

Pace Law Review

Volume 28
Issue 4 *Summer 2008*
Symposium: Victims and the Criminal Justice System

Article 8

June 2008

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Recommended Citation

Carlos Gomez-Jara Diez, *Corporations as Victims of Mismanagement: Beyond the Shareholders vs. Managers Debate*, 28 Pace L. Rev. 795 (2008)

DOI: <https://doi.org/10.58948/2331-3528.1111>

Available at: <https://digitalcommons.pace.edu/plr/vol28/iss4/8>

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Corporations as Victims of Mismanagement: Beyond the Shareholders vs. Managers Debate

Carlos Gómez-Jara Díez*

I. Introduction

In a much cited article from 1986, Professor John C. Coffee analyzed the conflicting interests within the “corporate web” when hostile takeovers soared in the 1980s.¹ In doing so, Coffee discussed various theories of the firm that were dominant at the time: the neoclassical,² the managerialist,³ and the transaction cost⁴ models. The ultimate goal of Professor Coffee’s article was to highlight the need to take into account interests other than those of the shareholders or managers.⁵ In this paper, I try to show that potential mismanagement cases⁶ must also introduce into the equation something beyond the shareholders vs. managers dialectic and to make use of some new theories regarding the nature of corporations. My point is quite simple and

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1. John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1 (1986) [hereinafter Coffee, *Corporate Web*]. See also John C. Coffee, Jr., *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 WIS. L. REV. 435, 444 (1988).

2. Coffee, *Corporate Web*, *supra* note 1, at 25.

3. *Id.* at 31.

4. *Id.* at 35.

5. *Id.* at 8, 13.

6. By using “mismanagement,” in German, *Untreue*, and in Spanish, *Administración Desleal*, I will encompass all cases in which a breach of fiduciary duty may achieve criminal relevance. It is therefore not merely confined to the extended use of the term “mismanagement” regarding the Employee Retirement Income Security Act of 1974 (“ERISA”), the federal statute covering 401(k) plans, that was established to protect employees from abuse by employers, or those acting on the employer’s behalf, by regulating fiduciaries’ conduct and making them personally liable for breaches of fiduciary duty. 29 U.S.C. §§ 1001-1169 (2006). See also, Kimberly Lynn Weiss, Note, *Directors’ Liability for Corporate Mismanagement of 401(k) Plans: Achieving the Goals of ERISA in Effectuating Retirement Security*, 38 IND. L. REV. 817 (2005) (comprehensively analyzing fiduciary duties under ERISA).

straightforward: corporations should not be identified with either managers, shareholders, or stakeholders, hence there is a subtle and differentiated corporate interest that should be protected by criminal law.

In trying to achieve that goal I first refer to a line of reasoning: perception of corporations as offenders to be distinctively punished without affecting shareholders or stakeholders. If corporations, as the argument goes, are subject as such to criminal liability, they ought to be criminally protected as such, regardless of shareholders' interests *per se*. Moreover, even if shareholders consent to corporate damage, there is a need to closely examine whether or not the distinct corporate interests are being affected in a way that requires criminal law action. This implies fully recognizing a link between corporate personhood and corporate victimhood, certainly expanding the scope of criminal liability.

To be sure, though criticism exists, it is acknowledged that corporations may be victims of fraud and, generally, of offenses that do not require a certain "mental state" on the victim's part in order to be self-evident.⁷ It is far more complicated to find corporations as victims of, for instance, threatening mail communications or other mental-related offenses.⁸ Clear borderline

7. See, e.g., MICH. COMP. LAWS ANN. § 712A.30(1)(b) (West 2006) ("[V]ictim includes a sole proprietorship, partnership, corporation, association, governmental entity, or other legal entity that suffers direct physical or financial harm as a result of the commission of a juvenile offense.").

8. See *United States v. Brownfield*, 130 F. Supp. 2d 1177, 1181 (C.D. Cal. 2001) (discussing the possibility of connecting the protection of 18 U.S.C. § 876, the mailing of threatening communications, with the definition of "person" in The Dictionary Act, 1 U.S.C. § 1, given that the victim of such threatening communications was the Federal Bureau of Investigation). The District Judge stated that "it is well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis. Even assuming this treatment of corporations persists when courts apply criminal statutes to corporations as victims, corporations cannot be understood to have physical bodies. The same nonsensical outcome results when the Court applies to section 876 the other equivalents of "person" under section 1 which have not received the same status as natural persons under the law as corporations, such as joint stock companies and associations." *Id.* (citing *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979)). The problem remains in applying such interpretation to business corporations: "Congress amended The Dictionary Act in 1948 and inserted a broader definition of 'person' to include 'corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals,' the same definition that appears in section 1 today . . . Congress' broadening of the definition, yet

examples are provided with the right to privacy or the right to free speech—not to mention the escalating debate on “corporate free speech”⁹—and the criminal law protection of such rights.¹⁰ This paper deals, however, with a very specific perspective—probably highly controversial—on the role of corporations as victims: their distinct corporate interest in mismanagement cases. The approach here is twofold. First, these cases imply conflicting interests, and the corporate actor’s interest is sometimes identified with either shareholders’ or stakeholders’. Second, these cases may affect third parties that not only demand directors’ and officers’ criminal liability, but also *corporate* criminal liability. Yet, this could imply being the victim and, additionally, being punished, which does not account properly for a certain notion of justice.

The groundbreaking theory of the firm that will be used to explain this distinct corporate interest to which the corporate

continuing to exclude the federal government, indicates that the federal government is meant to be excluded from the definition of ‘person’ in section 1.” *Id.* (citing *United States v. United Mine Workers of America*, 330 U.S. 258, 275 (1947) (“Congress made express provision [in 1 U.S.C. § 1] for the term [‘person’] to extend to partnerships and corporations . . . [and the] absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them.”)). Thus, even if it is assumed that section 1 applies to section 876, the allegations of the indictment remain deficient because the federal government is not a person within the meaning of section 1. See also Lisa DiBartolomeo, *Criminal Law – Government not Entitled to Restitution for Sting Operations Under the Victim and Witness Protection Act – United States v. Gibbens*, 25 F.3d 28 (1st Cir. 1994), 29 SUFFOLK L. REV. 903 (1995) (analyzing how the government does not qualify as a victim under the Victim and Witness Protection Act (VWPA) when it actively provokes the commission of a crime through a sting operation).

9. See ROBERT L. KERR, *THE CORPORATE FREE-SPEECH MOVEMENT: COGNITIVE FEUDALISM AND THE ENDANGERED MARKETPLACE OF IDEAS* (2008); Robert L. Kerr, *Subordinating the Economic to the Political: The Evolution of the Corporate Speech Doctrine*, 10 COMM. L. & POL’Y 63 (2005) [hereinafter Kerr, *Subordinating*].

10. Of course, a source of heated discussion is whether the ultimate goal of that protection is to protect the individuals “behind” the corporation. For a European discussion, see HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANS-NATIONAL CORPORATIONS (Michael K. Addo ed., 1999) (especially Michael Addo’s contribution in which he relies on cases before the European Court of Human Rights that have allowed corporations to bring claims for violations of rights, such as the right to freedom of expression and the right to privacy, even to the extent that the Court rejected a claim brought by shareholders alone as the corporation itself was the real victim of the government’s action). See also Alan J. Meese, *Limitations on Corporate Speech: Protection for Shareholders or Abridgement of Expression?*, 2 WM. & MARY BILL RTS. J. 305 (1993).

actor is entitled is the so-called autopoietic (self-produced) theory. According to this theory, corporations—at least those reaching a certain degree of complexity—are not made up of human beings or human actions, but of corporate decisions. Individuals here are not part of the corporate system, but of the environment of the corporate system. They basically provide the energy for the on-going existence of the corporate system, but are not part of it—just as the blood provides energy for the consciousness system, but it is not actually a part of the system of consciousness. To this extent, corporations develop a life of their own that, as it will be argued, deserves certain protection in modern society.¹¹

Part II of this essay will briefly examine the role of corporations as offenders and how organizational theory has shaped corporate criminal liability. Here, corporate citizenship has imposed important duties on corporations, with the key word “corporate compliance” reaching ever increasing levels of responsibility. Would it not be feasible to require that citizenship status also concedes greater rights to corporations, i.e., the right to be protected by criminal law even though shareholders or stakeholders consent to corporate damage?

Part III will then turn to some key issues of corporations as victims in mismanagement cases. First, a description of the main features of the autopoietic theory of firm will be provided. The main theme will be the “emergence” of the corporate actor as a distinct entity to which duties and rights are to be attributed. Second, an overview of different corporate interests pertaining to the corporate actor will be conducted. “Corporate survival,” among other interests, represents an undubiously central interest for corporations. Third, some examples of

11. Gunther Teubner, *Enterprise Corporatism: New Industrial Policy and the “Essence” of the Legal Person*, 36 AM. J. COMP. L. 130, 136 (1988) (confronting the concept of V. Gierke’s *reale Verbandspersönlichkeit*: “[I]f one abstracts from ‘life’ and ‘meaning’ in the direction of a theory of ‘self-reproducing systems,’ then one has found the criterion, with Gierke. The social substratum to be personified is not simply a (static) social structure. Instead, it is an internal dynamics system, with selections of its own, and with a capacity to self-organization and self-reproduction. All that Gierke had available to express this dynamism was the misleading metaphor of ‘life.’ Today for this we have the cooler, remoter concept of an autopoietic social system: a system of actions/communications that reproduces itself by constantly producing from the network of its elements new communications/actions as elements.”).

harming these distinct corporate interests of the corporate actor will be offered. "Corporate dismantlement" in takeovers with shareholders' approval provides an excellent example for examining the consistency of the thesis set forth in this article. To conclude, Part IV will try to espouse certain guidelines for future consideration of these problematic cases that have yet to be observed from this perspective.

II. Corporations as offenders

Since the landmark decision of *New York Central & Hudson River Railroad Co. v. United States*,¹² the theory of corporate criminal liability for malfeasance crimes has been deeply rooted in the American criminal law system.¹³ To be sure, in *Hudson* the U.S. Supreme Court employed a civil theory, i.e., vicarious liability,¹⁴ to justify a criminal law institution. This approach was based on efficiency and policy matters,¹⁵ and with time it became more obvious that a solid theoretical body to

12. 212 U.S. 481 (1909). For an early discussion of the case, see George G. Little, *Punishment of Corporations – The Standard Oil Case*, 3 U. ILL. L. REV. 447 (1909). The need for corporate criminal liability was then questioned over the following years. See, e.g., Canfield, *Corporate Responsibility for Crime*, 14 COLUM. L. REV. 469 (1914); Frederic P. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 16 (1928).

13. A recent comprehensive exposition through the various stages of corporate criminal law history is provided by WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS* 9-43 (2006). See also KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY* (2d ed. 1992); RICHARD GRUNER, *CORPORATE CRIME AND SENTENCING* (1994) [hereinafter GRUNER, SENTENCING]; RICHARD GRUNER, *CORPORATE CRIMINAL LIABILITY AND PREVENTION* (2005) [hereinafter GRUNER, PREVENTION]; LEONARD ORLAND, *CORPORATE CRIMINAL LIABILITY, REGULATION AND COMPLIANCE* (2004).

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

15. For comments on *Hudson*, see Pamela Bucy, *Corporate Ethos: A Standard For Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343 (1999) [hereinafter Laufer, *Corporate Liability*]; William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049 (1992).

support such institution was lacking.¹⁶ It took the courts, the legislature, and the academic world seventy years to provide the first justifications based not on individual actions, but on the "essence" of the corporate actor.¹⁷ As a result, the institution, despite constant criticism, achieved a previously unknown degree of consistency.

These new trends in corporate criminal liability were fundamentally due to the insights of organizational theory.¹⁸ As a result, the corporation was no longer a collection of individuals, but a complexity of synergetic interactions that could not be reduced to individual actions. Put differently, the corporate actor is said to be not a mere addition of individuals, but something separate from them. It is precisely in this distinctiveness of the corporation where its culpability, its blameworthiness, dwells. Therefore, concepts like "corporate policy,"¹⁹ "corporate ethos,"²⁰ "corporate structure,"²¹ or "corporate culture" started playing a key role in determining, at least at some stage of the proceed-

16. For an early harsh critique, see Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 21 (1957) ("Many weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these weeds is . . . corporate criminal liability. . . . Nobody bred it, nobody cultivated it, nobody planted it. It just grew."). For recent heavy criticism, see Jeffrey S. Parker, *Doctrine for Destruction: The Case of Corporate Criminal Liability*, 17 MANAGERIAL & DECISION ECON. 381 (1996).

17. See Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501 (1980).

18. The enactment of the Organizational Sentencing Guidelines clearly showed the final decision to move away from the optimal penalties theory and into organizational theory considerations. See LAUFER, *supra* note 13, at 33. In the years prior to the passing of the Guidelines Jeffrey S. Parker held a strong advocacy for the optimal penalties theory. See Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 AM. CRIM. L. REV. 513 (1989); Jeffrey S. Parker & Raymond A. Atkins, *Did the Corporate Criminal Sentencing Guidelines Matter?: Some Preliminary Empirical Observations*, 42 J.L. & ECON. 423 (1999) (critiquing the efficiency of the Guidelines and their organizational approach).

19. See Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287 (1990); Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743 (1992).

20. See Bucy, *supra* note 15.

21. See Peter A. French, *Integrity, Intentions and Corporations*, 34 AM. BUS. L.J. 141 (1996).

ings,²² to what extent a corporation should actually be punished. In sum, a distinct entity arises and there is a need for punishing its wrongdoings.

Codification of “corporate culpability” came with the enactment of the Organizational Sentencing Guidelines in 1991²³ and was decisive in the development of the aforementioned approaches. These concepts were obviously not isolated from a broader debate taking place in the field of corporate law, i.e., the Corporate Governance debate, which, though consistent since the groundbreaking work of Berle and Means in the 1930s,²⁴ reached its peak in the 1980s and 1990s.²⁵ In these decades, an unprecedented development of “Corporate Compliance” took place and it resulted in a new concept, which would dominate the coming years: the Good Citizen Corporation or Corporate Citizenship.²⁶ According to this approach, corporations had to be law-abiding citizens and if they adequately complied with the law by enacting “true” compliance programs²⁷—not just “superficial” compliance programs²⁸—they would be re-

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

23. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2004), available at <http://www.ussc.gov/2007guid/tabconchapt8.htm> (coining the Culpability Score for organizations). For the background and history of these Guidelines, see Ilene H. Nagel & Winthrop M. Svenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts about their Future*, 71 WASH. U. L.Q. 205 (1993). See also Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697 (2002) (assessing the current situation).

24. ADOLF A. BERLE & GARDNER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1933).

25. See AMERICAN LAW INSTITUTE, *PRINCIPLES OF CORPORATE GOVERNANCE. ANALYSIS AND RECOMENDATIONS* (1994) (the first tentative draft was released in 1982).

26. See UNITED STATES SENTENCING COMMISSION, *PROCEEDINGS OF THE SECOND SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES, CORPORATE CRIME IN AMERICA: STRENGTHENING THE “GOOD CITIZEN” CORPORATION* (1995), available at <http://www.ussc.gov/sympo/wcsympo.pdf>. For a brief overview, see Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 J. CORP. L. 731 (1996).

27. U.S. Sentencing Guidelines Manual § 8C2.5 (2004).

28. It has been contended that corporations are most interested in the cosmetic appearance of compliance. See John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Laufer, *Corporate Liability*, *supra* note 15.

warded with a 95% reduction in the monetary penalty to be imposed upon them.²⁹

An interesting point in this late development, and one that is important to the thesis of this article, is that corporate citizenship started shifting from a strict economic perspective to a stronger political significance. Just as the debate regarding corporate free speech achieved new levels of political meaning,³⁰ the possibility of a corporation expressing its views of society in the public square, according to *Lawrence Friedman*,³¹ also accounted for the possibility of suffering the imposition of a criminal sanction. By holding corporations criminally accountable as citizens, it turns out to be a logical consequence to recognize the possibility of protecting with criminal law their distinct corporate interest.

Certainly, if criminal liability is linked to the possibility of expressing certain views in the public square, with state penal sanctions being the reaction of the State against "improper" views expressed through crimes,³² then the opposite could also hold true. That is, if corporations have a right to free speech, and that surmounts to holding them criminally liable, should their actions reflect a denial of basic community values—that

29. See GRUNER, SENTENCING, *supra* note 13.

30. See Kerr, *Subordinating*, *supra* note 9.

31. Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 12 HARV. J.L. & PUB. POL'Y 833, 846 (2000) ("A corporation thus can be considered as similarly situated to an individual for purposes of the expressive rationale if it has a discrete identity within a community and expressive potential—that is if . . . a corporation objectively can be viewed as having an identity apart from its owners, managers, and employees to which expressive conduct can be ascribed. . . . The modern corporation also can be substantively distinguished from its owners, managers and employees by its capacity to express independent moral judgments in the discourse of the public square, and so to participate in the process of creating and defining social norms.").

32. This approach heavily relies on the expressive theories of (crime and) punishment. See generally Matthew Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000). In the field of criminal law see Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996). See also Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998).

citizenship status linked to the First Amendment³³ should also bear some fruits for the protections of their own, i.e., corporate interests.³⁴ Otherwise, we would be holding them accountable for actions that, if committed against them, would be regarded as non-criminal. This could imply a considerable contradiction in our approach to criminal law.

III. Corporations as victims

A. *Autopoietic Theory of the Firm*

The question then is how to identify that distinct entity having corporate interests of its own? In order to address this delicate issue, I will discuss one of the most complete, comprehensive, and also complex, social theories of the moment. Due to time and space considerations, a full discussion of its elements cannot be outlined here.³⁵ Yet, a description of the basic features of a relatively small segment of said social theory, i.e., the one that only refers to corporate organizations, seems to be feasible. In doing so, I will rely heavily on Gunther Teubner's

33. See Friedman, *supra* note 31, at 851-52 ("Though the corporation qua corporation cannot vote, Bellotti validates its community identity by sanctioning corporate contributions to 'what counts in democracy': discussion and debate about a community's problems, fears and hopes, including determinations about that conduct which should be deemed laudable, and that conduct which should be condemned. Corporations, like individual members of a community, participate in the process of creating and defining social norms, and in so doing distinguish themselves from those individuals.") (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)).

34. Most of the corporate citizenship movement is looking to add duties to the corporate status, such as corporate compliance or corporate social responsibility. Yet, duties must also imply rights. For the most part, those rights are generally viewed as the factual dominant position corporations hold in our society. That, however, is more a factual perspective than a legal perspective. Citizenship status must also provide certain legal rights to corporations, one of them being to acknowledge a corporate interest as an interest in itself that has to be protected by criminal law.

35. See generally NIKLAS LUHMANN, *ESSAYS ON SELF-REFERENCE* (1990); NIKLAS LUHMANN, *OBSERVATIONS ON MODERNITY* (William Whobrey trans., 1998); NIKLAS LUHMANN, *SOCIAL SYSTEMS* (John Bednarz & Dirk Baecker trans., 1996); NIKLAS LUHMANN, *THEORIES OF DISTINCTION: REDESCRIBING THE DESCRIPTIONS OF MODERNITY* (William Rasch ed., 2002). For an outstanding introduction to this social theory, see WILLIAM RASCH, *NIKLAS LUHMANN'S MODERNITY: THE PARADOXES OF DIFFERENTIATION* (2000).

work over the past 20 years.³⁶ In a nutshell, the basic reading of organizations provided by Teubner unfolds as follows.³⁷ First, organizations do not consist of human individuals as members, but of communications, more precisely of decisions as their self-constituted elements.³⁸ Second, organizations do “think.” It is through internal communication that they construct social realities of their own, quite apart from the reality constructions of their individual members. In short, organizations are epistemic subjects. Third, organizations are not per se capable of collective action. They transform themselves into collective actors by communicatively constituting their identity.³⁹ Fourth, the capacity for collective action emerges when organizations in their collective identity produce actions, and vice versa, organizational action produces their collective identity. Given that “an image is worth a thousand words,” here is what the aforementioned tenets are trying to convey:⁴⁰

According to Teubner, in individualistic and contractualist theories, a great deal is lost in the process of reducing corporations to a bundle of individuals or contracts.

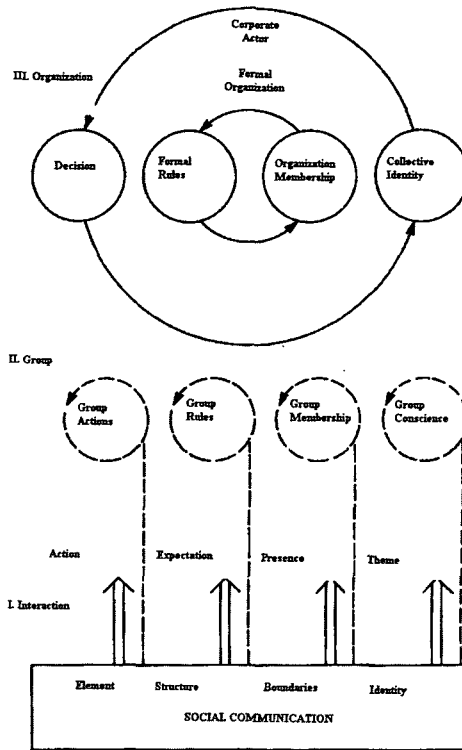
36. See generally GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993) [hereinafter TEUBNER, *AUTOPOIETIC SYSTEM*]; Gunther Teubner, *Enterprise Corporatism: New Industrial Policy and the “Essence” of the Legal Person*, 36 AM. J. COMP. L. 130 (1988); Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC’Y REV. 727 (1989) [hereinafter Teubner, *How the Law Thinks*]; Gunther Teubner, *Hypercycle in Law and Organization: The Relationship Between Self-Observation, Self-Constitution and Autopoiesis*, in EUROPEAN YEARBOOK IN THE SOCIOLOGY OF LAW 43 (Alberto Febrajo ed., 1988) [hereinafter Teubner, *Hypercycle*].

37. Teubner, *How the Law Thinks*, *supra* note 36, at 728-29.

38. Organizations are systems which compromise decisions and which themselves produce the decisions which compromise them. At the same time, they use their self-organized structures in order to specify expectations which guarantee that within the system every action can be treated as a decision. See TEUBNER, *AUTOPOIETIC SYSTEM*, *supra* note 36 at 134.

39. The organization itself constitutes an independent, autonomous system of action, reproducing itself not through contractual transactions, but through the recursive linkage of organizational decisions. To this extent, the logic of the contractual network is profoundly different from that of the decisional network. The contractual network is concerned with motivation; the decisional network is oriented towards organizational rationality – autopoietic reproduction and rationalization strategies.

40. See Teubner, *Hypercycle*, *supra* note 36, at 51.



[T]he “corporate actor,” as opposed to the individual contractual partners, as a new, different point of attribution for maximizing profit and minimizing transaction costs; the criterion of “corporate interest” as an independent criterion for resolving conflict between resource-holders—this is something which amounts to more than a mere balancing of interests against a background of real or fictitious market mechanisms; the corporate actor as a new contractual party for pooling resources; the collective binding effect of the corporate actor on the actions of the corporate agents; and the effect of the corporate actor on the outside world, which makes possible a new type of relationship between the firm and its environment.⁴¹

What can one expect then? It is the emergence of the corporate actor, whose social existence flies in the face of all methodological individualism, that leads the way for legal policy.⁴²

41. TEUBNER, AUTOPOIETIC SYSTEM, *supra* note 36, at 130-31.

42. For a thorough use of the autopoietic theory of the firm to set the legal policy for considering corporations as offenders, see CARLOS GÓMEZ-JARA DÍEZ, LA

This path ahead lies in reinforcing the institutional position of the corporate actor in order to make an impersonal context of autonomous action. This shall impose effective constraints on the range of action of individual participants in the interests of the organization, defined in broad social terms. It is now time to look more carefully at some corporate interests of the institutional corporate actors, always bearing in mind that this is a provisional (certainly not definitive) approach to the subject and that criticism is more than welcome.

B. *Corporate Interests Beyond Shareholders / Stakeholders Interests*

Assuming that the role of corporations as offenders might exert some influence in their role as victims, and that the auto-poietic theory of the firm provides firm moorings for speaking of a real corporate actor, the question then is what kind of corporate interests exist for criminal law to protect beyond the interests of shareholders, managers or stakeholders? Certainly, corporate law has always elucidated different forms for expressing a kind of differentiated character for the "corporate interest." For example, article 127.2 of the Spanish Corporations Act⁴³ defines "corporate interest" as the "interest of the corporation", i.e., not the interest of the shareholders of the corporation. Article 133 of the Spanish Corporations Act clearly states that corporate directors' liability will not be excused by mere shareholders' approval.⁴⁴ In a similar fashion, Section 76 of the German Corporations Act⁴⁵ defines the corporate interest as the "economic success" of the corporation, not the share or stakeholders' success, together with other concomitant interests of

CULPABILIDAD PENAL DE LA EMPRESA (2005); CARLOS GÓMEZ-JARA DÍEZ, *El Modelo Constructivista de Autorresponsabilidad Penal Empresarial*, in *MODELOS DE AUTORRESPONSABILIDAD PENAL EMPRESARIAL. PROPUESTAS GLOBALES CONTEMPORÁNEAS*, 93-161 (2006).

43. Article 127.2 of the Corporations Act (R.D.L. 1989).

44. For a thorough discussion of the duties of corporate directors towards that "corporate interest" in recent Spanish scholarship, especially regarding public listed companies, see SÁNCHEZ CALERO, *LOS ADMINISTRADORES EN LAS SOCIEDADES DE CAPITAL* (2005); DÍAZ ECHEGARRAY, *DEBERES Y RESPONSABILIDADES DE LOS ADMINISTRADORES DE LAS SOCIEDADES DE CAPITAL* (2004).

45. Aktiengesetz [AktG, Stock Corporation Act], Aug. 18, 2008, Federal Law Gazette, Part I, No. 36, §76 (F.R.G.).

the corporation.⁴⁶ And, to the same extent, mere approval of the shareholders does not per se fence off directors' liability.⁴⁷

The logic derived from identifying a *real* Corporate Actor implies certain corporate interests that cannot be identified with the interests of other persons. Moreover, as already stated, those interests may conflict with the interests of shareholders, stakeholders, or managers. Consequently, there is another variation to be added to the traditional conflict-of-interests-scheme between shareholders and directors,⁴⁸ namely, conflict of interests between the corporate actor and shareholders, stakeholders, or directors. The question then remains: what to do with those conflicts between the interests of the corporate actor and those of shareholders, stakeholders or directors? Of course, the problematic issue here is not so much when corporate and shareholders' interests align against directors' interests.⁴⁹ Problems fundamentally arise when shareholders and directors align their own private interests against the interests of the corporate actor. In the remainder of Part III.B, I will try to tackle some of the basic interests of the corporate actor. In Part III.C I will proceed to examine some examples of colliding situations.

Not surprisingly, the corporate actor's great interest should be to "survive." "Corporate survival" is the interest of the corporate actor in remaining within the "society of organizations,"⁵⁰

46. See Huffer, AktG, § 76 (6th ed.).

47. The issue is anything but uncontroversial. See Dierlmann, § 266, Münchener Kommentar zum StGB 130-40 (2005); EDWARD SCHRAMM, UNTREUE UN KONSENS 102-28, 132-44 (2006) (the opposing opinions of German Supreme Court caselaw and scholarship).

48. There is no need to extend the analysis at this point, as it is an inherent part of the agency problem and the separation between property and control. In a way, the additional ingredient provided by the autopoietic theory would be to question who is the principal and who is the agent. In this vein, instead of establishing a principal/agent relationship between shareholders and directors, that relationship should be established between corporate actors and directors. In this light, it would be more problematic to examine the relationship, according to the agency theory, between corporate actors and shareholders.

49. To be sure, there may be cases in which the alignment of corporate interests with either shareholders' or managers' interests gain substantial importance. This alignment would strongly argue in favor of recognizing pre-eminence of one over the other.

50. Charles Perrow, *A Society of Organizations*, 20 THEORY & SOC'Y 725-62 (1991) ("I argue that the appearance of large organizations in the United States makes organizations the key phenomenon of our time, and thus politics, social

i.e., modern society. To the extent that modern society has evolved from a "society of individuals" to a "society of organizations," permanence in such society may be regarded as a legitimate interest of the corporate actor. Current legislation does not foresee a right of the corporation to survive no-matter-what; yet, dissolution or liquidation of a corporation is subject to certain substantive and procedural requirements. In fact, in bankruptcy proceedings, courts may refuse to force liquidation, for instance, when there is a request to convert a case to a Chapter 7 liquidation from a Chapter 11 reorganization. This implies an interest in the on-going existence of the corporation and, although this statement is subject to important limitations, it reflects the perception of a differentiated interest.⁵¹ Therefore, and going back to the main concern, certain decisions made by directors, in agreement with shareholders, to liquidate the corporation may be regarded as mismanagement, so far as they negatively affect corporate interests.

Apart from "corporate survival," there is also an interest of the corporate actor in its financial well-being. "Corporate well-being" could be regarded as another important interest of the corporate actor. Surely, disposition of corporate assets always implies a kind of harm to the corporation, but the same holds true for individuals. The key issue here is to protect the corporation from "waste of corporate assets" approved by the company shareholders. "Corporate well-being" may collide with

class, economics, technology, religion, the family and even social psychology take on the character of dependent variables." See also CHARLES PERROW, *ORGANIZING CORPORATE AMERICA: WEALTH, POWER, AND THE ORIGINS OF CORPORATE CAPITALISM* (2002). In German scholarship, see the extensive analysis of Armin Nassehi, *Die Organisationen der Gesellschaft: Skizze einer Organisationssoziologie in gesellschaftstheoretischer Absicht*, in *SOZIOLOGIE DER ORGANISATION* 443 (Jutta Allmendinger & Thomas Hinz eds., 2002).

51. The debate regarding the "corporate death penalty" is surely of interest for this discussion, as it is seen as the most extreme measure to be adopted against a corporation and it is highly questioned in the academic world, especially after *Enron*. For basic terms of the debate, see Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933 (2005); Assaf Hamdani & Alon Klement, *Abstract, Deterrence and the Corporate Death Penalty* (October 20, 2007), available at <http://ssrn.com/abstract=1024698>.

excessive executive compensation⁵² and, regardless of shareholders' approval, the pay-for-performance approach should take into account the core of the service provided to the corporate actor himself.⁵³

C. *The Core of the Problem: Corporate Harm Despite Shareholders' Approval*

Throughout this article I have pointed out that the corporate actor may have certain interests that differ from those of shareholders, or, for that matter, from those of other parties involved. These different fields of analysis could be regarded as potentially conflictive. These cases do not encompass all possibilities of conflicting interests with the corporate actor, much less that these are the only ones in which criminal law has a say. I have chosen them because they represent recent case law in German jurisprudence that may shed some light on the consequences of this type of approach. All of them are high-profile cases regarded as hot topics in theory and practice.

Before considering these fields, and returning to the bare criminal arena, it is important to note that those cases have raised an important concern as to the relationship between mismanagement and the criminal institution of consent. Academic and jurisprudential attention paid to this subject soared in the 1990s, and with the turn of the century it has definitely established itself as a field of research. The possibility of affirming the existence of a mismanagement case, despite approval of each shareholder of the company, has not been easy to see.⁵⁴ Once again, time and space preclude me from reviewing the various requirements for valid consent in the U.S. and other countries. Let me then refer to the brilliant and thorough analysis

52. To get an idea of current discussion, see generally the contributions contained in ALFRED RAPPAPORT ET AL., *HARVARD BUSINESS REVIEW ON COMPENSATION* (2002).

53. For an interesting perspective, see R. Glenn Hubbard, Abstract, *Pay without Performance: A Market Equilibrium Critique* (December 2005), <http://ssrn.com/abstract=868513>.

54. See EDWARD SCHRAMM, *UNTREUE UND KONSENS* (2005); JOSEF M. WODICKA, *DIE UNTREUE ZUM NACHTEIL DER GMBH BEI VORHERIGER ZUSTIMMUNG ALLER GESELLSCHAFTER* (1993).

of Vera Bergelson.⁵⁵ To avoid too many references to the American scholar's literature, I only point out that the core of the subject-matter is that consent by shareholders would not be a right to hurt oneself, but the right to hurt someone else, i.e., the corporate actor, and that certainly the "objective meaning" to cause harm should play a significant role.

Cutting to the chase, a perfectly illustrative conflict between a corporate actor's interest and everyone else's is a "bust-up" takeover, a takeover motivated by the perceived disparity between the target's liquidation and its stock market value. The bidder makes clear that his sole purpose is to "sell" the corporation in bits and pieces. In what could be termed as "corporate dismantlement," it is known to the shareholders that the transaction will end with the corporation being dismantled by new, or even old, management.⁵⁶ To stick to the proposition, I should make clear that the shareholders, directors, and stakeholders would not suffer the consequences of such dismantlement, assuming that shareholders would get a "big chunk of money" for their shares, that directors would be rendered with a golden parachute, and that no creditors would have debts against the corporation. The problem is whether it would not be considered mismanagement to dismantle a well-regarded and correctly functioning corporation if that decision is only taken on individual interests. This was, with certain nuances, the issue in the *Mannesmann* case, which drew huge attention in the German media and, subsequently, in German academia. Though acquittal was rendered in the early stages of the proceedings, the Supreme Court granted certiorari and reversed prior opinions of lower courts.⁵⁷ Once the proceedings restarted,

55. See Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165 (2007) (referencing numerous case law and treatises). See also PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* (2004).

56. For an interesting perspective of the European discussion from a corporate law point of view, see Andrea Vicari, *Conflicts of Interests of the Target Company's Directors and Shareholders in Leveraged Buy-Outs*, 4 EUR. COMPANY FIN. L. REV. 346 (2007).

57. The Supreme Court did not emphasize the essence of the corporate actor, but stressed the need for directors to always act in the interests of the corporation (Unternehmensinteresse). The fact that the directors rendered themselves important appreciation awards that were not previously established, and contemplated retirement benefits that made no sense for the corporation—though they had been

the defendants agreed to a *nolo contendere* plea with the prosecution, and the case was closed.

Another, even trickier, example comes in light of certain cash management systems between parent and subsidiary companies. To be sure, the law governing corporate groups is certainly problematic,⁵⁸ not only in the U.S., but to an even greater extent in other countries.⁵⁹ The main characters in “private law performance” are usually the majority shareholders in the parent company and minority shareholders in the subsidiary.⁶⁰ Yet, recent cases involve criminal law considerations.⁶¹ In this vein, it could be profitable for a parent company to assign major losses to the subsidiary through the cash management system. Sticking to the thesis, the subsidiary must have no debts with creditors so that stakeholders are satisfied and that all management could be transferred to the parent company in case of liquidation. This type of case has raised serious concerns in Germany and some managers have been convicted of mismanagement for such maneuvers—it is the so-called “Corporate

approved by the majority shareholder of the (future) corporation—led the Supreme Court to reverse the acquittal and to fix certain guidelines for the new trial court to follow that would have ended up, no doubt, in conviction of all defendants. Regarding the Mannesmann case, see BERND SCHÜNEMANN, *ORGANUNTREUE: DAS MANNESMANN-VERFAHREN AL EXEMPLAR?* (2004); Martin Peltzer, *Das Mannesmann-Revisionsurteil aus der Sicht des Aktien- und allgemeinen Zivilrechts*, 27 ZIP 205 (2005); Andreas Ransiek, *Anerkennungsprämien und Untreue – Das “Mannesmann” Urteil des BGH*, NJW 814-16 (2006); Gerald Spindler, *Vorstandsvergütungen und Abfindungen auf dem aktien- und strafrechtlichen Prüfstand – Das Mannesmann-Urteil des BGH*, ZIP 349 (2006).

58. For an old, though comprehensive, approach to the law of corporate groups, see the various volumes of PHILIP BLUMBERG, *THE LAW OF CORPORATE GROUPS* (2004).

59. For an updated discussion from a comparative perspective, see JANET DINE, *THE GOVERNANCE OF CORPORATE GROUPS* (2006).

60. The leading authority in German corporate law is probably the Holz Müller doctrine. See Mark Löbbe, *Corporate Groups: Competences of the Shareholders’ Meeting and Minority Protection*, 5 GERMAN L.J. 1058 (2004). At its core, the Holz Müller doctrine deals with the balance of power between the Hauptversammlung (shareholders’ meeting) and the Vorstand (board of directors) of a German Aktiengesellschaft (AG – stock corporation) within the context of corporate groups. *Id.*

61. The leading case is *Bremen-Vulkan*, in which the use of a cash management system by a parent company that seriously damaged the capital equity of the subsidiary was considered mismanagement and the directors of the parent company were convicted. See Andreas Ransiek, *Untreue zum Nachteil einer abhängigen GmbH – “Bremer Vulkan”: Besprechung des Urteils des BGH wistra 2004, 341, 24 wistra 121* (2005).

Group Mismanagement” or “*Konzernuntreue*.”⁶² This, occurring in a country like Germany, which concedes less importance to corporations than “Corporate America,” suggests the strong potential implications for the United States.

IV. Conclusion: Lessons to be learned for the current corporate scandals involving mismanagement?

The perception of corporations as distinct offenders and victims brings new light to the approach taken by the Department of Justice towards current corporate scandals.⁶³ Most of these scandals involve mismanagement of large corporations that ended up with extraordinary losses for investors, employees, and even the general public. Enron, Worldcom, Adelphia Communications, Healthsouth, and Tyco, to name just a few, deal with paradigmatic cases of mismanagement. There is certainly the temptation of considering that some of these corporations, although victims of mismanagement activities conducted by their directors, also must be criminally charged. This could be termed as corporate victim-perpetrator cases.⁶⁴

Social demands for punishment are there; but in a system that fully recognizes the aforementioned principles, no criminal sanctions should be imposed upon the corporation itself.⁶⁵ It would be just another victim of the fraudulent activities of the Board of Directors or Senior Management. The governance of

62. Dirk Busch, KOZERNUNTREUE. EINE UNTERSUCHUNG SPEZIFISCHER UNTREUESTRAFBARKEIT INNERHALB VON KONZERNVERBINDUNGEN MIT AKTIENGESELLSCHAFTEN UND GESELLSCHAFTEN MIT BESCHRÄNKTER HAFTUNG (2004).

63. When writing this article the operation “Malicious Mortgage” was launched by the Department of Justice as a response to the credit crunch and the subsequent write-offs of major financial entities that ended up with the rescue of Fannie Mae and Freddie Mac by the Federal Reserve. It will be interesting to see if State Attorneys are going to be willing to charge not only specific individuals within these corporations, but the corporations themselves. The negative impact of such proceedings on the already aching U.S. economy will probably refrain them from adopting such a position, though a speedy national economic recovery may dramatically change the landscape.

64. See generally Alan C. Michaels, *Fastow and Arthur Andersen: Some Reflections on Corporate Criminality, Victim Status, and Retribution*, 1 OHIO ST. J. CRIM. L. 551 (2004) (citing relevant case law).

65. See *id.* at 564 (using “negative retributivism” based arguments to affirm that the victim status of the corporation ought to have an important normative bearing on the charging decision regarding the corporation and moreover on corporate punishment itself).

such individuals could no longer continue and therefore preventive measures should be adopted. One "measure" to adopt would be the immediate removal of the directors from their current positions in the company. However, unless the amount of the resulting financial harm due to directors and/or managers mismanagement forces the filing of a Chapter 7 Bankruptcy form, the corporation should still continue, and preventive measures should be removed once the corporation is back on the right track. Being both a victim and perpetrator on the same grounds does not seem feasible, when acknowledging the reality of the corporate actor, or to put in Peter French's words, when recognizing corporations as full fledged members of our moral community.⁶⁶

66. PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984); PETER A. FRENCH, JEFFREY NESTERUK & DAVID T. RISSER, *CORPORATIONS IN THE MORAL COMMUNITY* (1992).