thought-process effectively upgraded instances in which a defendant was objectively reckless to instances of intentionality. Whilst the distinctions between objective and subjective fault, intention and recklessness, are crucial to the modern construction of criminal liability, earlier notions of responsibility were not so finely delineated.[511] With its status tantamount to a rule of law, it was almost inevitable that continued reliance upon the presumption in this form would pose conceptual problems as the modern distinctions became ever more refined. Indeed, even after the confusion between the substantive and evidential issues had been tackled by the House of Lords in Woolmington [1935],[512] a decade later Turner was still observing that:

> once the actus reus is proved (...) the accused can only escape if the evidence shows (...) that he did not foresee the possibility of harm [which] he will be unable to do (...) if the facts show either that he clearly did foresee it or that an ordinary person in the circumstances could not (...) fail to foresee it.[513]

Since the main purpose of the criminal law was to protect innocent persons from harm caused by others, their protection was seen to be equally necessary against those who were reckless or indifferent as to the harm they may cause, as against those who intended that harm. Accordingly, the law at this time was not overly

---

[509] KJM Smith, *Lawyers, Legislators and Theorists* (OUP 1998) 160.

[510] The distinction between intention and subjective recklessness was not significant, see for example the Fourth Report of Her Majesty's Commissioners on Criminal Law 1839 (168) XIX; Nicola Lacey, 'Responsibility and Modernity in Criminal Law' (2001) 9 Journal of Political Philosophy 249 – 277.

[511] Aside from the application of this presumption, the early institutional texts reveal that notions of culpability had often rested on various interpretations of concepts such as 'malice' and other heavily moralistic language.

[512] *Woolmington v DPP* [1935] AC 462 (HL). See JW Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) 34.

[513] JWC Turner, 'Mens Rea and Motorists' in L Radzinowich JWC Turner (eds), *The Modern Approach to Criminal Law* (Macmillan 1945) 298.

concerned to distinguish between subjective and objective mental states.[514] That being said, the fact that defences gradually developed to rebut the presumption of intention are indicative of the fact that, in most cases, it came to be regarded as a rebuttable evidential inference. Similarly, the 1938 edition of Archbold's, having given due consideration to the basic tenets upon which the modern criminal law rests, expressed the position on presumptions generally in the following way,

> Presumptive or (as it is usually termed) circumstantial evidence is receivable in criminal as well as in civil cases; and, indeed, the necessity of admitting such evidence is more obvious in the former than the latter; for, in criminal cases, the possibility of proving the matter charged in the pleading by the direct and positive testimony of eye-witnesses or by conclusive documents is much more rare than in civil cases; and where such testimony is not available the jury are permitted to infer from the facts proved other facts necessary to complete the elements of guilt or establish innocence. It has been said that although presumptive evidence must, from necessity, be admitted, yet it should be admitted cautiously.[515]

More specifically, presumptions of law were categorised as either disputable or conclusive and the most important of the disputable presumptions was the presumption that the accused was innocent, expressed in the maxim, '*semper praesumitur pro negate'*. However, the presumption was said to be easily rebutted by proof of acts tending to show guilt, and, 'when these acts are wrongful and not accidental a presumption of malice or criminal intent arises (...) the evidence of guilt must not be a mere balance of probabilities, but must satisfy the jury beyond reasonable doubt that the accused is guilty'.[516]

However, the formulation of the presumption of intention varied between different

[514] JWC Turner, 'The Mental Element in Crimes at Common Law', in L Radzinowicz and JWC Turner (eds), *The Modern Approach to Criminal Law* (2nd ed, Macmillan 1948) 208, citing eg *R v Welch* (1875) 1 QBD 23.
[515] Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading, Evidence and Practice* (Sweet & Maxwell 1938) 404.
[516] Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading, Evidence and Practice* (Sweet & Maxwell 1938) 408 – 409.

authorities[517] and it was not until the 1960's that the last vestige of the objective assessment of mens rea can be found. Indeed, in DPP v Smith [1961][518] its status was recognised as an irrebuttable presumption of law, encompassing an objective test of mens rea. To quote Viscount Kilmuir L.C.:

> It is immaterial what the accused in fact contemplated as the probable result of his actions, provided he is in law responsible for them in that he is capable of forming an intent, is not insane within the M'Naghten Rules and cannot establish diminished responsibility. On that assumption, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result, and the only test of this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.[519]

However, given the gravity of the offence under consideration, namely murder, the Smith[520] judgment attracted considerable criticism which sparked a renewed interest in the nature of the presumption. Glanville Williams, for example, described it as the expression of a psychological theory. He said that since it is impossible to delve into a man's mind, he must be judged on his outward acts although, in addition to the supposed uniformity of human nature, there were also confessions, denials, demeanour in the witness box and also circumstantial evidence that could be taken into account.[521] The 1966 edition of Kenny's Outlines also continued to recognise it as an evidential presumption, 'rebuttable' by the accused through the raising of reasonable doubt, 'on the balance of probabilities'.[522] Similarly, Kenny's approved Denning L.J.'s dicta in *Hosegood v Hosegood (1950)*[523] in which he had stated that:

> The presumption of intention is not a proposition of law but a proposition of

[517] See for example *R v Philpot* (1912) 7 Cr App R 140 (CCA); Stoddart (1909) 2 Cr App R 217, 233.

[518] *DPP v Smith* [1961] AC 290 (HL).
[519] *DPP v Smith* [1961] AC 290 (HL), 327.
[520] *DPP v Smith* [1961] AC 290 (HL).
[521] Glanville Williams, *Criminal Law, The General Part* (Stevens & Sons 1961) 89 commented that if the presumption was accepted it would destroy the subjective definition of intention and efface the line between intention and negligence.
[522] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (19th edn, Cambridge University Press 1966) 39.
[523] *Hosegood v Hosegood* (1950) 66 TLR 735.

> ordinary good sense. It means this: that a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, it is not one that must be drawn. If on all of the facts of the case it is not the correct inference, then it should not be drawn".[524]

3.5 Section 8, virtual certainty and the silencing of the presumption

In the event, *DPP v Smith*[525] had raised sufficient uncertainty that Parliament felt obliged to enact s. 8 of the Criminal Justice Act 1967 to provide clarification. The provision finally put the status of the presumption beyond doubt and placed the common law factual presumption on a statutory basis, such that,

> A court or jury, in determining whether a person has committed an offence, (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

Whilst confirming that the presumption did not constitute a legal rule or import an objective standard of fault, s. 8 acknowledges that a person may be presumed to have intended or foreseen the natural and probable consequence of his act, but that the presumption may be refuted by other evidence raising contrary inferences. However, although the provision remains unchanged today, a string of high-profile appeals against murder convictions[526] went on to provide the test bed for a refined understanding of how evidence of intention may be found.[527] After successive definitions emanating from successive cases over successive decades, the position

[524] JWC Turner, *Kenny's Outlines of Criminal Law* (19th edn, Cambridge University Press 1966).
[525] *DPP v Smith* [1961] AC 290 (HL) and see Richard Buxton, 'The Retreat from Smith' (1966) Crim LR 196.
[526] See *Hyam v DPP* [1975] AC 55 (HL); *R v Moloney* [1985] AC 905 (HL); *R v Hancock and Shankland* [1986] AC 455(HL); *R v Nedrick* [1986] 1 WLR 1025 (CA); *R v Woollin* [1999] 1 AC 82 (HL).
[527] *R v Woollin* [1999] 1 AC 82 (HL) and see *R v Matthews and Alleyne* [2003] EWCA Crim 192, 2 Cr App R 30.

was finally settled in *Woollin [1999]* and expressed in this way:

> In the rare cases where the direction that it is for the jury simply to decide whether the defendant intended to kill or to do serious bodily harm is not enough, the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.[528]

Thus, whilst s. 8 puts on a statutory basis the common law presumption of fact and continues to refer to inferences of intention and foresight that may be drawn by reference to the terminology of 'natural and probable consequences',[529] the now infamous jury direction on intention emphasizes subjective foresight amounting to the infinitely higher standard of 'virtual certainty'.[530] The relevant authorities, as are typically rehearsed in academic texts dealing with intention, now tend to omit the statutory articulation contained in s. 8 and the language of natural and probable results appears long since rejected. Thus, in *Hyam v DPP [1975]*, Lord Diplock endorsed the view that an actor intended a result if, whilst it was not his purpose, he knew that it was a highly probable, or perhaps a merely probable, result.[531] Whereas this was sufficient mens rea for murder at that time, in the following decade the link between probability, foresight and intention was refined and given a more nuanced explanation.[532] However, the current law, deriving from *Nedrick [1986]*[533] and *Woollin [1999]*[534] articulates the finding of intention by reference to virtual certainty exclusively and is wholly absent of the language of natural and probable

[528] *R v Woollin* [1999] 1 AC 82 (HL) (Lord Steyn).
[529] Reversing the decision that had elevated its status in *DPP v Smith* [1961] AC 290.
[530] David Ormerod, *Blackstone's Criminal Practice* (OUP 2015) sets out the presumption at F3.63 whilst directing the reader to section A2.4 as regards jury directions on intention.
[531] *Hyam v DPP* [1975] AC 55 (HL).
[532] For example, *R v Hancock and Shankland* [1986] AC 455 (HL), 473, 'the greater the probability of a consequence the more likely it is that the consequence was foreseen and (...) if that consequence was foreseen the greater the probability is that the consequence was also intended' (Lord Scarman).
[533] *R v Nedrick* [1986] 1 WLR 1025 (CA).
[534] *R v Woollin* [1999] 1 AC 82 (HL).

consequences.[535]

Similarly, contemporary academic texts explain intention by reference to an actor's purpose or desire and, where this is denied, by reference to indirect or 'oblique' intention in which a discussion of the test of 'virtual certainty' typically takes centre stage.[536] As far as the legal landscape is concerned, the evidential presumption that a man intends the natural consequences of his act has been effectively silenced by the academic thrall surrounding the notion of virtual certainty as the level of foresight required to find intention.

It is disconcerting that s. 8 Criminal Justice Act and case law are apparently at odds. Of note, Lord Steyn in *Woollin* explicitly referred to s. 8 in his judgment and he dealt with it in this way. In his opinion, s. 8(a), the subsection which includes the phraseology of natural and probable consequences, is simply an instruction to the trial judge. In contrast, it is subsection 8(b) that sets out the legislative instruction to the jury, namely that they must take account of all relevant evidence. That being so, the case law, and in particular *Nedrick*, did 'not prevent a jury from considering all the evidence: it merely stated what state of mind (in the absence of a purpose to kill or to cause serious harm) is sufficient for murder.'[537] It is submitted that Lord Steyn's interpretation of the applicability of the relevant subsections is to be doubted. Read in its entirety, 'a court or jury' is to have regard of both subsections, (a) and (b), and the intention of the Law Commission, who drafted s. 8, was simply to require that intention and foresight were subjectively proved.[538] However, the message emanating from Lord Steyn's dicta is that a jury is not to be directed in terms of foresight of natural and probable consequences and, as far the jury are concerned, the finding of intention rests on foresight that the result was a virtually certain one. However, the silencing of the language of natural and probable consequences is not confined to the judicial discourse. It is clear that the presumption of intention of natural and probable consequences has disappeared from

[535] Although the test bed for a 'definition' of intention is confined to cases dealing with murder allegations, it is thought that the means to find intention should be consistent across the criminal law, see David Ormerod and Anthony Hooper, *Blackstone's Criminal Practice* (OUP 2014) A2. 4.
[536] Eg David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 106ff.
[537] *R v Woollin* [1999] 1 AC 82 (HL) 93 (Lord Steyn) quoting *R v Nedrick* [1986] 1 WLR 1025 (CA) 1028 (Lord Lane CJ).
[538] JC Smith and Brian Hogan, *Criminal Law: Cases and Materials* (3rd edn, Butterworths 1986) 43.

the criminal law narrative generally. It is of note that academic texts, which also inevitably focus on intention in the context of the murder offence, also tend to omit this articulation in favour of a detailed exposition of the test of virtual certainty where intention may be indirect.[539]

As was the case with the demise of the voluntariness doctrine, the linguistic and seemingly conceptual shift away from 'natural and probable consequences' to the 'virtual certainty' paradigm has had far-reaching implications. At one level, the extent of subjective foresight required has been elevated such that the outcome has gone from a probable one to a point of near certainty, at least in the context of murder. In this respect, given the gravity of the offence, the 'higher' test of fault is salutary. However, by rejecting the language of natural consequences, together with the objective stance it was erroneously taken to import, it is submitted that the metaphorical baby was, yet again, thrown out with the bathwater. Whereas the presumption of voluntariness became subsumed within the general doctrine of mens rea, effectively displacing the first fault presumption, the notion of virtual certainty effectively swamped its sister, the presumption of intention. Where a man was once presumed to have intended the natural and probable result of his act, subject to his evidence in denial, the onus is now on the prosecution to positively prove the defendant's state of mind. Again, the practical and theoretical implication is to shift the primary focus from the appearance of the act to the internal mental state. As has been observed in the context of voluntariness, it is this reconception that has proved particularly problematic in the case of corporate wrongdoing.

3.6 Turning the volume back up

Whilst reference to the presumption that a person intends the natural and probable consequences of his act has slipped from the legal narrative, of case law and academic texts, its demise is not yet complete. Indeed, in contrast to the academic and judicial preoccupation with the subjective test of 'virtual certainty' of foresight, it is of note that passing reference was made to it in the Criminal Justice and Courts

[539] For example, David Ormerod and Karl Laird, *Smith and Hogan's Text, Cases and Materials on Criminal Law* (11th edn, OUP 2014) 98.

Act 2015[540] and Blackstone's Criminal Practice continues to recognise the presumption of intention in its original form.[541] As may be expected of a practitioner text, it provides a detailed exposition as regards all of the potential evidential inferences that may be drawn in the trial process.

Unsurprisingly, the offence of murder provides the context of the rehearsal, with reference to the controversial decision in *Smith [1961]*[542] and the corrective provisions of s. 8 Criminal Justice Act 1967.[543] Although on its face, s. 8 does not appear to be confined to evidence of a murderous intent, Blackstone's interprets the effects of *Moloney*,[544] *Nedrick*[545] and *Woollin*[546] on the statutory provision. It proceeds on the basis that where death or grievous bodily harm is the natural and probable result of an act, the logical processes available to the jury appear to be threefold.[547] First, the jury may infer that death or grievous bodily harm was intended. Second, they may infer that such an outcome was foreseen and, from this, they may then infer that the death or grievous bodily harm was intended. Finally, a jury might decide not to draw either of the above inferences. However, whilst s. 8 addresses the concepts of intention and foresight together and their relationship with natural consequences, the practitioner text separates the concepts. Accordingly, it provides an explanation of the difference between the first two propositions such that, in the first instance, the inference of intention is made directly and, whilst looking at all the evidence, this can be by reference to the natural and probable consequences of the act. It is only in the second case that the inference of intention is made indirectly via foresight of a virtually certain outcome. The first process applies where the jury conclude from all the evidence that the accused intended the result in the sense that he desired it, the second process where they may conclude

[540] Criminal Justice and Courts Act 2015, s 33(8). This section relates to the new offence of disclosing private sexual photographs and films with intent to cause distress and this subsection states that a person is not to be taken to have disclosed with such an intent merely because that was a natural and probable consequence of the disclosure.
[541] David Ormerod and Anthony Hooper, *Blackstone's Criminal Practice* (OUP 2014).
[542] *DPP v Smith* [1961] AC 290 (HL).
[543] David Ormerod and Anthony Hooper, *Blackstone's Criminal Practice* (OUP 2014) F3.63 in which s.8 is quoted with the observation that this section placed the presumption of intention on a statutory footing.
[544] *R v Moloney* [1985] AC 905 (HL).
[545] *R v Nedrick* [1986] 1 WLR 1025 (CA).
[546] *R v Woollin* [1999] 1 AC 82 (HL).
[547] David Ormerod and Anthony Hooper, *Blackstone's Criminal Practice* (OUP 2014) B1.13.

that the accused intended the result, even though he did not desire it.
It is conceded that the higher standard of foresight required for a finding of murderous intent is a laudable common law development. However, that it has also put a seemingly complex spin on a plainly-drafted statutory provision of general application[548] is a matter of regret. What a jury may take as evidence of desire is a matter of conjecture, the difference between direct and oblique intention not necessarily that great, and the choice of evidential principle applied might well turn on the finest of distinctions.

However, since the 'virtual certainty' direction as regards foresight is only given in the rarest case, what can be said with confidence is that in the vast majority of trials the orthodox presumption of intention, as expressed at s. 8, is applicable.[549] That almost the entirety of the academic discourse on intention goes to foresight of virtually certain consequences is, therefore, inversely proportionate to its actual application in practice. Furthermore, although the evidential presumption is applicable in almost all cases, it fails to attract explicit judicial reference since the question of intention is usually left to the jury without any further elaboration.[550] Accordingly, the presumption of intention, and that an inference can be drawn from the natural and probable consequences of an act, is unlikely ever to be articulated in plain terms.[551] The absence of any judicial acknowledgment of the presumption is a fact supported by reference to the current judicial 'bench book' on jury directions. Whilst mentioning s. 8 and the relationship between intention and natural and probable consequences, the specimen directions confirm that elaboration of the meaning of intention will almost never be required.[552] Thus, whilst the academic narrative excludes mention of the evidential presumption, it is clear that explicit

[548] According to Lord Steyn in *R v Woollin* [1999] 1 AC 82 (HL), 96 'it does not follow that "intent" necessarily has precisely the same meaning in every context in the criminal law', it remains possible that lower levels of foresight could still be a sufficient basis for a legitimate inference in relation to other offences requiring intention.

[549] Ie those not turning on the finding of an oblique intent. The Crown Court Benchbook 2010 states that judicial elaboration in the form of the Woollin direction as to virtual certainty will 'almost never' be given. See <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf.> accessed 4 March 2015. See also David Ormerod and Anthony Hooper, *Blackstone's Criminal Practice* (OUP 2014) B.13; Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 172.

[550] David Ormerod and Anthony Hooper, *Blackstone's Criminal Practice* (OUP 2014) A.2.

[551] David Ormerod and Anthony Hooper, *Blackstone's Criminal Practice* (OUP 2014) A.2.

[552] <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf> accessed 4 March 2015.

reference to it is also rare in practice. It is submitted that this status quo has an apparently self-perpetuating quality. However, whatever the collective academic and judicial voices imply,[553] the judicial and practitioner materials at least demonstrate that the presumption of intention is alive and is still a fundamental evidential factor, albeit existing somewhat tacitly.[554]

The fact that the observable consequences of an act may be taken as indicative of intention has important application for a theory of corporate criminality. In the context of fraud particularly, the offence requires that the conduct is accompanied by a specific intention to make a gain or to cause a loss to another or expose another to a risk of loss.[555] Accordingly, it is submitted that in cases where, having considered all the evidence, the requisite intention can be presumed by reference to the consequences of the corporate conduct, the need to attribute fault via the fictional 'identification' mechanism is obviated. The presumption effectively averts the primary enquiry to the visible consequences of the act and away from metaphysical mental states, leaving the defendant organisation the opportunity to challenge the inference. Arguably this 'common sense' approach, considered so obvious that it requires no elaboration, has always formed a staple part of jury deliberations. Accordingly, practice and theory appear out of step, whilst practice has quietly tended to a manifest assessment of fault, the highly-vocalised doctrine of mens rea has been the predominant ideology and focus of attention.

3.7 The objective assessment of the subjective state

Having concluded that the manifest assessment of conduct more closely reflects the reality of fault assessment at trial, the extent to which the doctrine of mens rea truly

[553] Lacey, for example, refers to the presumption in the past tense opining that it is surprising that the presumption operated well into the 20th century, notwithstanding it remained founded on an objective approach to culpabilty. She asserts that it is a modified version of Fletcher's manifest liability model, Nicola Lacey 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64 MLR 350-71 referring to George P Fletcher, 'The Metamorphosis of Larceny' (Jan 1976) 89, 3 Harv L Rev; George P Fletcher, *Rethinking Criminal Law* (Little Brown and Co 1978).

[554] For example, David Ormerod and Anthony Hooper, *Blackstone's Criminal Practice* (OUP 2014) F3.63; <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf> accessed 4 March 2015.

[555] Fraud Act 2006, ss 2(1)(b)(i) and (ii); 3(b)(i) and (ii) and 4(1)(c)(i) and (ii).

departs from this approach will be considered. Arguably, this question is at the heart of this research and raises the perennial problem, how to determine the defendant's internal mental state. Whilst *Smith* erroneously upgraded the evidential presumption to a rule of law[556], effectively importing an objective test of intention, s. 8 affirmed the subjective nature of intention as a determinant of criminal fault.[557] That being said, if a defendant does not give evidence in his own trial, the objective test facilitated by the presumption is the only one available.[558] Otherwise, in cases where the accused does testify, the assessment of his subjective state must be effected objectively or manifestly since external evidence is the only available evidence.[559] Accordingly, whilst foresight and intention have, as legal concepts, attracted considerable debate and increasingly refined definitions in cases where the defendant denies desire, the requisite mental state must still be determined as a matter of fact.[560]

Considered in this light, it would appear that the shift from the objective assessment of fault to the subjective approach amounted to little more in substance than the procedural change, brought about by Criminal Evidence Act 1898, and the opportunity it provided for a defendant to give evidence in his own trial. Before its enactment, the presumption of intention of natural consequences was needed to operate as an objective assessment of fault but, with the passing of the act, the defendant could now testify as regards his subjective state of mind. However, the distinction between the objective test of fault and the objective or manifest assessment of conduct is paramount. As a matter of practice, it is clear that juries

[556] *DPP v Smith* [1961] AC 290 (HL).
[557] Criminal Justice Act 1967.
[558] Richard Buxton, 'The Retreat From Smith' (1966) Crim LR 196. Blackstone's confirms that in the absence of an explanation, a jury will doubtless infer that a defendant intended the natural and probable result of his action and that, as a purely factual inference, this is unexceptional. Apart from admissions made, this is the most obvious way to ascertain his state of mind. David Ormerod and Anthony Hooper, *Blackstone's Criminal Practice* (OUP 2014) A2.34.
[559] As regards this indirect knowledge of the internal state, Bentham, for example, said that the factors which should be considered are the act itself; the accompanying circumstances; the intention of the perpetrator; his degree of understanding or perceptive faculties which are to be inferred from the nature of the act or from circumstances peculiar to it; the particular motive or motives at its root and the general disposition of which it is indicative, JW Cecil Turner, *Kenny's Outlines of Criminal Law* (19th edn, Cambridge University Press 1966) 32 citing Jeremy Bentham's, *Principles of Morals and Legislation*.
[560] In this respect a man's thoughts are said to be 'as much facts as are his bodily movements', JW Cecil Turner, *Russell On Crime* (12th edn, Stevens & Sons 1964) 23.

still infer intention, in the sense of desire, on the common sense basis that the outcome was the natural and probable consequence of the act in question. The presumption of intention, considered with all of the other evidence, means that a jury may make the inference on the basis of everything relevant that they have observed. Since the totality of the evidence includes that of the defendant himself, the presumption is naturally rebuttable. Accordingly, it is submitted that the theoretical weight placed on the mens rea doctrine is a somewhat artificial construct, the inescapable fact being that whatever the subjective mental state, its determination can only be made objectively. It is thus submitted that the shift from the examination of the overt and physical to the consideration of the internal and metaphysical amounts to an ideological sleight of hand, altering nothing more than mere perception. The prominence given to the expanded doctrine of mens rea in the criminal narrative therefore effectively masks the continued existence of the presumptions of fault which continue, albeit tacitly, to provide the structural basis for the determination of liability.

3.8 The presumption of intention and the corporate actor

A corrective refocusing of the orthodox presumptions of fault would realign theory with evidential practicalities of both prosecution and defence. Further, it is submitted that an acknowledged return to such an approach would accommodate the prosecution of the corporate entity without detriment to the position of human defendants. As far as corporate culpability is concerned, the absence of a metaphysical 'mind' would not be fatal to the finding of criminal fault, nor would it involve the necessary inculpation of an associated individual. Further, the explicit employment of the evidential presumptions would simply acknowledge the continuing need to infer fault through the observance of the manifest.

The practicability of this approach to the specific problem of corporate fraud is readily demonstrable. The generic fraud offence can be perpetrated through the dishonest making of a false representation,[561] failure to disclose information[562] or

[561] Fraud Act 2006, s 2(1)(a).
[562] S 3(a).

abuse of a position[563] intending, by so doing, to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss.[564] Taking by way of example the widespread practice of mis-selling of personal protection insurance alongside other financial products, assuming that this conduct might be considered dishonest, the current approach turns on the successful application of the identification principle. This means that a corporation could only be convicted of fraud if a sufficiently senior director was personally guilty of the same offence such that his culpable state of mind could be considered that of the company. In this context, given the distance between the personnel at top level management and those who carry out the day to day corporate functions, and for various other reasons, a corporate conviction on this basis could be difficult to sustain. However, leaving aside the issue of establishing dishonesty for the moment, by applying the evidential presumption of intention, a corporate intention might be readily ascertained by the inference that the organisation intended to make a gain, through such sales activity, since this is the natural and probable result of such activity.

It is clear that both the presumption of voluntariness and the presumption of intention can serve equally in the context of corporate action as in that of individual action. Furthermore, the defendant organisation is as capable as the accused individual of calling witnesses to refute either or both presumptions in its defence. Whilst it is acknowledged that some 'defences' available to human individuals, such as duress, may be inapplicable to corporate defendants, the recognition of corporate autonomy could also afford the exciting opportunity to recognise, perhaps by analogy, some context specific defences.

3.9 Dishonesty and the corporate actor

Whilst it is clear that organisational capacity and intention might be attributed by application of the orthodox evidential presumptions, the generic fraud offence also requires proof of dishonesty. As regards fraudulent intent, in the context of obtaining by false pretences[565], the 1938 edition of Archbold stated that where

[563] S 4(1)(a).
[564] Ss 2(1)(b)(i) and (ii); s. 3(b)(i) and (ii); s. 4(1)(c)(i) and (ii).
[565] Eg at Larceny Act 1916, s 32(1).

money was obtained by pretences that were false, prima facie there was an intent to defraud.[566] Similarly, the use of false statements or documents to obtain money was evidence from which an intent to defraud may have been inferred, even where the money might have been obtained without them.[567] At this time there was also, of course, explicit recognition that 'prima facie everyone must be taken to intend the consequences of his acts'.[568]

Of note, contemporary analysis evidences a continued reliance on the inferential approach to fraudulent intents. For example, as regards the fraudulent trading offence, 'Whether there has been intent to defraud is a question of fact to be determined in every case and a person's intent usually has to be inferred from what the person did. The courts have said that there is some behaviour will usually give rise to an inference that there has been an intent to defraud'.[569] The Fraud Act 2006 is somewhat different in that it does not articulate liability in terms of fraudulent intent, preferring instead to employ the concept of 'dishonesty' that was introduced in the deception offences contained in the 1968 Theft Act. These provisions replaced the obtaining by false pretences offence which was set out in the Larceny Act 1916 and, of note, the Court of Appeal, in *R v Wright [1960]*,[570] affirmed that an intent to defraud was really synonymous with dishonesty. Final clarification to that effect was later provided in the Court of Appeal case of *Ghosh [1982]*[571] which set

---

[566] RE Ross and MJH Turner, *Archbold's Criminal Pleading: Evidence and Practice* (30th edn, Sweet & Maxwell 1938) 724 citing *R v Hammerson* (1914) 10 Cr App R 121 (CCA). This comment was made as regards Larceny Act 1916, s 32(1) which was the statutory forerunner of the 1968 and 1978 Theft Act deception offences. These were then replaced by the generic offence contained in the Fraud Act 2006.

[567] *R v Hopley* (1916) 11 Cr App R 248 (CCA).

[568] Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading: Evidence and Practice* (30th edn, Sweet & Maxwell 1938) 725 citing *R v Williams* (1836) 7 C & P 354.

[569] Stephen Mayson and others, *Company Law* (27th edn, OUP 2010-11) 693.

[570] *R v Wright* [1960] Crim LR 366 and see JWC Turner, *Kenny's Outlines of Criminal Law* (Cambridge University Press 1966) 365.

[571] *R v Ghosh* [1982] QB 1053 (CCA), 2 All ER 689, 692. Lord Lane observed that In *Scott v Comr of Police for the Metropolis* [1975] AC 819 (HL) Viscount Dilhorne traced the meaning of the words 'fraud', 'fraudulently' and 'defraud' in relation to simple larceny, as well as the common law offence of conspiracy to defraud. After referring to Stephen's *History of the Criminal Law of England* (Macmillan 1883) vol 2, 121 – 22 and *East's Pleas of the Crown* (1803) vol 2, 553 he continued as follows [1975] AC 819, 836 – 837: 'The Criminal Law Revision Committee in their eighth report on "Theft and Related Offences" (Cmnd 2977 (1966)) in para 33 expressed the view that the important element of larceny, embezzlement and fraudulent conversion was "undoubtedly the dishonest appropriation of another person's property"; in para 35 that the words "dishonestly appropriates" meant the same as "fraudulently converts to his own use or benefit, or the use or

out both objective and subjective elements that are required to establish dishonesty. In cases where a jury direction is necessary, Lord Lane held that the first question is:

> whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If (but only if) D's conduct was dishonest by those standards, the jury must consider the second question, namely: . . . whether the defendant himself must have realised that what he was doing was [by the standards of reasonable and honest people] dishonest.[572]

However, whilst the second question constitutes the subjective element, the Court of Appeal provided further elucidation when it said, 'In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly'.[573] Accordingly, it is acknowledged that in many cases dishonesty is so obvious (or manifest) that the *Ghosh* direction is not required.[574] Furthermore, if dishonesty is synonymous with intent to defraud and the latter notion was subject to the evidential presumption of intention, it is submitted that proof of dishonesty is also subject to such an approach. Of note, this accords with the construction of the 2 limb *Ghosh* test,[575] the overt appearance of the conduct being considered primarily, by reference to an objective standard of conduct, the subjective enquiry being conducted thereafter.

3.10 Making out the mens rea of corporate fraud

It is submitted that findings of organisational voluntariness and intention can be facilitated via the mechanism of the evidential presumptions and the manifest assessment of conduct. Further, it appears that a finding of corporate dishonesty can

---

benefit of any other person", and in para 39 that "dishonestly" seemed to them a better word than "fraudulently". Parliament endorsed these views in the Theft Act 1968'.

[572] *R v Ghosh* [1982] QB 1053 (CCA), 2 All ER 689, 692

[573] *R v Ghosh* [1982] QB 1053 (CCA), 2 All ER 689, 692 (L Lane).

[574] David Ormerod and Anthony Hooper, *Blackstone's Criminal Practice* (OUP 2014) B4.55.

[575] *R v Ghosh* [1982] QB 1053 (CCA), 2 All ER 689.

be inferred in the same way. As with the earlier examples of voluntariness and intention, where the conduct in question appears blatantly dishonest and the inference can be made, it would be open to a defendant organisation to bring evidence to refute that appearance. It can be concluded that as between the external act and the requisite mental state, albeit framed in subjectivist terms, the essential bridge continues to be evidential, behavioural presumptions based on the objective perception of manifest appearance.[576] All things considered, it is submitted that a renewed commitment to the presumptive approach to evidence would facilitate corporate convictions for fraud where there is an appearance of misconduct of this nature.

In summary, the black letter law analysis has identified various points in the evolution of the criminal law that have been determinative of the demise of the orthodox canons of fault and the associated evidential presumptions. However, whilst the concept of mens rea has grown and changed exponentially and the way in which mental fault is attributed has theoretically altered, '*actus non facit reum nisi mens sit rea'* is still said to express the basis of criminal fault. This articulation has survived the shifting boundaries of the actus reus and mens rea concepts themselves and perpetuates an approach to criminal liability that distinguishes sharply between physical elements of an offence and its requisite blameworthy states of mind. This dualism accords with the philosophy of Descartes but the construct is not without tension, particularly as regards notions of intention, voluntariness and what has been described as 'the mental element in an act'.[577] Accordingly, the following chapter considers the actus reus / mens rea construct in the light of developments in mind / action philosophy.

[576] Indeed, a revival of interest in the idea that criminal responsibility is and should be founded on an evaluative assessment of moral character, displayed in putatively criminal conduct, has been identified by Nicola Lacey, 'Character, Capacity, Outcome' in Marcus Dubber and Lindsay farmer (eds), *Modern Histories of Crime and Punishment* (Stanford University Press 2007).
[577] Glanville Williams, *Criminal Law, The General Part* (2nd edn, Stevens & Sons, 1961) 11.

4. Philosophical and scientific advancements

4.1 Mens rea - modern mind / action philosophy and mirror neurons.

Whilst the respective scope of the notions of actus reus and mens rea have not remained static, the modern understanding of the Latin maxim has generally involved the idea that the physical and the mental elements of an offence should be distinguished. Although this construct of criminal liability accorded with Cartesian dualism, it is widely agreed that act and intent are not ontologically distinct. Accordingly, this chapter provides a basic examination of contemporary philosophy, in particular 'mind / action' theory, with some important contibutions in this area having already been made in the context of the criminal law.[578] The philosophical case for the dismantling of the rigid actus reus / mens rea construct reveals a much more nuanced understanding of action such that contemporary philosophy and criminal law doctrine are demonstrably out of step. Departing from the dualist assumptions, it will be shown that the physical and mental are neither separate nor severable and, accordingly, a more holistic and contextual approach to fault attribution is desirable. This recognition removes the perceived need to distinguish finely delineated mental states which are currently considered in isolation from the physical act.

Further, this chapter goes on to consider the advancements made in scientific understanding of the workings of mirror neurons in the brain which disclose that the observer can acquire direct knowledge of the conduct of the observed. This finding provides additional support for the manifest assessment of conduct, reinstating the notion that criminal behaviour is readily recognisable as such. That being so, it is proposed that, in our individual capacity as actors within the organised groups typical of modern life, direct knowledge of organisational action is also possible through the observation of it. It will be shown that these discoveries afford a retreat from the predominance of the inflated mens rea doctrine in its current form such that corporate fault might now be attributed directly, without the need to identify an associated individual's metaphysical mind. This knowledge provides further support

[578] RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and Criminal Law* (Basil Blackwell 1990).

for the re-establishment the orthodox evidential presumptions and the manifest model of fault attribution.

Whilst this research argues the case for capacity-based liability, founded primarily on the orthodox voluntariness doctrine, it is also of note that the contemporary philosophy recognises that an autonomous actor can emerge from an organisation. Broadly stated, properties can combine to amount to something that is more than the sum of the parts. Expressed in various ideas and terms such as holism, realism and emergentism, the common proposition is that individual parts can join together to form something different, something sui generis. The clear implication for a theory of corporate culpability is that organisations can and do become personalities which are distinct from their members and thus can be recognised as responsibility-bearing actors. Accordingly, where corporate misconduct is the result of systemic and pervasive behaviour, not attributable to identifiable individuals, there is a case for inculpating the organisation directly, obviating the need to employ the artificial 'identification theory' in all cases.

Accordingly, this chapter briefly charts the developing theories of mind and action, which, taken together with neuro-scientific advances, underpin the case for a return to a presumptive approach to the attribution of fault and a realist account of organisations.

4.2 Cartesian dualism – the root of the actus reus / mens rea divide

The basis of criminal fault, expressed in the maxim, '*actus non facit reum nisi mens sit rea'* with its characteristic demarcation of physical and mental elements, is still constructed in accordance with what is called philosophy's 'official doctrine'.[579] The force behind the distinction was driven by the doctrine of dualism which separates the non-physical mind from the tangible body, [580] hailing chiefly from the thinking of Descartes nearly 4 centuries ago.[581] The dualist assumption holds that

[579] Gilbert Ryle, *The Concept of Mind* (Penguin 2000).
[580] See for example, RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and Criminal Law* (Basil Blackwell 1990).
[581] Scholastic and reformation theology was also influential. Platonic and Aristotelian theories of the intellect shaped the orthodox doctrines of the soul's immortality.

human beings have both a mind and a body which, although mutually exclusive ontological categories, are somehow harnessed together.[582] Accordingly, this thinking assumes 2 different kinds of existence, the physical which is composed of matter and the mental comprising consciousness. The physical body exists spacially, subject to mechanical laws, and is observable whereas the workings of the mind are private and can only be observed, internally by the individual himself. Although comprising distinct substances, there is causal interaction such that by a mental act of will, the individual can cause his physical body to move and, conversely, the physical phenomena can cause a mental sensation of pain. However, the laws of physics fail to explain the causal relationship between the mechanical animate and the inanimate.[583]

Whilst the respective disciplines of philosophy and science have struggled to provide an explanation for this mind-body relationship, the criminal law has continued to labour under the influence of 17th century Cartesian dualist philosophy. This has ultimately led to an approach whereby the making out of a criminal offence typically involves a 'step by step' accumulation of the requisite physical and mental elements, each apparently considered in isolation.[584] In addition, the Cartesian view of the mental process is that it is staged in the 'private theatre' of the mind of the individual and this view has endured such that it has been generally accepted that the state of a man's mind cannot be observed by anyone but the individual himself. Hence, whilst the moral attribution of fault has demanded a subjective approach to criminality, the evidential implication of the philosophy rejects the objective or manifest assessment of the defendant's state of mind. The necessary bridges between the subjective and objective, direct and indirect knowledge, have, therefore, been the evidential presumptions of voluntariness and that the accused must have intended the natural

[582] Plato opined that we each have a soul which is divine and immutable and before birth we pre-existed in a pure and disembodied state. The body is the vehicle for existence in the earthly world which is a transitory stage in the soul's eternal journey. It would seem that Descarte's interest in maintaining the dualist approach to the mind was partly motivated by his religous desire to allow for the survival of the soul after physical death. After the death of the body, the mind may continue to exist and function.

[583] Various theories have been put forward, for example Descartes himself thought that a fluid of 'animal spirits' flowing in the pineal gland provided the solution as to the interface between the mental and physical; others have suggested that God is the medium, for example Berkeley, Malebranche and Geulinext, that there is a pre-established harmony, Leibniz, or that there is only one underlying substance which is neither material or mental, Spinoza.

[584] *R v Hinks* [2001] 2 AC 241 (HL).

consequences of his actions. Whilst the presumptions are no longer openly acknowledged, this philosophy, with its dualist assumptions, has never been displaced as the ideological underpinning of the criminal law.

Although substance dualism is not widely accepted in philosophy today,[585] the problem of explaining consciousness and the mind-body relationship remains. However, faith that science will ultimately provide the link may well be borne out in that there has been interest in recent neuroscientific research.[586] For example, sophisticated brain imaging techniques have demonstrated correlations between mental phenomena and neural brain states and that there is a physical brain state accompanying every mental event, the physical brain identified as the determinant of mental activity.[587] Even so, the problem of explaining how a mental phenomenon can correlate with a physical one remains.[588] Various theories have emerged, for example that of psychoneural identity[589] and, thereafter, functionalism which became

[585] See for example, Jaegwon Kim, *Philosophy of Mind* (3rd edn, Westview Press 2011); Ryle infamously referred to it as the dogma of the 'ghost in the machine', Gilbert Ryle, *The Concept of Mind* (Penguin 2000) 17; Vadim V Vasilyev, 'Philosophy of Mind, Past and Present' (2013) 44, 1-2 Metaphilosophy 15. This dualist dilemma is avoided in monist thinking which holds that the world exists of a substance of just one kind. Thus the mental version of monism, idealism, holds that the mind constitutes the primary reality in that material things are simply the creation of our thoughts and mental experiences whereas materialist monism perceives mental states as physical states, see for example Thomas Hobbes, Richard Rorty, Daniel Dennett.

[586] Gilbert Ryle, *The Concept of Mind* (Penguin 2000).

[587] This follows scientific analysis of the psychoneural correlations. The mind-brain correlation thesis thus holds that for each type of mental event (M) that occurs to organism (O), there exists a brain the state of kind (B) (which is M's neural correlate or substrate) such that M occurs to O at time T if, and only if, B occurs to O at T, Jaegwon Kim, *Philosophy of Mind* (3rd edn, Westview Press 2011) ch 4.

[588] If C-fibre stimulation correlates to the feeling of pain this still leaves the problem of explaining how a mental phenomenon can correlate with a physical one, Jaegwon Kim, *Philosophy of Mind* (3rd edn, Westview Press 2011) ch 4.

[589] Explained in this way, replacing the 'pain occurs if there is C-fibre stimulation' theory with the notion that 'pain equals C-fibre stimulation', pain and C-fibre stimulation is but 1 phenomenon, not 2 phenomena whose correlation needs to be explained. According to this phsychoneural identity theory first advanced in the late 1950s, the mental state is identified with the physical processes of the brain. Although 'C-fibre activation' and 'pain' do not have the same dictionary meaning, they are one and the same, see Jaegwon Kim, *Philosophy of Mind* (3rd edn, Westview Press 2011). In the same way that bolts of lightning can be also described as atmospheric electrical charges; they are not synonymous but the 2 expressions, 'lightning' and 'atmospheric electric discharge', refer to the same phenomenon. The claim that the mind is produced by the brain and the naturalistic approach to the interaction of the mind and body has become mainstream opinion during the past few decades, see Vadim V Vasilyev, 'Philosophy of Mind, Past and Present' (2013) 44, 1- 2 Metaphilosophy 15. Identifying the mental with the physical brought the hypothesis within the ambit of physical theory which could then provide a complete framework to explain all aspects of the natural world. However, it is argued that psychoneural identities are no more reducible to basic physical–biological laws than the psychoneural correlations are, so they must also be viewed as fundamental and ineliminable postulates about how things are in the world. For the non-

the orthodox philosophy of cognitive science.[590] However, whilst functionalism provides a holistic conception of mentality,[591] it de-substantialises the mind and, therefore, encompasses the view that mental processes depend on, and are realised in, the physical make-up of the organism, although they are not reducible to it.[592] That being so, the mind must be a 'non-physical' thing and this still leaves the need to explain how the mind can cause something physical, such as a bodily movement.[593] In an attempt to avoid a return to the dualist dilemma, Vicari argues that both monist and dualist theories are implicitly based on the same rationally unjustified assumptions.[594] The main assumption is the exclusion principle which perceives the mental and physical as independent and exclusive ontological realms. However, scientific theories can explain the existence of the mind without reducing it or eliminating it such that it is compatible with the physical. Searle refers to this

---

reductivist, mental properties, along with other higher level properties of the special sciences, like biology, geology and the social sciences, resist reduction to the basic physical domain.

[590] Hilary Putnam, 'Psychological Predicates' in WH Capitan and DD Merrill (eds), *Art, Mind and Religion* (University of Pittsburgh Press 1967) reprinted as 'The Nature of Mental States' in Hilary Putnam, *Mind, Language and Reality: Philosophical Papers* (Cambridge University Press 1975) vol ii. The core of the functionalist conception of the mind is that organisms which are different, biologically and physically, can have the same psychology and, conversely, organisms with the same physical structure can have different psychological capacities and functions, depending on the way it is causally embedded in a larger system. Most neurons are alike and are largely interchangeable. According to functionalism, a mental kind is a functional kind or a causal–functional kind and, therefore, the feeling of pain accords with the concept of the tissue damage detector, a functional concept, specified by the job description. Thus, what makes something a mousetrap, for example, is its ability to perform that function rather than being composed of a specific psycho-chemical structure. Accordingly, pain is defined by reference to its function, that being to serve as a causal intermediary between pain inputs and pain outputs. Moreover, the causal conditions that activate the pain mechanism can include other mental states and the outputs of the pain mechanism can include mental states as well, for example the sense of distress or desire to be pain-free. The functionalist holds that mental states are real internal states with causal powers; pain is thus an internal neurobiological state typically caused by tissue damage that might, in turn, cause groans and avoidance behaviour. Mental states form a complex causal network which is anchored to the external world at various contact points. Here interaction takes place with the outside world, receiving sensory inputs and admitting behaviour outputs. The identity of a given mental kind depends solely on the place it occupies in the causal network. That is, what makes a mental event the kind of mental event that it is, is the way it is causally linked to other mental event kinds and input–output conditions. The identity of each mental kind therefore depends ultimately on the whole system – its internal structure and the way it causally links to the external world via sensory inputs and behaviour outputs.

[591] The mind is seen as a set of powers, abilities and processes which perform a causal role in the management of organism–environment transactions.

[592] What makes them irreducible is the fact that they are multiply realisable in different physical systems. Giuseppe Vicari, 'Beyond Conceptual Dualism: Ontology of Consciousness, Mental Causation, and Holism' in John R Searle (ed), *Philosophy of Mind* (Value Enquiry Book Series 2008).

[593] Jaegwon Kim, *Philosophy of Mind* (3rd edn, Westview Press 2011).

[594] Giuseppe Vicari, 'Beyond Conceptual Dualism: Ontology of Consciousness, Mental Causation, and Holism' in John R Searle (ed), *Philosophy of Mind* (Value Enquiry 2008) 60.

as biological naturalism, the theory being that consciousness is a state or a process realised in the brain whose causal base is at the lower, microstructural level of organisation of the brain itself.[595] Conscious states are therefore created in the physical structure of the brain and consciousness is causally explained by the interactions between the elements composing the brain as an organic system. It is realised at a level of the same system which is higher than that of the basic elements. Consciousness is therefore a causally emergent property of the brain. An emergent property is a feature of the entire system but not of its basic elements and it is causally explained not as the simple addition of the parts, but from the causal interactions at the level of the basic components of the system itself. For example, liquidity is an emergent property of water although no individual water molecule is in a liquid state, unlike the system as a whole. In the same way Searle argues that consciousness is the emergent of certain systems of neurons and that although no individual neuron can think or speak or feel, the system as a whole has this capacity. Thus, consciousness cannot be deduced or calculated from the sheer physical structure of the neurons without some additional account of the causal relations between them. The failure of ontological reduction can be explained by reference to other phenomena, for example, money and musical performances are, in principle, reducible to molecular structures or soundwaves, but if a bank or a musician were to redefine the concepts in these terms, they would lose the sense of the concepts themselves.[596]

By abandoning the disconnected Cartesian categories of the mental and the physical, the problem of mental causation disappears. Furthermore, scientific research provides an explanatory structure which accounts for the emergence of ontologically 'new' levels, with properties that are non-existent at the lower levels, but which emerge from the lower-level interactions as system macrofeatures. The reverse approach is reductionism with which science has been successful in reducing into atomic states various organic matter.[597] However, reductionist analysis moves from wholes down into parts and, by so doing, moves in the opposite direction from the

[595] John R Searle (ed), *Philosophy of Mind* (Value Enquiry 2008).
[596] Giuseppe Vicari, 'Beyond Conceptual Dualism: Ontology of Consciousness, Mental Causation, and Holism' in John R Searle (ed), *Philosophy of Mind* (Value Enquiry 2008) 60.
[597] Ursula Goodenough and Terrence W Deacon, 'The Sacred Emergence of Nature' in Philip Clayton (ed), *The Oxford Handbook of Religions and Science* (OUP 2006) ch 50.

way that matters arise. To understand how matters arise, the process must be run in reverse, for example from the sub atom to the atom to the amino acids to the protein to the polymer to the cell to the muscle to the contraction.[598] As scientists have undertaken such upwards projects, they have discovered that the whole is greater than the sum of its parts. They have not found something greater or something more, but something altogether different. Indeed, this something else can, in turn, participate in generating a new something else at a different level of organisation. These dynamics are termed emergence.[599] Turning again to the illustrative water molecule, whilst it comprises hydrogen and oxygen atoms, the molecule possesses unprecedented attributes because the joining of the atoms has distorted the shapes of each, producing a composite shape with its own intrinsic properties. Further, when water molecules interact together different outcomes are possible. Ice forms when the kinetic energy of the average molecule is low and the molecules' stickiness overcomes their movement; liquid water forms when their movement is just sufficient to overcome that stickiness and steam forms when their relative velocities are high enough that collisions seldom allow stickiness.[600] Thus, emergentists suggest that human characteristics are constructed bottom-up and are then deeply influenced by environmental contexts. Accordingly, human evolution has entailed the co-evolution of three emergent modalities – brain, symbolic language and culture – each feeding into and responding to the other two, thereby generating particular complex patterns and outcomes. This identification of a naturalistic and non-reductive ontology of mind is exciting in that it can now dialogue with scientific research to address the traditional philosophical problems.[601]

4.3 The criminal law and the holistic analysis of action

Whilst this thinking provides one of any number of possible answers that might respond to the dualist dilemma, at the very least the scientific research demonstrates

[598] Ursula Goodenough and Terrence W Deacon, 'The Sacred Emergence of Nature' in Philip Clayton (ed), *The Oxford Handbook of Religions and Science* (OUP 2006) ch 50.
[599] Ursula Goodenough and Terrence W Deacon, 'The Sacred Emergence of Nature' in Philip Clayton (ed), *The Oxford Handbook of Religions and Science* (OUP 2006) ch 50.
[600] Ursula Goodenough and Terrence W Deacon, 'The Sacred Emergence of Nature' in Philip Clayton (ed), *The Oxford Handbook of Religions and Science* (OUP 2006) ch 50.
[601] Giuseppe Vicari, 'Beyond Conceptual Dualism: Ontology of Consciousness, Mental Causation, and Holism' in John R Searle (ed), *Philosophy of Mind* (Value Enquiry 2008).

that the notions of mind and body, mental and physical, are inextricably interwoven and, in contrast to the traditional model of criminality, simply defy separation. Whilst this does not profess to be a philosophical or scientific thesis, it is submitted that there is evidently no bright line distinction to be made between an act and its accompanyting mental state and that the modern bifurcation of actus reus and mens rea concepts labours under a fundamental misconception. Thus, any attempt to demarcate the territory of the mental from the physical must be fraught with difficulties from the outset. Arguably, a more satisfactory basis for criminal liability would be established if the Latin maxim, on which it was based, was analysed holistically, avoiding the faux distinctions between the physical and mental elements. Indeed, the early understanding of the terms actus reus and mens rea more readily accords with today's scientific findings, the actus reus performing a much larger role than is the case today, encompassing the mental elements expressed in the offence definition. For example, the 1966 edition of Kenny's Outlines explained the meaning of actus reus in this way, it:

> may be defined as 'such result of human conduct as the law seeks to prevent'. This may include legally essential facts and included amongst them there may be one or more which are personal to the accused himself, including even his own thoughts. Thus, in burglary the prosecution must prove that the prisoner (1) broke and entered, (2) the dwelling house of another, (3) in the night, (4) *with intent to commit a felony therein.* Elements (2) and (3) are objective facts so the subjective mental attitude of the prisoner is irrelevant; that is to say, whether or not the prisoner believed it to be a dwelling house, or belonging to another, or that it was in the night can make no difference to his liability to conviction if the other facts are established. But (4) is subjective and the prosecution must establish beyond reasonable doubt that he had the specified intention, however, although this is a subjective matter it has nothing to do with the *mens rea* of the crime of burglary but is simply one of the facts which together constitute the *actus reus*, since a man's thoughts are as much facts as are his bodily movements.[602]

[602] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (19th edn, Cambridge Uni Press 1966) 17 and referring to JWC Turner, *Russell on Crime* (12th edn, Stevens & Sons 1964) 23.

It is clear that the orthodox actus reus / mens rea notions did not denote a strict separation of the physical and mental elements in crime, albeit that is current interpretation. That the modern interpretation makes for an uncomfortable fit in the overall conceptual scheme is demonstrated by some obvious theoretical difficulties which arise through the attempt of such an exercise. For example, some actus reus elements inevitably inhere a particular mental aspect of their own, for example, the fact of possession.[603] This is of no surprise when considered more generally in the light of science-led philosophy. To accord with the scientific advances made in this field, the criminal law will need to abandon the distinction and accept that the blameworthy state of mind does not accompany the act, it is an elemental aspect of it. Similarly, it is submitted that the orthodox distinction between the mental states, voluntariness and foresight of consequences,[604] is equally difficult.[605] Whilst acknowledging Turner's commitment to the distinction, it is arguably at this juncture that the modern approaches to fault attribution can be seen at their most problematic in conceptual terms. This can be discerned by reference to the doctrine of voluntariness and the earlier discussion in chapter 2. It is widely accepted that the development of the concepts of fault, sufficient to attract criminal disapprobation, has been a gradual one. In this respect, there is evidence that the doctrine of voluntariness began in the narrow sense to temper the harshness of a criminal law where fault had previously been attributable on the basis of simple causation. An early refinement added the requirement that the actor was the author of his act in the sense that literal involuntariness would negate liability. Subsequently, the doctrine was extended to encompass metaphorical involuntariness as is now expressed in the concepts such as duress and mistake. Whilst voluntariness was the mental fault element required in every offence, the common law developed further such that an accused would not attract criminal culpability if he had not foreseen some specified consequence of his act. Whilst this came to be described specifically as 'mens rea', it is submitted that this later requirement may have constituted a further refinement of the full doctrine of voluntariness rather than the identification of another distinct

[603] See above ch 2 and *Warner v MPC* [1969] 2 AC 256 (HL).
[604] Mens rea in its original sense.
[605] That such fine mental distinctions cannot be made is hinted at by the points of tension identified in ch 2. For example, the curious co-existing phenomena of insane and non-insane automatism, and the 'defence' of mistake, which can go either to deny the actus reus or mens rea, depending on their nature in the context of the modern construct.

mental state. The only context in which voluntariness needed to be considered separately was in that of the statutory offences which did not necessarily import the common law presumption of mens rea.

That the notions of voluntariness and mens rea are not capapble of segregation is demonstrable. Capacity-based responsibility, underpinned by the notion of the 'rational calculator', must encompass the notion that the choice expressed is not only freely made (and autonomous) but that it is also an informed choice. Implicit in the very language of 'rational calculation' is the inference that the accused has calculated, weighed up the circumstances, at least as far as he himself knows or perceives them. Put another way, it is simply the gradual refinement to the doctrine as it recognised metaphorical involuntariness.[606] Indeed, that the presumption of voluntariness encompasses a presumption of knowledge of circumstances was established above.[607] If the actor is possessed of this knowledge, and not acting under a mistake, there must remain only the finest of distinctions between this state of mind and that of mens rea, meaning foresight of particular consequences. It is submitted that if the rational actor is making choices in the context of the surrounding circumstances, he is almost certainly doing so with some insight or allusion to the possible outcome of his choice. It is only on the basis of his 'knowledge' or belief of the circumstances that consequences can be foreseen; like the rational calculator making his choices as regards the action itself, consequences cannot be predicted in a vacuum. Inevitably, such mental states cannot be artificially separated when they are all part and parcel of one process.[608]

Accordingly, it is submitted that mens rea, or foreseeability of consequences, and voluntariness, encompassing the notion of free action in knowledge of the circumstances, are better considered as points across a spectrum of awareness rather than distinct mental states. Knowledge, or perception of the circumstances in which

[606] That the fault doctrines evolved gradually is consistent with the gradual transition from objective to subjective fault assessment and also the emergence of various defences which did not originate at the same time.

[607] See the discussion in ch 2.

[608] Ashworth identifies the relationship between voluntariness and the capacity of the individual for rational choice and says that since choice can only be exercised in the context of awareness of surrounding circumstances, belief as to what one is doing at the time of the act is central to the attribution of moral responsibility, this is what he calls the 'belief principle', Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 156.

the act is done, must bear directly on the issue of foresight of consequence. Thus, it is submitted that, in addition to the ambivalent use of the term mens rea, it is entirely possible that the enlargement of the concept may be symptomatic of the fact that the fault concept is indivisable. This view is consistent with the other disciplines considered.[609]

On the strength of scientific developments in the understanding of action, it is submitted that the traditional presumptions of fault, which were deemed to provide the essential link to the subjective mental state, beg comment in 2 respects. First, it is clear that the mental and physical realms are not separate or severable and defy identification as distinct notions. Accordingly, the perception of the presumptions as bridges providing access to the internal mental state was misconceived. However, it is also the case that the manifest approach, implicitly adopted by the presumptions, more readily accords with today's more sophisticated understanding of action. Since the mental and physical are not severable, it is submitted that the observance of the conduct might point to a direct, holistic knowledge of the conduct in its totality. Indeed, further advances in neuroscience, discussed below, support such a proposition.

4.4 Mirror neurons and the manifest approach to fault attribution

The presumptions of fault implicitly recognised that the 'mental state', perhaps better described now as 'blameworthiness', was discernable only by reference to outward, physical behaviour. This approach is not inconsistent with the modern, scientific understanding of action which fundamentally challenges the traditional actus reus / mens rea construct of crime. However, whilst this research is not intended to advance the cutting-edge neuro-scientific account, yet more discoveries have been

[609] Scientific theories provide an explanatory device that can account for the existence of mind without reducing or eliminating it, effectively making mind compatible with the physical. In accordance with emergentism, the mental is explained as a feature, at the system level, of the physical structure of the brain, and, causally speaking, there are not 2 independent phenomena comprising conscious effort and unconscious neuron firings. Rather, there is just the 'brain system' which has one level of description when neuron firings are occurring and another level of description, the level of the system, where the system is conscious and indeed consciously trying to effect physical movement, Introduction to Giuseppe Vicari, 'Beyond Conceptual Dualism: Ontology of Consciousness, Mental Causation, and Holism' in John R Searle (ed), *Philosophy of Mind* (Value Enquiry 2008) 71.

made which bring exciting implications for the criminal law. In essence, advancements have been made in the context of mirror neurons which have considerable potential to redefine the way in which an individual's action is understood by others. The startling science now emerging suggests that the manifest observance of another's act does provide the observer with direct knowledge of it.

Whilst the dualist challenge has always been to access the internal theatre of the actor's mind, neuroscience now shows that sophisticated human cognitive abilities have their roots in a pre-linguistic, pre-conceptual and pragmatic understanding of the intentions and actions of other people.[610] It is precisely this human ability to infer other people's mental states, such as intentions, emotions or desires, that provides an essential basis for successful social interaction by enabling the prediction of others most probable future acts.[611] This primitive ability is embodied in particular areas of the prefrontal motor cortex where the same neurons that fire when a subject performs an intentional action also fire when the subject observes the same action performed by another.[612] It is now established that the mirror neuron system is the mechanism by which people re-use their own mental states, or processes represented in bodily format, to functionally attribute it, the mental state, to others. In this way it enables a direct appreciation of purpose without relying on

[610] G Rizzolatti et al, 'Neurophysiological Mechanisms Underlying the Understanding and Imitation of Action' (2001) 2 Nature Reviews Neuroscience 661 – 670; Giacoma Rizzolatti and Corrado Sinigaglia, *Mirrors in the Brain* (OUP 2008); G Rizzolatti and C Sinigaglia, 'The Functional Role of the Parieto-frontal Mirror Circuit: Interpretations and Misinterpretations' (2010) 11Nature Reviews Neuroscience (2010) 264 – 274.

[611] Maren E Bodden et al, 'Comparing the Neural Correlates of Affective and Cognitive Theory of Mind using fMRI: Involvement of the Basal Ganglia in Effective Theory of Mind' (2013) 9, 1, Advances in Cognitive Psychology 32 – 43.

[612] Rizzolatti and Sinigaglia discovered the involvement of the parietal cortex during theory of mind processing, who specified the fronto-parietal mirror circuit. Initially observed in the monkey premotor cortex, research into the human mirror neuron system is now providing results. The identification of mirror neurons not only enforces the thesis that action is not the result of pure perception and cognition, they have also been interpreted as the expression of a direct form of action understanding via embodied simulation, providing a unitary account of basic aspects of intersubjectivity Giuseppe Vicari, 'Beyond Conceptual Dualism: Ontology of Consciousness, Mental Causation, and Holism' in John R Searle (ed), *Philosophy of Mind* (Value Enquiry 2008), referring to Vittorio Gallese, 'Mirror Neurons, Embodied Simulation and a Second-Person Approach to Mind Reading', (2013) 49(10) Cortex 2954 - 56. The existence of the mirror mechanism is now firmly established in the human brain, see Kilner and others 'Evidence of Mirror Neurons in Human Inferior Frontal Gyrus' (2009) 29 (32), 10 Journal of Neuroscience153 – 59; Mukamel and others, 'Single Neuron Responses in Humans During Execution and Observation of Actions', (2010) 20 (8) Current Biology 750 – 6.

explicit propositional inference ,[613] the internal simulation of others' experiences by observation[614] transforms visual information into knowledge.[615]

Although the systematic investigation of affective and cognitive theory of mind has only recently started,[616] it is suggested that there is a distinction of the level of processing which differentiates between a mirror and a mentalising system.[617] This means that the ability can be further subdivided into affective and cognitive subcomponents, each of which can be affected individually or in combination. The affective component recognises the feelings of another person[618] and the cognitive infers the other's mental states, for example his desires, beliefs, or intentions. The mirror system[619] engages when perceiving biological motion to ascertain the underlying intentions of the observed movement whilst the mentalising system[620] provides a more abstract inference of goals. This system operates when there is no observable action of body parts and when intentions need to be inferred from abstract cues such as eye gaze, semantic information, facial expression, or knowledge about the situation. Mentalizing and mirroring are thus the two processes

[613] V Gallese, 'The Manifold Nature of Interpersonal Relations: the Quest for a Common Mechanism' (2003) 358 Philosophical Transactions of the Royal Society of London B, 517 – 28; V Gallese and C Sinigaglia, 'What is So Special with Embodied Simulation', (2011) 15 Trends in Cognitive Sciences 512 – 19.

[614] G Rizzolatti and others, 'Neurophysiological Mechanisms Underlying the Understanding and Imitation of Action' (2001) 2 Nature Reviews Neuroscience 661.

[615] G Rizzolatti and C Sinigaglia, 'The Functional Role of the Parieto-frontal Mirror Circuit: Interpretations and Misinterpretations' (2010) 11 Nature Reviews Neuroscience 264 – 274, 269. Neuroscientists suggest that the affective and cognitive theory of mind abilities recruit a network of brain structures, irrespective of the differentiation between its affective and cognitive subcomponents.

[616] Only a few functional imaging studies have compared both components to date, Maren E Bodden et al, 'Comparing the Neural Correlates of Affective and Cognitive Theory of Mind using fMRI: Involvement of the Basal Ganglia in Effective Theory of Mind', (2013) 9, 1 Advances in Cognitive Psychology 32 – 43.

[617] Van Overwalle F and Baetens K, 'Understanding Others' Actions and Goals by Mirror and Mentalizing Systems: A Meta-analysis', (2009) 48 Neuralimage 564-584.

[618] M Schaefer et al, 'Mirror like Brain Responses to Observed Touch and Personality Dimensions', 29th May 2013 Front Hum Neurosci 7:227.doi10.3389/fnhum.2013.00227 citing Bufalari and others, 'Empathy for Pain and Touch in the Human Somatosensory Cortex' (2007) 17 Cereb Cortex 2553 – 2561 who reported that somatosensory evoked potentials were modulated by the observation of attached hand with increased P 45 amplitudes during pain observation and decreased P 45 amplitudes during touch observation. Studies employing fMRI, magnetoencephalography, or TMS, transcranialmagnetic stimulation support the results of vicarious somatosensory activation when observing touch.

[619] This consists of the anterior intraparietal sulcus and the premotor cortex.

[620] This comprises the temporoparietal junction, the medial prefrontal cortex, and the precuneus.

used to access the mental states of others[621] and, since multiple actions may be effected to achieve a specific result, it is suggested that the process is not a one-to-one map between action and goal but a sophisticated process of many-to-many mapping. Furthermore, it is recognised that goals are also context dependent such that a different context leads to a different interpretation of the observed act.[622]

4.5 Mirror neurons and the assessment of collective action

It is clear that the neuroscientific advances support the reliability of an observer's assessment of action and the manifest approach to fault determination. It is also the case that the actions to which the corresponding knowledge can relate are not confined to direct observance of the act in question but would clearly extend to the reconstruction of the act at trial, in addition to the act of the giving of evidence generally. Whilst this is supportive of the manifest approach to criminality as expressed through the use of the fault presumptions, the discovery of mirror neurons also has some particularly interesting implications for a theory of intentionality in the specific context of collective action.[623] It is suggested that they confirm that collective intentionality is the biologically primitive and prelinguistic condition of the possibility of collective and cooperative behaviour which cannot be reduced or eliminated in favour of something else.[624] We are, it seems, innately 'programmed' to have direct knowledge of not just individual behaviour, but of collective behaviour too. This particular discovery has led to the new discipline called 'social neuroscience' in which the mirror neuron system provides an explanation of the

[621] It is recognised that there is a continuum from concrete to highly abstract goals and intentions and there is no a priori way to make a clear-cut and objective contrast between action means and action ends or goals. Similarly, multiple actions can be effected to achieve a specific result, therefore in order to drink one might grasp a cup, order a beer or open the tap. Consequently it is suggested that the process is not a one-to-one map between action and goal but many-to-many mapping, S Uithol, 'What Do Mirror Neurons Mirror?' Philosophical Psychology (2011) Oct 24, 5, 607 – 623.

[622] S Uithol, 'What Do Mirror Neurons Mirror?' (2011) Oct 24, 5 Philosophical Psychology 607 – 623 called inference to the best explanation, C Baker and others, 'Theory-based Social Goal Inference', (2008) Proceedings of the 30th annual conference of the Cognitive Science Society, Washington, 1447 – 1452.

[623] Giuseppe Vicari, 'Beyond Conceptual Dualism: Ontology of Consciousness, Mental Causation, and Holism' in John R Searle (ed), *Philosophy of Mind* (Value Enquiry 2008) 120.

[624] Giuseppe Vicari, 'Beyond Conceptual Dualism: Ontology of Consciousness, Mental Causation, and Holism' in John R Searle (ed), *Philosophy of Mind* (Value Enquiry 2008) 120.

emergence of sharedness and collectiveness from a biological perspective.[625]

Whilst mirroring provides the means by which collective action is understood, it goes further still by explaining how collective power,[626] encompassing collective intention,[627] emerges. Accordingly, neuroscience now provides direct scientific support for the proposition that a distinct organisational personality can emerge from the collective members. To obtain such emergence of collective power, the individual momenta simply converge to a similar direction so that a collective momentum results.[628] More specifically, to obtain collective action within groups of actors a mutual 'tuning process' occurs via the mirroring process. Thus, mirror neurons play an important role in both producing joint action and understanding it.[629]

Neuro-scientific findings thus put beyond doubt the fact that organisational fault can be both manifestly attributed, by observing the behaviour of the collective, and also directly imposed. It is submitted that this not only supports the proposition that corporations are responsibility-bearing actors in their own right, but it also obviates the need for a mechanism of fault attribution such as the identification principle. Since knowledge of the corporate behaviour is accessible to the observer, the manifest approach to the assessment of blameworthiness is equally as appropriate in the context of organisational behaviour as it is for that of individuals.

---

[625] Jan Treur, 'Biological and Computational Perspectives on the Emergence of Social Phenomena: Shared Understanding and Collective Power' (2012) 8 Transactions on Computational Collective Intelligence 168 – 191 ; Cacioppo JT and Berntson GG: *Social Neuroscience* (Psychology Press 2005); Cacioppo JT and others, *Social neuroscience: People thinking about thinking people* (MIT Press 2006); Decety J and Cacioppo JT (eds), *Handbook of Social Neuroscience* (OUP 2010); Decety J and Ickes W, *The Social Neuroscience of Empathy* (MIT Press 2009); Harmon-Jones E and Winkielman P (eds), *Social neuroscience: Integrating biologicaland psychological explanations of social behavior* (Guilford 2007).

[626] Jan Treur, 'Biological and Computational Perspectives on the Emergence of Social Phenomena: Shared Understanding and Collective Power' (2012) 8 Transactions on Computational Collective Intelligence 168 – 191.

[627] Elisabeth Pacherie and Jerome Dokic, 'From mirror neurons to joint actions' (2006) 7, (2-3) June Cognitive Systems Research 101-112; Cristina Becchioa and Cesare Bertoneb, 'Wittgenstein running: Neural mechanisms of collective intentionality and we-mode', (2004) 13 Consciousness and Cognition 123–133.

[628] This is what happens in the universe when, for example, comets or planets are formed out of smaller particles, based on mutual attraction based on gravitation, Jan Treur, 'Biological and Computational Perspectives on the Emergence of Social Phenomena: Shared Understanding and Collective Power' (2012) 8 Transactions on Computational Collective Intelligence 168 – 191.

[629] Elisabeth Pacherie and Jerome Dokic, 'From mirror neurons to joint actions' (2006) 7 (2-3) June Cognitive Systems Research 101-112.

4.6 The paradox of the manifest

It is evident that philosophy and science have found common ground through advancements in neuroscience and the discovery of the mirror neuron system in the brain. Where philosophy had struggled to answer the dualist dilemma, the question of the mind / body divide, scientific endeavour provided potential answers. However, the criminal law's continued commitment to the mental and physical distinction, articulated in the concepts of actus reus and mens rea (as they are now understood), is indicative of an institution which has thusfar refused to contemplate a more sophisticated theory of mind and action. It is now accepted that action is not a thing capable of sub-division into mental and physical elements and it is therefore submitted that the criminal law's continued attempt to do so is misguided. A holistic approach to the assessment of conduct is more conducive to the modern understanding in which the body, brain and mental processes are intinsically interwoven and ontologically complete. It is submitted that this analysis of action is more conceptually accommodating of the orthodox presumptions of fault which explicitly link the overt appearance of behaviour with the internal state. Whilst the hint of a manifest assessment of fault might cause some initial discomfort in the subjectivist camp, the veracity of this approach is effectively shored-up by recent developments in neuro-science. Paradoxically, the manifest approach is not manifest at all; the operation of the mirror neuron system providing direct knowledge of another's behaviour.

In view of this discovery, the orthodox presumptions of fault appear simply to express the fact that, in considering the totality of the behaviour, 'common sense' inferences might be drawn. This has exciting implications for a theory of corporate criminality in which the presumptions provide a process for fault attribution which does not involve enquiry and emphasis on a metaphysical mental state which is, in any event, a non-severable. Exciting as that may be, the newer social neuroscience discipline goes further still. Not only does it go some way to explain how mirror neurons are involved in the production of collective action, it also demonstrates that they provide the observer knowledge of it. The appropriateness of the manifest approach to the attribution of individual and corporate criminal liability is thus affirmed.

It is submitted that any remaining theoretical bars to either the manifest assessment of fault generally, or the realist approach to corporations specifically, must now be relinquished. Given the scientific advancements that have taken place over the last couple of centuries, it is time the criminal law rejected its dualist model of criminality in favour of a more sophisticated appreciation of action. As far as the assessment of individual wrongdoing is concerned, arguably what is required is little more than the return to a fully articulated presumptive approach to the assessment of conduct. Conceptually, the explicit expression of the evidential link between the appearance of the behaviour and its blameworthiness would sufficiently acknowledge a more sophisticated understanding of action.

More problematic, it would seem, is the introduction of a realist notion of organisations. Although the concept is a familiar one, judicial commitment to the doctrine of precedent must be acknowledged together with the weight of authority in support of the fiction approach to corporate fault attribution. It is therefore this aspect that the following chapter addresses in the form of a contextual and black letter law analysis of the development of the 'identification principle'. It is submitted that a reconsideration of authority in this area of law identifies that the earlier cases can be distinguished or shown to be ill-judged such that the obstacles to a common law move to realism can now be removed.

5. Realism: back to the future

It is at this point that, arguably, one of the most interesting findings to come from this research emerges. Whilst modern neuroscience supports the recognition of a distinct collective entity in certain circumstances, a conceptual commitment to the realist theory of organisations is not new. What neuroscience would ultimately demonstrate, other disciplines had long envisaged. Indeed, it is a matter of some irony that what is now considered the landmark legal authority for the emergence of the fiction theory was actually a case decided in the midst of prevailing realist ideology. The first articulation of the fictionist 'identification principle' of corporate liability is attributed to Viscount Haldane in the 1915 case of *Lennards' Carrying Company*.[630] What makes this authority particularly surprising is that Viscount Haldane was seemingly not bound by any earlier authority and, with a keen philosophical interest, he was very much attuned to realist theory.[631]

Accordingly, this chapter sets out the philosophical and legal context in which the *Lennard's* case[632] was decided. The first narrative deals with the broad general thinking of the time which, in essence, had moved from individualist theory to consider the significance and ontology of collective groups. In this respect, a strong realist view of group activity is revealed. The second narrative addresses specifically the common law, demonstrating a readiness to attribute corporate liability on the existing principles as they derived from master and servant law and agency doctrines.

5.1 Realist theory

Whilst individualism has remained the edifice of the criminal law, elsewhere holism

[630] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[631] In 1883, he published *Essays in Philosophical Criticism*, and in the same year, his translation of Schopenhauer's *The World as Will and Idea*. Other philosophical works include *Pathway to Reality* (1903), *Reign of Relativity* (1921), *The Philosophy of Humanism* (1922) and *Selected Addresses and Essays* (1928), see David Kahan's introduction to Richard Burdon Haldane's 1902-1904 Gifford Lectures: The Pathway to Reality at <http://www.giffordlectures.org/Browse.asp?PubID=TPTPTR&Volume=O&Issue=O&ArticleID=6> accessed 15 May 2014. Richard Burdon Haldane, *The Pathway to Reality: Being the Gifford Lectures Delivered in the University of St Andrews in the Session 1902 – 1904* (Ulan Press 2012).
[632] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).

is recognised as its conceptual pair. For individualism to exist, individuals had to accept a supreme state that would protect individual property and thus transcend the rights and powers of the individual.[633] The 20th century rise in holism emphasised notions of wholeness or collectiveness[634] and the idea that the state, comprising the individuals who are its subjects, is more than the sum of its parts.[635] However, in recognising that the analysis of social groups and structures needed to begin at the level of society or culture as a whole, the metaphor of the machine as a model for knowledge of life, mind and society was increasingly used. This metaphor provoked a particularly strong reaction from those[636] who considered society a sui generis reality, unique to itself and irreducible to its composing parts.[637] In the last decade of the 19th century, Durkheim,[638] for example, asserted that society was created when individual consciences interacted and fused together to create a synthetic reality that is completely new and greater than the sum of its parts.[639] With what is called the 'collective consciousness', he opined that collective groups 'can be considered to possess agential capabilities: to think, judge, decide, act, reform; to conceptualise self and others as well as self's actions and interactions; and to reflect'.[640]

---

[633] It is said that here were 2 important moments in Western political and scientific thought, the first being the 17th century birth of individualism and then the 20th century rise of holism in the life and human sciences, Tom Otto and Nils Bubandt, *Experiments in Holism, Theory and Practice in Contemporary Anthropology* (Wiley-Blackwell 2010).

[634] The term 'holism' is attributable to the South African statesman Jan Christiaan Smuts. Jan Christiaan Smuts, *Holism and Evolution* (Originally published 1926, Greenwood Press 1973).

[635] Tom Otto and Nils Bubandt, *Experiments in Holism: Theory and Practice in Contemporary Anthropology* (Wiley-Blackwell 2010).

[636] Particularly in German-speaking countries, Tom Otto and Nils Bubandt, *Experiments in Holism, Theory and Practice in Contemporary Anthropology* (Wiley-Blackwell 2010).

[637] Emile Durkheim, De La Division Du Travail Social (1893), *The Division Of Labour in Society* (trans WD Halls, The Free Press 1984).

[638] E Durkheim (1858 – 1917).

[639] <https://www.iep.utm.edu/durkheim/internet> accessed 15 May 2014, encyclopaedia of philosophy. Further, society, conceived as a collection of ideas, beliefs and sentiments of all sorts that are realised to individuals indicates a reality that is produced through the interaction of individuals, resulting in the fusion of consciences.

[640] Tom R Burns and Erik Engdahl, 'The Social Construction of Consciousness, Part 1: Collective Consciousness and its Socio-Cultural Foundations' (1998) 5(1) Journal of Consciousness Studies 72. The authors further their argument by reference to national behaviours during the Second World War in which different nations behaved differently towards their Jewish populations, according the the different collective consciousness, 77. Of note, writing in 1912, Durkheim was not blind to the forces driving social disintegration which had been brought about by modernity. The institutions of the past, which had previously brought unity and cohesiveness, were now lost and this made way for what he called the new cult of the individual, the abstract conception of the autonomous actor endowed with rationality and born free and equal to all other individuals. In 1912 Durkheim wrote the old gods are raging or are already dead, and others are not yet born, Emile Durkheim, *The Elemental Forms of Religious Life* (Originally published 1912, OUP 2008). This is closely linked to his

Thereafter, Smuts'[641] 'holist' analysis, published in 1907, 14 years after Durkheim's sociological work, focused on the tendency in nature to form wholes that are greater than the sum of the parts through created evolution.[642] According to his theory, the whole is in charge and all development and activity can only be properly understood when being viewed as a holistic character rather than as separate activities of special organs, or the separate products of special mental functions.[643] Although framed in language strongly resonant of that of emergentism,[644] his theory was not confined to the biological domain, and applied equally to human associations such as the State.[645] As regards group wholes, Smuts observed that:

> while the wholes may be mutually exclusive, their fields overlap and penetrate and reinforce each other, and thus create an entirely new situation. Thus we speak of the atmosphere of ideas, the spirit of a class, or the soul of a people. The social individuals as such remain unaltered, but the social environment or field undergoes a complete change. There is a multiplication of force in the society or group owing to this mutual penetration of the conjoint fields, which creates the appearance and much of the reality of a new

---

analysis of the social disintegration of European society brought about by modernity. European society became profoundly deep structure to and the institutions animating mediaeval life disappeared. Society as a whole lost its former unity and cohesiveness and this rendered former beliefs and practices irrelevant. The big things of the past, the political, economic, social, and especially religious institutions, no longer inspired the enthusiasm they once did. Belief in God weakened and this brought a rejection of other elements of Christian doctrine, such as Christian morality and metaphysics which were being replaced by modern notions of justice and modern science. But no new gods were created to replace the old ones. Durkheim saw Europe as a society in a state of disaggregation with no bonds between individuals. Out of the chaos he saw the emergence of a new religion to guide the West, he called this the cult of the individual. The Durkheimian view of organisational culture was that "all consciousness of necessity resides in individual minds" but that 'it converges and coalesces to a dynamic process of interaction and so becomes exterior and constraining in the incontrovertible sense that individuals find themselves enmeshed in thick and unyielding webs of social pressure that leave little recourse but to join the crowd', J Lincoln and D Guillot, 'A Durkheimian View of Organisational Cultures' in M Korczynski and others (eds), *Social Theory at Work* (OUP 2006).

[641] J Smuts (1870 – 1950).

[642] He observed that small units inevitably developed into bigger wholes, and they, in their turn, inevitably grew into ever larger structures without cessation. Jan Christiaan Smuts, *Holism and Evolution* (Originally published 1926, Greenwood Press 1973).

[643] Jan Christiaan Smuts, *Holism and Evolution* (Greenwood Press 1973) 284.

[644] Ursula Goodenough and Terrence W Deacon, 'The Sacred Emergence of Nature' in Philip Clayton (ed), *The Oxford Handbook of Religions and Science* (OUP 2006) ch 50.

[645] Jan Christiaan Smuts, *Holism and Evolution* (Originally published 1926, Greenwood Press 1973) ch 5.

organism. Hence we speak of social or group or national organisms.[646]

5.2 Legal theory: the really fictitious fiction

The juristic thinking of the same period was largely influenced by Otto von Gierke's[647] Das Deutsche Genossenschaftsrecht[648] in which he asserted that legal personality developed as recognition of real social fact as opposed to legal fiction.[649] Espousing the realist view,[650] Maitland[651] translated von Gierke's work under the title Political Theories of the Middle Age.[652] Similarly, a collection of essays published in a 1911 edition of the Law Quarterly Review agreed that the corporation was a creature of social fact, which preceded the creation of legal recognition and regulation, and suggested that the fiction theory had never been received into the common law.[653] Dicey[654] observed that, 'when a body of 20, or 2000, or 200,000 men bind themselves together to act in a particular way for some common purpose, they create a body, which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted'.[655]

Indeed, in 1905, just a decade before the landmark Lennards judgment,[656] CT Carr had produced an encyclopaedic work on the topic of the law of corporations. This was the result of Maitland's request for a detailed exposition of English Group-life[657]

[646] Jan Christiaan Smuts, *Holism and Evolution* (Originally published 1926, Greenwood Press 1973) 339, ch 12.
[647] Otto Von Gierke (1841 – 1921).
[648] Berlin 1868-81. This is translated as the German law of associations.
[649] David Foxton, 'Corporate Personality in the Great War' (2002) 118 LQR (July) 428-457.
[650] Frederic William Maitland, 'Moral Personality and Legal Personality' and 'Trust and Corporation' in HAL Fisher (ed), *The Collected Papers of Frederick William Maitland* (Cambridge University Press 1911) vol III at 210 – 319, 321 - 440; William Martin Geldart, 'Legal Personality' (1911) 27 LQR 90; Frederick Pollock, 'Theories of Corporations in Common Law' (1911) LQR 219.
[651] FW Maitland (1850 – 1906).
[652] Otto Friedrich von Gierke, *Political Theories of the Middle Age* (trans Frederic William Maitland, Cambridge University Press 1913).
[653] David Foxton, 'Corporate Personality in the Great War' LQR (2002) 118 LQR (July) 428-457.
[654] AV Dicey (1835 – 1922).
[655] Quoted by Frederic William Maitland in, 'Moral Personality and Legal Personality' in HAL Fisher (ed), *The Collected Papers of Frederick William Maitland* (Cambridge University Press 1911) vol III, 304 referring to the Sidgwick lecture 1910.
[656] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[657] Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Yorke prize essay 1902, Cambridge University Press 1905).

to match the German equivalent written by Dr von Gierke.[658] This comprehensive work on the law of corporations drew together much of Maitland's earlier material to demonstrate the nature and attributes of the corporation and the steps by which it had reached the then present legal form.[659] Whilst identifying that the origin of corporate liability was vicarious in nature, grounded as it was in the law of master and servant and principal and agent,[660] Carr endorsed the prevailing realist philosophy, remarking that, 'it may be worthwhile to reflect that the morality of all is not always identical with the morality of its constituent members: collectiveness has its effect upon conduct'.[661] Of realism he pronounced that it:

> reminds us that, in dealing with the Corporation, we are, after all, dealing with a body of men of flesh and blood, and a body which has a recognised personality, capacity, and will of its own. The will is hardly less real because it is the group will; the person hardly less real because it is a group person (...) there comes a time when the fictions fail to satisfy.[662]

He also quoted with approval Maitland's prediction that, 'Someday the historian may have to tell you that the really fictitious fiction of English law was, not that its Corporation was a person, but that its unincorporated body was no person'.[663]

Carr evidenced the wide field that had been long occupied by various forms of corporations[664] which included different:

> churches, universities, village communities, the manor, the township, the counties and hundreds, the chartered boroughs, the gild, the inns of court, the

[658] Otto Friedrich Von Gierke, *Das Deutsche Genossenschaftsrecht* (1866).
[659] Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Cambridge University Press 1905).
[660] Derived from a time when the servant was a slave with no persona, the relationship between master and servant was therefore not distinguished from that of principal and agent.
[661] Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Cambridge University Press 1905) 105.
[662] Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Cambridge University Press 1905) 180.
[663] Frederic William Maitland, 'Political Theories of the Midde Age, Introduction' xxxiv in Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Cambridge University Press 1905). 194. Indeed, it should be noted that the landmark judicial decision in Salomon v Salomon [1897] AC 22 (HL) was itself the product of the realist influence.
[664] Described as the English 'Fellowship' and association.

> merchant adventurers, the militant 'companies' of English condottieri, the trading companies, the companies that become colonies, the companies that make war, the friendly societies, the trade unions, the clubs, the group that meets at Lloyd's coffeehouse, the group that becomes the stock exchange, and so on even to the one-man company, the Standard Oil Trust and the South Australian statutes for communistic villages.[665]

The corporate form had been an intrinsic and long-standing part of the architecture of society since the Middle Ages[666] and it was recognised in 2 forms, the corporation sole and the corporation aggregate.[667] Carr included a detailed analysis of the development of both the civil and criminal liability of corporations. Of note, it was within the civil law context that the issue of attributing liability to a corporation, and whether malice could be imputed, had been argued.[668] The submissions made in a

[665] Otto Friedrich von Gierke, *Political Theories in the Middle Age*, (trans Maitland FW, Cambridge University Press 1913) translator's Introduction, xxvii.

[666] HAL Fisher (ed), *The Collected Papers of Frederick William Maitland* (Cambridge University Press 1911) vol 3. This was the result of the influence of Roman law towards the end of the Middle Ages.

[667] The corporation thus constituted the offical character of the holder for the time being of the same office or the common interest of the persons who for the time being were adventures in the same undertaking, into an artificial person or ideal subject of legal capacities and duties, HAL Fisher (ed), *The Collected Papers of Frederick William Maitland* (Cambridge University Press 1911) vol 3, referring to Sir F Pollock's explanation in his book on Contract.

[668] As regards the potential for civil liability, the earliest view had been articulated in the religious context and Pope Innocent III's declaration of 1245 in which he forbade the excommunication of corporations on the basis that "they have neither minds nor souls: they cannot sin", by a decree at the first Council of Lyons (1245) Pope Innocent III made this declaration, see Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Yorke prize essay 1902, Cambridge University Press, 1905) 73. It was from this ecclesiastical context that lawyers were later to set out the generalproposition that corporations were incapable of malice or intention. Later, in the 15th century, a year-book of Henry VI stated that a dean and chapter 'cannot have predecessor nor successor, they cannot commit treason, be outlawed or excommunicated, for they have no soul', X Rep 32b. A further expression of the sinlessness and soullessness of corporations can be found in the classic passage in Coke's Report of the case of *Sutton's Hospital* in 1612, [1558-1774] All ER Rep 11 at 13, see Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Yorke prize essay 1902, Cambridge University Press 1905) 76. This case involved the validity of a bequest to this charitable corporation, in which Coke said, 'The Corporation is only *in abstracto,* and rests only in intendment and consideration of the law. It is invisible and immortal.' However, this view was not settled and, in dissent, Lord Blackburn responded, 'I quite agree that a corporation cannot, in one sense, commit a crime – a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged or put to death, if that be punishment for the crime; and so, in those senses a corporation cannot commit a crime. But a corporation may be fined; and a corporation may pay damages', *Pharmaceutical Society v The London and Provincial Supply Association* [1874-80] 5 App Cas 857 (HL), 869. Thereafter, it took a series of cases between 1880 and 1904 to finally develop the principle of corporate liability in civil actions, *Eastern Counties Rly Co v Broom* (1851) 6 Ex 314; *Whitfield v SE Rly Co* (1858) 27 LT QB 229; *Green v London General Omnibus Company* (1859) 7 CBNS 290; *Barwick v English Joint-Stock Bank* (1867)LR 2 Exch 259; *Henderson v M Rly Co* (1871) 24 LTNS 881; *Bank of New South Wales v Owston* (1879) (JC) 4 App Cas

line of cases culminated in the court's acceptance that malice could be imputed[669] to a corporation with reasoning such as that of Chief Baron Kelly in 1871, 'If they [corporations] are not to be liable for the abuse of this power, they are given a power to commit acts of oppression to an extension of the nature really fearful to contemplate'.[670] Similarly, in 1886, Lord Fitzgerald had expressed his opinion in this way, 'I shall only say of corporations, and of these trading corporations especially, that I have often heard it observed that they certainly are very frequently without conscience and sometimes very malicious'.[671] Darling J. in the 1899 case of *Cornford v Carlton Bank* held that:

> If malice in law were synonymous with malice in French – a sort of esprit tinged with ill nature – I should entirely agree [with L Bramwell]. In such a sense a Corporation would be as incapable of malice as wit. But of malice – actual malice – in a legal sense, I think a corporation is capable.[672]

Indeed, according to Carr, the 1901 *Taff Vale Railway* case provided evidence that, in accordance with realist theory, the law also recognised the unincorporated association as a legal entity.[673]

The now infamous case involved an action by the Railway Company against the unincorporated trade union in relation to the activities of its members.[674] Finding in favour of the Railway Company, the House of Lords gave clear endorsement to the

---

270; *Edwards v Midland Rly* (1880) 6 QBD 287, (1880) 50 LJ (QB) 281; *Abrath v NE Rly Co* (1886) 11 App Cas 250; *Kent v Courage and Co Ltd* (1890) JP 55, 264; *Cornford v Carlton Bank* (1899) 1 QB 392-5.

669 The following civil cases are discussed, *Pharmaceutical Society v The London and Provincial Supply Association* [1874-80] 5 App Cas 857; *Eastern Counties Rly Co v Broom* (1851) 6 Ex 314; *Whitfield v SE Rly Co* (1858) 27 LT QB 229; *Green v London Gen Omnibus Company* (1859)7 CBNS 290; *Barwick v English Joint-Stock Bank*,LR 2 Exch 259; *Henderson v M Rly Co* (1871) 24 LTNS 88; *Bank of New South Wales v Owston* (1879) (JC) 4 App Cas 270; *Edwards v Midland Rly* (1880) 50 LJ (QB) 28; *Abrath v NE Rly Co* (1886) 11 App Cas 250; *Kent v Courage and Co Ltd* (1890) JP 55, 264; *Cornford v Carlton Bank* [1899] 1 QB 392; *Citizens Life Assurance Company v Brown* [1904] AC 423.

670 *Henderson v M Rly Co* (1871) 24 LTNS 881. Baron Bramwell also gave judgment in this case and others in which he strenuously denied that corporations could be malicious.

671 *Abrath v NE Rly Co* (1886) 11 App Cas 250, 254.

672 *Cornford v Carlton Bank* [1899] 1 QB 392.

673 Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Yorke prize essay 1902, Cambridge University Press 1905) 192.

674 *Taff Vale Rly Co v Amalgamated Society of Rly Servants* [1901] AC 426 (HL).

realist approach which was prevalent at the time:[675]

> The principle on which corporations have been held liable in respect of wrongs committed by servants or agents in the course of their service and for the benefit of the employer – qui sentit commodum sentire debet et onus - (see *Mersey docks and Gibbs (1866)* LR 1 HL 93) is as applicable to the case for trade union as to that of the Corporation. If the contention of the defendant society were well founded, the legislature has authorised the creation of numerous bodies of men capable of owning great wealth and of acting by agents with absolutely no responsibility for the wrongs that they may do to other persons by the use of that wealth and the employment of those agents (...) [See *Mersey Docks* case LR1 HL 120] It would require very clear and express words of enactment to induce me to hold that the legislature had in fact legalised the existence of such irresponsible bodies with such wide capacity for evil.[676]

Lord Halsbury, then Lord Chancellor, issued an opinion, with which Lord MacNaghten concurred, stating that, ‘''if the legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have implicitly given the power to make it suable in a court of law for injuries purposely done by its authority and procurement’.[677]

---

[675] *Taff Vale Rly Company v Amalgamated Society of Rly Servants* [1901] AC 426 (HL). Of note, Haldane, as King’s Counsel, acted for the trade union and his submissions in the Court of Appeal had centred on the proposition that a society could not be sued unless it was incorporated, or the legislature had said it could be sued as if it were incorporated. The ability of a trade union to hold property was facilitated by vesting it in the trustees, Trade Unions Act 1871, s 8; Trade Unions Act 1876, ss 3, 4 and it could not be inferred that the legislature intended to treat a trade union as if it were a corporate body. Further, although the union had no legal entity and it may be practically impossible to sue the members, the plaintiffs could not shortcut suing them by suing the registered name of the trade union instead. For their part, the plaintiffs contended that the status of trade union, created in the Trade Union Act 1871 contemplated an entity with perpetual succession, a body entitled to hold funds and therefore a legal entity irrespective of incorporation. In the event, Haldane KC’s arguments prevailed; A L Smith, MR, stated that there must be some statute enabling an action to be maintained in the name of the society. However, the House of Lords reversed the decision by analogy to the tortious liability of corporations. See the comments of David Foxton, ‘Corporate Personality in the Great War’ (2002) 118 LQR (July) 428 - 457.

[676] *Taff Vale Rly Company v Amalgamated Society of Rly Servants* [1901] AC 426 (HL) 430 (J Farwell).

[677] *Taff Vale Rly Company v Amalgamated Society of Rly Servants* [1901] AC 426 (HL) 436. In retrospect, however, the House of Lords decision in Taff Vale, recognising the collectivity as a social fact, produced ramifactions that cannot be understated. If it was, as suggested, a politically motivated decision driven by Lord Halsbury, the conservative Lord Chancellor in the unionist

Maitland observed that when the House of Lords found that the trade union could be liable for the acts of it members, it involved a recognition that questions of identity could not be detached from questions of responsibility, if they are to have a life of their own, groups must be willing to be held responsible for what their agents do.[678]

In contrast to the civil law, however, Carr observed that corporate liability had been 'readily brought home by the criminal law'.[679] He pointed to civic communities and cities, endowed with corporate status, which were subject to punishment for failing to repair roads and bridges, almshouses and grammar schools.[680] The punishment of the body was effected by fine and if further forms of sanction were needed, the crown could take away some of its civic privileges or even curtail its civic existence.[681] Further, referring Pollock,[682] Carr stated that corporate liability could be vicarious,[683] noting that the principle pervaded the whole of English law where

---

government, it's ironic consequence to shift massive public support to the Labour party and had this not been the case, history may have taken an altogether different course, KD Ewing, 'The Politics of the British Constitution' (2000) PL Autumn 405. The Trade Disputes Act 1906 was enacted in an atttempt to shore up the political damaged effected through the Taff Vale decision and the judges, especially the Law Lords, were set to exit from areas of appelate process that appeared to involve policy-making, Robert Stevens, *Law And Politics, The House of Lords As A Judicial Body, 1800 – 1976* (Wydenfelt and Nicholson 1978) 69.

[678] Otto Friedrich von Gierke, *Political Theories in the Middle Age*, (trans Maitland FW, Cambridge University Press 1913) translator's Introduction, xxii.

[679] Carr explains that the punishment of the individual criminal was, in early times, effected by threatening punishment to a group of individuals. In the days when the modern system of police was as yet unknown, the group of men was made answerable for the doings of the man. He said that there was **the** 'view of frank pledge', 18 Edw II: Stephen, *General View of Criminal Law*, 10: Stubbs, *Constitutional History* I, 87: Maitland, *Gloucester Pleas* XXXI etc. In the maturity of the system all men were bound to combine themselves into associations of 10, each of whom were security for the good behaviour of the rest. Consequently lawyers were early familiarised with the notions of making a company of men liable to criminal proceedings. These companies were in no sense corporations, the procedure not aimed at an impersonal artificial entity, aimed rather at any members of the group who appeared sufficiently substantial to pay a fine, Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Yorke prize essay 1902, Cambridge University Press 1905) 87.

[680] The punishment of the body was effected by amercement, a fine.

[681] What the crown had given, it could take away; charters could be forfeited, commercial advantages abolished, elected mayors and magistrates could be deposed and replaced by Royal lieutenants, Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Yorke prize essay 1902, Cambridge University Press 1905) 87 – 88.

[682] F Pollock (1845 – 1937).

[683] It is submitted that where liability is imposed vicariously, it is on a fiction basis rather than in accordance with the realist theory of organisations. However, such an observation may as much reflect the fact that the master and servant relationship was the precurser to the corporate employer and that as the law of master and servant developed there was no reason to allude to theories of realism which only became relevant where there was collective action.

the wrong is committed in the course of service and for the master's benefit.[684]

Whilst the literature reveals some disagreement about the development of the criminal law in the specific context of the trading corporation,[685] it is generally

[684] *Laugher v Pointer* (1826) 5 B&C 554 cited by Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Yorke prize essay for the year 1902, Cambridge University Press 1905) 97. In support, he quoted Lord Justice Rigby in *Dyer v Munday* (1895) 1 QBD 748 who had said, 'I can find no authority for distinguishing in the application of this rule between tortious and criminal acts of the servant'.

[685] Notwithstanding Carr's encyclopaedic analysis, academic accounts have focused on the attribution of criminal liability to the corporate form exclusively in the context of the commercial trading entity. On this narrow perspective, Brickey asserts that the general view in the early 16th and 17th centuries was that corporations simply could not be held criminally liable, see Kathleen F Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' 60 Wash ULQ 393, 396 giving as an example 1 William Blackstone, Commentaries 476. This seems to have the support of the infamous case of 1701 in which Lord Holt is reported to have said that a 'corporation is not indictable, but the particular members of it are'*, Anonymous Case* (No 935) (1701) 88 Eng Rep 1518, 1518 (KB 1701). It should be noted that the case report comprises just this one sentence and Lord Holt's reasoning cannot be ascertained. Whilst the distinction between civil and criminal law cannot be understood in the same way it is today, it is said that this precedent was still authoritative in the mid-19th century, notwithstanding there were recognised exceptions, see Leigh LH, *The Criminal Liability of Corporations in English Law* 1-12 (LSC Research Monographs, Nowe and Brydone Ltd 1969). Kanna and Coffee, for example, submit that there were a number of obstacles to the courts finding corporate liability in the 1700s which included the thinking that corporations could not be morally blameworthy, See Khanna VS, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109 Harv L Rev 1477 and John Collins Coffee Jr, 'Corporate Criminal Responsibility' in Sanford H Kadish (ed), *Encyclopaedia of Crime and Justice* (Aspen 1983) 253. An additional obstacle was the ultra vires doctrine which meant that the courts would not hold corporations accountable for acts not provided for in their charters, the fictional corporate entity had no mind and no body, and later it was said that, other than charter corporations, they were creatures endowed with the limited powers that were specified by the incorporating statute or the enabling provisions of the Companies Act by the objects set out in the memorandum of association. Powers were never explicitly conferred enabling corporations to commit crimes, therefore, such acts were ultra vires, see LH Leigh, *The Criminal Liability of Corporations in English Law 1-12* (LSC Research Monographs, Nowe and Brydone Ltd 1969) 8-9; John Collins Coffee Jr, 'Corporate Criminal Responsibility' in Sanford H Kadish (ed), *Encyclopaedia of Crime and Justice* (Aspen 1983). Similarly, as a matter of procedure, the accused had to be physically brought before the court, LH Leigh, *The Criminal Liability of Corporations in English Law 1-12* (LSC Research Monographs, Nowe and Brydone Ltd 1969) 9-12; Glanville Williams, *Criminal Law: The General Part* (2nd edn, Stevens & Sons 1961) 855 - 57. Thus, prior to the 19th Century, commercial trading corporations lay outside the scope of the criminal law institution, as it then was, because prisoners were required to stand at the bar in person and they could not be represented by lawyers, JWC Turner, *Kenny's Outlines of Criminal Law* (18th edn, Cambridge Uni Press 1962); *Anonymous Case* (No 935) (1701) 88 ER 1518, note, by Holt CJ. Finally, as corporations could act only through officers and not *in propria persona*, liability had to be vicarious and, according to Leigh, it was a fundamental principle of English common law that a person could not be held vicariously liable for the crimes of another, Leigh LH, *The Criminal Liability of Corporations in English Law* (LSC Research Monographs, Nowe and Brydone Ltd 1969) 3; *R v Huggins* (1730) 2 Ld Raym 1574. That being said, Leigh did recognise exceptions to what he described as the general rule which were developed by analogy with the established master/servant doctrine in the context that a local authority could be held vicariously liable for the strict liability common law offence of public nuisance. Arguably, Leigh is mistaken in this respect given that the corporations themselves were under a duty. Others note the reluctance of the criminal law to adopt the doctrine. It was argued that such a move would be contrary to the criminal law's aim of punishing only the

agreed that proceedings alleging public nuisance were some of the earliest to influence the criminal law's development. Of note, public nuisance was, in substance, a civil matter albeit technically framed as a criminal offence.[686] The offence would be committed when the local authority failed in its duty to maintain roads, bridges and waterways and examples of cases of this nature date back to the 17th and 18th centuries.[687] Although not based on vicarious liability, since the corporation itself was under the duty to perform the act in question,[688] it was in this way that, by the mid-19th Century, the courts began to accept that a trading company could be convicted of a criminal offence.[689] Thus, in *the Birmingham and Gloucester Railway* case of 1842[690] the company was indicted for a 'non-feasance' and in 1846 the *Great North of England Railway Company (1846)*[691] was indicted for a positive act, misfeasance by public nuisance[692]. It was in this case that Denman C.J. famously remarked:

> there can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it – that is, the Corporation, acting by its majority: and there is no principle which places them beyond the reach of the law for such proceedings.[693]

Although the observation was made in the context of a breach of a statutory duty, Carr identified that it had landmark importance in that it had 'fixed the attitude of the

---

morally culpable, where fault rested on vicarious, not personal, guilt. See Sanford H Kadish, 'Developments in the Law – Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions' (1979) 92 Harv L Rev 1227, 1231 - 42 for a discussion of arguments relating to moral blameworthiness and James R Elkins, 'Corporations and the Criminal Law: An Uneasy Alliance' (1976) 65 Ky L J 73, 97; Laski HJ, 'The Basis of Vicarious Liability' (1916) 26 Yale LJ 105, 130-134.

[686] See *R v Stephens* (1866) LR 1 QB 702

[687] For example, *Case of Langforth Bridge* 79 ER 919, (1634) Cro Car 365; *R v Inhabitants of Great Broughton*, 98 ER 418, (1771) 5 Burr 2700.

[688] Elkins JR, 'Corporations and the Criminal Law: An Uneasy Alliance' (1976) 65 Ky LJ 73, 87 - 88; John Collins Coffee Jr, 'Corporate Criminal Responsibility' in Sanford H Kadish (ed), *Encyclopaedia of Crime and Justice* 253, 253 - 4 (Aspen 1983).

[689] *R v Birmingham and Gloucester Rly* Co 114 ER 492, (1842) 3 QB 223; *R v Great North of England Rly Co,* 115 ER 1294, (1846) 9 QB 315.

[690] *R v Birmingham and Gloucester Rly Co* 114 ER 492, (1842) 3 QB 223

[691] *R v Great North of England Rly Co* 115 ER 1294, (1846) 9 QB 315.

[692] See Winn CRN, 'The Criminal Responsibility of Corporations' (1927-1929) 3 CLJ 398, 399 who says that the courts were compelled to recognise a like responsibility for acts done in breach of statutory duty as no satisfactory disctinction could be drawn between an act and an omission.

[693] R v *Great North of England Rly Co* 115 ER 1294, (1846) 9 QB 315, 327.

criminal law towards corporations'.[694] The potential for corporate prosecution had been expressly provided earlier in that statutory reference to a 'person' would include a corporate personality, unless a contrary legislative intention appeared.[695] Thereafter, in 1880 the House of Lords reviewed the scope of the criminal law in relation to corporate entities and, by way of limitation, found that an artificial person still could not commit treason, felony or a misdemeanour involving personal violence.[696] Writing in 1902, 2 decades later, Carr observed that if corporations 'can have a mens rea their criminal liability is almost unbounded'.[697]

However, whilst acceptance of the realist nature of organisations was seemingly not in doubt at the outset of the 20th century, it must be acknowledged that the decided cases point to a corporate liability based on vicarious principles established in the context of master and servant law and agency. It is to be conceded that, whilst at first blush these theories appear to make for incompatible bed-fellows, they are not mutually exclusive. In this respect, it is submitted that the realist notion of groups is not to be doubted, but that the limited factual situations in which the law had been brought into play concerned examples of wrongful conduct readily attributable to identifiable individuals. Accordingly, 'corporate' liability was found on the long-standing principles of vicarious liability and it is simply the case that, during this period, instances of corporate conduct which might transgress the Harding 'tipping point'[698] were yet to have come about.

---

[694] Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Yorke prize essay 1902, Cambridge University Press 1905) 96. In particular, Carr foresaw the possibility of the courts extending a corporation's criminal liability to manslaughter where negligence causes death.

[695] Criminal Law Act 1827, s14. The Interpretation Act of 1889 also reinforced judicial recognition that corporations could be held criminally culpable. Having already noted the distinct categorisation of statutory and common law offences, whether the same attitude also extended to common law offences is not clear.

[696] *Pharmaceutical Society v London & Provincial Supply Association* [1874 – 1880] 5 App Cas 857 (HL).

[697] Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Yorke prize essay 1902, Cambridge University Press 1905) 98 and citing *Stephens v Robert Reid and Co Ltd*, 28 Victorian law reports 82; *Lawler v P and H Egan Limited* (1901) 2 Ir R 589; *R v Panton* 14 Victorian law reports 836. Presumably Carr is here referring to common law offences, since the presumption of mens rea applied only to them.

[698] Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).

Indeed, in 1904, in a case dealing with the common law offence of malicious libel,[699] the Privy Council strongly reaffirmed that principles of agency law applied as equally to corporations as they did to individuals, such that corporate liability would be vicarious:

> If it is once granted that corporations are for civil purposes to be regarded as persons, i.e., as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases, in questions arising out of contract, and in questions arising out of torts and frauds; and to apply them to one class of libels and to deny their application to another class of libels on the ground that malice cannot be imputed to a body corporate appears to their Lordships to be contrary to sound legal principles. To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious.[700]

Furthermore, the 1910 edition of Archbold's practitioner text set out the general principles of corporate criminality as they were then understood.[701] Affirming the limitations identified earlier,[702] it listed the decided instances in which corporations had been indicted, namely non-feasance and misfeasance of public duties and the common law libel offences. However, this exhaustive rehearsal can be read alongside Carr's earlier analysis which indicated that the scope of corporate liability was effectively much broader, based as it was on the general principle of vicarious responsibility. Of note, Carr observed that, 'We have therefore arrived at the valuable idea that, if employers were not liable for the wrong done by their servants

[699] A common law offence, the punishment was set out in Libel Act 1843, s 5 see William Feilden Craies and Henry Delacombe Roome, *Archbold's Criminal Pleading, Evidence & Practice* (24th edn, Sweet & Maxwell 1910) 1236.
[700] *Citizens Life Assurance Company Ltd v Brown* [1904] AC 423 (PC) Aus (Lord Lindley).
[701] William Feilden Craies and Henry Delacombe Roome, *Archbold's Criminal Pleading, Evidence & Practice* (24th edn, Sweet & Maxwell 1910) 7.
[702] An artificial person could not commit treason, felony or a misdemeanour involving personal violence, *Pharmaceutical Society v London & Provincial Supply Association* [1874 – 1880] 5 App Cas 857 (HL).

it would be impossible to bring charges home to a corporation'.[703] It is thus evident that the imposition of corporate liability was not limited by any supervening doctrine, the corporate employer being treated as individual masters and principals alike.

5.3 Viscount Haldane L.C.'s realist philosophy

The snapshot of both the philosophical and legal contexts in which the landmark *Lennard's* judgment was delivered makes it a surprising decision, seemingly going against both the theoretical tide and the court's willingness to inculpate corporations. Arguably, what makes it even more questionable is the fact that it was also decided in the absence of any binding precedent. The fictionist approach to organisations that it is said to herald, therefore emerged in contradiction to both the prevailing theoretical landscape and the black letter law.

Of note, Viscount Haldane L.C., who is reputed with first articulating the 'directing mind fiction theory, was also something of a philosopher himself.[704] Profoundly influenced by the German thinkers, it is a matter of some irony that he himself held strong 'realist' beliefs.[705] Although he was called to the bar in 1879,[706] Haldane nonetheless maintained his philosophical interest and in 1883 he published *Essays in Philosophical Criticism* in addition to his translation of Schopenhauer's *The World as Will and Idea*. Other philosophical works Haldane produced include *Pathway to Reality* (1903), *Reign of Relativity* (1921), *The Philosophy of Humanism* (1922) and *Selected Addresses and Essays* (1928).[707] Illustrative of the influence of the

[703] Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Yorke prize essay 1902, Cambridge University Press 1905) 104.

[704] As a teenager, Haldane had lost the faith shared by his deeply religious parents and had become interested in a mixture of philosophy, theology, natural science and the idealism of TH Green and Georg Hegel, see John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Osgoode Society for Canadian Legal History, University of Toronto Press 2002). However, notwithstanding his publishing success, the New Statesman remarked that he was "a Hegelian who never understood Hegel, 'The Haldane Paradox', The New Statesman, 25 August 1928, 30. At 18 years of age he spent 6 months studying philosophy and geology in Gottingen, Germany and later won prizes and scholarships in philosophy at Edinburgh University.

[705] Richard Burdon Haldane, *An Autobiography* (Hodder and Stoughton 1929).

[706] Law and philosophy merged in his interest in jurisprudential cases and by 1882, he was appearing before the judicial committee of the Privy Council and before the House of Lords.

[707] David Kahan's introduction to Richard Burdon Haldane's 1902-1904 Gifford Lectures: The Pathway to Reality at

German realist theories of organisations, in book 1, lecture 2 of the Gifford series, for example, Viscount Haldane L. C. observed:

> In life we have in the organism this remarkable feature, that the life of the whole is present in each of the parts (...) But this whole of life does not in its work resemble a cause operating, *ab extra*, upon the organism, but is more like, more really analogous to, the purpose which the soldiers in an army or the citizens in a State are moved by when they act together. The cells of the body, the cells which make up the totality of the organism, act together purposively, or quasi-purposively, which is a better expression—and I refer to them in order to illustrate to you how really the analogy of the actual purpose of living beings, acting together in a regiment or in a State, is a better analogy to the life of the organism than is the analogy of a machine'.[708]

In his second book, Viscount Haldane L.C. again referred to the notion of a collective purpose or intention:

> The great result which modern Biology has achieved, lies in the demonstration that the living organism is an aggregate of the living units which are often called cells. But the aggregate is no mechanical aggregate. The cells are less like marbles in a heap than like free citizens living in a state. They act for the fulfilment of a common end, which continues so long as the life of the organism continues, and the fulfilment of which appears to be just that life.[709]

<http://www.giffordlectures.org/Browse.asp?PubID=TPTPTR&Volume=O&Issue=O&ArticleID=6> accessed 15 May 2014.

[708] Viscount Richard Burdon Haldane, *The Pathway to Reality: Being the Gifford Lectures delivered in the University of St Andrews in the Session 1902 -1904* (Ulan Press 2012) bk 1, lec 2.

[709] Viscount Richard Burdon Haldane, *The Pathway to Reality: Being the Gifford Lectures delivered in the University of St Andrews in the Session 1902 -1904* (Ulan Press 2012) bk 2, lec 3.

5.4 Summary

The ascription of vicarious liability[710] may not necessarily be compatible with realist theory but neither is it fatal to it. The fact that the liability incurred in the early cases was vicarious in nature does not weaken the realist theory. That an organisation has the potential to act autonomously does not lead to the conclusion that it can never be held responsible for the acts of its members when they are acting on behalf of the organisation. Rather, the issue goes to Professor Harding's tipping point in the spectrum of behaviour and the location of the emergence of the distinct corporate personality.[711] Whilst the contemporary theorists recognised the realist potential of organisations, the particular facts of the reported cases happened to engage rules of vicarious attribution, concerning, as they did, the relationship of the criminal conduct of individual employees with that of the employer. The nature of the corporation and the mode by which it may attract criminal fault are thus separate issues. Accordingly, this research recognises both the realist nature of the collective group,

[710] Indeed, the basis of vicarious liability itself remains contraversial and there is still disagreement as to whether it means that the master is responsible for the servant or whether the servant's acts are those of the master himself, Celia Wells, *Corporations and Criminal Responsibility* (2nd ed, OUP 2001) referring to Glanville Williams, 'Vicarious Liability: Tort of the Master or of the Servant?' (1956) LQR 72:522; Brent Fisse, 'The Distinction Between Primary and Vicarious Corporate Criminal Liability', (1967) ALJ 41,203. Ormorod suggests if the physical act of the employee is construed in law to be the act of the employer, in legal theory it is not really a case of vicarious liability at all, David Ormorod's, *Smith and Hogan's Criminal Law: Cases and Materials* (10th ed, OUP 2009). By way of illustration he says that in an offence of selling such as selling goods with a false trade description, in law the sale is the transfer of ownership of goods from A to B so although the goods are sold by the shop assistant, the seller is the owner of the goods ie the employer. In law too the employer is the possessor of goods and there are numerous offences of possessing various articles and an employer has been held to keep and to use a vehicle when it is in the keeping or use by his employee in circumstances which the law forbids. Whether the particular verb includes the inactive employer is a question of statutory interpretation but it should be noted that the law often has it both ways so the statute can be construed that the shop assistant has also sold the goods belonging to her employer and be guilty like the principle of the same offence. In the case of selling intoxicating liquor the owner of the liquor, the licensee and the barmaid may be all guilty as principals of the same offence as each has in law sold, *Allied Domecq Leisure Ltd v Cooper* [1999] Crim L R 230 and *Nottingham City Council v Wolverhampton & Dudley Breweries* [2004] 2 WLR 820. Alternatively, vicarious liability is said to be established by the identification of the conduct of the agent which is then ascribed to the employer, based on the legal relationship existing between them. On this view, vicarious liability is conceived as a structure of legal fiction which states that whatever a person does through an agent, he is deemed to have done himself and the knowledge of the agent is the knowledge of the employer, see Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and the Search for Self-Identity' [2001] Buff Crim LR 642. Blackstone explained the principle in terms of the fiction of an implied command, Blackstone, Commentaries 1, 417.

[711] Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).

the potential for it to incur liability vicariously and, in addition, the potential for an organisation to incur direct liability, for example when the criminal conduct is considered so pervasive and systemic that it is integral to the corporate behaviour.

At the dawn of the 20th century there was strong philosophical support for the realist view of collective groups with the notion that individuals coming together could lead to the emergence of an entity or consciousness that was more than the sum of its parts. That this was the case was seemingly accepted with little demur. For their part, the courts were as ready to attribute criminal liability to corporations as they were to human employers and principals, using the well established common law doctrines of master and servant and agency law. Viscount Haldane L.C. was no stranger to either the realist philosophy or the courts approach to corporations but is nonetheless taken to have established the fiction theory in the *Lennard's* judgment of 1915.[712] Since it marked a considerable departure from the prevailing orthodoxy, the following chapter seeks to explain the criminal law's adoption of the fiction theory, via the mechanism of the identification principle, with a black letter law analysis of this particular legal development.

[712] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).

6. The common law development of the identification principle

The decision emanating from the House of Lords in *Lennard's*[713] was a surprising one given the prevailing realist ideology, to which Viscount Haldane L. C. was no stranger, and the absence of any binding precedent. The identification doctrine associated with this judgment was described in a recent report by the Law Commission as one that 'treats the acts and states of mind of those individuals who are the directing mind and will of the corporation as the acts or state of mind of the corporation itself'.[714] Accordingly, the imposition of corporate liability requires a 'two step analysis [that] first identifies the perpetrator of the crime, and then asks whether he or she is a person who can be said to embody the company's mind and will'.[715] Thus, it has been suggested that the common law developed two main techniques for the attribution of criminal fault, first by vicarious liability arising from the employment or agency relationship and, subsequently, via the identification doctrine.[716] However, considered in the light of the findings in chapter 5, it is more accurate to say that the common law first developed one mechanism for the attribution of criminal fault and, thereafter, another by which to limit the operation of the first. Put another way, the identification principle constituted a refinement that serves to limit the broad application of vicarious liability.

In contrast to typical accounts of this area of law,[717] this chapter will demonstrate *Lennard's*[718] was not taken to decide anything remarkable at the time or to develop the law in relation to any general principle of liability, either in the civil or criminal law jurisdiction. Indeed, a wider examination reveals that the retrospective interpretation of *Lennard's*[719] places it in stark contrast to the prevailing criminal law which continued to apply the traditional principles of vicarious liability. That this is the case is demonstrated by reference to the leading substantive and practitioner texts of the period, taken together with a string of well-known authoritative cases that

[713] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[714] Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) pt 5, para 5.9.
[715] James Gobert, 'Corporate Criminality: four models of fault' (1994) 14(3) LS 393, 395.
[716] Described as the concept of corporate alter ego, see Sullivan GT, 'The Attribution of Culpability to Limited Companies' (1996) 55(3) CLJ 515,515.
[717] David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) 260.
[718] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[719] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).

were heard after *Lennard's*.[720] The analysis reveals that the landmark status now afforded to *Lennard's*[721] was due entirely to its subsequent elevation in *Tesco v Nattrass* over 5 decades later in 1972.[722]

6.1 Lennard's [1915]: in light of the evidential presumptions

Ironically, if *Lennard's*[723] had established this general principle of corporate fault attribution in 1915, the implications would have been of far less significance than they became over half a century later. In particular, the 2 evidential presumptions of fault were fully operational in the criminal law during this period. Accordingly, the primary focus of enquiry would have been the manifest appearance of fault, the presumption of intention of natural consequences applying as much to the corporate actor as to the human individual.[724] However, by the time of the *Tesco* prosecution in 1971[725], the enlarged mens rea doctrine had done much to displace the traditional canons of fault together with the evidential presumptions that accompanied them. Specifically, it will be recalled that *Sweet v Parsley*,[726] decided in 1969, 2 years before *Tesco*,[727] had already effected something of sea-change as regards the presumption of voluntariness,[728] whilst the presumption of intention had been causing considerable concern for the best part of the decade.[729] Thus, with the upgrading of the doctrine of mens rea and the displacement of the evidential fault presumptions, a combination of factors was to influence the development of the principles of corporate fault attribution. The increasing reluctance to convict in the absence of proof of a blameworthy state of mind was certainly evidenced by the judicial approach to the so-called 'strict liability' offences at the time of the *Tesco* decision[730] and it is plausible that the doctrine of vicarious liability suffered for much the same reason. Similarly, in the absence of the evidential presumption of intention,

[720] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[721] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[722] *Tesco Ltd v Nattrass* [1972] AC 153 (HL).
[723] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[724] *National Coal Board v Gamble* [1958] 1 QB 11.
[725] *Tesco Ltd v Nattrass* [1972] AC 153 (HL).
[726] *Sweet v Parsley* [1970] AC 132 (HL).
[727] *Tesco Ltd v Nattrass* [1972] AC 153 (HL).
[728] *Sweet v Parsley* [1970] AC 132 (HL).
[729] See the discussion above in chapter 3.
[730] *Tesco Ltd v Nattrass* [1972] AC 153 (HL).

the means by which a guilty corporate mind might be proved would now have been becoming problematic. It is submitted that in both these respects the recognition of the 'identification principle' provided a ready solution. Not only did the notion of the 'directing mind and will' resonate with the modern primacy of the metaphysical enquiry, its attribution to an earlier authority accorded with the orthodoxy of the black letter law methodology.

6.2 From *Lennards* to *Tesco*: the black letter law

In *Lennard's* the House of Lords was called to consider whether a corporate ship-owner could be liable for loss of the cargo due to the unseaworthy state of one of its ships.[731] Under the relevant merchant shipping provisions, the ship-owner could be liable if it could be shown that he, in this case the company, was at 'actual fault'.[732] The case turned on the meaning of 'actual fault' as it applied to a company and their Lordships felt that, properly interpreted, the term precluded the application of vicarious liability on the part of the employer for the negligent acts of his servant. Echoing the expression of Coke in the *Sutton's Hospital Case*,[733] which was influenced by the ecclesiastical notion that a corporation was incapable of sin,[734] the doctrine was first articulated by Viscount Haldane in broad terms:

> A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the Corporation.[735]

Lord Dunedin gave the only other speech in Lennard's and he did not comment on the 'directing mind' test at all, although he did refer to the 'alter ego' of the company and the fact that the board of directors had entrusted its business to the managing

[731] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[732] Merchant Shipping Act 1894, s 502.
[733] *Sutton's Hospital Case* (1612) [1558 – 1774] All ER Rep 11, 15 Co Rep 32b.
[734] Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Cambridge University Press 1905) referring to Dr Otto von Gierke, *Deutsche Genossenschaftsrecht III*, 279.
[735] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705, 713.

director, who had been at actual fault. Of note, *Ingram & Royle* was cited[736], this case predating *Lennard's*[737] by just 2 years and in which Scrutton J. had stated that in relation to the same provision, 'The only exceptions to the protection given by the statute are (a) if the fire happened with the actual fault or privity of the owner, which, in the case of a limited company, means the person having management; i.e. Mr Lindley (...) ',[738] the director in the instant case. Unlike Viscount Haldane L.C.'s dicta, there was no elaboration or metaphysical subtlety added. Indeed, Scrutton J.'s comment was obiter and did not go as far as to provide any reasoning or any authority for the proposition he made, it was simply taken as read.

The facts of *Lennard's* were that faulty ship boilers had caused the fire which destroyed the claimant's cargo. The managing ship-owner sought to rely on the said statutory provision since its purpose was to protect ship-owners from the acts of their servants and to limit liability for loss and damage. In determining the construction of the particular section, it was held that the owner himself needed to prove that he was not at actual fault. Applied to the corporate owner, it was said that this necessitated the person acting as the alter ego of the company showing that he was not personally at fault. Since the board of directors had placed responsibility for the management of the ship in the managing director, it was therefore the managing director who needed to show that he, acting for the company, was not at fault. In the circumstances, he, as the alter ego, had not done so and accordingly the company was liable for the loss of the cargo.

As regards any theoretical discussion about the liability of organisations, the *Lennard's* judgment was sadly wanting.[739] The authorities referred to were few in number and all concerned civil matters, none of which were exactly on point.[740] Similarly, neither Viscount Haldane L.C. nor Lord Dunedin purported to set out any general principle of corporate criminal liability in what was essentially a consideration of the issue of causation and the interpretation of one particular

[736] *Ingram & Royle Ltd v Services Martimes du Treport Ltd (No 1)* [1913] 1 KB 538.
[737] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[738] *Ingram & Royle Ltd v Services Maritimes du Treport Ltd (No 1)* [1913] 1 KB 538, 544.
[739] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[740] Cases referred to are *Wilson v Dickson* (1818) 2 B & Ald 2 which considered the position of individual part owners; *The Warkworth* (1884) LR 9 PD 20; *Norfolk & North America Steam Shipping Co Ltd v Virginia Carolina Chemical Co* [1912] 1 KB 229 (CA); *Ingram & Royle Ltd v Services Martimes du Treport Ltd (No 1)* [1913] 1 KB 538.

statutory provision. This is unsurprising in that the criminal liability of corporations was still evolving by analogy with the law of master and servant and that of principal and agent. For example, the 1910 edition of Archbold's Criminal Pleading quoted s. 2(1) Interpretation Act 1889, 'in the construction of every enactment (...) the expression "person" shall, unless a contrary intention appears, include a body corporate'; a contrary intention being inferred in cases of treason, felony, personal violence and where the penalty is imprisonment or corporal punishment.[741] The text then set out various authoritative examples of corporate liability. These included *Whitfield v South East Railway Co (1858)*,[742] a case concerning an allegation of malicious libel, in which Lord Campbell C.J. had held that since actions in tort or trespass could lie against a corporation, there must be circumstances in which express malice could also be imputed to a corporation.[743] Similarly, in *Mackay v The Commercial Bank of New Brunswick [1874]*[744] the Privy Council had decided that an incorporated bank could be liable in deceit for the false statements of its cashier, who was acting as a general manager of the bank. It did not doubt that a corporation could be liable for the fraudulent actions of an agent done in the course of his service. The Privy Council expressly approved the statement of Lord Cranworth in *Ranger v Great Western Railway [1854]*[745] in which his Lordship had applied simple agency principles where the employer was a corporation rather than an individual.

Two years after *Lennard's*,[746] the case of *Mousell Brothers [1917]*[747] decided that a railway company was criminally liable for the acts of its branch manager who had issued false consignment notes to avoid railway tolls. The decision was said to be based on the Parliamentary intention to make masters criminally liable for the acts of their servants, akin to the social welfare legislation relating to the sale of goods and drugs, where, as a matter of construction, statutes imposed an absolute liability on

[741] William Feiden Craies and Henry Delacombe Roome, *Archbold's Criminal Pleading, Evidence and Practice* (24th edn, Sweet & Maxwell 1910) 7, 8.
[742] *Whitfield v South East Rly Company* (1858) E, B & E 115; 120 ER 451.
[743] Express malice was distinguished from malice in law.
[744] *Mackay v The Commercial Bank of New Brunswick* [1874] LT vol 30, NS 180.
[745] *Ranger v Great Western Rly* [1854] 5 HLC 71.
[746] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[747] *Mousell Bros Ltd v London & North Western Rly Co* [1917] 2 KB 836.

the employer.[748] Giving judgment in *Mousell Bros*, Viscount Reading said:

> I think, looking at the language and the purpose of this Act, that the Legislature intended to fix responsibility for this quasi-criminal act upon the principal if the forbidden acts were done by his servant within the scope of his employment. If that is the true view, there is nothing to distinguish a limited company from any other principal, and the Defendants are properly made liable for the acts of [the manager].[749]

Considering the corpus of reported judgments of the time, there is nothing to suggest that the courts were seeking to construct some general principle of corporate liability.[750] Similarly, whilst it has been suggested elsewhere that the 'directing mind' theory resurfaced in the civil law in the early 1930s,[751] the 1938 edition of Archbold's[752] was drafted in the same terms as the 1910 version, notably absent of any reference to *Lennard's*[753] or indeed to any such theory. In contrast, it set out the provisions of the Criminal Justice Act 1925 which deal with procedural matters in instances where a corporation is charged 'alone or with some other person, with an indictable offence'.[754] It was not until the Second World War that cases dealing with the question of the basis of criminal responsibility of companies came to the fore

[748] See for example the discussion contained in the Law Commission, *Criminal Liability in Regulatory Contexts (*Law Com No 195, 2010) pt 5, para 5.4 and citing *Mousell Bros Ltd v London & North Western Rly Co* [1917] 2 KB 836, 845 (Atkin J).

[749] *Mousell Bros Ltd v London & North Western Rly Co* [1917] 2 KB 836, 845.

[750] According to Glanville Williams*, Criminal Law: The General Part* (2nd edn, Stevens & Sons 1961) 274, Mousell was the solitary exception to the principle that attributed acts do not apply to offences requiring mens rea. Ormerod, however, says that the best explanation is that the decision belongs to an intermediate stage in the development of corporate criminal responsibility, David Ormorod, *Smith and Hogan's Criminal Law, Cases and Materials* (10th edn, OUP 2009). Later Williams observed that the speech of Lord Evershed in *Vane v Yiannopolous* [1965] AC 486 (HL) suggested that *Mousell Bros Ltd v London & North Western Rly Co* [1917] 2 KB 836 was to be restrictively interpreted and it was no authority for saying that every employer is vicariously liable for his employee's offences involving mens rea, rather Mousell was an obscure decision and not clear authority for anything, Glanville Williams, *Text Book of Criminal Law* (2nd edn, Stevens & Sons 1961).

[751] See RJ Wickins and CA Ong, 'Confusion worse confounded: the end of the directing mind theory?' [1997] JBL Nov, 524 - 56; Ong points to several cases dealing with the liability of companies in negligence where employees had suffered injuries within a factory workplace but regrettably the author does not identify them by name. It should be noted in any event that negligence is not based on subjective mental states but objective assessment.

[752] Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading: Evidence and Practice* (30th edn, Sweet & Maxwell 1938) 10.

[753] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).

[754] Robert Ernest Ross and Maxwell Turner, *Archbold's Criminal Pleading: Evidence and Practice* (30th edn, Sweet & Maxwell 1938) 97.

again. These included *Triplex Safety Glass*,[755] *ICR Haulage*,[756] *Kent and Sussex Contractors*[757] and *Moore v Bresler*.[758] Of note, none of these cases made any reference to *Lennard's [1915]*[759] and continued to employ traditional agency principles.

In *Triplex Safety Glass [1939]*,[760] the Court of Appeal applied agency reasoning in relation to criminal libel and in *Moore v Bresler Ltd*[761] it was held that the corporate employer could be criminally liable if its employees performed an authorised job in an unauthorised, fraudulent way. That same year, in *Kent & Sussex Contractors*,[762] the company was prosecuted for issuing a record, knowing it to be false in a material particular.[763] The facts were that the transport manager had submitted the record in order to obtain petrol coupons with intent to deceive. At first instance it was held that the knowledge of the manager could not be imputed to the company but this was reversed on appeal to the Divisional Court. Notably, Viscount Caldecote C.J. rehearsed the judgment of Lord Cranworth in *Ranger v Great Western Railway Company [1854]*, which stated:

> Strictly speaking a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trade or other speculation not-for-profit, such as forming the railway, these objects can only be accomplished by the agency of individuals; there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail whether the principal under whom the agent acts is a corporation.[764]

---

[755] *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395 (CA).
[756] *R v ICR Haulage Ltd* [1944] KB 551.
[757] *DPP v Kent & Sussex Contractors* [1944] KB 146.
[758] *Moore v Bresler Ltd* [1944] 2 All ER 515.
[759] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[760] *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395 (CA).
[761] *Moore v Bresler Ltd* [1944] 2 All ER 515.
[762] *DPP v Kent & Sussex Contractors* [1944] KB 146.
[763] Informations were preferred against the respondent company under regulations 82(1)(c) and 82(2) of the Defence (General) Regulations 1939, charging them that for the purposes of the Motor Fuel (No 3) Rationing Order, 1941, that it with intent to deceive, made use of a document which was false in a material particular which was signed by the transport manager of the company.
[764] *Ranger v Great Western Rly* (1854) 10 ER 824 [86].

He noted that it was well settled that a corporation could be liable in actions such as fraud, libel or malicious prosecution and he also considered *Pearks, Gunston and Tee Limited v Ward*[765] and Channel J.'s recognition of quasi-criminal offences which imposed absolute liability. With regard to the present case, Viscount Caldecote C.J. stated that where:

> the company was charged with doing something with intent to deceive, [and] the second charge was of making a statement which the company knew to be false in a material particular (…) (t)he question of mens rea seems to be quite irrelevant (…). There was ample evidence, on the facts as stated in the special case, that the company, by the only people who could act or speak or think for it had done both these things, and I can see nothing in any of the authorities which requires us to say that a company is incapable of being found guilty of the offences with which the company was charged.[766]

Also giving judgment framed in agency terms, Macnaghten J. agreed that a corporation could only have knowledge and form an intention through its human agents but added that circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate.[767] In the same case, Hallett J. referred to the Interpretation Act 1889 and the Criminal Justice Act 1925 noting that, 'There has been a development in the attitude of the Court arising from the large part played in modern times by limited liability companies (...) the theoretical difficulty of imputing criminal intention is no longer felt to the same extent'.[768] Hallett J. also commented that:

> if every person desiring to obtain petrol coupons has a duty imposed by statutory authority to furnish honest information, it seems strange and undesirable that a body corporate desiring to obtain petrol coupons and furnishing dishonest information for that purpose should be able to escape the

[765] *Pearks, Gunston & Tee Ltd v Ward* [1902] 2 KB 1 concerned section 6 of the Food and Drugs Act 1875, providing that 'no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser'. Section 3 provides that, 'no person shall mix, colour, stain, or powder…'
[766] *DPP v Kent & Sussex Contractors* [1944] KB 146, 155 - 56.
[767] *DPP v Kent & Sussex Contractors* [1944] KB 146, 156.
[768] *DPP v Kent & Sussex Contractors* [1944] KB 146, 157.

liability which would be incurred in like case by private person.[769]

As regards criminal intent, he quoted from Atkin J.'s judgment in Mousell, 'I see no difficulty in the fact that an intent to avoid payment is necessary to constitute the offence. That is an intent which the servant might well have, inasmuch as he is the person who has to deal with the particular matter'.[770] Hallett J. also referred to *Triplex Safety Glass* in which du Parcq L.J. had taken the view that a body corporate may by its servants or agents be guilty of malice so as to render it liable to conviction for criminal libel.[771]

The subsequent Court of Appeal case, *ICR Haulage [1944]*,[772] involved a charge of common law conspiracy to defraud against the company, its managing director and other employees. Approving the earlier authorities, the company itself was included on the indictment. The Court of Appeal made use of the statement of Macnaghten J. in *DPP v Kent and Sussex Contractors Ltd [1944]* to the effect that the criminal intention of an agent, acting within the scope of his authority, could be imputed to the company.[773] In that same year *Moore v Bresler Ltd*[774] concerned the conviction of the company secretary and sales manager for making use of a document which was false in a material particular with intent to deceive.[775] The Divisional Court found the company itself criminally liable, notwithstanding the company had been the victim of the fraud and the individuals concerned had not been acting in the company's interests.

Whilst the early cases appear to be context- sensitive[776] they do not purport to establish a general principle of corporate criminal liability, indeed *in ICR Haulage [1944]*, Mr Justice Stable was explicit on that point.[777] Furthermore, according with

[769] *DPP v Kent & Sussex Contractors* [1944] KB 146, 158.
[770] *Mousell Brothers Ltd v London & North Western Rly Co* [1917] 2 KB 836, 846.
[771] *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395 (CA).
[772] *R v ICR Haulage Ltd* [1944] KB 551 (CCA).
[773] *DPP v Kent & Sussex Contractors* [1944] KB 146.
[774] *Moore v Bresler Ltd* [1944] 2 All ER 515.
[775] Contrary to Finance (No 2) Act 1940, s 35(2).
[776] See the rehearsal given and comments provided in the Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) pt 5.
[777] *R v ICR Haulage Ltd* [1944] KB 551, 599.

the agency analysis of liability at this time, the 1949 edition of Archbold's[778] made no mention of either *Lennard's*[779] and it was still absent from the 1958 and 1966 editions of Kenny's Outlines.[780] However, it was during this period that Lord Goddard C.J., in *Gardner v Akeroyd [1952]*, suggested that founding the criminal liability of employers on the basis of vicarious liability might be 'odious' and lead to potentially unjust results.[781] Of note, it was in the same year that the next reported reference to the 'directing mind and will' was made, and, like its predecessor *Lennard's*, the case was a civil matter.[782] It was not until 1957 that there was a veritable sea change. Brought about in the civil law case of *Bolton (Engineering) Co Ltd*,[783] Denning L.J. claimed that the earlier cases had created a unifying theory which set out an overarching principle for both the civil and the criminal liability of companies. He said, 'So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty. This is shown by *R v ICR Haulage Ltd*'.[784]

Of course, Denning L.J.'s comment on criminal liability was strictly obiter, *Bolton Engineering* itself concerning with a civil matter of landlord and tenant law.[785] *ICR Haulage*[786] had contained no mention of the directing mind theory either explicitly or implicitly and as for *Lennard's*, Denning L.J. observed simply that, 'in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company'.[787] However, it was in *Bolton Engineering* that Denning L.J. breathed life into the now infamous anthropomorphic

[778] TR Fitzwalter Butler and Marston Garsia, *Archbold's Pleading, Evidence and Practice in Criminal Cases* (Sweet & Maxwell 1949).
[779] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[780] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (17th edn, Cambridge University Press 1958); JW Cecil Turner, *Kenny's Outlines of Criminal Law* (19th edn, Cambridge University Press 1966).
[781] *Gardner v Akeroyd* [1952] 2 QB 743, 751 (Lord Goddard CJ). Considering whether an employer could be vicariously liable for the criminal attempt of an employee it was said, 'that it is a necessary doctrine for the proper enforcement of much modern legislation none would deny, but it is not one to be extended. Just as in former days the term "odious" was applied to some forms of estoppel, so might it be to vicarious liability'.
[782] *Admiralty v Owners of the Divina, The Truculent* [1952] P 1. Like Lennard's case, it concerned a defence afforded to an owner under shipping law.
[783] *HL Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 (CA).
[784] *HL Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 (CA) 172.
[785] *HL Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 (CA).
[786] *R v ICR Haulage Co Ltd* [1944] 1 KB 551.
[787] *HL Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 (CA) 172.

account that has become the touchstone of the doctrine:[788]

> A company in many ways may be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.[789]

Leaving aside the fact that this was a fundamentally problematic analysis for the criminal law, since the actus reus and mens rea seemed to reside in different individuals, the statement must be considered by reference to the principles of criminality as they existed at that time. Thus, as regards the reference to a state of mind, it must be remembered that in the 1950's the presumption of voluntariness and the presumption of intention were still in full sway. Whatever Denning L.J. said, the practice at that time was to assess fault primarily by reference to the overt conduct and its outcome. Accordingly, the full implication of Denning L.J.'s creative analysis of corporate liability would not be felt until much later with the displacement of the evidential presumptions in favour of the expanded notion of mens rea. It must also be noted that Denning L.J.'s innovative interpretation in *Bolton Engineering*[790] did not assert anything like a firm influence on the criminal law until much later, with opinion divided as to any certain development of the legal principle. For example, the 1961 edition of Williams' seminal Criminal Law text mentioned a 'new concept' in the law of tort where the 'acts of the "organs" of the corporation (...) were attributed to the corporation and treated (...) as though they were the acts of the corporation itself'.[791] In support of this tortious liability

[788] In other contexts, the anthropomorphic analogy was already familiar, eg Cecil Thomas Carr, *The General Principles of the Law of Corporations* (Yorke prize essay for the year 1902, Cambridge University Press 1905).
[789] *HL Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 (CA) 172.
[790] *HL Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 (CA).
[791] Glanville Williams, *Criminal Law, The General Part* (2nd edn, Stevens & Sons 1961) 855.

Williams quoted at length the dicta of Viscount Haldane L.C. in *Lennards*,[792] identified that the term 'organs' derived from the 1916 *Daimler v Contintental Tyre* case[793] and observed that the alter ego doctrine enabled the state of mind of the organ to be regarded as the company's own. As to the imputation of mens rea under this principle, Williams cited *ICR Haulage Ltd [1944]* in support.[794] That being said, the 1966 edition of Kenny's Outlines of Criminal Law was a little more reticent about recognising a new principle, stating that, 'the courts have moved in the direction of making the corporation directly responsible, by the fiction that the elements of criminal liability present in the responsible agent of the corporation can be imputed to the corporation itself'[795] and concluding that the 'formulation of clear principles of criminal liability for corporations is urgently needed'.[796] Given that Stable J. in *ICR Haulage* had articulated the judgment of the court in the language of the law of agency, there is arguably some weight to be afforded to Kenny's reservations.[797] Furthermore, whilst Glanville Williams explicitly linked the tortious development in *Lennard's*[798] to the development of the criminal law of corporations[799], not one of the cases he discussed in support had made any reference to *Lennard's*.[800]

The conclusion must be that at the time of the *Tesco v Natrass* prosecution in 1971,[801] *Lennard's*[802] had resurfaced after 5 decades to provide the authority for the

[792] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[793] *Daimler Co Ltd v Continental Tyre Co Ltd* [1916] 2 AC 307 (HL), 340.
[794] *R v ICR Haulage Co Ltd* [1944] 1 KB 551 (CCA) in Glanville Williams, *Criminal Law, The General Part* (2nd edn, Stevens & Sons 1961) 856. Williams also referred to *Law Society v United Service Bureau Ltd* [1934] 1 KB 343, 348 but was critical of the inelegant language, 857.
[795] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (19th edn, Cambridge University Press 1966) 77-8 and citing R Burrows, 'The Responsibility of Corporations Under Criminal Law' (1948) Journal of Crim Sci 1, 1ff.
[796] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (19th edn, Cambridge University Press 1966) 77-8.
[797] *R v ICR Haulage Co Ltd* [1944] 1 KB 551 (CCA) 695 (J Stable) approving the judgment of MacNaghten J in *DPP v Kent & Sussex Contractors Ltd* [1944] 1 KB 146, 156, 'It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate..If the responsible agent of a company, acting within the scope of his authority, puts forward ... his knowledge and intention must be imputed to the company'.
[798] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[799] Glanville Williams, *Criminal Law, The General Part* (2nd edn, Stevens & Sons 1961) 857 - 58.
[800] The cases he discusses are *R v ICR Haulage Co Ltd* [1944] 1 KB 551 (CCA); *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146, 155; *Moore v Bresler Ltd* [1944] 2 All ER 515.
[801] *Tesco Ltd v Nattrass* [1972] AC 153 (HL).
[802] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).

identification principle in tort law and the agency case of *ICR Haulage*.[803] Indeed, in its 1985 report, the Law Commission confessed to having been taken aback by the range of situations in which there was (to their knowledge) no direct authority prior to *Tesco v Nattrass*.[804]

As to the landmark case of *Tesco Supermarkets Ltd v Nattrass [1971],*[805] the company was prosecuted under section 11(2) Trade Descriptions Act 1968 for selling goods at a price higher than that advertised.[806] The supermarket sought to rely on the defence set out at s. 24(1), namely that the offence was committed by another, the store manager, and that the company had taken all reasonable precautions and exercised all due diligence to avoid it's commission.[807] In seeking to blame the store manager, Tesco argued that he was another person within the meaning of that provision and could not be viewed as the embodiment of the company itself. With the court finding in favour of the company, it has been suggested that the case emerged in an atmosphere of liberal reform. Lord Reid was certainly highly critical of the creation of absolute offences and the fact that individuals could be convicted of offences for which they were entirely blameless;[808] an injustice, he said, which brought the law into disrepute. It was, of course, Lord Reid who, just 2 years earlier, had been instrumental in the *Sweet v Parsley* ruling which had expanded the very concept of mens rea.[809]

Of note, Lord Reid relied particularly upon the dictum of Viscount Haldane L.C. in *Lennard's [1915]*[810] and then on that of Denning L.J. in *Bolton Engineering*

[803] *R v ICR Haulage Ltd* [1944] KB 551 (CCA).
[804] Law Commission, *The Codification of the Criminal Law* (Law Com No 143, 1985) ch 11, para 11.2 discussing *Tesco Ltd v Nattrass* [1972] AC 153 (HL).
[805] *Tesco Supermarkets Ltd v Nattrass* [1966] 1 QB 153 (HL).
[806] Trade Descriptions Act 1968, s 11(2) sets out 'if any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than at which they are in fact being offered he shall, subject to the provisions of this act, be guilty of an offence'.
[807] S 24 (1) sets out that, subject to subsection (2), it is a defence for the person charged to prove that (a) the commission of the offence was due to a mistake or to the reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.
[808] Sweet v Parsley [1970] AC 132 (HL), 148 (L Reid).
[809] Sweet v Parsley [1970] AC 132 (HL), 148 (L Reid).
[810] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).

[1957].[811] In addition, he cited the 1950 case of *Dumfries and Maxwelltown Co-operative Society v Williamson*[812] which had concerned the similar provisions of the Sale of Food (Weights and Measures) Act.[813] Agreeing with Lord Justice-General Cooper's interpretation, he held that vicarious liability should not be imposed for an infringement committed without the consent or connivance of the employer. Having relied upon the 2 civil cases, *Lennards*[814] and *Bolton*,[815] and then *Dumfries*,[816] which had considered the issue of vicarious liability, Lord Reid then considered criminal cases which he classified as examples of companies being held liable for the fault of 'a superior officer', referring to *DPP v Kent*[817] and *R v ICR Haulage*.[818] Arguably, the reference to the officers being 'superior' was superfluous since both cases had been decided by reference to simple agency theory in which the superiority of the officer involved was of no legal relevance. However, omitting explicit reference to the law of agency, Lord Reid then quoted a passage from the latter case, stating that:

> where in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company [it] (…) must depend on the nature of the charge, the relative position of the officer or agent, and other relevant facts and circumstances of the case.[819]

As far as this quote is concerned, it is contained in the final paragraph of Stable J.'s judgment in *ICR* in which he appeared to be talking generally about the need to consider a principal's liability for the acts of his agent on a case-by-case basis.[820] However, Lord Reid used the quote to support the recognition of the 'directing mind

[811] *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 (CA), 172.
[812] *Dumfries and Maxwelltown Co-operative Society v Williamson* [1950] SC (J) 76, 80.
[813] Sale of Food (Weights and Measures) Act 1926, s 12(5). An employer or principal charged with an offence against the Act may lay information against any other person whom he charges as the actual offender, and may have such person brought before the Court, and, if he proves that he used due diligence to enforce the execution of the Act and that the other person committed the offence without his consent or connivance, the other person shall be summarily convicted and the employer or principal shall be exempt from any penalty.
[814] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[815] *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 (CA) 172.
[816] *Dumfries and Maxwelltown Co-operative Society v Williamson* [1950] SC (J) 76.
[817] *DPP v Kent & Sussex Contractors* [1944] KB 146.
[818] *R v ICR Haulage Ltd* [1944] KB 551 (CCA).
[819] *R v ICR Haulage Ltd* [1944] KB 551 (CCA) 559.
[820] *R v ICR Haulage Ltd* [1944] KB 551 (CCA).

and will theory' which was said to require the culpability of a sufficiently senior officer. Lord Reid went on to cite a further two cases in which companies had not been held responsible for the acts of their servants[821] and, of these, the one reported case relied solely on the civil case of *Bolton Engineering [1957]*.[822] Lord Reid concluded that criminal liability only arose in 2 circumstances; the first, in the case of a company where the acts are those of responsible officers who form the 'brain' of the company and the second where the acts are those of a person to whom delegation of management has been passed. Delegation by an individual was he said, quite correctly, another principle which has been recognised in licensing cases but which was anomalous.[823] Bypassing any discussion of the longstanding agency principles and master and servant law, upon which the earlier criminal cases were based,[824] Lord Reid then focused on this anomalous line of authority.

The basis of delegated liability had only ever been applied in limited, fact-specific situations such as licensee's breaches where the licensee was absent from the licensed premises.[825] The principle comes into effect when an individual office-holder is under a duty and the performance of the duty is delegated to another[826] and, accordingly, there are obvious overlaps between it and the attribution of liability on the basis of both master and servant and agency law. Whilst this may explain the difficulties encountered by those who have sought to provide a coherent account of the development of a general principle in the attribution of corporate criminal fault, Lord Reid failed to consider the agency type cases. Appearing to intermingle, and thus confuse, the directing mind theory with that of delegation, Lord Reid asserted that a board of directors could delegate part of their functions of management so as to make their delegate an embodiment of the company. In the instant case, *Tesco v*

[821] *John Henshall (Quarries) Ltd v Harvey* [1965] 2 QB 233 in which case a company was not held criminally responsible for the negligence of a servant in charge of Weybridge and the unreported case of *Magna Plant v Mitchell*, 27th of April 1966 where the fault of the depot engineer, i.e. his knowledge, was not imputed to the company where he was a servant for whose actions the company was not criminally responsible. The facts of Henshall are similar to those of *National Coal Board v Gamble* [1959] 1 QB 11, in the earlier case the issue of the basis of corporate liability was not raised, in this latter case it was held that the employee's knowledge of the overloaded lorry could not be imputed to the company as his were not considered the brains of the company.
[822] *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 (CA), 172.
[823] Quoting *Vane v Yiannopolous* [1965] AC 486 (HL) in support.
[824] *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395 (CA); *Moore v Bresler Ltd* [1944] 2 All ER 515.
[825] *Tesco Ltd v Nattrass* [1972] AC 153 (HL) 175.
[826] *Allen v Whitehead* [1930] 1 KB 211.

Nattrass,[827] he held that the Tesco board had never delegated any part of its functions, but had set up a chain of command through regional and district supervisors whilst remaining in control. Accordingly, the acts or omissions of the shop manager were not the acts of the company itself.

On Lord Reid's analysis in *Tesco v Nattrass*, the identification principle restricted corporate liability to instances of culpability at a very high level within the organisation, namely 'the board of directors, the managing director and perhaps other superior officers of a company who carry out functions of management and speak and act as the company'.[828] It is this narrowing of liability to a very high level of management that has resulted in the widespread criticism that it is 'at odds with the realities of the diffusion of managerial power in large companies and, more troubling still, could provide companies with perverse incentives to decentralise responsibilities so as to make it impossible to identify a senior individual (...) in charge of any matter'.[829] This deficiency was addressed to some extent in a line of cases[830] culminating in the Privy Council case of *Meridian Global Funds Management (1995)*[831] in which Lord Hoffman framed the question in a purposive way.[832] Whilst the flexibility of this approach was applauded by many who recognised that it could resolve the problem of corporate liability in a doctrinally

[827] *Tesco Ltd v Nattrass* [1972] AC 153 (HL).
[828] *Tesco Ltd v Nattrass* [1972] AC 153 (HL), 171 (Lord Reid); although it should be noted that all the law lords provided a slightly different test for determining who may be identified as the mind of the company.
[829] Eilis Ferran, 'Corporate Attribution and the Directing Mind and Will' (2011) 127 LQR (Apr) 239-259; see too Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No 237, 1996) 1.10 - 1.21 for issues arising from the narrow basis of attribution of liability to a company for manslaughter.
[830] The civil case of *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685; *DG of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456 (HL).
[831] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC) NZ.
[832] In determining what acts were to be attributed to the company, the question was a matter of interpretation or construction of that substantive particular rule. Hence, if the court decided that the substantive rule was intended to apply to a company it then had to decide how it would and whose act or knowledge or state of mind was for that purpose intended to count as the act, knowledge or state of mind of the company. Lord Hoffman did not reject the directing mind metaphor altogether, he said that it was simply a phrase used by Viscount Haldane in the context of interpreting the particular statute in issue, see Celia Wells, 'Corporate Liability for Crime – Tesco v Nattrass on the Danger List?' (1996) Arch News 1, 5 and Celia Wells, 'The Law Commission Report on Involuntary Manslaughter: the Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity' [1996] Crim LR 545.

coherent fashion,[833] the approach was short-lived. Argued by the Crown in the corporate manslaughter case *AGs Ref (No 2 of 1999) [2000]*,[834] it was rejected by the Court of Appeal.[835]

Arguably, *Tesco*[836] could have been distinguished in future cases on the basis that it provided nothing more than clarity as to the interpretation of the specific piece of legislation with which it was concerned, the Trade Descriptions Act.[837] It has also been suggested that as the sole House of Lords' decision in this area and involving a 'public welfare' offence, not requiring proof of mens rea, the 'directing mind' argument could have been side-stepped altogether.[838] In this respect, it has been argued that the fact that their Lordships did not do so illustrates as much about the contemporary judicial aversion to strict liability offences as it does about corporate liability for non-regulatory offences.[839] Whilst there certainly appears to be evidence of a judicial agenda of this nature, with the broad expansion of the mens rea doctrine, it is also clear that the full extent of the potential legal implications of *Tesco*[840] would not have been obvious at the time. Much as both of the evidential presumptions were fully operative at the time of the *Lennard's* judgment,[841] the presumption of intention, by reference to the natural and probable consequences of the act, was just beginning to attract attention on a prolific scale in the *Tesco* era.

---

[833] See for example LS Sealy, 'The Corporate Ego and Agency Untwined' [1995] 54 CLJ 507; Ross Grantham, 'Corporate Knowledge: Identification or Attribution' (1996) 59 MLR 732; Celia Wells, 'Corporate Liability for Crime – Tesco v Nattrass on the Danger List?' (1996) Arch News 1, 5; Celia Wells, 'The Law Commission Report on Involuntary Manslaughter: the Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity' [1996] Crim LR 545. This approach was consistent with the 1994 Court of Appeal decision in the civil case of *El-Ajou v Dollar Land Holdings* [1994] 2 All ER 685 involving the imputation of knowledge to a company in an equitable case alleging 'knowing receipt' which also referred to the constitution of the company and to whom powers had been entrusted.

[834] *Attorney General's Reference* (No 2 of 1999) [2000] Cr App R 207.

[835] Meridian was taken to reaffirm the identification principle, *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC) NZ. The 2009 House of Lords civil case of *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39 (HL) (a ruling on auditors' civil liability) continued the use of anthropomorphic metaphors, as did *R v St Regis Paper Co Ltd* [2011] EWCA Crim 2527 (CCA) with emphasis placed on the status of the individual as the "embodiment of" the company.

[836] *Tesco Ltd v Nattrass* [1972] AC 153 (HL).

[837] RJ Wickins and CA Ong, 'Confusion worse confounded: the end of the directing mind theory?' [1997] JBL Nov 524 - 56.

[838] Celia Wells, 'Corporations: Culture, Risk and Criminal Liability' (1993) Crim LR Aug 551 – 566.

[839] Celia Wells, 'Corporations: Culture, Risk and Criminal Liability' (1993) Crim LR Aug 551 – 566.

[840] *Tesco Ltd v Nattrass* [1972] AC 153 (HL).

[841] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).

Although *DPP v Smith [1961]* had attracted much criticism,[842] upgrading the rebuttable evidential presumption to the status of an irrebuttable presumption of law, and s. 8 of the Criminal Justice Act 1967 had corrected its misapplication, the terminology of 'natural and probable consequences' was to be the subject of heightened judicial attention for some time to come.[843] Although *Tesco v Nattrass*[844] served to link the criminal liability of the company to the blameworthiness of one of its senior officers, the assessment of fault was still focused on the manifest appearance of the conduct. Accordingly, it is submitted that the metaphysical limitations of the identification principle were yet to become evident.

6.3 Summary

In summary, it is submitted that the 1915 *Lennard's* judgment,[845] addressing as it did the statutory interpretation of a shipping act provision, was in no way remarkable when it was delivered and its subsequent significance as a general principle of corporate liability was a matter of retrospective convenience. Indeed, that the case was to achieve landmark status was not evident at the time of Viscount Haldane's death in 1928 and, of the few cases mentioned by Viscount Haldane in his autobiography, *Lennard's* is not one.[846] Indeed, the retrospective interpretation of *Lennard's*[847] places it in stark contrast to the prevailing criminal law which continued to apply the traditional principles of vicarious liability. The landmark status now afforded to *Lennard's*[848] was due entirely to its subsequent elevation in *Tesco*[849] and a court keen to expand the boundaries of the mens rea doctrine yet further. It would appear that the identification doctrine was more the result of a haphazard conjunction of judicial pronouncements, made over a long period of time, than a coherent development of legal principle.

---

[842] *DPP v Smith* [1961] AC 290 (HL).
[843] See *Hyam v DPP* [1975] AC 55 (HL), *R v Moloney* [1985] AC 905 (HL), *R v Hancock and Shankland* [1986] AC 455 (HL), *R v Nedrick* [1986] 1 WLR (CA*), R v Woollin* [1999] 1 AC 82 (HL).
[844] *Tesco Ltd v Nattrass* [1972] AC 153 (HL).
[845] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[846] Richard Burdon Haldane, *An Autobiography* (Hodder and Stoughton 1929).
[847] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[848] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[849] *Tesco Ltd v Nattrass* [1972] AC 153 (HL).

Furthermore, it can be observed that the authorities involving the question of corporate misconduct have tended to involve the misconduct of one or two identifiable individuals, the issue being whether or not these individuals can be taken as the embodiment of the corporation itself for the purpose of liability attribution. As such, it is submitted that cases such as *Lennard's*[850] and *Tesco*[851] can be distinguished from cases involving widespread misconduct of a systemic nature. Instances of pervasive misconduct within an organisation are rare, with perhaps just the unsuccessful prosecution of P & O Ferries springing to mind.[852] The court held, and Parliament recognised, that corporate conduct of such a pervasive nature could not be addressed by reference to the identification principle. Accordingly, the bespoke corporate homicide offence was enacted, aligning to the recognition of aggregate fault, albeit confined to management level.[853] Whilst the identification principle might be serviceable in the former cases, it singularly fails in the latter. Recently enacted statutes provide precedent for the departure from the identification principle in specified instances of corporate misconduct and also implicitly accept that a corporation is a responsibility-bearing actor for the purpose of the criminal law.[854] While we remain bereft of a fully developed theory of corporations, it is submitted that cases involving criminogenic companies can, and should be, distinguished from those in which individual offenders can be located.

[850] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[851] *Tesco Ltd v Nattrass* [1972] AC 153 (HL).
[852] *P & O European Ferries Ltd* (1990) 93 Cr App R 72.
[853] Corporate Manslaughter and Corporate Homicide Act 2007
[854] Corporate Manslaughter and Corporate Homicide Act 2007; Bribery Act 2010.

7. Conclusion

Having established that both the common law and current statutory approaches to the attribution of corporate criminality are ill-suited to addressing modern examples of systemic corporate fraud, this research has identified the means by which dishonesty and intention can be attributed directly to an organization. Accordingly, the criminal law can now respond to instances of pervasive corporate fraud which go beyond the hitherto traditional cases involving the misconduct of individuals perpetrated in the corporate context. Thus, whilst the identification principle is a suitable method of corporate fraud attribution where a senior 'director' uses the corporate mantle to achieve his fraudulent purpose, this research provides the means by which organisations which have developed a corporate culture or practice can themselves be prosecuted.

The method has involved a combination of legal theoretical analysis, supported by the findings of mind/action philosophy and modern neuroscience. Further, the rational reconstruction sought has been achieved through a black letter law and historical unpicking of the formation of criminal law doctrine.

The development of the criminal law has been traced alongside the historical emergence of trading corporations and the new problems of crime that industrialisation brought. The historical account of the evolution of the construct of criminality, and the changing notions of the determinants of fault, has demonstrated that current assumptions about the basis of criminal liability rest on both a linguistic and conceptual confusion of the orthodox common law principles. In particular, the notion of mens rea has assumed a dominant role in the criminal law and, with the problematic metaphysical connotations it imports, this has duly impacted on the way in which the law has responded to corporate wrongdoing. However, a renewed recognition of the traditional doctrine of voluntariness, the original hallmark of criminal fault, is an important step towards facilitating a general model of corporate liability. This recognition inevitably acknowledges the continued existence of the evidential presumption of voluntariness which is both appropriate and practical in the attribution of fault, particularly in the corporate context. Without the need for the prosecution to prove specific mental states, it would be open for a representative of

the corporation to raise evidence of any denial that the corporate conduct was voluntary. Such an approach does not exclude the possibility that new context-specific defences may develop by analogy with the existing defences with which an individual can deny voluntariness. Conceived in its wider sense, acting freely and in knowledge of the circumstances, voluntariness is indicative of the capacity of the actor and provides the means by which a corporation can be recognised as a responsibility-bearing entity.

Whilst the presumption of voluntariness was erroneously interpreted to offend one basic tenet of criminal law, seemingly reversing the burden of proof, the presumption of intention came to be seen as an affront to the whole principle of subjective individualism. Mistaken for a legal presumption, not an evidential one, and thus taken to import an objective assessment of fault, it also became discredited. Accordingly, the evidential presumption of intention, based on the presumed foresight of natural consequences, gradually disappeared from the dialogue and narrative of the criminal law. Although the Criminal Justice Act 1967 had clarified the status of the presumption, the focus of debate shifted over the subsequent decades such that the judicial and academic attention exclusively concerned the notion of oblique intention and degree of foresight required before indirect intention could be found. The language of natural consequences was displaced by that virtual certainty. As a result, the fact that the presumption of intention continues to apply when direct intention can be inferred is now rarely articulated. Whilst it is evident that the presumption remains, it has but a tacit existence and it is rarely acknowledged explicitly. Of the 3 orthodox presumptions, the presumption of mens rea is the only one now explicitly acknowledged. However, the modern understanding of the mens rea doctrine has altered considerably. In its original form, the presumption applied only to common law offences such that fault was determined not only by virtue of the voluntariness of the act but also because the defendant had foreseen the specified harm that had resulted. That mens rea needed to be proved was assisted by the sister presumption of intention, where a harm foreseen was deemed to be a harm intended. Consequently, the demise of the latter, in conjunction with the extended definition of mens rea, means that the prosecution must prove, subjectively, that the defendant, at the time of the commission of the offence, was possessed of each of the mental states set out in the definition of the

offence in question. Accordingly, the primary enquiry in the trial process is now that of the defendant's mind where previously the presumptions had operated to focus first on the outward appearance of the act which, if suggestive of blameworthiness, could then be rebutted by the defendant's evidence.

This procedural and evidential shift has had obvious conceptual implications for the attribution of wrongdoing perpetrated by the corporate actor. However, the recognition of the continued existence of these presumptions facilitates the inculpation of the corporate entity on the same basis and model of criminality that is employed in the instance of individual liability. This discovery means that, as far as corporate action is concerned, the absence of a guilty metaphysical 'mind' is not fatal to the finding of fault. It is simply a matter of determining the process by which fault should be identified and, by acknowledging the operation of the orthodox presumptions, the overt act can be considered in the first instance with any denial of blameworthiness considered thereafter. Like the individual, the corporate defendant is capable of calling witnesses to refute either or both presumptions in its defence.

In the context of the fraud offence the evidential presumptions facilitate the attribution of both capacity and intent to the corporate actor. Whilst it is the element of 'dishonesty' that truly distinguishes the entrepreneurial from the fraudulent, it has been shown that the courts also take an inferential approach in this respect. In accordance with the traditional approach to fraudulent intent, the common law continues to consider the overt appearance of the conduct in question first, by reference to an objective standard, and, thereafter, makes the subjective enquiry. Accordingly, where the conduct in question appears blatantly dishonest the presumption of dishonesty can be refuted by the defendant organisation bringing evidence to the contrary. The essential 'bridge' in the attribution of fault continues to be the application of the orthodox evidential presumptions, based on the manifest perception of behaviour. Whilst this approach is determinative of individual liability, it is equally consistent with the attribution of corporate fault.

In support of this finding, an examination of contemporary philosophy, underpinned by recent scientific advances, serves to militate against the way in which criminal liability is currently constructed. It is shown to challenge both the strict bifurcation

of the physical and mental elements of the offence and also the way in which we comprehend the subjective mental state of the defendant. The Latin maxim, as taken as the basis for the separation of actus reus and mens rea, is shown to accord with the Cartesian view of the world but to fail in relation to a more sophisticated understanding of action in which the physical and mental are not ontologically separable. Thus, this analysis reveals that whilst the problem of finding the metaphysical guilty 'mind' presented an almost insuperable obstacle to attributing corporate culpability, the attempt to separate attributes of mind and body is itself based on an artificial construct. Dualism is no longer the prevailing theory of mind and action. Furthermore, contemporary philosophy is informed by scientific advances into the mirror neuron system of the brain. With evidence that direct knowledge of another's action can be experienced via the observation of it, credence is given to the explicit acceptance of the 'manifest' approach to the attribution of fault, the observance of the overt behaviour central to that enquiry. Since the forming of groups and the engaging in group action is an elemental characteristic of human behaviour, it is further demonstrated that if the experience of the individual observing the action of another individual provides direct knowledge of it, so too does the observance of 'group behaviour' exhibited, for example, through corporate action.

In as much as the historiographical account reveals the way in which the criminal law has gradually departed from the common law canons of fault, black letter law analysis specifically reveals the questionable basis of the identification theory of corporate liability. The landmark status afforded to *Lennard's [1915]*[855] was due to its retrospective elevation effected in the *Tesco v Nattrass* judgment of 1971, a case which seemingly turned on the prevailing judicial distaste for strict liability offences rather than the strict application of legal principle.[856] Whilst the usefulness of the identification principle is not in doubt where the misconduct of identifiable individuals is involved, and the question is whether or not they can be viewed as the embodiment of the corporation itself, it ceases to be of use where the misconduct is so systemic and pervasive that it is impossible to locate fault with the exactness that individual liability requires. That organisations are recognised as possessing the

[855] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705 (HL).
[856] *Tesco Ltd v Nattrass* [1972] AC 153 (HL).

capacity for autonomous action is now far from controversial. Accordingly, this research demonstrates that the criminal law already possesses the conceptual tools needed to attribute fault to the corporate actor and to address the unique nature of fraud when it is committed in this context. Given the lack of precedent in the context of systemic corporate fraud, there is an opportunity for the common law to make a coherent response which accords with orthodox doctrine, contemporary thinking and the scientific understanding of action. Alternatively, Parliament may put the matter beyond doubt with the enactment of an express provision such that, for example, 'in relation to a charge of fraud contrary to the Fraud Act 2006, a company may be found to be dishonest and have fraudulent intention, as described in act, where this is the obvious inference to be drawn from the corporate conduct and all the evidence'. In this respect, the recently enacted Bribery Act 2010 provides a valuable precedent not only for a zero-tolerance approach to economic crime but also for the treatment of organisations as criminally responsible actors in their own right.

Bibliography

Books

Abbot C, *Enforcing Pollution Control Regulation* (Hart 2009)

Adam S and others (eds), *Corporate Criminal Liability in Europe* (La Charte 2008)

Alexander S, *Space, Time and Deity*, The Gifford Lectures at Glasgow 1916-18 (Macmillan 1920)

Alston P (ed), *Non State Actors and Human Rights* (OUP 2005)

Arnold GF, *Psychology Applied to Legal Evidence and Other Constructions of Law* (2nd edn, Thacker, Spink 1913)

Arthurs HW, *'Without the law': Administrative Justice and Legal Pluralism in Nineteenth Century England* (University of Toronto 1985).

Ashworth A, *Principles of Criminal Law* (6th edn, OUP 2009)

Ashworth A and Horder J, *Principles of Criminal Law* (7th edn, OUP 2013)

Austin J and Campbell R (eds), *Lectures on Jurisprudence* (Kissinger Legacy 2010)

Bailey V (ed), *Policing and Punishment in 19th Century Britain* (Croom Helm 1981)

Baker DJ, *Glanville Williams' Textbook of Criminal Law* (3rd edn, Sweet & Maxwell 2012)

Banaker R and Travers M (eds), *Theory and Method in Socio-legal Research* (Hart 2005)

Beccaria C, *On Crimes and Punishments* (Bobs Merrill 1966)

Benson ML and Cullen FT, *Combating Corporate Crime: Local Prosecutors at Work* (Northeastern University Press 1998)

Bentham J, *Economic Writings* (For the Royal Economic Society, Allen and Unwin 1952 - 54) III

_ _ *Theory of Legislation* (Oceana 1975)

_ _ *Principles of Morals and Legislation* (Timeless 2015)

Bentley D, *English Criminal Justice in the Nineteenth Century* (Hambledon 1998)

Berman HJ, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983)

Bix B, *Law, Language, and Legal Determinacy* (OUP 1996)

Black M, *Philosophy in America* (Ithaca 1964)

Blackstone W, *Commentaries on the Laws of England 1765-69* (University of

Chicago Press 1979)

Bowring J (ed), *Collected Work of Jeremy Bentham* (Russell 1962) vol 1

Box S, *Power, Crime and Mystification* (Tavistock 1983)

_ _ *Recession, Crime and Punishment* (Macmillan 1987)

Broad CD, *The Mind and Its Place in Nature* (1925)

Brodbeck M (ed), *Readings in The Philosophy of the Social Sciences* (Macmillan 1968)

Butler TRF and Garsia M, *Archold's Pleading, Evidence and Practice in Criminal Cases* (Sweet & Maxwell 1949)

Cacioppo JT and Berntson GG: *Social Neuroscience* (Psychology Press 2005)

Cacioppo JT and others, *Social neuroscience: People thinking about thinking people* (MIT Press 2006)

Cairns DJA, Advocacy and the Making of Adversarial Criminal Trial (Clarendon 1998)

Cane P and Stapleton J (eds), *Essays for Patrick Attiyah* (Clarendon 1991)

Cane P and Tushnet M (eds), *The Oxford Handbook of Legal Studies* (OUP 2003)

Carr C T, *The General Principles of the Law of Corporations* (Yorke prize essay for the year 1902, Cambridge University Press 1905)

Carswell J, *The South Sea Bubble* (Crescent Press 1960)

Clayton P (ed), *The Oxford Handbook of Religions and Science* (OUP 2006)

Cohen and Scull (eds), *Social Control and the State: Historical and Comparative Essays* (Basil Blackwell 1983)

Coke E, *Institutes of the Laws of England: Commentary Upon Littleton* (First pub 1628, Forgotten Books 2012)

Coleman JS, *The Asymmetric Society: Organisational Actors, Corporate Power and the Irrelevance of Persons* (Syracuse University Press 1982)

Cornish WR and Clark G, *Law and Society in England 1750-1950* (Sweet & Maxwell 1989)

Corrigan P and Sayer D, *The Great Arch: State Formation, Cultural Revolution and the Rise of Capitalism* (Blackwell 1985)

Cowles V, *The Great Swindle* (Collins 1960).

Craies WF and Roome HD, *Archbold's Criminal Pleading, Evidence and Practice* (24th edn, Sweet & Maxwell 1910)

Dan-Cohen M, *Rights, Persons and Organisations: A Legal Theory for a*

Bureaucratic Society (California 1986)

D'Arcy E, *Human Acts* (OUP 1963)

Decety J and Cacioppo JT (eds), *Handbook of Social Neuroscience* (OUP 2010)

Decety J and Ickes W, *The Social Neuroscience of Empathy* (MIT Press 2009)

Dennet DC, *Brainstorms: Philosophical Essays on Mind and Psychology,* (MIT Press 1978)

_ _ *The Intentional Stance* (MIT Press 1987)

Devlin P, *Judge* (OUP 1981)

Dicey AV, *Law and Opinion in England* (2nd edn, Macmillan 1914)

Dine J and others, *Criminal Law Cases and Materials* (6th edn, OUP 2011)

Doig, A, *Fraud* (Willan 2006)

Douglas M, *How Institutions Think* (Syracuse University Press 1986)

Draper H, *Private Police* (Harvester 1978)

Dubber MD and Farmer L (eds) *Modern Histories of Crime and Punishment* (Stanford University Press 2007)

_ _ and _ _ (eds), *New Trends In the History of Criminal Law (*Stanford University Press 2007)

Duff RA, *Intention, Agency and Criminal Liability: Philosophy of Action and Criminal Law* (Basil Blackwell 1990)

_ _ (ed), *Philosophy and the Criminal Law*: *Principle and Critique* (Cambridge University Press 1998)

Duff RA and Green SP, *Philosophical Foundations of Criminal Law* (OUP 2011)

Duff RA and others, *The Boundaries of the Criminal Law* (OUP 2010)

Durkheim E, *The Division Of Labour in Society* (First pub 1893 as De La Division Du Travail Social, tr Halls WD, Free Press 1984)

_ _ *The Elemental Forms of Religious Life* (First pub 1912, OUP 2008)

Dworkin R, *Laws Empire* (Harvard University Press 1986)

East EH, *Pleas of the Crown* (First pub 1803, Forgotten Books 2012) vols 1 and 2

Elzinga K and Breit W, *The Anti-trust Penalties: a Study in Law and Economics* (Yale University Press 1976)

Emsley C, *Crime and Society in England 1750 – 1900* (3rd edn, Pearson Longman 2005).

Erskine T (ed), *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (Macmillan 2003)

Evans DM, *The Commercial Crisis 1847-1848* (First pub Letts Son & Steer 1848, Nabu 2010)

Evans DM, *Facts, Failures and Frauds: Revelations Mercantile Commercial Criminal* (First pub Groombridge & Sons 1859, Augustus M Kelly 1968)

Farmer L, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law: 1747 to Present* (Cambridge University Press 1996)

Fisse B and Braithwaite J, *Corporations: Crime and Accountability* (Cambridge University Press 1993)

_ _ and _ _ *Corporations, Responsibility and Corporate Society* (Cambridge University Press 1993)

Fisher HAL (ed), *The Collected Papers of Frederick William Maitland* (Cambridge University Press 1911) vol 3

Fletcher GP, *Rethinking Criminal Law* (Little, Brown and Co 1978)

_ _ *Basic Concepts of Criminal Law* (OUP 1998)

Foster M, *Foster's Crown Law* (2nd edn, Clarendon 1776)

Foucault M, *Discipline and Punish: The Birth of A Prison* (Penguin 1977)

French D and others, *Mayson, French and Ryan on Company Law* (27th edn, OUP 2010).

French PA, C*ollective and Corporate Responsibility* (Columbia University Press 1984)

Friedman LM and Fisher G (eds), *The Crime Conundrum: Essays on Criminal Justice* (Westview 1997)

Gale and others, *Fraud and the plc* (Butterworths 1999)

Gattrell VAC and others (eds), *Crime and the Law: The Social History of Crime in Western Europe Since 1500* (Europa 1980)

Geis G and Stotland E (eds), *White Collar Crime* (Sage 1980)

Gierke von OF, *Political Theories in the Middle Age* (First pub 1866 as Das Deutsche Genossenschaftsrecht, tr Maitland FW, Cambridge University Press 1913)

_ _ *Natural Law and the Theory of Society 1550-1800* (trans E Barker, Cambridge University Press 1934)

Gobert J and Pascal AM, *European Developments in Corporate Criminal Liability* (Routledge 2014)

Gobert J and Punch M, *Rethinking Corporate Crime* (Butterworths 2003)

Godfrey B and Lawrence P, *Crime and Justice 1750-1950* (Willan 2005)

Goodrich P, *Legal Discourse Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan 1986)

Gross H, *Criminal Psychology: A Manual for Judges, Practitioners and Students* (Little, Brown & Co 1911)

Guy JA and Beale HG (eds), *Law and Social Change in British History* (Royal Historical Society 1984)

Haldane RB, *The Pathway to Reality: Being the Gifford Lectures delivered in the University of St Andrews in the Session 1902 -1904* (Ulan Press 2012)

_ _ *An Autobiography* (Hodder & Stoughton 1929)

Hale M, *The History of the Pleas of the Crown 1* (1847)

Hans VP, *Business on Trial* (Yale University Press 2000)

Hanson S, *Legal Method, Skills and Reasoning* (3rd edn, Routledge 2010)

Harding C, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007)

Harmon-Jones E and Winkelman P (eds), *Social neuroscience: Integrating biological and psychological explanations of social behavior* (Guilford 2007)

Hart HLA, *Punishment and Responsibility* (Clarendon 1968)

Hawkins K, *The Human Face of Law: Essays in Honour of Donald Harris* (OUP 1990)

_ _ *Law As Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002).

Hay D and others (eds), *Albion's Fatal Tree, Crime and Society in 18th Century England* (Penguin 1975)

Hay D and Snyder FG (eds), *Policing and Prosecution in Britain 1750 – 1850* (Clarendon 1989)

Heath J, *18th Century Penal Theory* (OUP 1963)

Hegel, *The Philosophy of Right* (tr Knox TM, OUP 2010)

Herman ES, *Corporate Control, Corporate Power* (Cambridge University Press 1982)

Horst S, Laws, *Mind and Free* Will (MIT Press 2011)

Husak D, *Overcriminalization, The Limits of the Criminal Law* (OUP 2008)

Johnston L, *The Rebirth of Private Policing* (Routledge 1992)

Johnstone G and Ward T, *Key Approaches to Criminology: Law and Crime* (Sage 2010)

_ _ and _ _ *Key Approaches to Criminology, Law and Crime* (Sage 2010)

Kadish SH, *Encyclopaedia of Crime and Justice* (Aspen 1983)

Kenny CS, *Outlines of Criminal Law* (14th edn, Cambridge University Press 1933)

_ _ *A Selection of Cases Illustrative of English Criminal Law* (8th edn, Cambridge University Press 1935)

Kim J, *Philosophy of Mind* (3rd edn, Westview Press 2011)

Korczynski M and others, *Social Theory at Work* (OUP 2006)

Kostall RW, *Law and English Railway Capitalism 1825 – 75* (Clarendon 1994)

Langbein JH, *The Origins of Adversary Criminal Trial* (OUP 2003)

Leigh LH, *The Criminal Liability of Corporations in English Law* 1-12 (LSC Research Monographs, Nowe & Brydone 1969)

_ _ *Strict and Vicarious Liability*, (Sweet & Maxwell 1982)

Levi M, *Regulating Fraud* (Tavistock 1987)

_ _ *The Phantom Capitalists* (Ashgate 2008)

MacPherson CB, *The Political Theory of Possessive Individualism* (OUP 1962)

Manchester AH, *A Modern Legal History of England and Wales 1750 – 1950* (Butterworths 1980)

May L and Hoffman S (eds), *Collective Responsibility, Group Based Harm and Corporate Rights* (University of Notre Dame Press 1987)

_ _ and _ _ *Collective Responsibility: 5 Decades of Debate in Theoretical and Applied Ethics*, (Roman & Littlefield 1991)

McConville M and Wing HC (eds), *Research Methods for Law* (Edinburgh University Press 2007)

Maxwell PB and Bridgman GF, *Interpretation of Statutes* (7th edn, London1929)

McGrath P, *Commercial Fraud and Civil Practice* (OUP 2008)

Montesquieu C de, *The Spirit of the Laws* (First pub 1748, Forgotten Books 2010)

Morgan EV and Thomas WA, *The Stock Exchange: Its History and Functions* (Elak Books 1962)

Munsterberg H, *On the Witness Stand: Essays on Psychology and Crime* (Doubleday, Page 1909)

Murphy P, *Blackstone's Criminal Practice* (OUP 1994)

Musson A and Stebbings C (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press 2012)

Tim Newburn, *Criminology* (Willan 2007)

Nietzsche FW, *On the Genealogy of Morality* (tr Diethe C, Cambridge University Press 2006)

Norrie, A *Crime, Reason and History, A Critical Introduction to Criminal Law* (2nd edn, Cambridge University Press 2001)

Ormerod D, *Smith and Hogan, Criminal Law* (12th edn, OUP 2008)

_ _ *Smith and Hogan's Criminal Law, Cases and Materials* (10th edn, OUP 2009)

_ _ *Smith and Hogan's Criminal Law,* (13th edn, OUP 2011)

Ormerod D and Hooper A, *Blackstone's Criminal Practice* (OUP 2014)

Ormerod D, *Blackstone's Criminal Practice* (OUP 2015)

Ormerod D and Laird K, *Smith and Hogan's Text, Cases and Materials on Criminal Law* (11th edn, OUP 2014)

Otto T and Bubandt, *Experiments in Holism: Theory and Practice in Contemporary Anthropology* (Wiley-Blackwell 2010)

Parkinson JE, *Corporate Power and Responsibility, Issues in the Theory of Company Law* (Clarendon 2000)

Parris H, *Government and the Railways* (University of Toronto Press 1965)

Pearce F, *Crimes of the Powerful* (Pluto 1976)

Howard Pendleton, *Criminal Justice in England: A Study in Law Administration* (MacMillan 1931) vol 1

Pennock JR and Chapman JW, *Criminal Justice (Nomos XXVIII)* (Lieber-Atherton 1985)

Perkin H, *The Origins of Modern English Society 1780-1880* (Routledge 1969)

Philips A, *Lawyers' Language: the Distinctiveness of Legal Language* (Taylor & Francis 2002)

Popper KR, *The Open Society and its Enemies* (Routledge & Kegan Paul 1945) vols 1 & 2

_ _ *The Poverty of Historicism* (Routledge & Kegan Paul 1957)

Posner RA, *Economic Analysis of Law* (Aspen 2007)

Poynder J, *Literary Extracts* (unknown binder 1844)

Punch M, *Dirty Business: Exploring Corporate Misconduct* (Sage 1996)

Putnam H, *Mind, Language and Reality: Philosophical Papers* (Cambridge University Press 1975) vol 2

Radzinowicz L, *The History of the English Criminal Law* (Stevens 1948) vol 1

Radzinowich L and Turner JWC, *The Modern Approach to Criminal Law*

(Macmillan 1945)

_ _ and _ _ *The Modern Approach to Criminal Law* (2nd edn, Macmillan 1948)

Reiman J, *The Rich Get Richer and the Poor Get Prison: Ideology, Class, Criminal Justice* (8th edn, Pearson 2006)

Reiner R, *The Politics of the Police* (3rd edn, OUP 2000)

Reith C, *A Short History of the British Police* (OUP 1948)

Rizzolatti G and Sinigaglia C, *Mirrors in the Brain* (OUP 2008)

Robb G, *White Collar Crime in Modern England, Financial Fraud and Business Morality 1845 -1929* (Cambridge University Press 1992)

Ross RE and Turner MJH, *Archbold's Criminal Pleading, Evidence and Practice* (30th edn, Sweet & Maxwell 1938)

Rothman DJ, *The Discovery of the Asylum* (Little, Brown 1971)

Rozenberg J, *The Case for the Crown: The Inside Story of the DPP* (Thorsons 1987)

Ryle G, *The Concept of Mind* (Penguin 2000)

Salter M and Mason J, *Writing Law Dissertations* (Pearson 2007)

Saywell JT, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Osgoode Society for Canadian Legal History, University of Toronto Press 2002)

Searle GR, *Morality and the Market in Victorian Britain* (Clarendon 1998)

Searle JR, *Intentionality: An Essay in the Philosophy of Mind* (Cambridge University Press 1983)

_ _ *Philosophy of Mind* (Value Enquiry 2008)

Sharpe JA, *Crime in Early Modern England 1550-1750* (Longman 1984)

Shute S and others (eds), *Action and Value in Criminal Law* (Clarendon 1993)

Slapper G and Tombs S, *Corporate Crime* (Longman 1999)

Smith G and others, *Studying Fraud as White Collar Crime* (Macmillan 2011)

Smith JC and Brian Hogan, *Smith and Hogan Criminal Law* (4th edn, Butterworths 1978)

_ _ and _ _ *Smith and Hogan Criminal Law: Cases and Materials* (3rd edn, Butterworths 1986)

Smith KJM, *Lawyers, Legislators and Theorists* (OUP 1998)

Smits JM, *The Mind and Method of the Legal Academic* (Edward Elgar 2012)

Smuts JC, *Holism and Evolution* (First pub 1926, Greenwood Press 1973)

Stephen JF, *A History of the Criminal Law of England* (Macmillan 1883) vol 2

Stevens R, *Law And Politics, The House of Lords As A Judicial Body, 1800 – 1976* (Wydenfelt & Nicholson 1978)

Sugarman D (ed), *Legality, Ideology and the State* (Academic Press 1983)

Sugarman D, *Law in History: Histories of Law and Society* (New York University Press: International Library of Essays in Law and Legal Theory 1996) vols I and II

Sutherland E, *White Collar Crime* (Holt 1949)

Taylor J, *Boardroom Scandal: The Criminalization of Corporate Fraud in Nineteenth-Century Britain* (OUP 2013)

Thompson EP, *Whigs and Hunters, the Origins of Black Art* (1st edn, Pantheon 1976)

Turner JWC, *Kenny's Outlines of Criminal Law* (17th edn, Cambridge University Press 1958)

_ _ Kenny's *Outlines of Criminal Law* (18th edn, Cambridge University Press 1962)

_ _ *Russell on Crime* (12th edn, Stevens & Sons 1964) vol 1

_ _ *Kenny's Outlines of Criminal Law* (19th edn, Cambridge University Press 1966)

Turner JWC and Armitage A LL, *Cases on Criminal Law* (Cambridge University Press 1953)

Twining W, *Blackstone's Tower: The English Law School* (Stevens & Sons 1994)

Van Hoecke M, *The Methodologies of Legal Research* (Hart 2011)

Warner M, *Organisational Choice and Constraint* (Saxon House 1977)

Weber M, Economy and Society (University of California Press 2013)

Weiner M J, *Reconstructing the Criminal, Culture: Law and Policy in England 1830 – 1914* (Cambridge University Press 1990)

Wells C, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001)

Williams G, *Criminal Law: The General Part* (2nd edn, Stevens & Sons 1961)

_ _ *Text Book of Criminal Law* (2nd edn, Stevens & Sons 1967)

Wilson S, *The Origins of Modern Financial Crime: Historical foundations and current problems in Britain* (Routledge SOLON Explorations in Crime and Criminal Justice Histories 2014)

Zedner L, *Criminal Justice* (OUP 2004)

Journals:

_ _ 'Causes of the Increase of Crime'(Jul – Dec 1844) 56 Blackwood's Edinburgh Magazine

_ _ 'Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions' (1979) 92 Harv L Rev, 1227

Agassi J, 'Methodological Individualism' (1960) 11(3) British Journal of Sociology, Sept, 244

_ _ 'Institutional Individualism' (1975) 26(2) British Journal of Sociology, June, 144

Ahdieh R, 'Beyond Individualism in Law and Economics' (2011) 91 BUL Rev 43

Alldridge P, 'The Law Relating to Free Lunches' (2002) 23 Co Law 264

Arenella P, 'Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability' (1992) 39 UCLA Rev 1511

Arlen J and Kraakman R, 'Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes' (1997) 72 NYUL Rev 687

Baker C and others, 'Theory-based Social Goal Inference' (2008) Proceedings of the 30th annual conference of the Cognitive Science Society, Washington, 1447

Baldwin R, 'The New Punitive Regulation' (2005) MLR 351

Bartrip P and Fenn P, 'The Administration of Safety: the enforcement policy of the early factory inspectorate, 1844-1804', (1980) 58 Pub Adm 87

Becchioa C and Bertoneb C, 'Wittgenstein running: Neural mechanisms of collective intentionality and we-mode', (2004) 13 Consciousness and Cognition 123

Becker GS, 'Crime and Punishment: An Economic Approach' (1968) 76 J Pol Econ 169

Blackwood's Edinburgh Magazine, 'Causes of the Increase of Crime' (Jul – Dec 1844) 56 7-8

Bodden ME and others, 'Comparing the Neural Correlates of Affective and Cognitive Theory of Mind using fMRI: Involvement of the Basal Ganglia in Effective Theory of Mind' (2013) 9, 1 Advances in Cognitive Psychology 32

Bonner J and Forman B, 'Bridging the Deterrence Gap: Imposing Criminal Penalties on Corporations and their Executives for Producing Hazardous Projects' (1993) 20 San Diego Justice Journal 1

Bradney A, 'Law as Parasitic Discipline' (1998) 25 Journal of Law and Society 71

Brickey KF, 'Corporate Criminal Accountability: A Brief History and an

Observation' (1982) 60 (2) Wash U L Q 393
Brodbeck M, 'Methodological Individualism: Definition and Reduction' (1958) 25 Philosophy of Science Philosophy of Science 1
Bucy PH, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 Minn L Rev 1095
Bufalari and others, 'Empathy for Pain and Touch in the Human Somatosensory Cortex' (2007) 17 Cereb Cortex 2553
Burns TR and Engdahl E, 'The Social Construction of Consciousness, Part 1: Collective Consciousness and its Socio-Cultural Foundations' (1998) 5(1) Journal of Consciousness Studies 72
Burrows R, 'The Responsibility of Corporations Under Criminal Law' Journal of Crim Sci (1948) 1
Buxton R, 'The Retreat from Smith' (1966) Crim LR 196
Carson WG, 'White-Collar Crime and the Enforcement of Factory Legislation' (1970) 10 Brit J Criminology
_ _'Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation' (1970) 33 MLR 396
_ _ 'The Conventionalisation of Early Factory Crime' (1979) 7 Int'l J Soc Law 37
Cavanagh N, 'Corporate Criminal Liability: An Assessment of the Models of Fault' (2011) 75 JCL 414
Clarkson CMV, 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59 MLR 557
Clough J, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18 Crim L F 267
Coffee JC Jnr, 'Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions' (1980) 17 Am Crim L Rev 419
_ _ 'No Soul to Damn, No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment' (1981) 79 Mich L Rev 386
Copp, SF, 'The Early Development of Company Law in England and Wales: Values and Efficiency' (Bournemouth University, unpublished PhD thesis, Dec 2003)
Copp S and Cronin A, 'The Failure of Criminal Law to Control the use of Off Balance Sheet Finance During the Banking Crisis' (2015) 36(4) Co Law 99.
Cotterell R, 'Subverting Orthodoxy, Making Law Central: A View of Socio-legal Studies' (2002) 29 Journal of Law and Society 632

Dau-Schmidt K, ‘An Economic Analysis of the Criminal Law as a Preference-Shaping Policy’ (1990) Duke Law Journal 1

_ _ ‘Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law’ (1997) Wis L Rev 389

Devlin P, ‘Statutory Offences’ (1958) JSPTL 206

Dicey AV, ‘The Combination Laws as illustrating the relation between law and public opinion in England during the 19th century’ (1904) Harv L Rev 511

Dubber MD, 'Historical Analysis of Law', Law & Hist Rev (1998) 16 159

Elkins JR, ‘Corporations and the Criminal Law: An Uneasy Alliance’ (1976) 65 Ky L J 73

Ewing KD, ‘The Politics of the British Constitution’ (2000) PL Autumn 405

Farmer L, ‘Bringing Cinderella to the Ball: Teaching Criminal Law in Context’ (1995) 58(5) MLR 756

Farmer L, ‘The Obsession With Definition: The Nature of Crime and Critical Legal Theory’ (1996) S & LS 5:57

Ferran E, ‘Corporate Attribution and the Directing Mind and Will’, (2011) 127 LQR (Apr) 239

Fisse B, ‘The Distinction Between Primary and Vicarious Corporate Criminal Liability’ (1967) 41 ALJ 203

_ _ ‘Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions’ (1983) 56 S Cal L Rev 1141-246

Fisse B and Braithwaite J, ‘Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability’ (1988) 11 Sydney L Rev 468

Fletcher GP, ‘The Metamorphosis of Larceny’ (1976) 89 Harv L Rev (Jan) 3

Foxton D, ‘Corporate Personality in the Great War’ (2002) 118 LQR (July) 428

French PA, ‘The Corporation as a Moral Person’ (1979) 16 Am Phil Q 207

Gallese V, ‘The Manifold Nature of Interpersonal Relations: the Quest for a Common Mechanism’ (2003) 358 Philosophical Transactions of the Royal Society of London B, 517

_ _ ‘Mirror Neurons, Embodied Simulation and a Second-Person Approach to Mind Reading', (2013) 49(10) Cortex 2954

Gallese V and Sinigaglia C, ‘What is So Special with Embodied Simulation’ (2011) 15 Trends in Cognitive Sciences 512

Garoupa N and others, ‘The Investigation and Prosecution of Regulatory Offences:

Is there an economic case for integration?' (2011) 70(1) CLJ 229-259
Geldart WM, 'Legal Personality' (1911) 27 LQR 90
Gilligan GP, 'The Origins of UK Financial Services Regulation' (1997) 18(6) Co Law 167
Gobert J, 'Corporate Criminality: four models of fault' (1994) 14(3) LS 393
_ _ 'Corporate Criminality: New Crimes for the Times' (1994) Crim LR 722
Goff R, 'The Search for Principle' (1983) 69 Procs Brit Acad 169
Grantham R, 'Corporate Knowledge: Identification or Attribution' (1996) 59 MLR 732
Hart HLA, 'Definition and Theory in Jurisprudence' (1954) 70 LQR 37.
Held V, 'Can A Random Collection of Individuals Be Morally Responsible?' (1970) J Phil 68
Hodgson GM, 'Meanings of Methodological Individualism' (2007) 14 (2) Journal of Economic Methodology (June) 211
Howard C, 'Strict Responsibility in the High Court of Australia' (1960) 76 LQR 547
Hsaio M, 'Abandonment of the Doctrine of Attribution in Favour of Gross Negligence Test in the Corporate Manslaughter and Corporate Homicide Act 2007' (2009) 30(4) Co Law 110
Hyde D, 'In Practice: Practice Points: "Grease" is the Word' (2013) LS Gaz, 17 June, 24.
Iwai K, 'Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance' (1999) 47 Am J Comp L 583
Jackson RM, 'Absolute Prohibition in Statutory Offences' (1936 -1938) 6 CLJ 83
Kadish SH, 'Developments in the Law – Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions' (1979) 92 Harv L Rev 1227
Khanna VS, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109 Harv L Rev 1477
Kilner and others, 'Evidence of Mirror Neurons in Human Inferior Frontal Gyrus' (2009) 29 (32), 10 Journal of Neuroscience 153.
Lacey N, 'In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory' (2001) 64 MLR 350-71
_ _ 'Responsibility and Modernity in Criminal Law' (2001) 9 Journal of Political Philosophy 249-77
_ _ 'Space, Time and Function: Intersecting Principles of Responsibility across the

Terrain of Criminal Justice' (2007) 1 Criminal Law and Philosophy 233-50
Lanham D, 'Larsonneur Revisited' (1976) Crim LR 276
Laski HJ, 'The Basis of Vicarious Liability' (1916) 26 Yale LJ 105
Lederman E, 'Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle' (1985) 76 J Crim L & Criminology 285
_ _ 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and The Search for Self-Identity' (2001) Buff Crim LR 642
Lee IB, 'Corporate Criminal Responsibility as Team Member Responsibility' (2011) 31(4) OJLS 755
Leigh LH, 'The Criminal Liability of Corporations and Other Groups' (1977) Ottawa L Rev
Levi M, 'The Roskill Fraud Commission Revisited: An Assessment' (2003) JFC 11(1), 38-44
Lobban M, 'Nineteenth Century Frauds In Company Formation: Derry v Peek in Context' (1996) 112 LQR Apr 287
Lynch ACE, 'The Mental Element in the Actus Reus' (1982) LQR 98
Mackay RD, 'Non-Organic Automatism' (1980) Crim LR 350
Marsh D and Locksley G, 'Capital in Britain, Its Structural Power and Influence over Policy' (1983) 6 (2) West European Politics 36
Masters JL, 'Fraud and money laundering: the evolving criminalization of corporate non-compliance' (2008) JMLC 103
Mays R, 'The Criminal Liability of Corporations and Scots Law: Learning the Lessons of Anglo-American Jurisprudence' (2000) 4 Edin LR 46
McDonald M, 'The Personless Paradigm' (1987) 37 UTLJ 212
Morrissey DJ, 'Toward a new/old theory of corporate social responsibility' (1989) 40 Syracuse L Rev 1005
Mukamel and others, 'Single Neuron Responses in Humans During Execution and Observation of Actions' (2010) 20 (8) Current Biology 750
O' Malley P, 'Risk, Power and Crime Prevention' (1992) 21 Economy and Society 252
Ouchi WG, 'Organisational Culture' (1985) Annual Review of Sociology 457
Overvalle van F and Baetens K, 'Understanding Others' Actions and Goals by Mirror and Mentalizing Systems: A Meta-analysis', (2009) 48 Neuralimage 564

Pacherie E and Dokic J, ‘From mirror neurons to joint actions’ (2006) 7, (2-3) June Cognitive Systems Research 101

Pettit PN, ‘Responsibility Incorporated’ (2007) 117 Ethics 171

Posner RA, ‘An Economic Theory of the Criminal Law’ (1985) 85 Colum L Rev 1193

Pollock F, ‘Theories of Corporations in Common Law’ (1911) LQR 219

Quaid JA, ‘The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis (1998) 423 McGill LJ 67

Ramirez MK, ‘The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty’ (2005) 47 Ariz L Rev 933-1002

Richardson G, ‘Strict Liability for Regulatory Crime: The Empirical Evidence’ (1987) Crim LR 295-306

Rizzolatti and others, ‘Neurophysiological Mechanisms Underlying the Understanding and Imitation of Action’ (2001) 2 Nature Reviews Neuroscience 661

Rizzolatti and Sinigaglia, ‘The Functional Role of the Parieto-frontal Mirror Circuit: Interpretations and Misinterpretations’ (2010) 11 Nature Reviews Neuroscience 264

Sayre F, ‘Public Welfare Offences’ (1933) 33 Col LR 55

Scanlan G, ‘Dishonesty in Corporate Offences, A Need for Reform?’ (2002) 23(4) Co Law 114

_ _ ‘Offences concerning directors and officers of a company – fraud and corruption in the United Kingdom – the future’ (2008) 29(9) Co Law 264

Schaefer M and others, 'Mirror like Brain Responses to Observed Touch and Personality Dimensions', 29 May 2013 Front Hum Neurosci 7:227.doi10.3389/fnhum.2013.00227

Schumpeter J, ‘On the Concept Of Social Value’ (1909) QJ Econ 213

Scruton R, ‘Corporate Persons’ (1989) Proceedings of the Aristotelian Society (supplementary series) 239

Sealy LS, ‘The Corporate Ego and Agency Untwined’ (1995) 54 CLJ 507

Shannon HA, ‘The Coming of General Limited Liability’ (1930-1) 2 J Econ Hist 269

_ _‘The Limited Companies of 1866-1883’, (1933) 4 J Econ Hist 295

Shapiro SP, ‘Collaring the Crime, Not the Criminal: Reconsidering the Concept of

White Collar Crime' (1990) 55 Am Soc Rev 346 – 65

Sindall RS, 'Middle Class Crime in 19th Century England' (1983) 4 Crim Just Hist 23

Smith KJM and Wilson W, 'Impaired Voluntariness and Criminal Responsibility: Reworking Hart's Theory of Excuses – the English Judicial Response' (1993) 13 OJLS 69

Spencer H, 'Railway Morals and Railway Policy' (1854) 100 Edin L R 426-7

Steinberg A, 'The Spirit of Litigation; Private Prosecution and Criminal Justice in 19th Century Philadelphia' (1986) 20 Journal of Social History 243

Sullivan GR, 'The Attribution of Culpability to Limited Companies' (1996) 55(3) CLJ 515

Teubner G, 'Enterprise corporatism: new industrial policy and the 'essence' of the legal person' (1988) 36 Am J Comp Law 130

Thomas P, 'Curriculum Development In Legal Studies' (1986) 20 Law Teach 110

Tigar ME, 'It Does the Crime But Not the Time: Corporate Criminal Liability in Federal Law' (1990) 17 Am J Crim Law 211

Treur J, 'Biological and Computational Perspectives on the Emergence of Social Phenomena: Shared Understanding and Collective Power' (2012) 8 Transactions on Computational Collective Intelligence 168

Turner JWC, 'The Mental Element in Crimes at Common Law' (1936 - 1938) 6 CLJ 31

Udehn L, 'The Changing Face of Methodological Individualism' (2002) 28 Ann Rev Soc 478

Uithol S, 'What Do Mirror Neurons Mirror?' (2011) Oct 24, 5 Philosophical Psychology 607

Vasilyev VV, 'Philosophy of Mind, Past and Present' (2013) 44, 1-2 Metaphilosophy 15

Watkins JWN, 'Historical Explanation in the Social Sciences' (1957-8) British Journal for the Philosophy of Science 104

Weiner MJ, 'Judges v Juror's: Courtroom Tensions in Murder Trials and the Law of Criminal Responsibility in 19th Century England' (1999) 17 LHR 467

Wells, C 'The Decline and Rise of English Murder: Corporate Crime and Individual Responsibility' (1988) Crim LR (Dec) 788

_ _ 'Corporations: Culture, Risk and Criminal Liability' (1993) Crim LR (Aug) 551

– 566
_ _ ‘Corporate Liability for Crime: the Neglected Question’ (1995) 14(4) IBFL 42
_ _ ‘Corporate Liability for Crime – Tesco v Nattrass on the Danger List?’ (1996) Arch News 1
_ _ ‘The Law Commission Report on Involuntary Manslaughter: the Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity’ (1996) Crim LR 545
_ _ ‘Corporate Manslaughter: Why Does Reform Matter?’ (2006) SALJ 646
Williams G, ‘Vicarious Liability: Tort of the Master or of the Servant?’ (1956) LQR 72:522
Williams G, ‘Offences and Defences’ (1982) 2 LS 233
Williams ML, ‘Coercion and the Labour Contract: Revisiting Glasbrook Brothers and the Political Friction of Lewis Jones’ (2012) 8 Int JLC 1-25
Wilson, S, ‘Law, Morality and Regulation: Victorian Experiences of Financial Crime’ (2006) Brit J Criminol 1073
_ _ ‘Collaring the Crime and the Criminal: Jury Psychology and Some Criminology Perspectives on Fraud and the Criminal Law’ (2006) JCL 75
Winn CRN, ‘The Criminal Responsibility of Corporations’ (1927-1929) 3 CLJ 398
Woolf T, ‘The Criminal Code Act 1995 (Cth)- Towards a Realist Vision of Corporate Criminal Liability’ (1997) Crim L J 257

Official Materials

Allens Arthur Robinson (for the United Nations Special Representative of the Secretary – General on Human Rights and Business), ‘Corporate Culture’ as a basis for the criminal liability of corporations (Feb 2008) <http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf> accessed 24 April 2015
Hampton P, *Reducing Administrative Burdens: Effective Inspection and Enforcement, Final Report* (London, 2005)
Her Majesty’s Commissioners on Criminal Law, *Fourth Report* (1839)
Law Commission, *The Codification of the Criminal Law* (Law Com No 143, 1985)
_ _ *A Criminal Code for England and Wales* (Law Com No 177, 1989) vol 1

_ _ *Criminal Law: Involuntary Manslaughter* (Law Com No 135, 1994)

_ _ *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No 237, 1996)

_ _ *Report on Fraud* (Law Com No 276, 2002)

_ _ *Reforming Bribery* (Law Com No 185, 2008)

_ _ *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010)

Macrory RB (Better Regulation Executive), *Regulatory Justice: Making Sanctions Effective, Final Report* (Nov 2006)

Levi M, *The Economic Cost of Fraud Report for the Home Office* (London, NERA 2000)

Levi M and others, *The Nature, Extent and Economic Impact of Fraud in the UK* (London: ACPO 2007)

Ministry of Justice, *A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007*, Oct 2007

Royal Commission on Criminal Procedure, *The Investigation and Prosecution of Criminal Offences in England and Wales: the law and procedure* (Cmnd 8092, HMSO 1980).

_ _ on Practices and Proceedings of the Courts of Common Law, 5th Report (1833-4)

Select Committee on *Joint Stock Companies First Report*, BPP, VII 1844, the 'Gladstone Committee Report'

_ _ on the *Financial Aspects of Corporate Governance*, Parliamentary Papers 1992, the 'Cadbury report

Websites

<http://www.bbc.co.uk/news/business-30695720> accessed 6 January 2015.

<http://www.financial-ombudsman.org.uk/news/speech/2013/CW-BILA-conference.pdf>

<http://www.financial-ombudsman.org.uk/contact/PPI-your-case.html> accessed 22 January 2015.

<http://www.giffordlectures.org/Browse.asp?PubID=TPTPTR&Volume=O&Issue=O&ArticleID=6> accessed 15 May 2014.

<http://www.gov.uk/government/publications/annual-fraud-indicator--2> accessed 31 October 2014.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118532/annual-fraud-indicator-2011.pdf accessed 7 May 2015

<http://www.iep.utm.edu/durkheim/internet> accessed 15 May 2014.

<http://www.inhouselawyer.co.uk/index.php/fraud-and-corporate-crime/8264-fraud-forgotten-but-not-gone> accessed 7 May 2015

<http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf> accessed 4 March 2015.

<https://www.justice.gov.uk/downloads/legislation/bills-acts/bribery-bill-ia.pdf accessed 24 April 2015.

Lectures

Smith J, Annual Lecture for the Judicial Studies Board, 'Judge, Jurist and Parliament', 2002.