How Can Restorative Justice and the Unified Theory of Punishment Help Us Make Sense of Corporate Crime and Punishment?

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ABSTRACT

The supposed deterrent and retribution 'tough on corporate crime' model may have been promising when corporate criminal liability was recognised over a century ago, but it is not working today. The response to 'controlling corporate crime' should not be a simple hefty fine, a simple apology, or a pinky promise. The starting point lies in gaining an understanding of the justifying aims of punishment before determining how punishment should be distributed.

The thesis moves away from the 'soft on crime' vs. 'tough on crime' debate, towards a 'smart on crime' approach. It goes back to the foundations of corporate criminal law to assess its aim(s) and purpose(s): why should we punish corporations? Why do corporations violate the law? How should corporations be brought to justice when they violate the law? If corporations cannot be imprisoned, how should they be punished?

The thesis explores existent theories of punishment and responses to crime (retribution, deterrence, rehabilitation, restoration) to assess whether they are well-suited, or badly-suited, to dealing with corporate crime. It advances proposals and recommendations for improving corporate criminal liability standards, and how punishment of corporations might be reformed. The thesis brings new insights to corporate crime and punishment through the concept of 'restorative justice.'

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CHAPTER 6: THE UNIFIED THEORY OF PUNISHMENT

Introduction

It should not be surprising to read that companies have been subject to criminal liability for over a century.[1] After all, The Supreme Court of the United States granted companies the constitutional right to bring a claim in federal court and equal protection as individuals under the Fourteenth Amendment[2] well before allowing women to practice law[3] and African Americans to have equal rights under the law.[4]

Corporate misbehaviour, whether defined as a civil law violation or a criminal law violation, can have long-lasting impacts on individuals and communities. Companies have rights and obligations as 'persons' under the law, hence should be held accountable to any act or omission that is in violation of the law.[5]

Yet, recurrent calls for being 'tough on corporate crime' have not necessarily resulted in a reduction in the rate of crime nor have produced norm-compliant behaviour by companies. Reports suggest that although the level of reported crime has increased, the rate of prosecutions has decreased.[6] Elizabeth Warren compellingly states,

> [While] we have one set of the law on the books, we really have two different judicial systems. One just system is for the rich and the powerful. In that system…giant companies that break the law walk away with a small fine and pinky promise not to do again…The second justice system is for everyone else.[7]

[1] John Hasnas, 'The Century of a Mistake: One Hundred Years of Corporate Criminal Liability' (2009) 46 American Criminal Law Review 1329, 1329; Kathleen F. Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (1982) 60 Washington ULQ 393, 393.
[2] See *Bank of the United States v. Deveaux*, 9 US 61 (1809); *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886).
[3] *Bradwell v. The State*, 83 U.S. 16 Wall. 130 (1872)
[4] United States Constitution, 14th Amendment, section 2 (United States).
[5] *Salomon v A Salomon & Co Ltd* (1896) UKHL 1, (1897) AC 22; Arthur W. Machen, 'Corporate Personality' (1911) 24 Harvard Law Review 347, 347-353; Susan M. Watson, 'The Corporate Legal Person' (2018) Journal of Corporate Law Studies 1, 30; Brenda Hannigan, *Company Law* (4th edn, OUP 2015) 77.
[6] Financial Times, 'White Collar Prosecutions Plummet even as Crime Rises' (Financial Times, July 2017) <https://www.ft.com/content/8751e754-6e3e-11e7-bfeb-33fe0c5b7eaa> accessed 24 July 2017.
[7] Elizabeth Warren, 'Senator Warren Urges Congress to Reject Bad Judicial Nominees' (*Youtube.com*, 31 October 2017) <https://www.youtube.com/watch?v=rJTEHN2WfiA> accessed 30 March 2019.

The law as it stands provides avenues for 'negotiated justice' and for companies to 'buy their way out of a crime,'[8] thus placing companies at a different legal position than individuals.

Recent proposals and debates have covered foundational issues that ought to have been resolved when corporate criminal liability has been recognised, including debates on whether companies should be subject to liability for mens rea offences, and piecemeal reforms establishing different standards of liability for similar misconducts.[9] From here, a notable quote by Fisse in 1982 is worth considering,

> [M]odern corporate criminal law owes its origin and design more to crude borrowings from individual criminal and civil law than to any coherent assessment of the objectives of corporate criminal law and how those objectives might be attained.[10]

The theoretical coherency of the law is paramount to its development in practice. Many questions and concerns emerge: why are companies subject to criminal liability? What differentiates companies from individuals? Why do companies violate the law? If the corporate entity cannot be imprisoned, how should companies be brought to justice when they violate the law? What is the process of bringing them to justice and what is the amount and form of punishment that should be imposed?

The United States Sentencing Commission (Hereinafter 'the Sentencing Commission') has included the following statement in its sentencing guideline manual,

> A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most

[8] Colin King and Nicholas Lord, *Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Palgrave Macmillan 2018) 7.
[9] For e.g., The Criminal Finances Act 2017 introduced an offence of failure to prevent tax evasion. In January 2017, there has been a call for evidence concerning a new standard of liability for economic crime; Ministry of Justice, 'Corporate Liability for Economic Crime: Call for Evidence' (UK Government, 13 January 2017) <https://www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence> accessed 10 July 2018; Criminal Finances Act 2017, sections 45-46; Washington Examiner, 'Senators Give Criminal Justice Reform Another Try' (Washington Examiner, October 2017) <http://www.washingtonexaminer.com/senators-give-criminal-justice-reform-another-try/article/2636541> accessed 22 June 2018.
[10] Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions.' (1982) 56 S. Cal. L. Rev. 1141, 1143.

> observers of the criminal law agree that the ultimate aim of the law itself, and of punishment, in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of 'just deserts.' Under this principle, the punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant. Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results…
>
> Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might, therefore [recognise] the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes or has found over time, to be important from either just deserts or crime control perspective.[11]

The Sentencing Commission accepts that the main aim of punishment is 'crime control,' yet finds through 'empirical results' that choosing between just deserts or deterrence is not necessary because the sentences based on either theory would produce the same or similar results. The Commission goes further to assert that the guidelines formed 'the first step in an evolutionary process,' and it is subject to improvement even though they may not be acceptable to those wishing to 'adopt a single philosophical theory, and then work deductively to establish a simple and

[11] United States Sentencing Commission, 'Guidelines Manual 2016' (United States Sentencing Commission 2016) <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf> accessed 8 February 2017, Ch. 1 Pt. A, 4-5.

perfect set of categorisations and distinctions.'[12] They also do not provide details on the legitimacy of the empirical data used to evidence the lack of distinctions between the theoretical approaches to retribution and deterrence; how sentencing decisions 'would produce the same or similar results'; and whether it could be scaled to a larger extent to apply to federal crimes that guide state crimes; or whether such data would be applicable to changing circumstances and in the long term. Nevertheless, the penal aims could work together as part of a broader framework if the theoretical approaches and the methods of distribution are defined.

There is no one theory of deterrence or retribution.[13] It is inevitable that failing to understand how these aims work together would mean one would prevail over the other when they are in conflict.[14] Empirical evidence finds that different judges have their personal liability and punishment philosophies, prioritise punishment goals differently, and resultantly impose different sentences.[15]

Accordingly, the thesis starts with the following contentions:

First, companies and individuals are both legal persons under the law, yet a company is an autonomous entity that is generally created for the purposes of profit. The globalisation of businesses and increasing variety of corporate management structures present new challenges to controlling corporate misconduct. Attitudes towards compliance vary with changing economic circumstances.

Second, if the supposed 'tough on crime approaches' are not working, then perhaps moving away from the 'tough on crime' vs. 'soft on crime debate', and alternatively adopting a 'smart justice' or 'smart on crime' approach (Hereinafter 'SOC'), is a starting point to any meaningful reforms in this area of law. Agreeing on the philosophical foundations of the criminal justice process is important, and is a starting point to the SOC approach, which can be described as

> [Creating] smart policies that will ensure continued public safety while also preventing unnecessary incarceration. These policies range from making sure that we have a sound, predictable, tough yet rational sentencing

[12] ibid Ch. 1 Pt. A, 5-6.
[13] See Thom Brooks, *Punishment* (Routledge 2012) 16, 35.
[14] Paul Robinson, *Distributive Principles of Criminal Law* (OUP 2008) 2.
[15] ibid.

> structure to diverting more people to innovative [programmes]...These reforms will require changes in laws.[16]

SOC necessitates considering the existent philosophies of punishment and responses to crime; which include retribution, deterrence, rehabilitation and restoration, to understand corporate misbehaviour and how the criminal justice system could be reformed to address it.

The rest of the introduction will define key terms, before setting out the aims of the thesis and its structure.

Definitions

Jurisdiction

The thesis comparatively analyses the law in England and Wales and the United States for two particular reasons. First, many common law jurisdictions like Australia, Hong Kong, Singapore, and India have closely followed or replicated their models.[17] Studying the selected models would provide insights to needed reforms to corporate criminal liability laws at an international level.

Second, from a historical standpoint, the recognition of corporate criminal liability in the United States followed legal developments in England and Wales. Particularly, in *New York Central & Hudson River Railroad Company v. United States*,[18] one of the first cases establishing corporate criminal liability, cited an English case to support its decision.[19] Nevertheless, each jurisdiction adopts a distinctive liability and sentencing framework today.

[16] Lauren-Brooke Eisen, Nichole Fortier, and Inimai Chettiar, 'Federal Prosecution for the 21st Century' (Brennan Center for Justice 2014) 1. <https://www.brennancenter.org/sites/default/files/publications/Federal_Prosecution_For_21st_Century.pdf > accessed 6 April 2019.
[17] Luke Tolaini, 'Corporate Criminal Liability' (Clifford Chance, 26 April 2016) <https://www.cliffordchance.com/briefings/2016/04/corporate_criminalliability.html> accessed 22 June 2018).
[18] *New York Central & Hudson River Railroad Company v. United States*, 212 U.S. 481 (1909).
[19] ibid 493.

Thus, comparatively studying the selected jurisdictions assists in evaluating the advantages and disadvantages of different standards of liability and sentencing models.

The Company, Crime, and Corporate Crime

A crime can be defined as an act or an omission that the state recognises as a criminal law violation.[20] A company[21] is a form of a business organisation that undergoes the 'incorporation' process to form an entity with a separate legal personality under the law.[22] There are different types of companies.[23] A distinction between 'individual accountability' and 'corporate accountability' should be drawn.[24] Corporate crime can be defined as conducts or omissions committed by a company that the state recognises as a criminal law violation by the company.[25]

Theory of Punishment

Herbert Hart states that any theory of punishment could be classified through the definition of punishment, the aims or justifications of punishment, and the distribution of punishment. The elements are interconnected.[26] Brooks follows Hart's classification, clarifying that 'any theory of punishment must first satisfy the definition of punishment. We must then identify the general justifying aim of punishment and how this aim may be achieved through the distribution of

[20] The definition of a 'crime' is contested; David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th edn, OUP 2018) 3-4.
[21] Company, corporation, corporate entity, corporate body will be used interchangeably.
[22] *Salomon* (n 5); Machen (n 5); Watson (n 5); Hannigan (n 5).
[23] The thesis recognises that further research could be conducted in relation to the viability of the proposals of this thesis in relation to specific types of companies. What is important for the present purposes is that a company is a form of an entity that has a separate legal entity under the law.
[24] Note: The thesis focuses on punishing the corporate entity, although arguments made throughout the thesis may be applicable to holding individuals within the corporate entity in certain circumstances. Exploring the theoretical approaches to corporate criminal liability and punishment is required to define what counts as a violation of the law; and the circumstances where a violation of the law should be attributed to the corporate entity, individuals within the corporate entity, or both.
[25] Ormerod and Laird (n 20) 245-7.
[26] Brooks, *Punishment* (n 13) 6.

punishment.'[27] Punishment is a response to crime. The justifying aim of punishment and the distribution of punishment must adhere to the definition of punishment as a response to crime.[28]

Following a broad interpretation of Hart's and Brooks' proposals, the following understanding of a theory of punishment is advanced:

The justifying aim of punishment defines the reasons for punishing companies; provides guidance on the scope of liability (i.e. the standards of liability or what conducts or omissions ought to be criminal and who should be held responsible when violations of the law occur) and explains the causes of crime.

The justifying aim of punishment determines the distribution of punishment. The distribution of punishment is interpreted broadly to include how companies are brought to justice once they violate the law (the process), and the amount of punishment that should be imposed once a company is brought to justice (the sentence). Again, all of the elements adhere to the definition of punishment as a response to crime.[29]

Objectives

The thesis generates new thinking and contributes to knowledge in two contested areas, restorative justice and corporate crime.[30] Particularly, the thesis studies the following:

(a) **How did companies become 'criminal subjects' and why does it matter today?:** examine corporate criminal liability and sentencing from a historical and theoretical perspective to advance three contentions relating to the law's failure to achieve retribution and deterrence and a theoretical basis of corporate criminal liability.
(b) **When should companies be punished?:** assess current criminal standards of liability to advance a theoretical and practically coherent model that accounts for different types of crimes and corporate management structures.

[27] ibid.
[28] ibid 5-6.
[29] ibid 37.
[30] See Chapters 1 and 5.

(c) **Why should companies be punished? How should they be punished?:** assess the suitability of various approaches to retribution, deterrence, rehabilitation, and restoration to explain (i) the justifying aim of punishment: Why should companies be punished? What acts and omissions should be punished under criminal law?; and (ii) the distribution of punishment: How should companies be punished and/or be brought to justice when they violate the law?

In relation to (c), the thesis distinctively examines mixed models that combine retribution, deterrence, rehabilitation, and/or restoration.[31] It uniquely advances knowledge on the punitive restoration form of the Unified Theory of Punishment (Hereinafter 'the UTP')[32] in the context of companies. It distinctively advances and defends an innovative and original understanding and contextualisation of restorative justice.

Chapter by Chapter Breakdown

Chapter 1 places the thesis in a historical context. It examines various theoretical bases of corporate criminal liability and punishment by exploring the development of corporate law, corporate civil liability, and corporate criminal liability in the

[31] Note: There is no agreement on what the purposes of criminal law are, and their contextualisations within the criminal justice system are contested in literature. Retribution and deterrence drive current procedures, policies, and laws governing corporate crime in England and Wales and the United States. The thesis focuses on four theories: retribution, deterrence, rehabilitation, and restoration. See United States Sentencing Commission, 'Guidelines Manual 2016' (n 11) Ch. 1 Pt. A, section 2; Sentencing Council, 'Environmental Offences: Definitive Guideline' (National Archives 2015) < http://www.sentencingcouncil.org.uk/wpcontent/uploads/Final_Environmental_ Offences_Definitive_Guideline_web2.pdf> accessed 7 January 2017; Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (National Archives 2014) < https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf> accessed 8 February 2017; Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (National Archives 2015) < http://www.sentencingcouncil.org.uk/wp-content/uploads/HS-offences-definitive-guideline-FINAL-web1.pdf> accessed 7 January 2017; Ormerod and Laird (n 20) 4-5; Brooks, *Punishment* (n 13) 11; Robert M. McFatter, 'Purposes of Punishment: Effects of Utilities of Criminal Sanctions on Perceived Appropriateness' 67 Journal of Applied Psychology 255, 255; Albert W. Alschuler, 'The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next' (2003) 70 The University of Chicago Law Review 1, 1; Esther Van Ginneken, 'The Pain and Purpose of Punishment: A Subjective Perspective' (2016) Howard League What is Justice? Working Papers 22/2016 <https://howardleague.org/wp-content/uploads/2016/04/HLWP-22-2016.pdf> accessed 1 April 2019, 3.

[32] Thom Brooks, 'Stakeholder Sentencing' in Julian V. Roberts and Jesper Ryberg (eds), *Popular Punishment: On the Normative Significance of Public Opinion for Penal Theory* (OUP 2014) 183; Brooks, *Punishment* (n 13) 83.

United States and England and Wales. It also assesses the current standards of liability and sentencing practices, including other ways of responding to violations of the law (e.g. Deferred Prosecution Agreements (Hereinafter 'DPAs'). Accordingly, it advances a theoretical basis of corporate criminal liability and a standard of liability model and discusses the possible flaws in current sentencing aims in theory and practice.

Chapters 2 to 5 examine the suitability of retribution, deterrence, rehabilitation and restoration to deal with corporate crime. Recognising the various theoretical approaches, understandings, and contextualisations of retribution, deterrence, rehabilitation, and restoration in theory and practice, each chapter historically and theoretically analyses the development of the theories and evaluates the advantages and disadvantages of their applications and/or incorporations to laws and policies to respond to non-corporate crimes and corporate crimes. After critiquing the current application of the theories (as pure models and as part of mixed models) to deal with corporate crime in literature and/or practice, the chapters argue for alternative approaches that are aligned with the theoretical basis of corporate criminal liability and standard of liability model set out in Chapter 1.

Chapter 6 builds on the proposals in Chapters 2 to 5 in relation to retribution, deterrence, rehabilitation and restoration. A one size fit approach is not theoretically nor practically coherent, necessitating the discussion of the UTP, a prominent theory of punishment that is in line with the theoretical basis of corporate criminal liability and standard of liability models advanced in Chapter 1. The chapter explores the foundational principles of the UTP in the context of companies, studies its merits in the context of corporate crime, and thereby advances a new theory of punishment for companies. This includes proposals for changing the aims of punishment and distribution of punishment.

Chapter One

Corporate Crime

1 Introduction

Corporate criminal liability has been recognised in England and Wales and the United States for over a century.[33] Today, recurrent calls for tougher laws have not necessarily resulted in a reduction in the rate of crime nor produced norm-compliant behaviour by companies. Recent reports suggest that although the level of reported crime has increased, the rate of prosecutions has decreased.[34]

In England and Wales, there has been a trend of piecemeal legislative reforms and calls for establishing new liability standards for similar criminal activities.[35] In the United States, debates have considered issues like the basis of corporate criminal liability for non-strict liability offences, which are foundational issues that should have been resolved in the early cases recognising corporate criminal liability.[36]

The stagnant development of corporate criminal law can be traced back to the following interrelating reasons:

(a) uncertainty surrounding the theoretical justification(s) for holding companies liable under the criminal law;
(b) the divergence of views regarding the suitable standards of liability, which includes (i) the circumstances in which the criminal acts of employees and/or agents should be implicated to the companies, and (ii) whether it is theoretically sensible and practical to hold companies liable for crimes other than strict liability offences that require proving the mens rea of intent, recklessness, or negligence; and

[33] Hasnas (n 1) 1329; Brickey, Corporate Criminal Accountability: A Brief History and an Observation' (n 1) 393.
[34] Financial Times (n 6).
[35] For e.g., The Criminal Finances Act 2017 introduced an offence for failure to prevent tax evasion. In January 2017, there has been a call for evidence concerning a new standard of liability for economic crime; Ministry of Justice (n 35); Criminal Finances Act 2017, sections 45-46; Washington Examiner (n 9).
[36] Washington Examiner (n 9).

(c) the current methods of punishment and existent alternative processes for bringing companies to justice once they have violated the law.

Accordingly, referring to (a) above, Section 2 takes a step back to explore the basis of corporate criminal liability from historical and theoretical perspectives. The first cases recognising corporate criminal liability have not coherently assessed the objectives of criminalising companies nor have addressed how the objectives can be achieved, resulting in laws that cannot cope with new challenges to regulating companies in an increasingly globalised and fast-changing market. A number of theoretical justifications for the basis of companies are not practically coherent nor aligned with current liability and sentencing frameworks. The section will advance a theoretical justification that overcomes these difficulties.

Referring to (b) and (c) above, Section 3 investigates current standards of liability and mechanisms for sentencing companies. Based on the findings in Section 2, the section advances an appropriate standard of liability model that is theoretically and practically coherent. This sets the scene for investigating (c) in the following chapters (investigating current methods of punishment and existent alternative processes for bringing companies to justice once they have violated the law).

2 The Basis of Corporate Criminal Liability

Defining 'crime' and the 'company' requires addressing 'how does a company commit a crime?' and 'what are the benefits of using the criminal law to regulate corporate activities?'[37] Mays states,

> The importance of finding the most appropriate method of ascribing liability cannot be overstated. Not only does it represent the intellectual foundation of corporate criminal liability, it also may…determine whether or not any system of corporate criminal liability engenders widespread public support. Only in circumstances where the basis of liability is seen to be fair and justifiable can broad endorsement be expected.[38]

[37] David Kershaw, *Company Law in Context: Text and Materials* (2nd edn, OUP 2012) 155.
[38] Richard Mays, 'Towards Corporate Fault as the Basis of Criminal Liability of Companies' (1998) Mountbatten Journal of Legal Studies 31, 31.

The standards of liability set the parameters for corporate criminal liability, which is essential in gaining an understanding of the justifying aims of punishment and the causes of corporate crime. The section aims to find a theoretically and practically coherent basis of corporate criminal liability, through historically examining the development of corporate law and criminal law as applied to companies, and theoretically examining academic literature on the imposition of corporate criminal liability.

2.1 The Historical Recognition of Corporate Criminal Liability

Wells compellingly states, '[i]n truth…there is no easy history of corporate criminal liability.'[39] History shows that in search of a coherent application of the corporate form and separate legal personality to corporate liability, different standards of liability were adapted, notably the *respondeat superior* and the identification doctrine standards.[40]

Section 2.1 evaluates the development of the corporate form, separate legal personality, and two notable standards of liability in England and Wales and the United States. The discussion will at times place more focus on UK company law, but references to US corporate law will be made where needed. The reason for this approach is clear. Kershaw states,

> [Both] jurisdictions started from the same place. In both jurisdictions…in several instances, for a period in the mid-nineteenth century, the leading cases in the United States and the United Kingdom were English eighteenth- and nine-teenth-century corporate cases, fashioned from English non-corporate legal borrowings.[41]

The development of US corporate law was largely influenced by UK law.

2.1.1 The Corporate Form, Separate Legal Personality, and Corporate Liability

[39] Celia Wells, *Companies and Criminal Responsibility* (2nd edn, OUP 2001) 99.
[40] Mays (n 38) 32.
[41] Kershaw (n 37) 3.

In the Fourteenth century, companies in the United Kingdom were lawfully incorporated by authority of the Parliament, by royal charter, or by prescription.[42] Companies were created as a result of concessions by the state.[43] A company for a limited purpose could be created by implication.[44] Early companies were primarily formed to manage church property, but that was later extended to further types of associations, like universities and hospitals. The Sixteenth and Seventeenth centuries witnessed the recognition of joint stock companies. Given that most business associations were not incorporated, some engaged in fraud scandals without incurring any liability, resulting in wide social and economic harms.[45]

The Bubble Act of 1720[46] was subsequently passed to regulate and punish individuals for violating laws in corporate settings, labelling them as 'public nuisances.'[47] Particularly, it regulated individuals who undertook projects under false pretences, miscommunicated information about the transferability of their shares, and acted on behalf of corporate bodies without legal authority.[48]

Concurrently, section 19 of the Interpretation Act 1889 defined a 'person' as including 'any body of persons corporate or unincorporate.' English courts also recognised companies as 'legal individuals.' They invented a separate 'imaginary human personality to the associated which is distinct from its members,'[49] as confirmed in *Salomon v Salomon*.[50] Three fundamental principles were accordingly established: (a) a company is an entity separate from its members; (b) corporate property is separate from the property of its members, and (c) a judgment against a company could only be executed against the property of the company not the property of its members.[51] Importantly, *Salomon*[52] changed the requirement for incorporation from petitioning the state, to following a process of incorporation as required by statute.[53]

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[42] Kathleen F. Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (n 1); WS Holdsworth, 'English Company Law in the 16th and 17th Centuries' (1922) 31 The Yale Law Journal 382, 382.
[43] Watson (n 5) 3.
[44] Holdsworth (n 42) 383.
[45] Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (n 1) 398.
[46] (6 Geo. 1 c. 18).
[47] ibid.
[48] ibid.
[49] M V. Sankaran, 'The Criminal Liability of Companies in Anglo-American Law' (Seminar on Criminal Law 1978) 1,1.
[50] *Salomon* (n 5)
[51] Machen (n 5).
[52] *Salomon* (n 5).
[53] Watson (n 5).

Nevertheless, the coherent application of these principles to civil and criminal liability was difficult: a company, an imaginary human personality, can only commit acts that it is legally empowered to do; cannot intend to commit an act and cannot be imprisoned.[54] Blackstone Commentaries stated, 'a company cannot commit treason or felony or other crime, in its corporate capacity, though its members may in their distinct individual capacity.'[55] Companies were said to 'have no souls,' and as artificial entities, could not stand trial or serve many punishments as individuals can.[56]

The way in which courts recognised corporate criminal liability for different types of offences tested the theoretical and practical coherency of corporate criminal liability. There was no challenge to imputing corporate criminal liability on regulatory offences because many of these regulatory offences were strict liability offences, where crimes do not require a mens rea.[57] The greater challenge lied in extending corporate criminal liability to offences requiring proof of mens rea. Two standards of liability that emerged are notable, the *respondeat superior* standard and the identification doctrine standard.[58]

2.1.2 Liability for Regulatory Offences

Criminal liability for regulatory offences was established without much challenge. Pinto and Evans assert, 'encouraged, no doubt, by of the Interpretation Act (1889), by the turn of the Nineteenth century, the criminal courts accepted that a company could be liable for a wide range of criminal offences within the regulatory sphere.'[59] The application of the corporate criminal liability for regulatory offences followed from a straight application of s.2(1) of the Interpretation Act 1889.

Companies in the UK began to incur criminal liability for a limited range of offences, including public nuisance, criminal libel, and breach of statutory duties.[60] Several

[54] Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (n 1) 401.
[55] Sankaran (n 49) 3.
[56] W. R. Thomas, 'How and Why Companies Became (and Remain) Persons Under the Criminal Law' (2016) Florida State University Review, Forthcoming 1,1.
[57] Ormerod and Laird (n 20) 143, 248.
[58] ibid.
[59] Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (2nd edn, Sweet & Maxwell 2008) 33.
[60] G. Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43 International and Comparative Law Quarterly 493, 496.

cases addressed liability for nuisance arising out of non-repair of highways or bridges by counties.[61] This was later extended to cover the liability of railway companies.[62] In *Regina v Birmingham and Glouster Railway Company*,[63] a company was held indictable for failing to comply with a legal mandate requiring the removal of a bridge erected over a road.[64]

2.1.3 The *Respondeat Superior* standard

The courts overcame the challenge of imputing criminal liability to a company for failing to meet a statutory duty set out in the law through the civil law legal principle of vicarious liability.[65] Under *respondeat superior*, the criminal act of any employee or officer is imputed to the company if the employee or officer had the express or implied authority to commit the act, and they committed the act for the benefit of the company. The company is held to be vicariously liable for the acts of the employee or officer.[66]

In *The Queen v. Great North of England Railway Company*,[67] a company was found criminally liable for misfeasance when it illegally cut through and obstructed a highway in the county of Durham.[68] The defendants argued that a company could not be held for misfeasance, relying on dicta of Holt C.J in *Anonymous* case.[69] Prosecutors, on the other hand, relying on *Birmingham and Glouster Railway Company*[70] and *Rex v The Severn and Wye Railway Company*,[71] contended that Holt C.J.'s dictum is not the law as it stands.[72] The case sided with the prosecution, holding that a company is liable under criminal law for nonfeasance and misfeasance.[73]

The case is notable for holding companies criminally liable for non-strict liability offences. It justified its decision as a matter of public policy: '[the] tendency of

[61] For e.g., *Russell v Man of Devon*, 100 Eng. Rep. 359 (1788).
[62] *The King v Mayor and Company of Liverpool* (1802) 3 East 86; *The King v Company Stratford Upon Avon* (1811) 14 East 348; *The King v Severn & Wye Railway* (1819) 2 B. & 645.
[63] (1841) 3 Q.B.R. 231.
[64] Sankaran (n 49) 1.
[65] Mays (n 38) 33.
[66] Anca I. Pop, 'Criminal Liability of a Companies-Comparative Jurisprudence' (King Scholar Program thesis, Michigan State University College of Law 2006) 23.
[67] *The Queen v. Great North of England Railway Company* (QB 1846) 9 QB 315, 319.
[68] ibid 319.
[69] 12 Mod. 559 (K.B. 1701) 559.
[70] *Glouster Railway* (n 63)
[71] *The King v Severn & Wye Railway* (n 62).
[72] *Great North of England Railway Company* (n 67).
[73] ibid 325.

modern decisions has been to make companies, civilly as well as criminally, amenable like individuals.'[74] Moreover, the court maintained there is '[a relaxation of] a rule established in a state of society very different from the present, at a time when companies were comparatively few in number and upon which it was very early found necessary to engraft many exceptions.'[75] Without considering the theoretical coherence of its decision, it extended the tort law principle, vicarious liability, to criminal law, to support corporate criminal liability for 'misfeasance'. Misfeasance is 'an intentional tort, where the relevant intention is bad faith.'[76] The *respondeat superior* doctrine, holds principals liable for the wrongful actions of agents if completed for the benefit of the principal and is within the express or apparent scope of their duties.[77]

Given that the railway company had ordinary powers to interfere with roads, any illegal acts of members of the company in relation to such powers could be imputed to the company. The members of the company authorised a criminal act in the name of the company, and such could be implicated to the company benefiting from this act.[78] This has established a standard of liability where the criminal acts of any employee acting on behalf of the company could be imputed to the company. With regards to the punishment, the court stated that 'the common law punishment for a nuisance is a fine, imprisonment, or both. The first of these can be inflicted on a company.'[79] Given that a corporate entity cannot be imprisoned as an individual can, a fine would be imposed as punishment.

The United States followed the English jurisdiction's development of corporate criminal liability in the early 1900s. The Supreme Court in *New York Central & Hudson River Railroad Company v. United States*[80] relied on the *respondeat superior* doctrine to recognise corporate criminal liability.[81] In the case, a railroad company and two of its agents (the general traffic manager and assistant traffic manager) were

[74] ibid 319.
[75] ibid 320.
[76] Mark Aronson, 'Misfeasance in Public Office' < http://www.lawcom.gov.uk/app/uploads/2016/01/apb_tort.pdf> accessed 1 April 2019, 1.
[77] Kathleen F. Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (n 1) 401-3.
[78] *Great North of England Railway Company* (n 67) 321.
[79] ibid 322.
[80] *New York Central* (n 18).
[81] M. H. Baer, 'Organizational Liability and the Tension Between Corporate and Criminal Law' (2010) 19 Journal of Law and Policy 1, 2; Edward B. Diskant, 'Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure' (2008) 118 Yale Law Journal 126, 139.

held liable for paying rebates to sugar refining companies upon shipments of goods between states, which was in violation of the Elkins Act.[82] It provides,

> (a) Anything done or omitted to be done by a company common carrier subject to the act to regulate commerce…which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee lessee, agent, or person acting for or employed by such company, would constitute a misdemeanour under said acts, or under this act, shall also be held to be a misdemeanour committed by such company
> (b) In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission, or failure of such carrier, as well as that of the person.

The court held that companies ought to be criminally liable for acts of their agents that are in violation of the Elkins Act.[83] The court cited *The Queen v. The Great North of England Railway Co.*,[84] discussed above. It specified that, for the purposes of public policy, the tort principle of *respondeat superior* should extend to criminal law. If officers and agents of companies conduct decisions in accordance with the companies' purposes, motivations, and goals, they can be seen to have intended to complete the acts and should be praised and/or held accountable for such acts.[85] In particular, agents could assume to have had the power to perform acts within the scope of their employment for the benefit of the principal, without the principal having necessarily participated in or expressly authorised the conduct.[86] It follows that companies accept the benefits of the agents' conducts through profits. Therefore, it is not against public policy to hold the company accountable for any unauthorised acts by its agents if they have accepted the benefits of such acts. The court further explained that since the company itself cannot be arrested or imprisoned, its property could be taken for the purposes of punishment or compensation.[87]

[82] 32 Stat. at L 847, 708, U.S. Comp. Stat. Supp. 1907.
[83] ibid.
[84] *Great North of England Railway Company* (n 67).
[85] *New York Central* (n 18) 495.
[86] ibid.
[87] ibid.

Following the English experience, the recognition of corporate criminal liability in the United States is justified in early cases due to 'shifting trends in legal formalisms', rather than through theoretical concepts. It was practically expedient and effective to respond to the growing power and size of companies and changing attitudes towards compliance through recognising corporate criminal liability.[88]

As explored in the next section, the *respondeat superior* standard still applies in England and Wales and the United States.[89] Yet, the development of the identification doctrine standard in England and Wales narrowed the applicability of *respondeat superior* as a prominent company criminal liability standard.[90]

2.1.4 The Identification Doctrine

In England and Wales, the prominence of the *respondeat superior* standard was narrowed by the 'identification doctrine' standard. Like *respondeat superior*, the identification doctrine originates in civil law, as set out in the case of *Lennard's Carrying Co. Ltd v Asiatic Petroleum Ltd*.[91] In the case, the court held that, for the purposes of tort law, the act of the managing director or controlling officer, not any member within the company, equated to an act of the company.[92] Viscount Haldane L.C. stated,

> [A] company 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 company, the very ego and centre of the personality of the company … somebody who is not merely a servant or agent for whom the company is liable upon the footing respondent superior, but somebody for whom the company is liable because his action is the very action of the company itself.[93]

[88] A. Weissmann and D. Newman, 'Rethinking Criminal Corporate Liability' (2007) 82 Indiana Law Journal 411, 418; W.R. Thomas (n 56) 9; Baer (n 81) 2-3. See the discussion on deterrence in Chapter 1, sections 2.1.3 and 3.1.3.
[89] See Chapter 1, section 3.1.
[90] Mays (n 38) 38.
[91] (1915) AC 705.
[92] ibid 712-4.
[93] ibid 713-4.

The criminal acts of individuals who are the 'directing mind and will of the company' equate to the actions of the company. Corporate criminal liability would apply even if the agent acted against the set procedures because they '[directed] the mind of the company towards the commission of an offence.'[94]

Defining the scope of individuals whose acts or omissions would be imputed to the company for a particular state of mind or behavioural standards was developed from the 1940s.[95] In *DPP v. Kent and Sussex Contractors, Ltd*,[96] it was held that the knowledge and intention of the 'responsible agent of the company' should be attributed to the company.[97] In *Bolton (Engineering) Co. Ltd v T.J. Graham & Sons Ltd*,[98] Denning L.J stated,

> [A] company may in many ways be likened to a human body. It has a brain and 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 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. So you will find 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.[99]

Agents are defined as individuals who hold high positions within a company, particularly being capable of making decisions on behalf of the company and/or play a key function within the company's decisional structure. Finding a company liable requires identifying individuals within the company who hold high positions and can represent the company, and proving that such individuals committed the actus reus and mens rea of the offence. Their criminal acts are implicated to the company because a company, an artificial body, cannot act without its agents.

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[94] ibid 714.
[95] See for e.g., *R. v. I.C.R. Haulage, Ltd* (1944) K.B. 551; *Moore v. Bresler* (1944) 2 All E.R. 515; *DPP v. Kent and Sussex Contractors, Ltd*. (1944) 1 All K.B. 146.
[96] (1944) 1 All K.B. 146.
[97] ibid 156.
[98] (1957) 1 Q.B. 159.
[99] ibid 172.

In *Tesco Supermarkets v Nattrass,*[100] the company in the case was charged with an offence under the Trade Descriptions Act 1968 when a cashier employee sold a product above the advertised price, which was contrary to the company's policies and employee training. The Trade Descriptions Act 1968 has three defences: mistake, reliance on information supplied to the trader, and/or an accident beyond the control of a person, and the person took all reasonable precautions and exercised due diligence to avoid the commission of the offence.[101] The company raised the last defence.[102] Lord Diplock provided guidance on the 'identification doctrine', stating,

> What natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.[103]

Agents of the company can be identified through the memorandum or articles of association, or through powers granted by the board of directors. Additionally, a company would not be held liable unless the agents are identified, and there is evidence that the agents had the requisite actus rues and mens rea for the offence.[104] Thus, applying the identification doctrine, the criminal acts of an individual holding the position of a 'cashier' cannot be imputed to the company.

A number of issues arise from the *Tesco Supermarkets v Nattrass*[105] decision. Lord Reid notes,

> Parliament has chosen to deal with the problem piecemeal… the main object of these provisions must have been to distinguish between those who are in some degree blameworthy and those who are not, and to enable the latter to escape from conviction if they can show that they were in no way to blame.[106]

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[100] *Tesco Supermarkets Ltd. v Nattrass* (1972) A.C. 153.
[101] ibid 168.
[102] ibid 153, 167.
[103] *Nattrass* (n 100) 200.
[104] Celia Wells, 'Corporate Liability for Crime: The Neglected Question' (1995) International Banking and Financial Law 42, 43.
[105] *Nattrass* (n 100) 200.
[106] ibid 169-70.

The court did not specifically define the scope of liability for different types of crimes beyond stating that the *respondeat superior* standard would only apply if the employee committed a criminal act without violating the company's procedures.[107] Moreover, the court did not take into account that companies come in different sizes and have different management structures. Defining the exact parameters of individuals who represent the 'alter ego of the company' can be challenging.

These issues were apparent in later decisions. *Tesco Supermarkets v Nattrass*[108] was distinguished from *Tesco Stores Ltd v Brent London Borough Council*.[109] In the case, a store manager sold a video work with an age classification certificate to a person below the specified age. Section 11 of the Video Recordings Act 1984 regulates the selling and supplying of video work with age classification certificates. It is a criminal act to sell or supply a video work for someone under the age listed in the classification certificate.[110] Defences include lack of knowledge or reasonable grounds to believe that the classification certificate contained the age statement or lack of knowledge or reasonable grounds that the person did not attain the required age.[111] The court held that the regulatory route to the offence would be followed, or in other words, that the *respondeat superior* standard would apply in the case. The company could not rely on the defence of 'lack of knowledge' under the identification principle.

Distinctively, the criminal act in *Tesco Stores Ltd v Brent London Borough Council*[112] did not have a 'due diligence' defence like *Tesco Supermarkets v Nattrass*,[113] and the act was committed by a senior manager rather than an employee not following the orders of the company. In a large company like Tesco, the senior manager would not fall under the category of a person who 'would have directed the company towards the commission of the offence.' Lord Buckley stated in *Tesco Stores Ltd v Brent London Borough Council*,[114] 'can a company which contracted to supply a video rely on a defence …on the basis that its employee's state of mind

[107] ibid 173.
[108] *Nattrass* (n 100).
[109] *Brent London Borough Council* (n 112).
[110] Video Recordings Act 1984, s. 11(1).
[111] ibid s 11(2).
[112] *Tesco Stores Ltd v Brent London Borough Council* (1993) 2 All ER 718; 1 W.L.R. 1037.
[113] *Nattrass* (n 100).
[114] *Brent London Borough Council* (n 112).

cannot be imputed to itself? …No.'[115] The court reasoned that if the directing mind and will approach was followed and the defence was to be applied, no large company could ever be held liable.[116]

Thus, *Tesco Stores Ltd v Brent London Borough Council*[117] and *Tesco Supermarkets v Nattrass*[118] illustrate difficulties in determining the applicable rule of attribution if statutory or common law offences fail to provide clear and straightforward guidance.[119]

Lord Hoffmann in the Privy Council decision, *Meridian Global Funds Management Asia Ltd v Securities*,[120] sought to clarify when corporate criminal liability would be imposed through 'the rules of attribution.'[121] He acknowledges that the states of minds and behavioural standards by certain members within the company can be attributed to the company through statutory provisions; the company's constitution; and common law principles. However, in some circumstances, the law excludes the rules of agency or vicarious liability by stating that the defendant is required to fulfil the actus reus and mens rea of the offence.[122] He states,

> [I]n such a case, the court must fashion a special rule Hoffman clarified that in such circumstances, it is important of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.[123]

Importantly, determining whether a company is criminally liable is context dependent; it requires looking at the specific offence or case to determine the rule of attribution that will apply.[124] Ormerod and Laird state, 'it remains to be seen how far in practice the [*Meridian*] approach displaces [*Nattrass*] by allowing corporate

[115] ibid 1045.
[116] ibid 1042.
[117] ibid 1037.
[118] *Nattrass* (n 100).
[119] Kershaw (n 37) 162.
[120] (1995) 3 WLR 413; (1995) 2 AC 500.
[121] ibid 506.
[122] ibid 507.
[123] ibid.
[124] ibid 511.

liability when the acts are those of individuals who would not be seen as a controller.'[125] The impact and contextualisation of the case remain unclear.

Dignam and Lowry imply that the case displaced the narrow application of the identification doctrine in *Tesco Supermarkets v Nattrass*,[126] stating that '[*Nattrass*] provided a misleading analysis. The real issue was who were the controllers of the company for the purposes of attribution…Despite this the idea of an alter ego or directing mind and will of a company still appear in the law from time to time.'[127] They argue that the case is compatible with the rule in *Salomon*,[128] which emphasises that a company is separate from its members.[129] Loveless et al. further states, 'Lord Hoffman stated that the identification model of liability was not always appropriate and was one subcategory of a broader rule of attribution.'[130] The courts do not view the identification doctrine as the default rule but rather look at the objective of the statute to determine whether liability would be attributed to the company.[131]

On the other hand, Ormerod and Laird interpret *Meridian Global Funds Management Asia Ltd v Securities*[132] as a restatement of the law rather than a departure from the law.[133] In *R v St Regis Paper Company Ltd*,[134] Moses LJ, citing Ormerod and Laird, recognise that the case reemphasises looking back at the statute and sources of the law to determine the correct rule of attribution.[135] The case has also approved the narrow approach in *Moore v. Bresler*,[136] which was parallel to the approach in *Tesco Supermarkets v Nattrass*.[137]

[125] Ormerod and Laird (n 20) 252.
[126] (1972) A.C. 153.
[127] Alan Dignam and John Lowry, *Company Law* (10th edn, OUP 2018) 270.
[128] *Salomon* (n 5).
[129] Dignam and Lowry (n 127) 270.
[130] Janet Loveless, Mischa Allen, and Caroline Derry, *Complete Criminal Law* (6th edn, OUP 2018) 175.
[131] Law Commission, 'Criminal Liability in Regulatory Contexts' < http://www.lawcom.gov.uk/project/criminal-liability-in-regulatory-contexts/#related> accessed 1 April 2019.
[132] *Meridian* (n 120).
[133] Ormerod and Laird (n 20) 253.
[134] (2012) 1 Cr. App. R. 14, 177.
[135] ibid 177, 185.
[136] (1944) 2 All E.R. 515.
[137] *Nattrass* (n 100); Ormerod and Laird (n 20).

Nevertheless, recent cases have viewed the identification doctrine as the default rule of attribution.[138] The Supreme Court in *Jetivia SA and another v Bilta (UK) Ltd (in liquidation) and others*[139] held that the acts of the directors could not be attributed to the company. In *R v A Ltd*,[140] Brian Leveson P stated that 'save in those cases where consideration of the legislation creating the offence in question leads to a different and perhaps broader approach, as discussed in *Meridian Global Funds Management Asia Ltd v Securities Commission*, the test for determining those individuals whose actions and state of mind are to be attributed to a corporate body remains that established in *Tesco Supermarkets Ltd v Nattrass*.'[141] The approach of the courts on contextualising the identification doctrine as the default rule or as a subset of many attribution rules is inconsistent, contributing to the perception that corporate criminal liability as a theoretically incoherent concept.[142]

From here, it may be worth going back to the question asked at the beginning of the section: What is the theoretical justification for extending *respondeat superior* and the *identification doctrine*, both civil law principles, to the criminal law?

One may argue that 'deterrence' was the objective of recognising corporate criminal liability. Corporate criminal liability was seen as a necessary response to increasing social and economic harms by companies. The growing size and power of companies and eagerness for profit maximisation shifted attitudes of complying with the law. Moreover, holding members of companies liable under civil law and/or criminal law was not sufficient to deter companies from violating the law, hence focusing on punishing the corporate entity was seen as a better mechanism in deterring the specific company and other companies from committing violations of the law.[143]

Yet, as Chapter 3 explores, different approaches to deterrence adopt distinctive approaches to attributing fault to the company. Some approaches to deterrence focus on holding individuals within the company reliable and reject corporate criminal liability to achieve specific deterrence; whilst other approaches see value in applying

[138] See for e.g., *Ferguson v British Gas Trading Ltd* (2009) EWCA Civ 46; *Jetivia SA and another v Bilta (UK) Limited (in liquidation) and others* (2015) UKSC 23; and *G-Star Raw Cv v Rhodi Ltd & ors* (2015) EWHC 216.
[139] (2015) UKSC 23.
[140] *R v A Ltd* (2016) WECA Crim 1469, [27].
[141] ibid.
[142] Sankaran (n 49) 2.
[143] Baer (n 81) 3.

corporate criminal liability only when deterrence is not achieved through holding the members personally accountable.

Early cases did not adequately identify the aims of punishing companies nor how corporate bodies, artificial entities, could be deemed to have 'intended' a criminal act or were 'negligent.' Even if 'deterrence theory' is linked to the basis of corporate criminal liability, it is still not clear which approach to deterrence is being followed, resulting in difficulties in defining the rules of attribution. Accordingly, in search for an 'intellectual foundation of corporate criminal liability,'[144] section 2.2. will consider a select of theoretical justifications to corporate criminal liability that has been considered in legal literature.

2.2 Theoretical Justifications to Corporate Criminal Liability

2.2.1 Justifying Corporate Criminal Liability as Moral Responsibility

One justification to corporate criminal liability relates to the moral blameworthiness of the company, i.e. viewing the company as an 'autonomous moral [agent]'.[145] Many theoretical approaches to 'corporate criminal liability as group moral agency' have emerged, which can be grouped as the 'group moral agency' approach.[146] The subsection focuses on the theoretical views of Peter French and Philip Pettit on companies as moral individuals. French states,

> [My] interest is to argue for a theory that accepts companies as members of the moral community, of equal standing with the traditionally acknowledged biological human beings…hence that they can have whatever privileges, rights, and duties as are, in the normal course of affairs, accorded to moral persons.[147]

Companies are collectives that are equal to individuals and should have the same rights and owe the same moral obligations.[148] French argues that a moral person is a 'subject of a right' and does not require 'biological existence.'[149] They are collectives or 'conglomerates' not an aggregate of individuals because they have decision-

[144] Mays (n 38) 31.
[145] Ian B. Lee, 'Corporate Criminal Responsibility as Team Member Responsibility' (2011) 31 Oxford Journal of Legal Studies 755, 755.
[146] ibid.
[147] Peter A. French, 'The Corporation as a Moral Person' (1979) 16 Am Phil Q 207, 208.
[148] ibid 215.
[149] ibid 210.

making processes.[150] Being subject to a right incurs responsibility in certain circumstances: when the subject's actions cause an event, and/or when 'the event was the direct result of an intentional act of the subject'.[151] Given that companies are collectives with decision-making processes, they have a corporate personality that can intend. Intent can be established from the company's internal decision structure (Hereinafter 'CID'), which reflects the policies of the company and the power structure within the company.[152] The CID is driven by the decisions of personnel who are acting for the benefit of the company.[153]

Additionally, Pettit also argues that companies are moral agents. He recognises corporate criminal liability on the basis of 'a regime of moral responsibility [dictating] when people are blameworthy.'[154] He argues,

> '[A] group of people will constitute a corporate agent…[which is] an individual human person, being capable of advancing considered goals in light of considered representations and, in particular, being capable of registering and responding to desiderata of rationality as well as to the values that members of the group personally countenance'[155]

Agreeing with French's assertion that companies are conglomerates, Pettit states that companies are group agents.[156] Group agents can be held responsible if three conditions are satisfied. First, 'value relevance', where the company has the choice to make a 'good or bad or right or wrong decision.'[157] Second, 'value judgement', where the company has the ability through knowledge or evidence to make judgements about the relative value of options.[158] Third, 'value sensitivity', where the company can make decisions after considering the value relevance and judgement.[159] Accordingly, companies are capable of intentionality through the recurrent decisions taken by its members to advance their goals and are morally

[150] Peter A French, *Collective and Corporate Responsibility* (Columbia University Press 1984) 13.
[151] ibid 42; French, 'The Corporation as a Moral Person' (n 147) 210-2.
[152] ibid 212.
[153] ibid.
[154] Philip Pettit, 'Corporate Responsibility Revisited' (2009) 38 Rechtsfilosofie & Rechtstheorie 159, 171.
[155] ibid 163.
[156] Philip Pettit, 'Responsibility Incorporated' (2007) Ethics 171, 172.
[157] ibid 177.
[158] ibid.
[159] ibid.

responsible for decisions that result in violations of the law.[160] A company can 'intend' if four conditions are met: the company's members have a shared goal, members within the company individually contribute to advance the goal, the company makes decisions to advance that goal, and members within the company have a common awareness of that goal.[161]

From here, the corporate entity is capable of being held responsible in the same way individuals are, including criminal liability. Both French and Pettit argue that if companies are proven to be morally blameworthy, they should not be precluded from criminal liability and punishment.[162] French explains that a company can have moral responsibility even if one or more of its members are not responsible.[163] Pettit states that the mens rea, or guilty mind, includes 'intentional malice, malice with foresight, negligence, or recklessness.'[164]

Many issues arise from 'the group moral agency' approach. First, French and Pettit argue that companies owe moral duties to individuals, therefore can be morally blameworthy. Yet, they fail or do not sufficiently explain the reasons behind companies owing moral duties to individuals and how they are part of the moral community.[165] Pettit derives his arguments on attracting moral blameworthiness from Christian catechisms on 'conditions necessary and sufficient for a deed to constitute a serious sin….[There] must have been a grave matter…full knowledge of the guilt, and full consent of the will.'[166] Pettit argues that a company can make value judgements hence attracts blame, yet it is very difficult to draw the line between a good and bad value judgement, especially when making short and long-term decisions to maximise the success of the company. This relates to the broader argument that there are flaws in establishing a civil and/or criminal liability system based on a 'morally good citizen or company.' Individuals have different perceptions as to what 'morality' is, and it is unlikely that a state has one moral standard.[167] Making decisions based on 'moral rules', which are constantly subject to change and

[160] ibid 185.
[161] Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press 2011) 33.
[162] French, *Collective and Corporate Responsibility* (n 150) 31-47; Philip Pettit, 'Corporate Responsibility Revisited' (n 154).
[163] French, *Collective and Corporate Responsibility* (n 150) 31-47.
[164] Philip Pettit, 'Responsibility Incorporated' (n 156) 176.
[165] Lee (n 145) 762-3; J. Corlett, 'Corporate Responsibility and Punishment' (n 165) 2 Public Affairs Quarterly 1, 4.
[166] Philip Pettit, 'Responsibility Incorporated' (n 156) 174.
[167] Brooks, *Punishment* (n 13) 7-8.

vary amongst different consumer markets, is difficult. The possible coherency of this argument is diminished in the context of a company.

Furthermore, it is not clear which and how different types of mens rea are recognised by Pettit and French. Mellema recognises, 'how far French is willing to go in granting collectives the capability of bearing moral responsibility is not clear.'[168] Lee further states, 'what distinguishes a defect [by a company] from an innocent causative act is not explained by French.'[169] French explains how a company can 'intend' but does not explain whether criminal responsibility can be established through other ways, i.e. whether a company can be reckless, have malice with foresight and/or be negligent. Additionally, Pettit lists the different types of mens rea that could be attributed to a company without explaining the particular differences between them. He does not, for instance, provide examples of circumstances where a company can be said to have met 'malice with foresight' rather than 'recklessness'. The foundations of his arguments based on 'reliance on grave matter…full knowledge of the guilt following, and full consent of the will,' reflecting Christian catechisms, do not reflect culpability standards like negligence and recklessness.

Overall, one theoretical justification to corporate criminal liability is that companies, like individuals, owe moral responsibilities. This account faces many difficulties, including sufficiently justifying how the company would be part of the moral community, defining the moral community, drawing the line between civil and criminal liability, and explaining the differences between the types of mens rea and culpability standards that are accepted. Therefore, it is more coherent to explore theoretical approaches that draw the line between moral blameworthiness and criminal liability.[170]

2.2.2 Justifying Corporate Criminal Liability as Team Member Responsibility

One influential theoretical view of corporate criminal liability is Lee's 'corporate criminal liability as team member responsibility'.[171] Corporate criminal liability is '[the] shared responsibility of the members of the incorporated enterprise for wrongdoing by one or more of the other members.'[172]

[168] Gregory F. Mellema, *Collective Responsibility* (Radopi 1994) 55.
[169] Lee (n 145) 763.
[170] ibid.
[171] ibid 771.
[172] ibid 766, 771.

Under this view, companies are defined as 'a set of legal consequences produced by corporate law and the company's constitutive documents.'[173] A company is created by a set of contracts, resulting in legal relationships between all bodies working on behalf of the company. [174] The company is a separate legal personality because it undergoes a process of incorporation; it is not an association of shareholders but is a 'separate legal entity from its shareholders.'[175]

Given that the company is a separate legal personality following incorporation, it will adopt a persona.[176] The company will develop monitoring and bonding policies to promote mutual loyalty between members of the company and the corporate body, and to maximise efforts to reach the objectives of members of the companies working as one unit or one team.[177] Mutual exchanges of value between the company and the market help in defining the corporate personality or character and the company are also likely to develop policies and implement measures to establish its personality to its clients and the community.[178] Resultantly, companies have a set of collective action principles that are well-founded regardless of whether there are changes to the team members. [179]

Attitudes towards compliance by members of the company are influenced by the contract they have with the company, monitoring and bonding policies, and the benefits received. Members of the team judge their conduct not individually, but relative to whether they completed their tasks and the company's objectives as a result of their collective actions.[180] Corporate success is the result of contributions by any person within the team.[181] Any achievement committed by one or more members should be taken as credit for collective achievement of the whole team, and any failure committed by one or more members should be a discredit to the whole team. Members of the team, motivated by the team's norms and behaviour, may contribute to positive achievements in compliance with the law, or negative achievements that incur benefits to the company but are in violation of the law.[182]

[173] ibid 766.
[174] ibid 768-9.
[175] Watson (n 5) 4.
[176] ibid.
[177] Lee (n 145) 768-9.
[178] ibid 766.
[179] ibid 764, 781, 775.
[180] ibid 772.
[181] ibid 764, 772, 781.
[182] ibid 755, 756, 773, 781.

For companies, crimes are defined as acts or omissions that are the responsibility of the team. Lee states,

> [Condemnation] of the whole company draws attention to the contributory role that the team's norms played in producing the wrongdoing and to the responsibility of the members in relation to the content of those norms… and for the state to condemn the direct wrongdoer alone is to implicitly and mistakenly absolve the team.[183]

When the negative achievements fall under criminal liability laws, criminal liability should be imposed on both the member of the team and the organisation, to influence the behaviour of team members who may have contributed to the generation of conduct leading to the wrongdoing, and to allow team members to evaluate whether they should continue to be part of the corporate entity.[184]

Lee argues that criminal liability should be imposed under two circumstances. First, it should arise when the commission of the wrongdoing is partially or completely motivated by the team's norms. Second, it should arise when team members contribute to or commit the unlawful act or omission in pursuit of the team's goals.[185] The team members under the latter circumstance could also incur personal liability. When liability is imposed in accordance with these principles, companies would be alerted that legal violations could create a setback to achieving long term corporate goals.[186]

2.2.3 The Coherence of Corporate Criminal Liability as Team Member Responsibility

From here, it is crucial to consider the theoretical and practical coherency of corporate criminal liability as team member responsibility. The view compellingly overcomes difficulties posed by the Group Moral Agency Theory, and successfully counterargues many views in legal literature that oppose corporate criminal liability

[183] ibid 778.
[184] ibid 764, 781.
[185] ibid 772.
[186] Ronald Slye, 'Companies, Veils and International Criminal Liability' (2008) 33 Brooklyn Journal of International Law 955, 778.

as a principle. The subsection will defend Lee's team member responsibility basis to corporate criminal liability in light of these views.

Corporate criminal liability as team member responsibility advantageously provides a 'non-moral' view of corporate criminal liability. Liability is imposed when a team member contributes to or commits an unlawful act in pursuit of the team's goals and by the motivation of the team's norms. The view does not set immorality as a standard for imposing liability. This is advantageous for three reasons.

First, the theory is in line with the concepts of separate legal personality and corporate personhood following *Salomon*.[187] According to a modern view of the concession theory, the corporate legal personality is acquired following incorporation as allowed by statute; 'a persona dicta that owed its existence to the state.'[188] The impact of this is as follows – the corporate exists as separate from its shareholders and is not merely an aggregate group. Accordingly, it has representatives like the board of directors and acquires a persona through its internal processes and decision-making processes.[189]

Second, it clearly draws the line between criminal and civil liability and justifies the necessity for criminal liability in addition to civil liability. From here, one should evaluate the necessity of criminal liability in addition to civil liability. One view that rejects criminal liability is the neoclassical view. The neoclassical view distinguishes civil from criminal liability methods of punishment and compensation. Civil liability imposes fines, whereas criminal liability imposes sanctions beyond fines, notably imprisonment. Since corporate bodies are fictional entities, they cannot be imprisoned, hence criminal liability is not necessary. If the primary method for sentencing is fines, then civil liability is a more economically feasible way of dealing with wrongdoings. Criminal prosecutions often incur high costs associated with substantive procedural and substantive safeguards.[190]

Having considered Lee's views on criminal liability, it is clear that views rejecting liability on the basis of methods of sentencing and compensation fail to distinguish between the aims of sentencing and methods of punishment. It is not viable to reject

[187] *Salomon* (n 5)
[188] Watson (n 5) 26.
[189] ibid 26-28.
[190] ibid 758.

criminal liability for cost-internalisation purposes. Neither is it viable to reject criminal liability due to the fact that the predominant method of punishment is the payment of fines, which is similar to civil law cases. History evidences the failure of civil liability to influence the behaviour of companies. Imposing a criminal fine carries a different weight from imposing a civil fine. Criminal fines attach the label 'criminal' to the conduct and eliminate the option of factoring in the costs of civil fines as a part of their business (possibly through insurance).[191] Parallel to Lee's views, this is more likely to influence members of companies to adjust their preferences and understand that such conduct would result in punishment and that the prosecution of one company is likely to influence the behaviour of other companies to avoid future criminal liability.[192] As will be investigated in the next section and later chapters, the payment of fines is not the only way to punish companies.

Third, it clarifies the role of members in a corporate entity and identifies situations where personal liability and corporate liability would be imposed.[193] This advantageously overcomes difficulties of justifying the extension of *respondeat superior* and the identification doctrine to criminal law, which early cases have failed to do.

Legal literature opposing corporate criminal liability often cite the theoretical incoherence of extending vicarious liability, a tort principle, to criminal law. One view that rejects corporate criminal liability on theoretical grounds is worth considering. Hasnas states, '*New York Central* was a mistake when it was decided, remains a mistake today, and should be explicitly overruled.'[194] Hasnas sees a clear distinction between criminal and civil laws: Criminal laws aim to punish, whereas civil laws aim to achieve 'corrective justice', which would require an individual, even without personal fault, to pay compensation to restore an injured party for an act that they have caused or benefited from. Corporate criminal liability thereby authorises a form of collective punishment that directly contradicts fundamental principles of a liberal society, which are advocated by Anglo-American criminal law.[195]

[191] Denis Binder, 'The Increasing Application of Criminal Law to Disasters and Tragedies' (2016) 30 Natural Resources & Environment 1, 1; Slye (n 186) 970.
[192] Lee (n 145) 778.
[193] ibid 780.
[194] Hasnas (n 1) 1337.
[195] ibid 1349.

Particularly, as the court in *New York Central*[196] considered, Hasnas contends that imposing corporate criminal liability would incriminate shareholders for acts that they did not commit without affording them due process of the law.[197] Moreover, management within companies cannot authorise illegal activities. Both situations evidence that a corporate entity cannot commit the actus reus and mens rea of a crime. Actus reus involves the performance of a legally prohibited act, and mens rea requires the actor to have a particular state of mind when committing the act. [198] When a sentence is imposed, the property of shareholders would be used to pay for the fine, even though shareholders do not have the actus reus and mens rea for the commission of the offence.[199]

Having considered Lee's views on the roles of members within a company, it is clear that personal criminal liability would not be imposed on shareholders of a company if they were not directly involved with the operations of the company. A study that examined American public companies convicted of federal crimes in 1984-1990 has concluded that the impact of corporate crime on shareholder wealth is not apparent and that corporate crime occurs less frequently in companies where top management have a larger ownership stake.[200]

In companies where ownership and management are separate, shareholders have the opportunity to learn about the company's ethos, operations, policies, and management structure policies before investing in the company. Directors and employees perform tasks and make decisions based on achieving the identified corporate purposes, which include maximising shareholder profits. The personal interests of shareholders who are not involved in the operations of the company are not impacted by corporate criminal liability; criminal liability is not imposed on a shareholder not involved in the management of the company.[201] Companies have assets that shareholders benefit from, and liabilities that shareholders are impacted by. Punishment is imposed on the company's assets, including money shareholders

[196] ibid.
[196] *New York Central* (n 18).
[196] *New York Central* (n 18) 492.
[197] Hasnas (n 1) 1338.
[198] ibid.
[199] ibid.
[200] Cindy R. Alexander and Mark A. Cohen, 'Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost' (1999) 5 Journal of Corporate Finance 1, 26.
[201] Sara Baele, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 American Criminal Law Review 1481, 1483.

invested into the company, rather than the shareholders' personal assets.[202] The court in *New York Central*[203] rightly justified its decision by looking at the negative impact of immunising companies by taking away 'the only means of effectually controlling the subject matter and correcting the abuses.'[204] It would be against public policy to immunise shareholders who benefit from decisions performed by its agents in accordance with the goals and purposes of the company.[205]

If shareholders are involved in the operation of the company, Lee's views clarify that corporate criminal liability would only be imposed if it falls under one of the specified circumstances. A shareholder would only incur personal liability if they were directly involved in the commission of the offence.[206]

Furthermore, Lee's team member responsibility view to corporate criminal liability is parallel to legible views on how corporate bodies can commit the actus reus and mens rea of a crime. At first sight, it seems unreasonable to hold a company criminally liable for the acts of the employees or agents, especially if committed contrary to their authority.

Nevertheless, criminal liability is only imposed to enforce a 'maximum degree of care' against the person in authority to prevent harm to others, rather than moral guilt.[207] According to Lee, companies can be held liable for a criminal act if their agents have acted for the purpose of benefitting the company (actus reus), and the agents or employees had the actual or apparent authority to act on behalf of the company or believed that their conduct would benefit the company (mens rea).[208] Mens rea has often been defined as a 'wicked mind, thus implying that the law is … concerned with the moral guilt of the wrongdoer.'[209] Nevertheless, mens rea means that the person has met a specific culpable standard, which the law regards as criminal, such as gross negligence, intention, or recklessness.[210] The law has adopted these standards to effectively prevent harm to third parties and does not assess the

[202] ibid 1485.
[203] ibid 322.
[203] *New York Central* (n 18).
[204] ibid 496.
[205] ibid 495-6.
[206] Alexander and Cohen (n 200) 1.
[207] Arthur Goodhart, *English Law and the Moral Law* (Steven and Sons Limited 1953) 86.
[208] Hasnas (n 1) 1338.
[209] Goodhart (n 207) 85.
[210] ibid.

degree of moral guilt of the defender.[211] Accordingly, corporate decisions that result in a violation of the law should be imputed to the company. Since the company is likely to acquire benefits from the violation, the punishment would include imposing a fine to be paid from the company's assets and properties. Based on these views, the extension of *respondeat superior* and the identification doctrine to criminal law can be justified through a non-moral basis of corporate criminal liability.

A non-moral view of corporate criminal liability is in line with the development of the corporate form and separate legal personality in England and Wales and the United States. Despite their flaws, the *respondeat superior* and identification standards do not refer to the moral responsibility of the company, but rather define the legal responsibility of the company as a result of violations of law by certain employees within the company.[212] Fisse argues that companies cannot be immoral, 'if one believes that offences are 'sins with legal definitions'…then one cannot believe in corporate criminal liability; companies lack a conscience.'[213] Corporate responsibility cannot be articulated in moral terms, and culpability does not have to be tied to morality.[214] A non-moral view is also practically in line with criminal laws as applied to individuals because moral obligations are not always legal obligations under the law.[215] Moreover, corporate criminal liability as team member responsibility is inclusive of different forms of mens rea, thereby accounting for different risk factors and causes that may lead to a violation of the law.

Overall, understanding corporate criminal liability as team member responsibility is theoretically and practically coherent: the view appropriately bridges the gap between the theoretical foundations of criminal law and addresses arguments against the historical recognition of corporate criminal liability. Any reforms to the law should seek to modernise corporate criminal laws rather than abolish them. The next step is to explore current corporate criminal laws in England and Wales and the United States, including liability standards and sentencing practices.

[211] ibid 86.
[212] Mays (n 38) 43.
[213] Fisse (n 10) 1177.
[214] Jennifer A. Quaid, 'The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis' 43 McGill Law Journal 67, 74.
[215] Susan F. Mandiberg, 'Moral Issues in Environmental Crime' (2011) 7 Fordham Environmental Law Review 881,903.

3 The Current Scope of Corporate Criminal Liability and Sentencing

Having assessed the historical development of corporate criminal liability and sentencing, the next step is to explore the current scope of the law, particularly liability standards and sentencing practices. As discussed above, although the first American decision establishing corporate criminal liability referenced English law, each jurisdiction adopts distinctive liability standards and sentencing practices today. Recent proposals in England and Wales have considered the advantages of implementing reforms in line with the laws in the United States.[216]

3.1 Liability Standards

3.1.1 England and Wales

In England and Wales, the standard of liability is set in accordance with the type of crime.[217] First, the *respondeat superior* theory applies to strict liability offences, where no mens rea is needed to prove that the offence occurred.[218] For instance, traffic offences under the Road Traffic Act 1988 are strict liability offences unless they expressly require proving fault. Section 1 of the Road Traffic Act 1988 states that a person who causes the death of another person by driving a vehicle dangerously will be guilty of an offence. Accordingly, if an employee violates the law while in the course employment, the company may be held liable. Second, the 'alter ego principle', otherwise known as the 'directing mind' or identification doctrine, applies to 'all types of offences, including those which require mens rea'.[219]

Second, the court determines whether to apply the *respondeat superior* standard or identification doctrine standard for intermediary cases that could, at first instance, be categorised as either strict liability offences or non-strict liability offences. For example, the hybrid regulatory offences may have a due diligence defence, a lack of

[216] Kirstin Ridley, 'Britain Weights Tougher Laws to Tackle Corporate Crime' (*Reuters*, 13 January 2017) <http://uk.reuters.com/article/uk-britain-fraud-law-idUKKBN14X001?il=0> accessed 7 February 2017.
[217] Wells, 'Corporate Liability for Crime: The Neglected Question' (n 104) 42.
[218] ibid; Pop (n 66) 32.
[219] Wells, 'Corporate Liability for Crime: The Neglected Question' (n 104) 42; The Crown Prosecution Service, 'Corporate Prosecutions: Legal Guidance' <https://www.cps.gov.uk/legal-guidance/corporate-prosecutions> accessed 30 March 2019.

knowledge defence, or a constructive knowledge element.[220] Courts have been classifying these offences as either strict liability offences or non-strict liability offences by considering the specific circumstances of each case.[221]

Third, distinct standards of liability have been created by statute to punish certain types of crimes, which have displaced the common law. They were passed 'to overcome the historical difficulty in establishing corporate criminal liability.'[222] These include money laundering (Money Laundering Regulations 2007), bribery (Bribery Act 2010), fraud (Fraud Act 2006), and manslaughter (Corporate Manslaughter and Corporate Homicide Act 2007).

Under the Bribery Act 2010, an organisation could be held liable if a person associated with the organisation bribed a person with the intention of

> '[obtaining or retaining] business for the organisation, or [obtaining or retaining] an advantage in the conduct of business for the organisation…[unless the organisation proves they had] adequate procedures designed to prevent persons associated with the organisation from undertaking such conduct.'[223]

A person is considered to be associated with the organisation if they perform services for or on behalf of the organisation, regardless of their capacity (including employees, agents or subsidiaries). Additionally, employees are assumed to perform services for or on behalf of the organisation unless it could be proven otherwise. The Bribery Act 2010 takes a broader approach than common law because the criminal act committed by an employee, agent or subsidiary could be imputed to the company. The mens rea of intent by the employee, agent or subsidiary is imputed to the company unless a defence of having adequate procedures to safeguard against the bribery exists.

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[220] Wells, 'Corporate Liability for Crime: The Neglected Question' (n 104) 42; Celia Wells, 'Case Comment: Corporate Liability for Crime – *Tesco v Nattrass* on The Danger List?' (1996) Archbold News 5, 6.
[221] See Chapter 1, section 2.1.2 and section 2.1.3.
[222] Jonathan Grimes, Rebecca Niblock, and Lorna Madden, 'Corporate criminal liability in the UK: the introduction of deferred prosecution agreements, proposals for further change, and the measurements and consequences for officers and senior managers' (*Practical Law*, 2013) < http://global.practicallaw.com/4-547-9466 > accessed 7 February 2017.
[223] Bribery Act 2010, s 71.

The Corporate Manslaughter and Corporate Homicide Act 2007 altered the common law standard.[224] An organisation can be found criminally liable 'if the way its activities are managed or organised- (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.'[225] The company would only be found liable if the activities were managed or organised by one or more members of 'senior management', which are defined as those who have 'significant roles in (i) the making of decisions about how the whole or substantial part of its activities are to be managed or organised or (ii) the actual managing or organising of the whole or a substantial part of those roles.'[226] Therefore, the act takes a broader approach than the common law approach because it does not require identification of the culpable act and mind of a specific individual within the company, but prosecution would still have to prove that the criminal act is associated with the way senior management has conducted its activities before liability can be established.

Overall, the standards of liability under England and Wales have originated from *respondeat superior* in early cases recognising a corporate criminal liability, to a framework adopting different liability standards to tackle different types of crime. Determining intermediary cases on a case by case basis may be detrimental to holding companies liable, as they may adopt management structures to safeguard against prosecution. Moreover, passing laws to overcome difficulties of the identification doctrine in bringing companies to justice may be advantageous, yet should be approached carefully to ensure that liability standards are consistent for similar corporate crimes or for crimes that carry the same levels of seriousness.

3.1.2 The United States

To gain a full understanding of corporate criminal liability standards, it is noted that American criminal law derives from common law (English criminal law and state common law), and statutory law at state and federal levels.[227] There are no common law crimes in the federal system because the federal government derives as delegated by the Constitution, but common law definitions are used in federal case law.[228] States define crimes and set their own criminal procedural rules, as long as they

[224] Corporate Manslaughter and Corporate Homicide Act 2007, s 20.
[225] ibid s 1.
[226] ibid s 1(4).
[227] Jocelyn M. Pollock, *Criminal Law* (11th edn, Routledge 2016) 5.
[228] ibid 6.

comply with the state Constitution and the federal Constitution.[229] State crimes are recognised through common law and statutes established by the state legislature.[230] Many states have adopted the same principles and replicated the liability standards adopted by federal law and the American Law Institute's Model Penal Code (Hereinafter 'MPC').[231] Robinson and Dubber state, 'if there can be said to be an 'American criminal code,' the Model Penal Code is it…even within the minority of states without a modern code, the Model Penal Code has great influence, as courts regularly rely upon it to fashion the law that the state's criminal code fails to provide.'[232] The MPC has codified substantive criminal laws and is often relied upon by courts to interpret and apply the law.[233]

Federal courts deal with offences that have a federal interest, as expressly and impliedly provided by the Constitution.[234] Title 18 of the United States Code is the main criminal code of the federal government and overlays the codes of all states and the District of Columbia. Title 1 of The United States Code states, 'unless the context indicates otherwise… the words 'person' and 'whoever' include companies, associations, firms, partnerships, societies, and joint stock companies as well as individuals.'[235] Accordingly, federal criminal laws apply to companies.

As to the standards of liability, American law at state and federal levels 'choose the most encompassing model among the existing models – *respondeat* superior- to cope with corporate criminal liability.'[236] The *respondeat superior* doctrine, following *New York Central*[237] is used for non-strict liability offences. A company can be prosecuted for intent, recklessness or knowledge if an employee committed a crime. Under the *respondeat superior* doctrine, the criminal act of an employee acting

[229] ibid.
[230] D. S. Broyles, *Criminal Law in the USA* (Wolters Kluwer 2011) 34.
[231] American Law Institute, 'Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code' (as adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962. Philadelphia, Pennsylvania, The Institute 1985); Broyles (n 230) 226-7; Kathleen F. Brickey, 'Rethinking Corporate Liability Under the Model Penal Code' *(*1988) 19 Rutgers L.J. 593, 633-34.
[232] Paul H. Robinson and Markus D. Dubber, 'The American Model Penal Code: A Brief Overview' (2007) 10 New Crim. L. Rev. 319, 323.
[233] ibid 319.
[234] United States Constitution, Article 6, section 6; Articles 1, section 8, article 18, section 2; amendment 10., section 2 (United States).
[235] United States Code, section 1 (2012) (United States).
[236] Eliezer Lederman, 'Corporate Criminal Liability: The Second Generation' (2016) 46 Stetson Law Review 71, 71.
[237] ibid 322.
[237] *New York Central* (n 18).

within the scope of his or her employment and on behalf of the company, regardless of his hierarchy within the company and his or her capability to represent the company, could be implicated to the company.[238]

Additionally, the standard under the MPC is narrower than the common law standard. Similar to the English approach, standards of liability are determined by the type of criminal activity. Strict liability offences apply to companies unless legislation specifies otherwise, or a contrary legislative purpose appears.[239] As to non-strict liability offences, Section 2.07(1) states that liability could apply in three situations. First, when an agent acting on behalf of the company within the scope of their employment, commits an offence that meets the standard set in a statute, and there is a legislative purpose for the imposition of the liability on the company. An agent is defined as a 'director, officer, servant, employee or another person [authorised] to act on behalf of the company or association.'[240] Importantly, s 207(5) specifies that unless contrary to the legislative purpose of a specific statute, the defendants have a defence, if proven by a preponderance of the evidence, that the high managerial agent, having supervisory responsibility for the subject matter of the offence, employed due diligence to prevent its commission. Second, when a company fails to meet a duty of affirmative performance imposed by law.[241] Third, where the board of directors or a high managerial agent acting on behalf of the company within the scope of their employment 'authorised, requested, commanded, performed or recklessly tolerated' an offence.[242] A high managerial agent is defined as an officer of a company that has 'duties of such responsibility that his conduct may fairly be assumed to represent the policy of the company or association.'[243]

The MPC framework adopts a similar yet more structured approach than the English framework. The MPC clearly specifies the basis of liability, and clearly identifies a common 'due diligence' defence for all non-strict liability statutory offences, unless the defence goes against the legislative purpose of the statute.

3.1.3 Reconsidering Current Standards of Liability

[238] Pop (n 66) 4.
[239] American Law Institute (n 231) s 2.07 (2).
[240] ibid s 2.07(4)(b).
[241] ibid s 2.07 (1) (a)-(b).
[242] ibid s 2.07 (1) (c).
[243] ibid s 2.07 (1) (a)-(b).

From here, it is important to discuss possible issues with current standards of liability as set under the law in England and Wales and the United States.

The *respondeat superior* standard provides that the acts of low-level employees in an organisation can be imputed to the company, even if committed is against corporate authority, as long as the employee had the express or apparent authority to make the decision or commit the act. The historical recognition of *respondeat superior* could be justified as a way of achieving deterrence. Targeting the company rather than individuals associated with it was seen as a way of reducing future harmful behaviour by the company (specific deterrence) and other companies (general deterrence).[244] Companies will enforce better procedures to select their employees.[245]

Yet, early cases have evidenced their inability to deal with different corporate structures and sizes. Companies should not be held responsible for unauthorised decisions made by employees.[246]

Having considered Lee's corporate criminal liability as team member responsibility, the *respondeat superior* standard would unlikely impact the behaviour of team members within the company, because it implies that liability could be imposed regardless of the team's norm-compliant behaviour. Companies would not invest in implementing compliance programmes if they could still be held liable. Although prosecution does take into account whether the specific employee made an effort to hide his unauthorised conduct when determining the sentence, the company will still be held liable.[247]

One contrary compelling argument is the existence of defences like 'due diligence' or 'lack of knowledge' under common law in England and Wales and the United States, and the MPC, for a select of non-strict liability offences. Yet, it is not justifiable for an employee's criminal act, that is not justified by the team's norms, to be imputed to a company in non-strict liability cases where such defences do not exist.

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[244] For a discussion on specific deterrence and general deterrence, see Chapter 3, section 2.2.1.
[245] Mays (n 38) 35.
[246] Baer (n 81) 5.
[247] Desio P, 'An Overview of the Organisational Guidelines' (United States Commission) <http://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf> accessed 7 February 2017.

In England and Wales, difficulties also arise in classifying hybrid cases that have due diligence or lack of knowledge defences, or where the definition of the offence requires constructive knowledge.

Additionally, the identification doctrine standard, adopted by English law and the MPC, is a deficient tool for effective enforcement of criminal law against large modern companies. It fails to address the complexity of current corporate structures. It is often difficult to identify the specific senior officer(s) responsible for a violation of a certain criminal law. Tariq states, 'critically, the larger the company is, the harder the prosecutor's task is to locate first, the culpable alter ego of that company.'[248] The issue is emphasised in the context of international companies with managers in various jurisdictions, and sharing economy companies, where management structures could be implemented to safeguard against liability.

The identification doctrine is 'superfluous for deterrent purposes.'[249] Gobert argues that the standard works 'best in cases where it is needed least and works least in cases where it is needed most.'[250] The larger the company, the more likely it is able to avoid liability. Large companies can decentralise responsibilities to avoid liability, by making it difficult to identify anyone senior individual in charge of a particular operation. In practice, senior officers can delegate their tasks to low-level employees to avoid criminal liability, thus making it difficult to identify the specific agents that fulfil the *actus reus* and *mens rea* components of many criminal offences. In *Tesco v Nattrass*,[251] the court held that when an agent delegates managerial functions within a company with the result that the commission of a criminal act occurs, this comes within the directing mind and will principle and the company should accordingly be held liable.[252] It is often still difficult, however, to prove whether the delegation actually took place at all, as the company can always argue that the lower level employee committed the act without any authority from the company itself. As Celia Wells rightly argues, traditional theories of corporate liability fail to '[tackle] the question of corporate risk-taking.'[253]

[248] Mohammed S. Tariq, 'A 2013 Look at The Corporate Killer' (2014) Company Lawyer 17, 17.
[249] James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14 Legal Studies 393, 401.
[250] ibid 400.
[251] *Nattrass* (n 100).
[252] ibid 174.
[253] Wells, 'Corporate Liability for Crime: The Neglected Question' (n 104) 44.

Additionally, the UK Ministry of Justice has stated that the identification doctrine may encourage bad corporate culture and practices, such as manipulating meeting minutes by not recording those present in order to conceal the presence of board members, or creating and using zero-asset companies to handle negotiations with third party agents.[254] The UK Parliament has attempted to overcome such difficulties by codifying new standards of liability for different types of corporate wrongs. The Bribery Act 2010 carves out a due diligence defence and the Corporate Manslaughter and Corporate Homicide Act 2007 introduces a holistic approach to identifying whether management has failed to meet the standard required under the law. Their recent call to change the standard of liability is limited targeted at economic crimes (defined as money laundering, fraud, and false accounting).[255] The report recognises the failure of the identification model in combatting corporate crime due to the inherent difficulties of finding companies liable as described above.

It is doubtful whether implementing piecemeal reforms, rather than a reassessment of the law as a whole, is a step in the right direction. Economic crimes could, for instance, encompass wrongs well beyond that specified in the call for evidence; companies can always be said to be committing criminal wrongs for economic benefit. Reforming the law narrowly would likely lead to different standards of liability for comparable wrongs, leading to a fragmented system. From here, it is worth considering an alternative model that overcomes difficulties found in current liability standards.

3.1.3.1 An Alternative Standard of Liability

The Canadian corporate criminal liability model compellingly provides an alternative framework that is aligned with corporate criminal liability as team member responsibility. House Government Bill C- 45 was passed in 2003 to amend the Criminal Code[256] and 'modernise the law with respect to the criminal liability of companies and sentencing of companies.'[257]

[254] Ministry of Justice (n 35).
[255] ibid.
[256] The Criminal Code R.S.C. 1985 (Canada).
[257] Department of Justice (Canada), 'A Plain Language Guide Bill C-45 – Amendments to the Criminal Code Affecting the Criminal Liability of Organisations' (Department of Justice, 7 January 2015) <http://www.justice.gc.ca/eng/rp-pr/other-autre/c45/#sec1> accessed 10 July 2018.

Companies are covered under the Criminal Code. Section 2(1) states that 'everyone', 'person', or 'owner' includes 'public bodies, bodies corporate, societies, companies.'[258] Section 22(1) governs offences where negligence must be proven for an organisation to be prosecuted for a criminal offence. It states,

> In respect of an offence that requires the prosecution to prove negligence, an [organisation] is a party to the offence if:
>
> (a) acting within the scope of their authority
>
> (i) one of its representatives is a party to the offence, or(ii) two or more of its representatives engage in conduct, whether by an act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
>
> (b) the senior officer who is responsible for the aspect of the organisation's activities that is relevant to the offence departs – or the senior officers, collectively, depart- markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organisation from being a party to the offence.[259]

In *R v Metron Construction Company*,[260] an Ontario company was convicted of criminal negligence when an independent contractor hired by the company as a site supervisor departed from the standard of care expected of a reasonably prudent person. He was hired to work as a site supervisor to manage a project restoring concrete balconies in Toronto. The way the operations were conducted resulted in the death of four workers on the site.[261] He failed to ensure that the workers received written instructions in their respective languages for the use of fall protection systems and did not instruct the workers to use the swing stage in accordance with safety practices, nor did he prevent bodily harm and death through ensuring that lifelines were used during work hours. The court held that the independent contractor came within the definition of a senior officer as defined by section 2 of the Criminal Code.

Section 22(2) further governs conduct that is based on a *mens rea* standard, excluding negligence. It states,

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[258] ibid.
[259] The Criminal Code R.S.C. 1985 (Canada), s 22(1).
[260] 2013 ONCA 541, OJ No 3909 (QL).
[261] ibid

> In respect of an offence that requires the prosecution to prove fault – other than negligence- an organisation is a party to the offence if, with the intent at least in part to benefit the organisation, one of its senior officers
>
> (a) acting within the scope of their authority is party to the offence;
>
> (b) having the mental state required to be party to the offence and acting within the scope of their authority directs the work of other representatives of the organisation so that they do the act or make the omission specified in the offence; or
>
> (c) knowing that a representative of the organisation is or is about to be party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

Importantly, section 217(1) concerning the Duties Tending to Preservation of Life states,

> [Everyone] who undertakes, or had the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Section 21(1) states that parties to offences include those who 'actually commit the crime, does or omits to do anything for the purpose of aiding any person to commit it; or abets any person in committing it.' Section 2 defines a senior officer as,

> [A] representative who plays an important role in the establishment of an [organisation's] policies or is responsible for managing an important aspect of the [organisation's] activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.

In *R c Pétroles Global Inc*,[262] a company was found liable when a regional manager illegally participated in price fixing and, with his knowledge, allowed his six territory managers to engage in price fixing. The case affirmed that a middle manager is included in the definition of 'senior officer' under section 2 of the Criminal Cod, and that their criminal conduct can indeed be attributed to the company.

[262] 2013 QCCS 4262.

The Canadian approach advantageously considers the variety of corporate structures. Through this approach, companies are unable to evade liability simply by delegating duties to lower level managers. They will not be held responsible when low-level employees commit criminal acts that the company did not authorise and took reasonable steps to avoid. This comes in line with proposals by Lee on corporate criminal liability as a team member responsibility. Importantly, the framework overcomes difficulties of prosecution found under the MPC and the identification doctrine standard applied in England and Wales.

Canada's framework offers a comprehensive approach to corporate criminal liability. Reforms to current liability frameworks in line with the Canadian framework are a welcomed step. The UK Ministry of Justice's recent proposals for further piecemeal codifications of certain types of corporate misconduct run the risk of miscategorising and setting different standards of liability for criminal acts that be construed as carrying the same level of seriousness. In practice, moving towards codification of liability standards may be interpreted as a practical impossibility as it would involve the abolishment of a number of recent laws. The benefits of adopting two standards of liability that categorise misconduct according to the type of mens rea outweighs these concerns, provided careful consideration is given to align liability standards with sentencing practices.

3.2 Sentencing

3.2.1 England and Wales

The aims of punishing individuals are different from the aims of punishing companies. The Sentencing Council specifies that the aims of sentencing are to punish the offender ('going to prison, doing unpaid work in the community, obeying a curfew or paying a fine'), make the offender give something back ('payment of compensation or through restorative justice'), rehabilitate and reform the offender ('changing an offender's behaviour to prevent future crime'), reduce crime ('preventing the offender from committing more crime and putting others from committing similar offences'), and protect the public ('from the offender and from

the risk of more crimes being committed by them'.[263] Thus, the aims include retribution, deterrence, restoration, and rehabilitation.

The Sentencing Council's definitive guidelines (Hereinafter 'Definitive Guidelines'), the goals of punishment are limited to 'deterrence and removal of gain derived through the commission of the offence,'[264] hence are limited to deterrence and retribution. It is unclear why the goals of punishment are different for individuals and companies, and why there is no clarity on whether one goal would preside over another in deciding sentences.

The main method of punishing companies is the payment of fines.[265] Section 164 of the Criminal Justice Act 2003 requires setting a fine that reflects the seriousness of the offence, taking in mind the financial circumstances of the offender.[266] Through section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues guidelines to enforce appropriate sentencing structures for companies sentenced on or after October 2014, unless the court chooses otherwise or the interests of justice are harmed by following the guidelines.[267] These include the Environmental Offence Definitive Guideline; The Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline; and the Fraud, Bribery and Money Laundering Offences Definitive Guideline.[268]

In England and Wales, courts must follow sentencing guidelines.[269] Section 125(3)-(4) of the Corners and Justice Act 2009 has offence ranges for each type of offence. There are starting points to each category and aggravating and mitigating circumstances are considered to impose the appropriate sentence.[270]

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[263] Sentencing Council, 'Sentencing Basics' (Sentencing Council 2017) <https://www.sentencingcouncil.org.uk/about-sentencing/sentencing-basics/> accessed 8 February 2017.

[264] Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31); Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (n 31).

[265] Bribery Act 2010, s 11(2); Corporate Manslaughter and Corporate Homicide Act 2007, s 1(6).

[266] Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31).

[267] ibid.

[268] ibid; Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31); Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (n 31).

[269] Coroners and Justice Act 2009, s 125(1).

[270] Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31) 4.

For example, the process is followed to sentence companies for violations under fraud, money laundering and bribery:

(a) Compensation: the court determines whether the company is required to compensate for any 'personal injury, loss or damage resulting from the offence' as appropriate, taking into consideration the 'evidence and means of the offender.'[271]
(b) Confiscation: the court considers confiscation if it is appropriate or the Crown requests for an order of compensation.[272]
(c) Determining the offence category: the court defines the category in line with culpability and harm. Culpability is divided into high, medium and low culpability, and in circumstances where characteristics are present from one or more of the categories, the court '[balances] these characteristics to reach a fair assessment of the offender's culpability.'[273] Harm is determined on a case by case basis and a financial sum is calculated. For instance, in fraud cases, harm is defined as the 'actual or intended gross gain to the offender.'[274] If the financial sum cannot be calculated, the court decides the appropriate amount in accordance with what could be achieved in all the circumstances, which may be 10-20 percent of revenue.[275]
(d) Starting point and category range: harm is multiplied by a relevant percentage figure representing culpability, and adjustment of the fine is completed according to factors relating to the seriousness of the crime.[276]
(e) Adjustment of the fine: the court considers whether the fine amount is reflective of 'the removal of all gain; appropriate additional punishment, and deterrence.'[277]
(f) Consider factors to reduce the sentence: the court considers whether the company assisted the prosecution or investigation.
(g) Reduction for the guilty plea: the court considers whether to reduce the fine based on a company pleading guilty.
(h) Ancillary orders: the court considers any ancillary orders that should be applied.

[271] ibid.
[272] ibid.
[273] ibid.
[274] ibid.
[275] ibid.
[276] ibid.
[277] ibid.

(i) Totality principle: the court considers whether the total sentence, if a company is sentenced for more than one offence, is 'just and proportionate to the offending behaviour.'[278]
(j) Reasons: the court needs to give reasons and explain the impact of the sentence.[279]

Additionally, The Environmental Offences Definitive Guideline applies to organisations that violate the Environmental Protection Act 1990, the Environmental Permitting (England and Wales) Regulations 2010, and other relevant offences.[280] The guideline follows a process to determine the fine (£100 fine to an unlimited fine). The process of determining the appropriate fine is as follows: The court determines the offence category using culpability and harm factors, defines a category range based on the annual accounts of the company, considers the mitigating and aggravating factors to decide on a fine within the category, reviews whether the sentence 'as a whole meets, in a fair way, the objectives of punishment, deterrence and removal of gains derived through the commission of the offence;'[281] takes into account factors like the assistance of prosecution and a guilty plea; sets ancillary orders; considers whether the sentence is just and proportionate to the offending behaviour, and is required to provide reasons and explain the effect of the sentence.[282]

Furthermore, the Government introduced DPAs in 2014 through Schedule 17 of the Crime and Courts Act 2013. It is a process that allows companies to avoid criminal prosecutions and a criminal trial through an agreement with a prosecutor to pay a sanction.[283] The goals of DPAs are to achieve 'uniformity, proportionality, deterrence and punishment in corporate sentencing and… provide a clear and consistent framework for the assessment of financial penalties … to avoid the collateral consequences of a conviction.'[284] Upon awareness of possible misconduct (through self-reporting; investigation; or whistleblowers), the prosecution would invite the company, through a letter, to enter into negotiations. If the company agrees, a further letter setting the terms and conditions is sent. Following that, the company and prosecution would engage in negotiations, including reaching an

[278] ibid.
[279] ibid.
[280] Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31).
[281] ibid.
[282] ibid.
[283] Grimes et al. (n 222).
[284] Cheung R, 'Money Laundering- A New Era for Sentencing Organisations' (2017) J.B.L. 23, 26.

agreement to pay a sanction and possibility of undergoing monitoring and reporting requirement, and reporting details of financial gains or losses and details relating to each offence. If the company does not comply with the terms of the DPA, this can be used as evidence in subsequent criminal proceedings. Lastly, the prosecution would apply to the court for final approval, and must show that the terms of the DPA are fair, reasonable, and proportionate, and in the interests of justice.[285]

3.2.2 The United States

The United States Sentencing Commission Guidelines Manual 2016 (Hereinafter 'Sentencing Commission Guidelines') states that the basic objective of the Sentencing Reform Act 1984 is as follows:

> [To] enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system … reasonable uniformity in sentencing by narrowing the disparity in sentencing imposed for similar criminal offences committed by similar offenders…[and] proportionality in sentencing through a system that imposes appropriately different sentences for the criminal conduct of differing severity.[286]

It specifies that 'the basic purposes of criminal punishment are: deterrence, incapacitation, just punishment, and rehabilitation.'[287] Moreover, an overview document of the sentencing guideline for organisations states,

> [These] guidelines are designed to further two key purposes of sentencing: 'just punishment' and 'deterrence.' Under the 'just punishment' model, the punishment corresponds to the degree of blameworthiness of the offender, while under the 'deterrence' model, incentives are offered for [organisations] to detect and prevent crime.[288]

The Sentencing Reform Act 1984, creating the Sentencing Commission, was based on the recommendations of the MPC. Section 1.02(2) of MPC advocates that sentencing guidelines address the following goals,

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[285] Grimes et al. (n 222).
[286] United States Sentencing Commission, 'Guidelines Manual 2016' (n 11) Ch. 1 Pt. A, section 3.
[287] ibid.
[288] Desio (n 247).

> The general purposes of the provisions governing the sentencing and treatment of offenders are:
>
> (a) to prevent the commission of offences;
> (b) to promote the correction and rehabilitation of offenders;
> (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
> (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offence;
> (e) to differentiate among offenders with a view to a just [individualization] in their treatment.[289]

The Sentencing Commission goals thus reflect approaches to deterrence, rehabilitation, and retribution. Similar to England and Wales, the guidelines do not clarify how these penal aims to work under one framework. In the guidelines, the offences are categorised in accordance with the offence behaviour and characteristics, and offence ranges are arranged to stipulate the appropriate sentence under each class.[290]

Sentencing is determined through Section 8 of the Sentencing Commission Guidelines Manual 2016. For crimes including environmental crimes, the Guidelines state that judges should apply sentences following 18 U.S.C. §§ 3553 and 3572.[291] The sentences are fines, probation for up to five years, restitution orders, issuance of public notices of conviction, and exposure to forfeiture statutes.[292]

The Guidelines detail the sentencing process and the level of punishment. The following principles reflect the sentencing approach: The company is required to remedy any harms caused by the offence by making victims whole for the harm caused. This does not form part of the punishment.[293] If the company is funded by criminal means or the company is set primarily for a criminal purpose, the fine is set

[289] American Law Institute (n 231) s 1.02 (2).
[290] United States Sentencing Commission, 'Guidelines Manual 2016' (n 11) Ch. 1 Pt. A, section 2.
[291] United States Sentencing Commission, 'Quick Facts: Organisational Offenders' (United States Sentencing Commission Organisational Datafiles) 1 <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Organizational-Offenders_FY15.pdf> accessed 8 February 2017.
[292] Desio (n 247).
[293] United States Sentencing Commission, 'Guidelines Manual 2016' (n 11) Ch. 8, 525.

high to divest the company of all of its assets. In other circumstances, the fine range is determined based on the culpability of the companies and the seriousness of the offence. Specifically, seriousness is determined by the greatest of 'pecuniary gain, pecuniary loss, or the amount in the guideline offence level fine table.'[294] Culpability is determined by two mitigating and four aggravating factors. The aggravating factors are '(i) the involvement in or tolerance of criminal activity; (ii) the prior history of the [organisation]; (iii) the violation of an order; and (iv) the obstruction of justice.'[295] The mitigating factors are: '(i) the existence of effective compliance and ethics [programme]; and (ii) self-reporting, cooperation, or acceptance of responsibility.'[296]

Furthermore, probations are enforced in certain circumstances to ensure that other sanctions are implemented or that steps will be taken by the organisation to reduce the likelihood of future criminal conduct.[297] These include, (a) remedial orders, which would require 'community service…to reduce or eliminate the harm threatened, or to repair the harm caused by the offense, when that harm or threatened harm would otherwise not be remedied'; (b) orders of notice, which could be used to 'notify unidentified victims of the offense'; (c) restitution orders, which would 'require restitution …to compensate identifiable victims of the offense.'[298]

Additionally, the United States has introduced DPAs in the 1990s, that allow 'a prosecutor of an [organisation] to enter into an agreement whereby prosecution is deferred pending successful compliance with certain conditions that may include payment of a substantial financial penalty; an overhaul of corporate governance structures; and compliance, with the appointment of compliance monitors.'[299] DPAs require companies to alter their 'compliance [programmes], governance structures, or scope of operations.'[300] Particularly, prosecutors have responded to corporate criminal misconduct through pretrial diversion agreements.[301] Prosecutors can decide not to pursue criminal charges against a company if they agree to cooperate in the investigation, pay a fine, and make internal changes. Such internal changes

[294] (n 31) Ch. 8, 525.
[295] ibid.
[296] ibid.
[297] ibid.
[298] ibid.
[299] Cheung (n 284) 25.
[300] Jennifer Arlen and Marcel Kahan, 'Corporate Governance Regulation Through Non-Prosecution' (New York University Law and Economics Working Papers, Paper 426) 1-2.
[301] ibid.

would include requiring the company to modify certain business practices, hire a prosecutor-approved corporate monitor, or alter its internal reporting structure.[302]

3.2.3 Reconsidering Sentencing Aims and Methods

Having briefly considered the aims of punishment and methods of punishment, it is important to discuss possible flaws in the current sentencing processes.

First, it is clear that the aims of punishing individuals are different from the aims of punishing companies. As seen above, sentencing objectives for individuals in England and Wales are deterrence, incapacitation, retribution, rehabilitation, and restoration. In federal American law and the MPC, sentencing objectives for individuals follow the English example except for restoration. However, sentencing objectives for companies are limited to deterrence and retribution in both jurisdictions. The recognition of corporate legal personality and the recognition of rights for companies as separate legal entities should warrant the same sentencing objectives for companies and individuals.

Second, the theoretical approaches to sentencing objectives are not clear. The most commonly cited sentencing objectives are deterrence (specific and general), rehabilitation, restoration, and retribution or just deserts.[303] There is no single approach to any of the sentencing aims; each theory has many schools of thought on when punishment should be imposed and how punishment should be distributed. For example, retribution states that 'punishment is justified when it is deserved and no more than deserved.'[304] Particularly, the punishment should not be imposed on innocent individuals because they 'do not deserve it', and that the more severe the crime, the more severe the punishment should be.[305] Retributivists centralise their arguments upon desert and proportionality, but adopt distinctive interpretations of desert and proportionality.[306]

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[302] ibid.
[303] Robin L. Lubitz and Thomas W. Ross, 'Sentencing & Corrections: Issues for the 21st Century' (Papers from the Executive Sessions on Sentencing and Corrections No. 10, U.S. Department of Justice: National Institute of Justice and The Corrections Program Office 2001) <http://rbtaylor.net/50_read_sentencingguidelines.pdf> accessed 05 January 2017; John Braithwaite and Gilbert Geis, 'On Theory and Action For Corporate Crime Control' (1982) 2 NPPA Journal 292, 292; McFatter (n 31).
[304] Thom Brooks (ed), *Sentencing* (Ashgate Publishing Limited 2014) xi.
[305] ibid.
[306] Brooks, *Punishment* (n 13) 16.

As seen above, sentencing practices have incorporated retribution and deterrence into one system, to target different categories of offenders and offences.[307] This means that a sentence could be intended to serve any or all of the objectives.[308] However, 'the relative strength of the various competing goals in affecting perceptions of the appropriateness of penalties [needs to be considered].'[309] There is no philosophical framework that reconciles the differing perceptions of criminal punishment.[310] There are based on different theories that reflect how liability is to be established and how the sentences are to be set. Thom Brooks states that one major problem of the MPC 'is not that it seeks to address multiple goals in sentencing but its lack of a more robust and attractive theoretical framework that brings unity to its goals and illuminates punishment's primary goal of restoring rights within the context of a stakeholder society.'[311]

The Sentencing Commission rejects the implementation of a system that sets primacy of one goal over another and alternatively employs an empirical approach to conclude that regardless of the distinctions between retribution and deterrence, both approaches will achieve similar results in terms of how the sentences are to be structured.[312] This reflects an attempt to '[justify] a legal practice without sufficient consideration of how the individual parts coherently work together in support of the practice aims.'[313] Leaving the decision for judges to weigh the primacy of the penal aims is disadvantageous because there are various interpretation of the theories and how they may apply in the context of companies.

Third, it is not clear how sentences would be imposed to advance one aim in a way that would not contradict another aim. In England and Wales and the United States, the main method of punishment is paying fines. This has not been evidenced to achieve the goals of creating norm compliant behaviour and reducing the levels of offending in the long term.[314] Fines are not effective in cases where the violations include harm to the community, and the community is not able to have a say in how

[307] Lubitz and Ross (n 303).
[308] McFatter (n 31).
[309] ibid 256.
[310] Brooks, *Punishment* (n 13) 149, 212.
[311] ibid 148.
[312] ibid 133.
[313] ibid.
[314] For e.g., see Financial Times (n 6).

the funds are going to be allocated, nor are they likely to change the behaviour of companies with wide access to resources.[315]

Overall, a wide disparity exists between the goals of punishment in theory and how they have been translated to practice. The following chapters will be dedicated to exploring the identified issues in greater detail, particularly the theoretical approaches to the penal aims and how they have been applied and/or could apply in the context of companies.

4 Conclusion

The chapter served as a starting point to understanding corporate criminal laws in the United States and England and Wales. Section 2 studied the basis of corporate criminal liability from a historical and theoretical view. The first cases recognising corporate criminal liability reflect its necessity and are a welcomed development, given the failure of administrative and civil liability to change the behaviour of companies, and the high impact of corporate misconducts on individuals. However, early cases failed to adequately explain the theoretical basis of corporate criminal liability. The second part of Section 2 accordingly investigated theoretical explanations of corporate criminal liability. 'Companies as morally blameworthy entities' is not a theoretically coherent approach. Alternatively, 'corporate criminal liability as team member responsibility' is aligned with the historical development of the law, and thus theoretically and practically coherent.

Section 3 explored current liability standards and sentencing processes. The section discussed issues with current liability frameworks in England and Wales and the United States. The standard of liability model in Canada is advantageously aligned with corporate criminal liability as team member responsibility, provides a more consolidated and less fragmented framework, and compellingly takes account of different types of corporate management structures. Additionally, companies are punished to achieve deterrence and retribution. The goals of punishment are different for companies and individuals, and there is no guidance on how the goals would work together under one single framework. Payment of fines is the dominant method of sentencing. In the United States, companies could be subject to probation, restitution orders, issuance of public notices, and exposure to forfeiture statutes.

[315] Sally S. Simpson, *Corporate Crime, Law, and Social Control* (Cambridge University Press 2002) 10; McFatter (n 31).

These methods are only imposed when necessary and are not mandatory. DPAs are processes that can help companies avoid criminal prosecution if they agree to complete certain remedial steps, including the payment of fines. It is not clear how sentences would be imposed to advance one aim in a way that would not contradict another aim.

The two proposals relating to recognising corporate criminal liability as team member responsibility and adopting the Canadian standard of liability framework sets the scene for arguments in the following chapters. A wide disparity exists between the goals of punishment in theory and practice. The next chapters will explore prominent theories (retribution, deterrence, rehabilitation, and restoration) to advance proposals for a compelling theory of punishment for companies.

Chapter Two

Retribution

1 Introduction

Retribution still 'merits recognition as the criminal law's central objective.'[316] Retribution and deterrence are recognised as the main aims of punishing companies in England and Wales and the United States. The United States Organizational Sentencing Guidelines state that 'just punishment', defined as punishment corresponding to the degree of blameworthiness of the offender, is the main purpose of criminalising companies.[317] Similarly, the Definitive Guidelines in England and Wales identify 'removal of gain derived through the commission of the offence' as the main purpose of punishment for various criminal offences applying to companies.[318]

John Cottingham contends that using the term 'retributive' does not serve a useful purpose; the term is imprecise and multivocal.[319] Sentencing guidelines should clarify which approach to retribution is being followed. This issue becomes even more fundamental because retribution and deterrence could be perceived as conflicting goals of punishment: the classical view of retribution justifies punishment when it is deserved, and deterrence is a consequentialist theory that justifies punishment for its effects.[320] As briefly discussed in Chapter 1, sentencing policies fail to explain the theoretical approaches undertaken, and whether retribution and deterrence could work together under one single framework. The Commission in the USA attempts to address these concerns by stating that the aim of the law itself is to control crime, but there is no consensus on how such would be achieved, nor is there a consensus on whether retribution or deterrence take primacy

[316] Alschuler (n 31).
[317] Desio (n 247).
[318] Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (n 31); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31).
[319] John Cottingham, 'Varieties of Retribution' in Thom Brooks (ed), *Retribution* (Ashgate Publishing Limited 2014) 1.
[320] Kevin Carlsmith, John Darley, and Paul Robinson, 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment' (2002) 83 Journal of Personality and Social Psychology 284, 284.

over one another as crime objectives. They state that empirical results show that regardless of the distinctions between approaches to retribution and deterrence, both approaches will achieve similar results in terms of how the sentences are to be structured.[321]

As explored in Chapter 1, corporate criminal laws in England and Wales and the United States owe their development to borrowings from individual criminal and tort laws, rather than a thorough assessment of the objectives of corporate criminal liability and how it could be achieved.[322] This poses difficulties because some methods of punishment cannot apply to companies.[323] The chapter stresses the importance of understanding what the foundational concepts of the law are. It takes a step back to explore retribution theories and their application to punish companies.

The chapter primarily aims to explore the suitability of retribution as a penal aim of punishment for companies. Section 2 investigates various interpretations of retribution and assesses the advantages and disadvantages of these various interpretations. Section 3 critiques the compatibility of retribution views with modern corporate criminal laws and evaluates the viability of retribution as a pure theory to punish companies. Section 4 advances an alternative view to retribution that works as part of a mixed theory of punishment that adopts multiple aims.

2 Defining Retribution

There is no single theory of retribution; there are varying interpretations to the definition, scope, limitations, and justifications of retribution. Yet, 'retribution' is a staple term used in sentencing policies in England and Wales and the United States.[324] Generally, a retributive theory of punishment includes, at a minimum, three principles: responsibility, proportionality, and just requital. [325] Retribution is known to be the 'just desert' theory of punishment, where punishment is only imposed when it is 'just' to do so, and the criminal 'deserves' to be punished.[326]

[321] United States Sentencing Commission, 'Guidelines Manual 2016' (n 11) Ch. 1 Pt. A, section 3; Brooks, *Punishment* (n 13) 133.
[322] Fisse (n 10) 1143.
[323] Eliezer Lederman, 'Criminal Law, Perpetrator and Company: Rethinking a Complex Triangle' (1972) 76 The Journal of Criminal Law and Criminology 285, 309.
[324] Hugo A. Bedau, 'Retribution and the Theory of Punishment' (1978) The Journal of Philosophy 601, 601-2.
[325] ibid 602-3.
[326] Wong, 'Retribution and Corporate Crime.' (2006) 32 Criminal Law Bulletin 1, 6-7.

The section will theoretically explore the origins of retribution and how it has diverged into numerous approaches in legal literature. Approaches to retribution are analysed by considering the circumstances in which punishment is deserved, and how punishment is distributed.

2.1 Classical Retribution

Classical retribution, with some modifications, still holds recognition as the foundational basis for 'how justice should be dispensed in democratic societies.'[327] Retribution was arguably embedded in the Judeo-Christian tradition, creating what is now known as one of the basic justifications for punishment. According to classical retributivists, punishment is justified on its own ground rather than to serve any other purpose. Classical retributivism, rooted in a view of religion, advocates that those who commit wrongful acts that break the moral code of the society or cause harm to others deserve punishment because they disobeyed 'God's laws.' Wrongful acts often result in a break of the moral code of the society, and punishment should be imposed to restore that order.[328] The assumptions of classical retribution are (a) punishment is repayment of debt by the criminal to society; (b) punishment is justified on its own ground; (c) punishment needs to fit the crime, and (d) questions of culpability and ways of preventing future crime are not relevant.[329]

Immanuel Kant, a key figure of classical retribution, advocates the Placation theory, which has connections with notions of sacrifice and placation of the Old Testament.[330] As referred to in Maslen, Kant states,

> [Punishment] can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime; for a human being may never be manipulated merely as a means to the purposes of someone else … He must first be found to be

[327] Terance D. Miethe and Hong Lu, *Punishment: A Comparative Historical Perspective* (Cambridge University Press 2005) 16.
[328] Kent Greenwalt, 'Punishment' (1983) 74 Journal of Criminal Law and Criminology 343, 347.
[329] Miethe and Lu (n 327).
[330] Hannah Maslen, *Remorse, Penal Theory and Sentencing* (Bloomsbury Publishing 2015) 13; Cottingham (n 248) 5.

> deserving of punishment before any consideration is given to the utility of his punishment for himself or for his fellow citizens.[331]

Kant invokes a backwards-looking approach to punishment by focusing on the crime committed rather than imposing punishment in view of restraining similar future conduct.[332] The enforcement of punishment should be done without considering how it may impact other individuals in society.[333]

Furthermore, classical retribution distributes punishment based on desert, or 'treating people as they deserve'.[334] Punishment is morally permissible and obligatory to repay the debt to society, and it needs to fit the crime.[335] Kant argues that punishment is guided by moral standards and the 'an eye for an eye' principle.[336] The principles could be traced back to the Mosiac laws of the Old Testament and the Quraan, where punishment is imposed in proportion to the gravity of the offence.[337] The Old Testament states that both 'the criminal shall repay an eye for an eye and a tooth for a tooth and that the sins of the father shall be visited upon the sons.'[338] This was later found in the *lex talionis* of early Roman law.[339] Kant states,

> What kind and what degree of punishment does legal justice adopt as its principle and standard? None other than the principle of equality… the principle of not treating one side more favourably than the other. Accordingly, any underserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself. Only the law of retribution (*jus talionis*) can determine exactly the kind and degree of punishment.[340]

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[331] Immanuel Kant, *RECHTSLEHRE* in Hannah Maslen (n 330) 14; Thom Brooks, 'Corlett on Kant, Hegel and Retribution' (2013) 76 Philosophy 561, 562.
[332] Maslen (n 330).
[333] Brooks, 'Corlett on Kant, Hegel and Retribution' (n 331) 564.
[334] James Rachels, 'Punishment and Desert' in Hugh LaFollette (eds.), *Ethics in Practice* (Oxford: Basil Blackwill, 1997) <http://www.jamesrachels.org/punanddes.pdf> accessed 1 July 2017, 470; Jami Anderson, 'Annulment Retributivism: A Hegelian Theory of Punishment' (1999) 5 Legal Theory 363, 365.
[335] Miethe and Lu (n 327) 16.
[336] Brooks, 'Corlett on Kant, Hegel and Retribution' (n 331) 566.
[337] Miethe and Lu (n 327) 15-16, 71.
[338] ibid.
[339] ibid.
[340] Stephan Nathanson, *An Eye for an Eye* (2nd edn, Oxford: Rowman and Littlefield, 2001) 367.

Classical retribution views punishment as a repayment of debt to society. Debt is accrued when a criminal inflicts suffering to another person that causes an imbalance of justice to society. Furthermore, the distribution of punishment is based on what the state distributes to individuals within a society. The state has the duty to impose punishment to restore the moral order in the society that occurs as a result of the wrongdoing.[341] Punishment, hence, restores the moral balance that the crime caused.

Looking at the forms of punishment that could be inflicted on individuals, *lex talionis* indicates that punishment needs to 'duplicate the exact manner and degree of the crime.'[342] Since legal punishment is justifiable vengeance, corporal and capital punishment are seen as appropriate in some cases.[343] Kant states that punishment is physical harm necessary for the allocation of justice, even if not connected to the moral wickedness of the criminal.[344]

Classical retribution has many flaws because it does not provide a measure for moral desert and does not clarify the criteria for determining the levels of punishment.[345] Classical retribution states that morality, guided by a view of religion, determines when punishment should be imposed. However, individuals within one society have different opinions on what is deserving of punishment. Morality has a subjective standard and societies may follow no or more than one religion.[346] When considering how punishment is distributed, the 'eye for an eye' principle is difficult to apply in cases where harm is not inflicted on other individuals. This may include prostituting, driving under the influence, or using drugs.[347] Similarly, punishment is difficult to apply in cases where it is morally unacceptable. If classical retributivism is applied strictly, it would involve methods like torturing torturers and raping rapists.[348] One may conversely argue that classical retribution does not require imposing a punishment that is identical to the crime committed. Rather, a punishment that produces an equal level of harm suffered by the victim or by the society could be imposed. Nevertheless, the level of 'equal harm' is difficult to quantify in cases where no direct harm has been suffered by another individual. Moreover, classical

[341] Greenwalt (n 328).
[342] Leon Pearl, 'A Case Against the Kantian Retributivist Theory of Punishment' (1982) 11 Hofstra Law Review 273, 273.
[343] ibid.
[344] Brooks, 'Corlett on Kant, Hegel and Retribution' (n 331) 565-6.
[345] Nathanson (n 340).
[346] Brooks, *Punishment* (n 13) 20.
[347] Nathanson (n 340) 368.
[348] ibid.

retribution incorrectly assumes that individuals have the same level of sensitivity to harm.[349]

Furthermore, classical retributivism does not consider the circumstances of the offence and culpability factors, or how future similar conduct could be refrained by other individuals in society. Failure to take account of culpability and mitigating factors is problematic in the context of individuals who are seen to be disadvantaged by social institutions. It is unclear whether Kant views individuals disadvantaged by social institutions as criminals because they willfully committed a crime, or as non-criminals because they do not deserve to be punished.[350] Additionally, the failure of classical retribution to factor in the specific circumstances of the offender may result in punishing innocent individuals.[351]

It is also questionable whether classical retribution can exist in a framework that includes multiple penal aims. Current laws in England and Wales and the United States apply multiple aims of punishment.[352] Classical retribution rejects the impact of punishment on future crimes. This implies that retribution cannot exist alongside deterrence, which is a consequentialist view of punishment. Many deterrence approaches impose punishment based on creating fear within the general society on the consequences of committing similar wrongful conduct.[353]

Nevertheless, one interpretation of Kant's retribution theory suggests that retribution could work alongside other goals of punishment. Brooks contends that Kant considers retribution for moral law violations and consequentialism for positive law violations.[354] The distinction between moral laws and positive laws is as follows: Moral laws are universal laws that stem from how individuals act and become 'the standard by which [individuals] judge the moral correctness of every particular action.'[355] Moral laws require individuals to act according to the universal laws created by individual actions. Positive laws are rules written in legislation that may be rational or irrational, and not necessarily measurable by morality standards.

[349] ibid.
[350] Anderson (n 334) 364.
[351] Thom Brooks, 'Kant's Theory of Punishment' (2003) 15 *Utilitas* 206, 208.
[352] Maslen (n 330).
[353] ibid.
[354] Thom Brooks, 'Kant's Theory of Punishment' (n 351) 206.
[355] ibid 215.

Thom Brooks also points to Kant's arguments on governments imposing deterrent punishments when pragmatic matters outweigh the achievement of justice. In his 'Doctrine of Right', Kant argues that protection of the community outweighs retributive concerns. If all murders were executed, and the number of criminals is so great, necessity would require the state to enforce a judgement other than capital punishment.[356]

On a broader level, this interpretation of Kant's retribution theory encouragingly suggests that classical retribution could work alongside other penal aims, in line with current prominent penal aims in England and Wales and the United States. However, having advanced a non-moral basis to corporate criminal liability in Chapter 1, classical retribution would not be an appropriate framework for punishing companies. The next step is to evaluate the development of classical retribution into many modern approaches in legal literature.

2.2 Modern Varieties to Retribution

The understanding of 'retribution' diverged from its original classical variant in religious scripts and classical interpretations, including Immanuel Kant's retribution theory, to various interpretations amongst academics. Particularly, many interpretations of proportionality and desert emerged.[357] Cottingham defines nine approaches to punishment labelled as 'retributive.'[358] Twenty years later, Walker stated that the versions of retribution have multiplied since Cottingham's article.[359]

Two interlinking remarks could be pointed out when assessing modern approaches to retribution. First, there are many interpretations of what conducts should be criminal, and how a crime should be punished. Second, some modern varieties of retribution are not 'pure'. They use other penal aims to justify either the aim of punishment and/or distribution of punishment.[360]

2.2.1 New Interpretations to What Counts as a Crime and How Criminals Ought to be Punished

[356] ibid 213.
[357] Brooks (eds), *Retribution* (n 319) ix.
[358] John Cottingham, 'Varieties of Retribution' (n 319).
[359] Nigel Walker, 'Even More Varieties of Retribution' (1999) 74 Cambridge Journals 595, 595.
[360] Brooks, *Punishment* (n 13) 94.

First, many modern approaches to retribution have altered the conditions of what counts as criminal conduct and how punishment is distributed. Expressivist theories are variants of retributivism, advocated by philosophers like Joel Feinberg and Antony Duff.[361] Brooks synthesises the ideas of retributivist expressivism as follows,

> [Punishment] is justified as the communication of retributivist expressivism. Punishment is (a) an activity communicated by the state to offenders (b) pertaining to their retributivist desert for moral wrongdoing (c) that is best communicated through the expression of legal punishment.[362]

Punishment is justified when it causes immoral harm and is distributed in proportion to immorality.[363] It 'has an expressivist function of [communicating] public disapproval to criminal offenders for their moral wrongdoing where punishment is proportionate to immorality.'[364] Punishment aims to communicate that the public disapproves the criminal's immoral conduct and distributes punishment in proportion to the immorality of the conduct.

Expressivist theories have different positions on whether punishment requires further justifications beyond that 'it is deserved', whether it needs to be communicated and expressed, the reasons for punishing moral wrongs, which moral wrongs are to be punished, and the methods of punishing criminals.[365] For example, regarding the distribution of punishment, Feinberg distinguishes between punishment and penalties. Punishment, limited to imprisonment, requires public condemnation as a justification, and penalties include community sentencing, verbal warnings, and monetary fines. Duff also requires offenders to express their remorse to the public as part of the punishment, to fulfil the 'punishment as communication of public disapproval' justification of sentencing.[366]

Furthermore, the Fair Play theory, advocated by philosophers like John Rawls and HLA Hart, adopts different interpretations to the justification and distribution of punishment. Fair play connects punishments with society's political order. Notably, John Rawls states that individuals have political obligations, defined as moral

[361] Brooks, 'Criminal Harms' in Thom Brooks (ed), *Law and Legal Theory* (Brill 2014) 149.
[362] ibid 152.
[363] ibid 151.
[364] ibid 150.
[365] ibid 153.
[366] ibid 152-3.

obligations or duties to obey the law and support the state's political institutions.[367] Punishment is justified when individuals choose not to meet their obligations to the cooperating members of society.[368] This is based on fairness and considering the value of law-abiding citizens in society. Non-criminal individuals exercise self-restraint by respecting the rights of others in society, whilst criminals gain fulfilment from committing crimes.[369] Similar to Kant's retribution theory, the state should play a role in impeding criminals from gaining an unfair advantage over citizens who abide by the law.[370] However, the focus should be placed on protecting law-abiding individuals rather than the offender. Distribution of punishment is aimed at 'restoring the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.'[371] Thus, punishment is interpreted as a repayment of debt in proportion to the unfair advantage obtained a criminal accrues as a result of committing the crime. [372]

2.2.2 Hybrid Theories: Retribution and Other Penal Aims

Second, several modern retribution theories do not completely reject utilitarian views.[373] Even Kant's classical retribution theory of punishment considers deterrence principles for the distribution of punishment.[374]

One modern approach to retribution that considers other penal aims is 'negative retribution.'[375] Notably, Rawls and Hart's approaches to retribution are classified under negative retribution. Rawls argues utilitarianism addresses questions about specific cases, and retribution addresses 'the application of particular rules to particular cases.'[376] Retribution provides the justification for punishing a particular criminal, and utilitarianism justifies why institutional practices punish any criminal.[377] Rawls focuses on restoring the rights of law-abiding citizens rather than just punishing the criminal. Hart similarly agrees that different penal aims could be

[367] John Simmons, 'The Principle of Fair Play' (1979) 8 Philosophy and Public Affairs 307, 307.
[368] Richard Dagger, 'Punishment as Fair Play' (2008) 14 *Res Publica* 259, 262.
[369] Cottingham (n 319) 4-5.
[370] ibid 5.
[371] Dagger (n 368) 261.
[372] John Cottingham, 'Varieties of Retribution' in Brooks (eds), *Retribution* (n 319) 5.
[373] Brooks, *Punishment* (n 13) 93.
[374] Brooks, 'Kant's Theory of Punishment' (n 351) 213.
[375] Brooks, *Punishment* (n 13) 96.
[376] ibid 90.
[377] ibid.

used to justify punishment.[378] Particularly, negative retributivism states that individuals who deserve punishment should be prosecuted, but the application of punishment should be in accordance with consequentialist considerations.[379]

As discussed above, classical retribution, otherwise identified as positive retribution, links desert to the justification of punishment and its distribution. Conversely, negative retribution contends that desert is necessary but not sufficient for distributing punishment to those who deserve it and that the system is guided by other considerations to understand whether one should apply punishment. For example, the punishment of a deserving criminal should not apply if it would lead to war or political instability.[380]

At first instance, negative retribution is more aligned with the laws in England and Wales and the United States than classical retribution, because it adopts deterrence and retribution as penal aims of punishment. However, negative retributivism contradictorily argues that punishing offenders does not contribute to crime reduction but justifies a criminal justice system that accepts these effects.[381]
Overall, the section explored various theoretical approaches to retribution, ranging from classical retribution to various modern interpretations of retribution. The purpose of exploring the approaches is to note their unique interpretations with regards to when punishment is deserved and the methods of punishment. Several issues are pointed out: First, negative retribution inconsistently justifies punishment in accordance with retribution principles but agrees with distributing punishment in accordance with deterrence principles. This crucially highlights the importance of agreeing on the theoretical foundations of current sentencing practices to avoid any inconsistencies. Second, retribution approaches that advance morality as a basis for setting laws are incompatible with current criminal laws in the United States and England and Wales. Third, approaches to retribution that limit punishment to 'imprisonment' are incompatible with current criminal laws applying to companies. Therefore, retribution cannot exist as a sole primary objective for punishing companies as some theories contend. These issues will be explored in the context of corporate crime below.

[378] ibid 93; John Cottingham, 'Varieties of Retribution' in Brooks (eds), *Retribution* (n 319) 4.
[379] Brooks, *Punishment* (n 13) 96.
[380] ibid 97.
[381] Brooks, *Punishment* (n 13) 92; Cottingham, 'Varieties of Retribution' (n 319) 248.

3 Retribution and Corporate Crime

3.1 Which Approach to Retribution is Being Followed by Sentencing Practices?

There are many theoretical approaches to retribution. This could be an advantage and a disadvantage. As Chapter one briefly discussed, the Definitive Guidelines (England and Wales) and the Sentencing Commission Guidelines (United States) list retribution as a penal aim.[382] They do not, however, detail the theoretical approach to retribution that is being followed.

Different approaches to retribution adopt unique interpretations to what 'deserves to be punished.' Stone argues that some forms of culpability like vicarious liability and negligence may be unjust to impose on companies. He states,

> [To] move the law in this direction is, at least by degrees, to loosen the criminal law's moral tethers. Negligence is shadowy. Vicarious is plastic (who, after all, will appear, after the fact, to have been in 'a responsible position?'). Neither squares well with fair notice, intent, or real blameworthiness.[383]

In his view of retribution, crimes that require the mens rea of negligence would be unjust to impose on companies because it is 'immoral'. The line between what is negligent and not negligent is difficult to draw, and it is unfair to impute corporate criminal liability for the criminal acts of any employee within the company. Nevertheless, Thompson states that negligence-based liability is justified because of the potential gross harm resulting from organisational negligence. This view is parallel to the negative retribution approach discussed above. Academics that limit 'just punishment' to certain types of mens rea (e.g. solely to intent-based crimes) could lead one to believe that the retributive principle of desert is incompatible with current corporate criminal laws that punish companies under various men rea standards.[384]

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[382] Desio (n 247); Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31); Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (n 31).

[383] Christopher D. Stone, 'A Comment on 'Criminal Responsibility in Government' (1985) 27 Criminal Justice 241, 246.

[384] Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1998) 11 Sydney L. Rev. 468, 502.

Nevertheless, the existence of various approaches to retribution and 'what deserves punishment' could be advantageous. The law could adopt one approach to retribution that is theoretically, and practically coherent, and current laws could be reformed to clarify which approach to retribution needs to be taken. Section 4 will consider a viable approach to retribution.

3.2 'Moral Retribution' and Corporate Crime

The majority of retribution approaches, as evidenced in Section 2, are based on morality. This generally means that criminals are punished to the degree they deserve, and this degree is measured in accordance with the crime's 'wickedness'.[385] Having considered moral based justifications of corporate criminal liability in Chapter 1, it is reiterated that distinguishing punishable evils and punishable non-evils is difficult. Moreover, criminal laws in England and Wales and the United States still punish acts that are not necessarily 'immoral'. It is also often difficult to ascertain the actual intentions of the defendants and whether they were morally responsible to a certain extent.[386] These arguments are discussed in greater detail below in the context of expressivist theories, given their popularity in the literature on retribution.[387] The critique may also be applicable to other approaches to retribution.

As explored in the previous section, expressivist theories define criminality in relation to immorality. Yet, not all crimes by companies are harms to morals. In other words, there is a wide spectrum of crimes that are not clearly linked to morality, and criminal laws in England and Wales and the United States enforce punishments on conducts that are not necessarily immoral.[388]

As discussed in Chapter 1, the thesis takes the view that morality is an illegitimate basis for the imposition of criminal laws on companies; corporate responsibility is justified based on 'team member responsibility.'[389] For example, The Bribery Act 2010 criminalises a company for failing to take adequate procedures to prevent individuals associated with the company from bribing a person, with the intention of

[385] Brooks, *Punishment* (n 13) 20.
[386] ibid.
[387] Brooks, 'Criminal Harms' (n 361) 150.
[388] ibid 155-6.
[389] see Chapter 1; Lee (n 145) 762.

benefiting the company.[390] Opinions may diverge on whether the act of bribing an individual is immoral, and whether a company's failure to set procedures that prevent its representatives from bribing other individuals is immoral.

Expressivist theories also emphasise communicating public disapproval of the criminal's act to achieve retribution. In practice, however, society is likely to have a divergence of moral and political values. Individuals may agree on the criminality of murder and theft but may disagree on the justifications of punishment and degree of punishment.[391] Duff conversely argues that a criterion for criminalisation does not need to be set for the public to communicate its disapproval when a crime occurs.[392] This argument fails on many grounds. Not setting a criterion for what ought to be criminalised would prevent the collection of information on the common values in society, how the common values collide, how to overcome the collision of values, and determining the values that need to be communicated to reflect public condemnation.[393]

Expressive theorists do not explain how 'justice' is achieved when harm is caused to various parties, including 'direct, indirect and remote victims.'[394] They also fail to explain whether punishment should be set proportionally to the harm caused to all the victims or just the direct victims. It is difficult to consistently set a degree of public condemnation that is proportionate to the moral wrongfulness of a criminal offence.[395] It is crucial to apply these issues in the context of corporate crime. In a corporate manslaughter case, for instance, the direct victim could be the person who has been killed as a result of the company's deviation from the relevant standard of liability. The indirect victims may be family members and dependents who have suffered financial and/or emotional distress. The remote victims are members of the community who have been affected by the crime (for e.g. incurred costs as a result of modifying their routines to avoid being victims of a crime).[396] BP Exploration and Production Inc. was convicted on counts of manslaughter and violations of environmental laws that resulted in the death of eleven individuals and one of the

[390] Bribery Act 2010, s 71 and s 8.
[391] Brooks, 'Criminal Harms' (n 361) 156-7.
[392] R.A. Duff, 'Answering for Crime' in Brooks (ed), *Law and Legal Theory* (n 361) 157.
[393] ibid.
[394] ibid 236.
[395] Brooks, 'Criminal Harms' (n 361) 156.
[396] ibid 149.

largest oil spills in the history of the petroleum industry.[397] The victims are the eleven individuals who have lost their lives; their families, spouses and defendants; and communities impacted by exposure to organic solvents.[398] From here, should punishment only be set in proportion to the death of eleven individuals? Should the negative impacts on the health of individuals in contaminated communities be accounted for? The long-term impact on the remote victims is unlikely to be taken into consideration under expressive theorists.

3.3. Limiting Punishment to 'Imprisonment' and Retribution as a 'Pure' Theory of Punishment for Companies

Even though retribution is a dominant penal aim, a 'pure' theory of retribution would be difficult to apply to modern criminal law.[399]

First, classical retribution distributes punishment in accordance with the principle of proportionality, expressed as the 'eye for an eye' principle. Under this principle, punishment focuses on the crime committed and not the offender, regardless of the potential for re-offending.[400] Current sentencing policies, which list retribution as a penal aim, do not enforce these principles. Alternatively, they enforce minimum mandatory sentences or a sentence range for each type of offence, which is increased and/or decreased in accordance with the specific circumstances of the criminal act and the offender.

One may conversely argue that current sentencing policies apply a modern approach to retribution. The 'eye for an eye' principle has been modified to 'applying the punishment that fits the crime' by many modern approaches to retribution. Modern approaches to retribution also accept considering mitigating circumstances like diminished capacity and mental incapacity. As discussed above, these modern

[397] Ben Bryant, 'Deepwater Horizon and the Gulf Oil Spill- Key Questions Answered' The Guardian (20 April 2011) < https://www.theguardian.com/environment/2011/apr/20/deepwater-horizon-key-questions-answered> accessed 27 May 2017.
[398] Linda Marsa, '6 Years After Deepwater Horizon spill, thousands of people still sick' (10 October 2016, Grist Magazine) <http://grist.org/article/6-years-after-deepwater-horizon-oil-spill-thousands-of-people-are-still-sick/> accessed 27 May 2017.
[399] Desio (n 247); Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31); Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (n 31).
[400] Paul A. Gillian, 'An Eye for a Wetland? Exploring Retribution as a Theory of Environmental Sentencing,' (1994) 25 University of Baltimore Law Forum 11, 14.

approaches to retribution, like expressivist theories, are not 'pure' and adopt principles accepted by other penal aims. A modified version of morality that is not retroactive, and considers the variety of corporate structures, types of companies, financial resources of companies, and other circumstances when enforcing punishment, may be a feasible way to distribute punishment.

Second, a number of modern approaches to retribution limit punishment to 'imprisonment.'[401] These approaches to retribution are incompatible with the basis of corporate criminal liability. Moreover, mixed theories of punishment, like expressivist theories, which justify punishment on retributivist grounds and distribute punishment based on deterrence grounds, are theoretically and practically incoherent, as discussed above.

Overall, many approaches to retribution fail to justify why companies should be punished and how they should be punished. Nevertheless, an interpretation of the principle of proportionality, not in its traditional form, could contribute to a viable theory of punishment for companies. From here, a viable theory of punishment for companies should overcome the flaws identified with many retribution approaches, to particularly combat various corporate crimes, and target various types of companies.[402] An alternative view that could fit in within a mixed theory of punishment is explored next.

4 An Alternative View to Retribution: Legal Retribution

4.1 The Theoretical Basis of Legal Retribution

'Legal retribution' is a non-moral approach to retribution developed by Brudner based on Hegel's philosophy and other scholars who follow his theories, including Green and Seth. Brooks takes into account of all these views and develops a modified and more compelling theory of legal retributivism.[403]

Brudner, as referred to in Brooks' article, states,

[401] Brooks, 'Criminal Harms' (n 361) 152.
[402] Thom Brooks, 'Punishment: Political, not Moral' (2011) 14 New Criminal Law Review: An International and Interdisciplinary Journal 427,436.
[403] ibid 432.

> The best theory of the penal law's general part … is not a theory about how the moral good of punishing evil is best served; nor is it a theory about when it is appropriate to express moral condemnation of blameworthy conduct or character through the penal power of the state; nor is it an account of what it takes for punishment to be a form of moral pedagogy addressed to a socially responsible agent rather than a tool for manipulating the behaviour of a rational hedonist. To put the point succinctly: the best theory of the penal law is a theory of penal right rather than one of penal morality.[404]

In interpreting Brudner's theory, Ramsay states,

> [The] most persuasive feature of Brudner's theory is that… [it is] able to explain features of the criminal law that moral theory is unable to explain. Moral theories of criminalisation either rely on the harm principle and are unable to explain those criminal wrongs (such as battery) that can be committed without proof of any harm, or they rely on moral retributivism that is unable to explain the entirely harm-oriented public welfare offences, where there may be no moral wrongdoing. These two perspectives similarly struggle to explain why negligence is common in the public welfare offences but traditionally absent from what judges sometimes refer to as 'true crimes'.[405]

Legal retribution convincingly punishes companies for breaking the law regardless of whether the law is immoral or moral. For Brudner, punishment is connected to a violation of 'liberty' rather than harm. Desert is understood as the defendant's wrong; or actions and inactions that cause interference with the choice of others, and the 'connection between the recipient's wrong and the wrong he suffers.'[406] In practice, however, some crimes may not interfere with the free choice of others. Brudner excludes these crimes from legal retributivism but includes them under other categories in his full instrumentalist theory of penal laws.[407] For example, he states 'public welfare offences' would fall outside legal retributivism but would be included under a 'full theory of justified penal force.'[408] He argues that only public welfare offences that involve 'knowing', hence 'contravening a statute protecting

[404] Alan Brudner, *Punishment and Freedom* in Brooks, 'Punishment: Political, not Moral' (n 402).
[405] Peter Ramsay, 'The Dialogic Community at Dusk' (2014) Critical Analysis of Law 316, 317.
[406] Brooks, 'Punishment: Political, not Moral' (n 402) 430.
[407] Alan Brudner, 'A Reply to Critics of Punishment and Freedom' (2011) 14 New Criminal Law Review: An International and Interdisciplinary Journal 495, 495-6.
[408] ibid 495.

greenery cannot be criminal, in my view, for this action falls into the subcategory of breaches of welfare laws that serve a social preference.'[409] However, in England and Wales and the United States, prosecution of environmental crimes is 'an established part of [the] criminal justice system.'[410] Hence, an interpretation of legal retribution that includes strict and non-strict liability offences is more aligned with current criminal laws.

The modified theory proposed by Brooks states that conducts that violate the rights of others should be criminal. Importantly, he states, 'we may violate rights in preventing others from free choice, but it is not clear that all rights violations entail the prevention of free choice to each other.'[411] The interpretation of 'conducts that violate the rights of other people' is subject to constant change given changing perspectives and values of individuals in the community.[412] The types of services and products offered by companies, attitudes towards compliance, and the types of companies, are subject to constant change. Moreover, attitudes toward compliance are impacted by the aforementioned factors. Legal retribution advantageously considers these factors to justify punishment.

Additionally, legal retribution states that punishment is justified for strict liability offences and non-strict liability offences (including intent and negligence). Brooks states, 'punishment is often justified through its justifying aim or purpose, such as retribution, deterrence or rehabilitation.'[413] Additionally, Brudner states, 'there is plenty of discretionary room in sentencing for fixing the exact measure of punishment with a view to deterrence and rehabilitation.'[414] Legal retribution accepts that sentences may be distributed in accordance with rehabilitation and deterrence where appropriate, and distribution of punishment includes methods beyond imprisonment.[415] Applying these concepts to corporate crime, the punishment of companies is justified when they have defective compliance systems and internal procedures that lead to interference with the rights of others. Legal retribution accepts that crime can result from other reasons, and punishment is justified in other circumstances beyond just deserts.

[409] ibid 496.
[410] Gillian (n 400) 17.
[411] Brooks, 'Punishment: Political, not Moral' (n 402) 434.
[412] Brooks, *Punishment* (n 13) 120.
[413] Thom Brooks, 'Stakeholder Sentencing' (n 32) 12.
[414] Brudner, 'A Reply to Critics of Punishment and Freedom' (n 337) 497.
[415] Ramsay (n 405) 319-320.

Legal retribution distinctively overcomes the three main issues identified in the previous section. First, it adopts a broader view of punishment that justifies its imposition in accordance with different penal aims, including just deserts. Second, it provides a non-moral basis of punishment, making it theoretically and practically coherent with current criminal laws in the United States and England and Wales. Third, it states that punishment could be distributed through imprisonment and other methods.

4.2 Legal Retribution for Corporate Crime

Having explored the theoretical foundations of legal retribution and how different approaches to retribution may apply in the context of companies, it is important to defend its viability in the context of corporate crime in further detail. It has been argued that legal retribution could form part of a broader theory of punishment for companies (given that accepts other penal aims for the justification and distribution of punishment). The section defends legal retribution and illustrates its alignment proposals set in Chapter 1.

The section also defends legal retribution by considering the views of Wong. Wong rejects retribution as a theory of punishment for companies. Wong argues that 'the basic assumptions and fundamental postulates of retribution cannot satisfactorily assess blame, impose liability, and exact restitution on companies.'[416] Wong raises three questions when discussing retribution in the context of corporate crime: '(1) What corporate conducts should be punished?; (2) who should be held responsible for corporate conduct?; and (3) How should corporate criminals be punished?'[417] Each of the questions is explored in greater detail below.

4.2.1 Which Corporate Wrongs Should be Punished?

Many approaches to retribution punish conduct that is 'immoral' and use 'immorality' as a scale for drawing the line between legal and illegal conduct. Wong rightly argues that retributivists adopt different interpretations to 'immoral conduct', yet do not provide guidance on determining the difference between morality and immorality. Moral-based retribution approaches are not practically coherent because

[416] Wong (n 326) 33.
[417] ibid 15.

it is difficult to define 'morally correct' decisions that companies have to make to avoid breaking the law.[418]

Nevertheless, legal retribution overcomes difficulties found in moral-based approaches to retribution. Legal retribution contends that not all moral wrongs are illegal and not all laws are based on morality. It is just to punish companies when they violate the rights of individuals, regardless of whether the violation is moral or immoral.

This view comes in line with Lee's 'team member responsibility' view. It stipulates that corporate misconducts should be criminalised if they are motivated by the team's norms and/or pursued by the team's members in pursuit of their goals; and punishes strict liability offences and non-strict liability offences that may have been caused by negligence, intent, or recklessness.[419]

4.2.2 Who Should be Held Responsible for Corporate Wrongs?

The proposals of legal retribution reflect that both individual responsibility and corporate responsibility would be imposed when it is just to do so (when the rights of individuals are violated). As Chapter 1 advanced, corporate criminal liability is justified when the actions or inactions of certain representatives within the company are viewed as 'team member responsibility.' For non-strict liability offences, team member responsibility is defined in accordance to the 'broad identification principle', where the actions and omissions of senior management, even when they delegate their tasks to low-level employees, should be representative of the company's actions.[420] Consistent with legal retribution, it is also just to punish misconducts that are the responsibility of the team when they violate the rights of other individuals, including strict liability offences. Individuals within the company who are pinpointed to have committed a criminal offence could also incur personal liability.

It is crucial to assess opposing views to defend legal retribution. Wong argues that the main retribution debate lies in 'whether moral culpability can be imposed on an impersonal entity.'[421] Since a company is not an individual, how could moral fault

[418] ibid 17.
[419] Lee (n 145) 772.
[420] Department of Justice (Canada) (n 257).
[421] Wong (n 326) 28.

be attributed to it?[422] This view is parallel to arguments rejecting corporate criminal liability as explored in Chapter 1. Wong concludes that moral culpability requires 'a capacity to conduct moral reasoning and an ability to make responsible choices.'[423] 'Causing harm' is not sufficient to attribute moral culpability. Furthermore, he argues that it is difficult to pinpoint the responsibility of wrongdoing within a corporate entity. Decisions may be carried by more than one individual, often as part of a group, with or without supervision. Members of companies may also change over time.[424]

Brent and Fisse alternatively argue that many retributive approaches incorrectly reinforce 'individualism'. Particularly, they lie on three assumptions: First, they 'pre-suppose individual as opposed to corporate responsibility.'[425] Second, they are 'pre-conditioned on fault,' which is not workable or defensible in the context of companies.[426] Third, they argue that punishing companies goes against desert.[427] Similar to arguments of the 'group moral agency' theory advanced in Chapter 1, Brent and Fisse find companies as responsible moral agents, because they have a wealth of resources and can acquire superior knowledge over individuals.[428] From there, they advance a 'concept of reactive fault', which attributes corporate criminal liability based on 'unreasonable corporate failure to devise and undertake satisfactory preventative or corrective measures in response to the commission of the actus reus of an offence by personnel acting on behalf of the company.'[429] A company can be morally responsible because of intending to enforce policies and complete projects, and accordingly for failing to achieve compliance with the law.[430] Third, they argue that as blameworthy moral agents, companies incur punishment that may impact innocent shareholders. This is similar to the impact of a crime on the families of the victims and defendants. In the case of companies, innocent associates and shareholders do not serve punishment or experience the stigma of punishment. Moreover, they partake in a distributional scheme of profits and losses from the company's activities, have accepted corporate benefits flowing from profits of the

[422] ibid.
[423] Ibid 29.
[424] ibid.
[425] Fisse and Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (n 384).
[426] ibid.
[427] ibid.
[428] ibid 503-5.
[429] ibid 505.
[430] ibid 506-7.

company or on the basis of their position within the company, and hence should look at their involvement as an investment rather than 'praise of blame.'[431]

Although it is agreed that a clear distinction between individual and corporate liability needs to be made, Brent and Fisse incorrectly base liability on moral grounds. Difficulties with moral retributive approaches have been discussed extensively in the previous sections. Companies can always safeguard against the 'reactive fault' standard of liability by enforcing 'corrective measures' following the commission of the offence. In some circumstances, the costs of implementing corrective measures are lesser than the short-term profits made out of the commission of the offence.[432]

Legal retribution clearly distinguishes between individual criminal liability and corporate criminal liability. Innocent individuals who work for the company are not subject to the stigma of conviction and criminal punishment, and those who have participated or were responsible are estopped from earning illegally, and the company is estopped from allocating illegal resources at the society's expense.[433] This would influence the behaviour of team members and allow them to evaluate whether they should continue to be part of the company.[434] Therefore, it is just to punish individuals within the company that have committed an offence for the benefit of the company, and they can be held individually responsible for the crime they committed.

4.2.3 How Should Corporate Crimes be Punished?

As discussed in Chapter 1, punishment is distributed in accordance with retribution and deterrence principles. For example, in the United States, the principle of proportionality applies, and the seriousness of the crime determines the sentence severity.[435] Moreover, one of the requirements for sanctions imposed on companies and their agents is that they provide 'just punishment'.[436] Nevertheless, it is unclear what approach to retribution is being followed to determine 'fair and just

[431] ibid 508.
[432] Brooks, 'Punishment: Political, not Moral' (n 402) 434.
[433] Fisse (n 10) 1175.
[434] Lee (n 145) 764, 772, 781.
[435] United States Sentencing Commission, 'Guidelines Manual 2016' (n 11) Ch. 1 Pt. A, section 2.
[436] ibid.

punishment' and to define the parameters of 'seriousness' in relation to proportionality.
Wong argues that distributing punishment in accordance with retribution is problematic. He states,

> [W]hen only the group is being harmed as a collective, and not that of the members individually, whose moral judgement should be taken into account?... When the harm is done to a group…it elicits distinct and different emotion and/or cognitive response than when an individual is personally injured.'[437]

The criminal conduct is committed by a group entity and it is difficult to ascertain the moral judgement of the group. Moreover, different levels of harm are suffered by various groups of people as a result of the crime.

Legal retribution, on the other hand, does not concentrate on the moral judgement of these groups. Legal retribution provides that it is just to punish companies that violate the rights of other people, even for crimes that do not require proof of mens rea. For example, the punishment would be distributed in accordance with retribution principles in strict liability offences, because it is just to punish a company when they conduct an act that violates the rights of others. Methods of punishment clearly go beyond imprisonment. Punishment is distributed in proportion to the gravity of the rights violated. A process could be implemented to identify the individuals whose rights have been affected by the criminal act or omission.

4.2.4 The Advantages of Legal Retribution

Legal retributivism's distinctive view of law and culpability accounts for different offences and offenders, which other retribution approaches fail to do. Section 2 theoretically analysed various interpretations to retribution, ranging from its classical variant to modern interpretations like the Fair Play theory; expressivist retributivism, and negative retributivism. Classical retribution stands on an extreme and negatively defends strict views on punishment guided by religious views, which are difficult to apply in the context of companies. It is problematic to provide a set objective standard of morality, a criterion for determining the levels of punishment, and to

[437] Wong (n 326) 32.

apply modes of punishment based on the 'eye for an eye' principle. Expressivist retributivism also considers morality as a standard for punishment and do not provide a clear criterion as to how punishment should be distributed in proportion to morality. It is unclear whether punishment could go beyond imprisonment, and whether communication of public disapproval is linked to the standards of liability. This would be problematic in the case of companies, given the practical impossibility of imprisoning companies, and the existence of various standards of liability. The Fair Play theory and negative retributivism positively attempt to collate different retribution and other theories to gain a better understanding of the justifying aims of punishment and its distribution. Nevertheless, the theories fail to clarify how retribution and utilitarianism could function coherently under one theory.

Thus, legal retribution advantageously accepts that crime has more than one cause. Brooks states, 'if our freedom and rights are better protected and preserved by the incorporation of non-retributivist elements in the specific circumstances under certain conditions, then it may be a mistake to reject such incorporation out of hand.'[438] When the primary aim of punishment is the protection of rights, then punishment could be tailored to the specific circumstances of each case. Proportionality is accepted by different theories. Legal retribution is part of a mixed theory that can accommodate other goals of punishment when they best address the protection of rights in a specific situation.

5 Conclusion

The chapter explored retribution theories and defended a view of retribution that can effectively address corporate crime.

Section 2 defined and assessed various approaches to retribution, ranging from classical retribution to various modern views of retribution. Section 3 identified three main challenges: the lack of clarity on which approach to retribution is currently being applied in practice; prevalent retribution approaches that define morality in relation to legality do not represent modern criminal laws nor provide insights on how laws could be improved or how justice could be achieved; and views on retribution pertaining to it being a 'pure theory of punishment' and punishment being

[438] Brooks, 'Punishment: Political, not Moral' (n 402) 437.

limited to imprisonment create vast difficulties to the practical coherency of retribution to address corporate crime.

Section 4 advanced 'legal retribution' as an alternative view that could fit within a mixed punishment model, through explaining its theoretical underpinnings, and exploring and defending its application in the context of corporate crime. This was addressed by explaining its advantages over other views of retribution discussed in Sections 2 and 3. Legal retribution is well-suited with ideas discussed in Chapter 1 (corporate criminal liability as 'team member responsibility', the Canadian standard of liability model, and justifying the punishment of non-strict liability offences).

Overall, legal retribution can work as part of a theory of punishment for companies that consider other penal aims. It overcomes disadvantages of the lack of clarity of current sentencing policies that do not define the approach of retribution to be followed and how retribution could fit with other penal aims and addresses discrepancies between the theory and practice of retribution, which is crucial when applied to address corporate crime. The next chapters will also consider the compatibility of retribution with deterrence, rehabilitation, and/or restoration.

Chapter Three

Deterrence

1 Introduction

Deterrence is an essential postulate of criminal liability and sentencing practices. Deterrence encompasses a family of theories that justify crime to deter future criminal acts and the frequency of future crimes.[439] In comparison to approaches to retribution focusing on just deserts, deterrence theories broadly fall under consequentialist justifications to punishment.[440] Consequentialism could be generally defined as justifying punishment because the perceived positive consequences exceed the negative consequences.[441] In the context of companies, deterrence theories claim that companies obey the law because the threat of detection and punishment through criminal sanctions is important to companies and their managers.[442]

As Chapter 2 explained, the two central objectives of imposing criminal law on companies in England and Wales and the United States are retribution and deterrence.[443] Having discussed how retribution could contribute to a broader theory of punishment, the next step is to examine the fitness of deterrence to contribute to a theory of punishment for companies. This requires examining the coherence of deterrence as a theory of punishment, and how it has been applied in practice to regulate corporate misconduct.

The chapter is structured as follows: Section 1 examines various theoretical approaches to deterrence, ranging from classical deterrence to modern deterrence approaches. Section 2 analyses the application of deterrence in England and Wales and the United States to address corporate crime. Section 2.1 particularly addresses

[439] Brooks, *Punishment* (n 13) 35.
[440] Lippke, 'Imprisonable Offences' in Brooks (ed), *Law and Legal Theory* (n 361) 243.
[441] ibid.
[442] Simpson (n 315) 9.
[443] Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31); Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (n 31); Desio (n 247).

how sentencing policies have applied deterrence theories in combination to retribution to punish corporations; and how DPAs provide a supplementary, yet important, contribution to controlling corporate crime. Section 2.2 discusses challenges to adopt a liability and sentencing model based solely on deterrence. Taking in mind the advantages and pitfalls of retribution, Section 3 discusses how deterrence could play a part in a theory of punishment for companies.

2 Deterrence Theory

Like retribution, there is no single theory of deterrence.[444] The section will theoretically explore the foundational concepts of deterrence, from its classical views laid down by utilitarian philosophers to its various modern approaches. The views of deterrence are analysed by considering the circumstances in which punishment should be imposed and allocated.

2.1 The Origins of Deterrence

The word deterrence originates from the Latin word *deterre* – 'to frighten from or away.'[445] Deterrence could be defined as the manipulation of individual behaviour through threats. Like retribution, Freedman arguably states that deterrence is rooted in a view of many religious books, asserting that individuals should conduct their earthly lives in accordance to how they may be rewarded or punished for eternity in the next life. He explains that in the Bible, God's first words contained a deterrent effect. God permitted Adam to eat any fruit in the garden except for the fruit of the Tree of Conscience; eating the forbidden fruit means that Adam was 'doomed to die.' Adam and Eve failed to follow these rules, resulting in their banishment from Eden and delayed death. The story of Adam and Eve is also present in many religions that promise 'heaven' and threaten 'hell', including Islam.[446]

The concept of 'threat with a purpose' and the ability to manipulate individual calculations to prevent them from committing harm emerged in the thinking of utilitarian philosophers.[447] Deterrence developed from universalistic assumptions on human nature and law obedience, advocated by utilitarian philosophers. They

[444] Brooks, *Punishment* (n 13) 11.
[445] Lawrence Freedman, *Deterrence* (Polity Press 2004) 6.
[446] ibid 7.
[447] ibid.

protested retributivist theories dominating criminal laws and policies in Europe.[448] Three prominent classical deterrence proponents include Thomas Hobbes (Leviathan), Cesare Beccaria (Dei Delitti e delle Pene), and Jeremy Bentham (An Introduction to the Principles of Morals and Legislation).[449] According to Bentham,

> In so far as by the act of punishment exercised on the delinquent, other persons at large are considered as deterred from the commission of acts of the like obnoxious description, and the act of punishment is in consequence considered as endued with the quality of determent. It is by the impression made on the will of those persons, an impression made in this case not by the act itself, but by the idea of it, accompanied with the eventual expectation of a similar evil, as about to be eventually produced in their own instances, that the ultimately intentional result is considered as produced: and in this case, it is also said to be produced by the example, or by the force of example.[450]

This view reflects the three main components to deterrence theories, 'severity, certainty, and celerity.'[451] First, the higher the severity of punishment, the more likely that individuals will abide by the law. Second, laws should be certain to ensure individuals understand the consequences of committing crimes and refrain from violating the law. Third, punishments should be imposed swiftly for the offender and other individuals to understand the negative impacts of violating the law. [452] These ideas are explored in greater detail below.

Classical deterrence assumes that criminals, like other individuals, are rational actors.[453] Crime is committed by individuals following a pain-pleasure analysis, where individuals conclude that the benefits of committing a crime exceed its costs.[454] Hobbes states that individuals are 'creatures of their own volition who want certain things and who fight when their desires are in conflict.'[455] Individuals pursue their self-interests, including social reputation and material gain, and these self-interests can create conflict with other individuals' interests. The conflict of interests

[448] *Encyclopaedia of Prisons and Correctional Facilities* (2005) 234; Brooks, *Punishment* (n 13) 35, Simpson (n 315) 22.
[449] Brooks, *Punishment* (n 13) 36.
[450] Jeremy Bentham, *The Rationale of Punishment* in Freedman (n 447) 8.
[451] *Encyclopaedia of Prisons and Correctional Facilities* (n 448) 235.
[452] ibid.
[453] Carlsmith et al. (n 320) 285.
[454] *Encyclopaedia of Prisons and Correctional Facilities* (n 448) 234-5.
[455] ibid 234.

could lead to exclusion by some members of the society, and in some cases, lead to law violation. Classical deterrence claims that individuals agree to enter a 'social contract', enforced by the government, to regulate their conflict of interests.[456]

Distribution of punishment is based on the pain-pleasure principle. Bentham states that criminals would be prevented from engaging in punishment if the apparent or actual value of pain is higher than pleasure.[457] He also asserts that states have an obligation to 'promote the happiness of the society, by punishing and rewarding.'[458] Similarly, Beccaria states,

> What are the true and most effective laws? They are those pacts and conventions that everyone would observe and propose while the voice of private interest, which one always hears, is silent or in agreement with the voice of the public interest.[459]

Deterrence is achieved when the laws define crimes and specify the amounts and types of punishment for different types of crimes, applied proportionally to the amount of harm inflicted on society.[460] Punishment should not be imposed in excess of what is necessary to prevent individuals from violating the law and controlling the actions of offenders.[461] Deterrence focuses on manipulating individual behaviour through the threat of punishment and enforcing prosecution. Beccaria asserts that manipulating individual behaviour requires influencing their minds and inflicting low damages on the criminal.[462] Bentham states that certainty, rather than severity, is a more efficient way of controlling crime.[463] The combination of the threat of punishment and actual punishment can deter future crime.[464]

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[456] ibid.
[457] Carlsmith et al. (n 320) 285.
[458] *Encyclopaedia of Prisons and Correctional Facilities* (n 448) 235.
[459] Brooks, *Punishment* (n 13) 40.
[460] *Encyclopaedia of Prisons and Correctional Facilities* (n 448) 238; Transparency International Canada, 'Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada' (Transparency International Canada, July 2017) <http://www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf> accessed 27 September 2017, 14-15.
[461] *Encyclopaedia of Prisons and Correctional Facilities* (n 448) 235; Kevin C. Kennedy, 'A Critical Appraisal of Criminal Deterrence Theory' (1983) 88 Dick. L. Rev. 1, 2.
[462] Brooks, *Punishment* (n 13) 48.
[463] *Encyclopaedia of Prisons and Correctional Facilities* (n 448) 236.
[464] Brooks, *Punishment* (n 13) 40.

Overall, traditional deterrence is based on three concepts: severity, certainty, and celerity. Today, these concepts reflect the framework for testing deterrence.[465] Classical deterrence was developed as a universalistic idea of how individuals act and how society should respond to individuals who did not follow the law. This can be perceived as an advantage and a disadvantage. The pain-pleasure and free will concepts do not consider other possible preventative effects of punishment beyond its frightening impacts. It simplistic views also fail to consider the differences between various types of offenders and how their decisions may be influenced by personal experiences and demographics.[466]

On the other hand, classical deterrence positively contributes to understanding the cause of committing certain crimes and how punishment should be enforced. For instance, classical deterrence contends that individuals always seek to achieve their self-interests, and crime stems from a conflict of interests between the specific offender and others in the society, and offenders feeling excluded from the society.[467]

Hence, deterrence in its traditional form contributes to knowledge on individual behaviour and factors that contribute to criminality. Many modern deterrence approaches adopt modified versions of these principles, as will be explored in the next section.[468]

2.2 Modern Deterrence

Classical deterrence has a number of flaws: the pain-pleasure principle is simplistic and not practically coherent, uniform punishments are insufficient, and the need to develop concrete and diversified ways to respond to crime. Consequently, modern deterrence theories tested the assumptions of classical philosophers and developed a set of theories, which have three common assumptions.

Under modern deterrence approaches, individuals are inhibited from committing crimes for a number of reasons: '(1) they fear the consequences of punishment, (2) laws have an educative influence on citizens, and (3) a person's prosocial habits are reinforced.'[469] Punishment is based on enforcing a 'preventative force against crime'

[465] Freedman (n 445) 61.
[466] Simpson (n 315) 24.
[467] *Encyclopaedia of Prisons and Correctional Facilities* (n 448).
[468] Simpson (n 315) 24.
[469] ibid.

to control or change the present and future behaviours of individuals in a way that makes them fearful of the consequences of offending.[470] It may also have an educative influence on them and personal circumstances are taken into account in sentencing. The rest of Section 2.2 will discuss notable elements of modern deterrence.

2.2.1 General Deterrence and Specific Deterrence

Modern deterrence theories introduced two methods of controlling crime. Crime can be controlled at an individual and a broader level, the former known as 'specific deterrence' and the latter known as 'general deterrence'. The greater the certainty and severity of punishment, the greater the deterrent impact on other offenders (specific deterrence) and the public (general deterrence).[471] The two concepts work together to control crime from a different angle.[472] General deterrence aims to inhibit the general society from committing crimes when they witness criminals inflicting pain. Specific deterrence focuses on deterring the specific offender from committing further crime through imposing proportional 'pain' to offset the benefits of committing the crime.[473]

A closer look at general and specific deterrence reveals its similarities to rehabilitation. The problem to be addressed is '[whether] rehabilitation is deterrence by another name.'[474] Somer argues that rehabilitation can be 'a principal objective of correctional [programmes] but should not be considered as a 'penal aim'.[475] This implies that rehabilitation is a sub-set of deterrence. This view is incorrect on a number of grounds.

Rehabilitation and deterrence fall under consequentialist approaches to punishment, which justify punishment because of the positive consequences of obeying the law over its negative consequences.[476] Brooks states that although deterrence and rehabilitation both aim at the reduction of crime, the results are achieved through

[470] Kennedy (n 461) 1-2.
[471] Simpson (n 315) 9.
[472] Brooks, *Punishment* (n 13) 36-7.
[473] *Encyclopaedia of Prisons and Correctional Facilities* (n 448).
[474] Brooks, *Punishment* (n 13) 58.
[475] Robert Somer, *The End of Imprisonment* (Oxford University Press 1976) 119.
[476] Lippke, 'Imprisonable Offences' (n 440) 243.

two distinctive ways. Specific deterrence asserts that an offender has experienced punishment and is fearful of further punishment if they choose to commit another crime. General deterrence is achieved when members of society fear the punishment that other offenders have endured. This does not mean that all offenders and members of the society who do not engage in further crime do not have the desire to do so. On the other hand, rehabilitation affirms that members of the society, including offenders, would not commit crime because they have no desire to engage in crime.[477] Therefore, the aims of crime reduction are achieved in two different ways, making rehabilitation and deterrence separate penal aims.

2.2.2 Deterrence and Incapacitation

Specific and general deterrence have different perspectives on the construction of punishment that go beyond conveying fear in the consequences of punishment as stated above. Brooks states that punishment under deterrence could take several forms: fear, incapacitation, and reform. Fear of the threatened punishments may deter individuals from criminality. Moreover, criminals may not engage in more crime because they have been reformed.[478] With regards to incapacitation, many academics interpret it as a distinct penal aim.[479] Spelman states,

> The criminal justice system controls crime in several ways. By maintaining a threat of punishment for those who commit crimes, it may deter potential offenders from committing criminal acts in the first place. Alternatively, offenders who have been punished may be deterred by the threat of being punished again. If deterrence is unsuccessful, the system may rehabilitate offenders once they have been caught. And if rehabilitation is unsuccessful, the system can put convicted offenders in jails and prisons where they are unable to harm the rest of us. That is, incarcerated offenders are incapacitated.[480]

Incapacitation is interpreted as a way of dealing with criminals who cannot be rehabilitated or deterred. Deterrence also accepts imprisoning criminals in certain circumstances. From here, incapacitation should be interpreted as a form of deterrence rather than a separate theory of punishment.[481] Somer defines incapacitation as 'the state of being held in or contained, … [which may involve] the

[477] Brooks, *Punishment* (n 13) 59.
[478] ibid 37.
[479] Somer (n 475) 1.
[480] Spelman W, *Criminal Incapacitation* (Plenum Press 1994) 4.
[481] Brooks, *Punishment* (n 13) 37.

physical removal of the offender from society, …[or] the chemical and surgical means of restraint.'[482] Incapacitation could be explained as physically restraining an individual from committing crimes, often through imprisonment. It could also include loss of vocational licenses and deportation.

One of the reasons why incapacitation fails the 'theory' test is its failure to explain the particular circumstances and lengths of incapacitation, the impact of incapacitation, and the influence of the wrong of confinement and the expense.[483] Specifically, incapacitation unrealistically embraces imprisoning 'everyone', including innocent people, to prevent future crime.[484] Brooks notably states that incapacitation makes 'a mistake about the geography of crime.'[485] Incapacitation fails to recognise that offending does not stop when offenders are imprisoned, because individuals may commit crimes in prison. [486] Somer recognises that the rate of crime in American prisons has increased.[487]

Therefore, incapacitation fails to meet the definition of punishment as a response to crime.[488] Section 2.1 will further explore how corporations could be incapacitated.

2.2.3 The Rational Actor Model and the Economic Theory of Deterrence

The traditional pain-pleasure and free will principles have been further examined by modern deterrence approaches. Modern deterrence elaborates that human rationality is partially determined and partially bounded. Decisions are limited by the amount, quality, and type of knowledge a person acquires. Decisions are made based on the information available, and individual demographic, environmental and situational experiences.[489]

Some modern deterrence theorists, notably Becker, advance an economic theory of punishment.[490] Inspired by Beccaria and Bentham's economic calculus, he developed a theory to answer normative questions on the number of resources and punishment

[482] Somer (n 475) 29.
[483] ibid 29.
[484] Brooks, *Punishment* (n 13) 37, 222.
[485] ibid 37.
[486] ibid.
[487] Somer (n 475) 31.
[488] ibid; Brooks, *Punishment* (n 13) 37.
[489] Simpson (n 315) 24.
[490] ibid 25; AR Piquero, R Paternoster, G Pogarsky, and T Loughran, 'Elaborating the Individual Difference Component in Deterrence Theory' (2011) 7 Annu. Rev. Law Soc. Sci. 335, 337.

that should be used to enforce criminal laws. He measures the 'social loss' from offences; including vengeance, deterrence, compensation, and rehabilitation; and finds the expenditure of resources that minimise the losses; including costs of prosecuting offenders, the nature of punishments, and responses of offenders to changes in enforcement.[491] In his study, he states that crimes include tax evasion, white-collar crimes, and views punishment as including imprisonment, probations, and fines.[492] He further contends that the change of the probability of punishment (certainty of punishment) has a greater impact on preventing crime than a change of punishment (severity of punishment).[493] It follows that using fines 'whenever feasible' has a greater impact on social welfare over imprisonment.[494] The use of imprisonment requires knowledge on the elasticities of the response of offences to change in punishments, which is difficult to calculate.[495] In his 'theory of collusion', he concludes that optimal allocation of resources complements optimal policies to combat illegal behaviour.[496]

Becker's theory inspired a series of studies that embraced an economic perspective of crime. Durlauf and Nagin conducted a review of various empirical studies on deterrence, particularly aggregate regression studies that examine (i) the relationship between crime rates and aggregate measures of police levels, and (ii) the relationship between imprisonment rates and aggregate crime rates. In relation to (i), they critique a study by Donohue (2009) that identifies six major published journal articles and find a negative association between imprisonment rates and crime rates. They state that these studies do not evaluate how alternative policies jointly affect crime and imprisonment, do not explain the use of certain control variables, and negatively use functional forms that do not represent aggregations of individual decisions.[497] In relation to (ii), they evaluate studies that positively find an inverse relationship between large resource commitments to policing and lower crime rates, stating that the validity of these results is diminished by inadequate attention to model uncertainty. Based on these findings, Durlauf and Nagin find that the studies on rates of imprisonment and crime rates are theoretically and statistically flawed and that

[491] Gary S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169, 170.
[492] ibid 171.
[493] ibid 176.
[494] ibid 193.
[495] ibid 194.
[496] ibid 208.
[497] Steven N. Durlauf and Daniel S. Nagin, 'Imprisonment and crime: Can both be reduced?' (2011) 10 American Society of Criminology 13, 25-26.

the studies on resource commitments and crime rates are useful but only to a limited extent.[498]

Furthermore, Durlauf and Nagin examine studies that focus on the deterrent effect of specific policies or interventions, including (i) severity-based policies and (ii) certainty-based policies. In relation to (i) severity-based policies, they examine studies on the deterrent effect of 'California's Three Strikes and You're Out' law, which orders a 25-year minimum sentence after a criminal is convicted of 'three strike-eligible offences.' For instance, Zimring, Hawkings, and Kamin (2001) conclude that the three-strike law resulted in a 2% decrease in felony rates. They observe that these studies do not conduct a cost-benefit analysis of the trade-off between attendant increases and crime reduction, which in hand diminishes the policy impacts of their findings. Additionally, Durlauf and Nagin assess a study by Helland and Tabarrok (2007) on the effects of the law on crime and its cost-effectiveness. It focuses on whether the law deterred offending among individuals previously convicted of strike-eligible offences. They compared the future offending of two-strike and one-strike convicted criminals. They found that the arrest rates were 20% lower for the two strike-eligible offences, hence reflecting that the risk of a 25 minimum sentence contributed to decisions on whether to re-offend. Durlauf and Nagin observe that the studies did not consider the differences in legal representation between the two groups, the differing incentives for additional crime commission, and whether some criminals committed non-strike eligible offences.[499]

With regards to (ii) certainty-based policies, Durlauf and Nagin analyse studies on the relationship between marginal changes in police presence or different approaches to mobilising police and crime rates. This includes empirical studies on the effects of abrupt changes in police presence and crime-prevention effectiveness of different strategies for deploying police. They review various studies on how police resources are used and conclude that the impact of police activity is heterogeneous and depends on the circumstances.[500] Additionally, they examine Cincinnati Police Department (Shi, 2009), the New Jersey State Police (Heaton, in press), and the Oregon State Police (DeAngelo and Hansen, 2008),[501] which have concluded that there is an

[498] ibid 27.
[499] ibid 27-31.
[500] ibid 36-37.
[501] ibid 31-32.

inverse relationship between police presence and crime rates. They point out that there was no examination of police behaviour beyond making arrests.[502]

They conclude, in agreement with Becker, on the following: increasing lengthy sentences has a marginal deterrent effect; increasing the visibility of police in ways to heighten the perceived risk of apprehension has a substantial deterrent effect, and experiencing imprisonment compared with non-custodial sanctions like probation – referred to as specific deterrence- does not prevent reoffending and may have a criminogenic effect.[503]

One advancement of modern theories of punishment is the importance of severity, celerity, and certainty. As seen in Becker's economic theory and in a number of other deterrence studies, empirical evidence points towards certainty and severity over celerity with regards to the rate of commission of a particular offence.[504] A number of studies hold inverse relationships between the rate of crime and the severity of punishment and certainty of the law.[505] It follows that certainty of the law is regarded as a more important variable than the severity of punishment.[506] For example, Williams and Hawkins state that formal sanction threats deter crime by triggering informal sanction threats. Informal sanction threats include internal emotions of guilt and shame.[507] Williams and Hawkins interpret certainty as a combination of the actual certain or uncertain status of the law and the perception of that certainty and conclude that effective communication about the rational basis of punishment and threats of punishment play a positive factor in effective deterrence.[508] Additionally, Andenaes states that the influence of deterrence varies by the crime type.[509] Some determinant factors for setting punishment are detection and publicity. First, crimes that are unlikely to be detected require more severe penalties to maintain the same value of punishment. Second, when a criminal is prosecuted, it is desirable to communicate the prosecution to individuals in society.[510] The greatest deterrence impact occurs when criminal acts are calculative in nature. Simpson argues that

[502] ibid 14.
[503] ibid 14.
[504] Kennedy (n 461) 4.
[505] R. V. G. Clarke and Marcus Felson (ed.), *Routine Activity and Rational Choice (Advances in Criminological Theory)* (Transaction Publishers 2004) 37.
[506] Kennedy (n 461) 4-5.
[507] AR Piquero et al. (n 490).
[508] Kennedy (n 461) 5-6.
[509] AR Piquero et al. (n 490).
[510] Carlsmith et al. (n 320) 285.

accordingly, many types of corporate crimes are more deterrable than violent crimes.[511]

Overall, it is important to recognise that many deterrence studies interpret terms like 'severity' and 'celerity' differently and use different control variables, which may diminish the impact of the studies and their practical coherence. Nevertheless, modern deterrence theories contribute to understanding the causes of crime and how punishment should be distributed. Through testing the assumptions of celerity, severity, and certainty, modern theories of deterrence find that punishment should not be uniform. There are different forms of deterrence influencing the rate of compliance to laws, including fear, incapacitation, and reform. Additionally, although the modern rational actor model simplifies how individuals could comply with the law by assuming that they are all deterrable, modern deterrence approaches positively expand on the idea by recognising that individual decisions are partially determined and bounded.[512] Deterrence and rehabilitation attempt to address the issue of reducing crime in two different ways.

Having explored the theoretical underpinnings of many deterrence approaches and how they apply to non-corporate crime, the next section will discuss the application of deterrence to corporate crime.

3 Deterrence and Corporate Crime

Deterrence models are based on four assumptions: (a) companies are fully-informed utility maximisers; (2) statutes define illegal misconduct; (3) punishment provides the primary incentive for corporate compliance; and (4) enforcement agencies optimally detect and punish misbehaviour, given available resources.[513] Companies always calculate whether the benefit of committing an offence is higher than the costs and risks. Laws clearly draw the line between legal and illegal behaviour, and enforcement agencies use their resources to detect and punish illegal behaviour by companies. Punishment should create an incentive for developing norm-compliant behaviour in the long run.

[511] Simpson (n 315) 26.
[512] ibid 24.
[513] John T. Scholz, 'Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory' (1997) 60 Law and Contemporary Problems 253, 254.

The section analyses the competency of applying a punishment theory based on deterrence. Section 3.1 studies sentencing guidelines and DPAs. Section 3.2 discusses the sufficiency of applying deterrence to corporate crime and potential discrepancies between the theory and practice of a corporate crime.

3.1 Deterrence Theory and Corporate Criminal Laws in England and Wales and the United States

3.1.1 Definitive Guidelines (England and Wales) and Sentencing Commission Guidelines (USA)

Current sentencing guidelines are based on deterrence principles, as discussed in Chapter 1. In England and Wales, the Definitive Guidelines state that the goals of punishment are 'deterrence and removal of gain derived through the commission of the offence.'[514] In accordance with deterrence, corporations primarily pay fines when they violate the law. Section 164 of the Criminal Justice Act 2003 states that the fine is set in accordance with the seriousness of the offence, taking in mind the financial circumstances of the offender.[515]

For example, The Corporate Manslaughter and Corporate Homicide Act 2007, which criminalises companies for serious management failures resulting in fatalities, has an offence range of £180,000 to an unlimited fine. The sentencing guidelines follow a number of steps to determine the fine.

First, the seriousness of the offence is determined based on the foreseeability of serious injury; how far the company fell from the standard of duty; whether the breach was a result of a systematic departure from good practice or is representative of systematic failures; the number of deaths; and risks of further serious injuries and deaths. Second, the court considers the company's annual turnover and financial factors to determine the category range. Third, the court ensures that the fine meets the objectives of retribution and reduction of crime and has a substantial economic impact on the company to force management and shareholders to understand the

[514] Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31); Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (n 31).
[515] Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 192).

importance of having a safe environment for workers and how members of the public are affected by their activities. Fourth, the court considers the level of fines and the ability of the companies to improve conditions within the organisation to comply with the law, and the impact the fine has on other stakeholders. Where appropriate, the fine could be substantial to keep the company out of business. The court contemplates reducing the fine based on factors like guilty pleas, and whether the companies have assisted the prosecution. The court also evaluates the necessity of additional ancillary orders like compensation, remediation, and publicity orders.[516] Thus, in England and Wales, the Definitive Guidelines apply deterrence principles: this includes applying fines in proportion to the seriousness of the offence, judged by factors like the impact on members of the public, lack of safe environments for workers, and departure from their duty of care under the law. Fines can be lowered if the company assists prosecution or pleads guilty.

Referring back to the assumptions of deterrence that companies are utility maximisers and legal punishment should inspire norm compliant behaviour, companies with large access to resources are less likely to adopt norm-compliant cultures. Distribution of punishment in accordance with these principles allow these companies to 'payout' their fines and factor in the cost of crime. It is beneficial to consider a different structure for the distribution of punishment that would fit different types of companies. Sentencing policies need to be restructured in a way where deterrence goals are only applied when appropriate for the case at hand.

The Sentencing Commission Guidelines also aim to further deterrence and retribution. Distribution of punishment is through paying fines, combined with, where appropriate, probation for up to five years, making restitution, issuing public notices, and exposure to forfeiture statutes. Parallel to the deterrence principle that companies are 'fully informed utility maximisers,' when an organisation primarily operates for a criminal purpose or by criminal means, the fine should be set high to divest the organisation of all its assets.[517] For other crimes, the fine range is set in accordance with the seriousness of the offence and culpability of the organisation. Seriousness is reflected by the greatest pecuniary gain, pecuniary loss or the amount set out in the offence level fine table.[518] Additionally, parallel to the assumption that punishment should create incentives for companies to comply, companies can self-

[516] Desio (n 247).
[517] United States Sentencing Commission, 'Guidelines Manual 2016' (n 11) Ch. 8, 525.
[518] ibid.

police their own conduct to detect and prevent crime.[519] Chapter Eight of the Sentencing Guidelines lists criteria for establishing an effective compliance programme known as a corporate 'good citizenship' model, which includes:

> [O]versight by high-level personnel; due care in delegating substantial discretionary authority; effective communication to all levels of employees; reasonable steps to achieve compliance, which include systems of monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal; consistent enforcement of compliance standards including disciplinary mechanisms; reasonable steps to respond to and prevent further similar offenses upon detection of a violation.[520]

The Sentencing Commission Guidelines list the components of a 'good citizenship programme', but do not clarify how these programs could be implemented, nor how companies could design their compliance programmes. Companies may not be encouraged to develop institutional cultures that discourage criminal conduct if they are subject to prosecution despite implementing compliance programmes. The *respondeat superior* standard of liability for many corporate crimes may also pose an issue for achieving punishment goals because companies could be held liable for the act of a low-level employee even if they implemented a good citizenship model. It is difficult to set the level of fines in cases where the main operations of the company are not primarily criminal sufficiently high to outweigh the risk of a company engaging in crime and/or investing in compliance programmes. On the other hand, it may be argued that the Commission can mitigate potential fines for up to 95 percent for having effective compliance programmes. The argument, however, fails to recognise the informal sanctions that result from criminal prosecution.[521]

Overall, distribution in accordance to deterrence and retribution could successfully address certain types of companies and crimes where the crime is clearly a result of a company calculating the risks of offending to be lower than the short and long-term benefits of violating the law. Accordingly, when companies commit a crime because the costs of crime are lower than the perceived benefits, fines should be imposed in proportion to the seriousness of the offence. Other methods of punishment accepted by penal aims may be used in other circumstances. The

[519] Desio (n 247).
[520] ibid.
[521] ibid.

application of the proportionality principle is accepted by other punishment theories and may be suitable in certain types of corporate crimes. In practice, companies may commit a crime for more than one reason; which goes beyond the assumptions set by deterrence theories, and the availability of methods of distribution that can effectively target crime in these circumstances is pivotal.

3.1.2 DPAs

The recognition of DPAs in the early 1990s in the United States, and in 2014 in England and Wales, is a hallmark for corporate criminal law. It foreshadows that the role of criminal law in regulating corporate misconduct is increasingly broader. Companies in certain circumstances are encouraged to self-report and settle rather than be prosecuted through normal trial. DPAs are applied as pre-trial diversion tools in some circumstances. If companies comply with the conditions of the DPA, they avoid punishment.

As explained in Section 2.2.2, there are many forms to deterrence, including fear, incapacitation, and reform.[522] Many approaches to modern deterrence also recognise the impact of informal sanctions on the levels of compliance.[523] DPAs could be interpreted as a tool for imposing fear and reforming companies. This argument is explored in further detail below.

3.1.2.1 DPAs in Theory

As discussed in Chapter 1, DPAs are agreements between prosecutors and companies who have violated a criminal law to pay a sanction and follow steps to avoid criminal prosecution and trial.[524] When the prosecution is aware of misconduct by a company (through self-reporting, investigation, and whistleblowers), they invite the company to enter into negotiations. Upon agreement, the prosecution would invite the company to set the terms and conditions of the agreement. The terms and conditions could include agreeing to pay a sanction; undergoing monitoring and reporting requirements, including reporting details pertaining to the offence; the

[522] Brooks, *Punishment* (n 13) 37.
[523] Carlsmith et al. (n 320) 285.
[524] Grimes et al. (n 222).

appointment of compliance officers; and/or altering their governance structures, the scope of operations, or compliance programmes.[525]

Although it is acknowledged that DPAs are not a traditional method of punishment, the implementation of DPAs is a direct application of principles adopted by many deterrence theories. It forecasts different forms of punishment: fear, incapacitation, and reform. DPAs aim to achieve deterrence, proportionality, and uniformity in corporate sentencing to assess financial penalties and avoid collateral consequences of a conviction.[526] They incapacitate the company from committing further crime, through monitoring and requiring them to change their governance structures in a way that is compliant with the law. Additionally, companies will likely fear prosecution and take steps to comply with the terms and conditions of the DPA.

The next step is to comparatively analyse the implementation of DPAs in England and Wales and the USA.

3.1.2.2 DPAs in Practice

In the United States, DPAs have been employed in the early 1990s. They are not set under a statute but are rather implemented in accordance with policies set by the Department of Justice and the Deputy Attorney General guidelines for the enforcement of DPAs (Hereinafter 'Deputy Attorney General Guidelines'), which are produced in the form of memorandums. Prosecutors and the general authority have high discretion, and judicial involvement would depend on the case. DPAs do not require filing formal criminal charges against the company.[527]

In 1999, the then Deputy Attorney General Eric Holder identified eight factors to be considered in deciding whether to charge a company, which remain mostly unchanged,

1. The nature and seriousness of the offence, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of companies for particular categories of crime;

[525] Cheung (n 284) 25; Grimes et al. (n 222).
[526] Cheung (n 284) 26.
[527] ibid 30.

2. The pervasiveness of wrongdoing within the company, including the complicity in, or condonation of, the wrongdoing by corporate management;
3. The company's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. The company's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges;
5. The existence and adequacy of the company's compliance programme;
6. The company's remedial actions, including any efforts to implement an effective corporate compliance programme or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and
8. The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.[528]

The Deputy Attorney General Guidelines also define ten relevant principles for using and monitoring DPAs once the process was initiated. A monitor is appointed to provide recommendations and ensure that the company adheres to reporting requirements. A monitor is a highly-respected person or entity that does not have any conflicts of interests and does not compromise public confidence. The Department of Justice also has the duty to determine if a company complied with the terms of the DPA. Furthermore, the Deputy Attorney General Guidelines define 'cooperation with prosecution', which relates to the extent at which companies disclose relevant facts. It does not include whether the company has advanced attorney fees to its employees, whether the company retained or sanctioned employees, nor whether the company has entered into a joint defence agreement.[529] Moreover, attorney-client privileges made in furtherance of crime or fraud are excluded from privilege protection.[530] A recent memorandum emphasised the obligation for companies to provide all relevant facts relating to individuals

[528] Transparency International Canada, 'Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada' (Transparency International Canada, July 2017) <http://www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf> accessed 27 September 2017) 10-11.
[529] ibid 12.
[530] ibid.

responsible for misconducts. It further stated that leniency regarding civil or criminal liability would only be given if the company discloses the responsible individuals.[531]

The Deputy Attorney General Guidelines are parallel to the Sentencing Commission Guidelines. The guidelines for determining whether to charge a company include the nature and seriousness of the offence, the company's remedial actions, and whether the company has an adequate compliance programme to lessen the chances of reoffending in the future. It evidences that the role of the criminal law has changed from simply punishing companies to enforcing measures to control the levels of offending and how companies could operate in a way that would not violate the law. The processes, however, are not codified under law. They largely operate based on broad guidelines with high discretion given to prosecutors. Companies who do not comply with the terms of the DPA may not be subject to criminal liability. Having considered the adequacy of Lee's team member liability basis for corporate criminal liability, identifying the individuals responsible for the criminal act within the company is essential. The current processes would shield and protect individuals from potential criminal liability.

In England and Wales, DPAs are governed by Schedule 17 of the Crime and Courts Act 2013. Contrary to the USA, section 2 prohibits prosecutors from agreeing to withhold charges; failure to comply with requirements of a DPA would lead to criminal prosecution. Section 5 sets the requirements for every DPA. This includes,

> (i) To pay the prosecutor a financial penalty;
> (ii) to compensate victims of the alleged offence;
> (iii) to donate money to a charity or a third party;
> (iv) to disgorge any profits made by [the accused] from the alleged offence;
> (v) to implement a compliance programme or make changes to an existing compliance programme relating to [the accused]'s policies or to the training of [the accused]'s employees or both;
> (vi) to co-operate in any investigation related to the alleged offence;
> (vii) to pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA.[532]

[531] ibid 14-15.
[532] Transparency International Canada (n 528) 16.

Similar to the United States, some of the requirements of DPAs reflect principles inherent in many deterrence theories and are similar to the sentencing guidelines. These include the payment of fines, compensation, disgorgement of profits; and restructuring compliance programmes. The financial penalty is comparable to what a court would impose upon conviction of a guilty plea.[533]

Schedule 17 further specifies the roles of the prosecutors, monitors, and offenders. This evidences high judicial oversight on DPAs, contrary to the American process. Particularly, prosecutors need to obtain approval from the court to sign that entry to the DPA would be in the interests of justice and that the proposed terms are fair, reasonable, and proportionate. After approval is obtained and negotiations are completed, they are submitted to the court for final approval, and any positive approvals must be done in an open court.[534]

There are also procedures regarding breaching DPAs, and how to modify the terms of a DPA. Section 11 gives prosecutors the power to discontinue proceedings following the expiry of a DPA. Section 13 states that the statement of the facts in a DPA is treated as an admission by the company and can be used in any criminal proceeding relating to the alleged offence. Failure to comply with these requirements could be used as evidence in subsequent criminal proceedings.[535]

Section 6 of Schedule 17 requires the Serious Fraud Office and Crown Prosecution Service to issue a Code for prosecutors offering guidance on DPAs. Prosecutors need to consider the Code when exercising their responsibilities. The Code states that a DPA is a discretionary tool and that only the prosecutor may invite the company to enter into DPA negotiations as an alternative to prosecution. The company may refuse an invitation if it is offered. Furthermore, the prosecutor may draw the judge's attention to any victims' statements or information relating to the impact of the alleged offence on the victim. Any financial penalty needs to consider the financial resources of the company. A company is given a discount to an early guilty plea, equating to a one-third discount for a plea at the earliest opportunity.

[533] ibid.
[534] ibid 16-7.
[535] Grimes et al. (n 222).

Section 7 of Schedule 17 governs the conduct and appointment of monitors. It specifies that their appointment is dependent on factual circumstances of each case, and must be fair, reasonable, and proportionate. The offenders must afford the monitor access to all relevant aspects of its business during the course of the DPA, and any legal professional privilege is unaffected and remains intact. It also sets the requirements for corporate compliance programmes, including training and education, details on contract terms with stakeholders, and reporting requirements.[536]

It is clear that the DPA process in England and Wales, in theory, offers more advantages than the DPA process in the United States. There is a clear framework for the implementation of DPAs: not meeting the terms of the DPA would lead to criminal prosecution, and prosecutors have to obtain approval from the court and ensure that the DPA is in the interests of justice and the proposed terms are fair. This advantageously limits the amount of discretion given to prosecutors, encourages transparency, and is in line with legal certainty. Additionally, 'cooperation with prosecutors' is interpreted differently. The reports of the monitors in the United States are subject to privilege rules, and certain information is not available to the prosecutors, whereas the information is provided to prosecutors and the company in England and Wales and the United States. The English framework encourages transparency, and all the internal issues that have led a certain company to violate the law are resolved to minimise the potential of reoffending.

It is important to assess the operation of DPAs in practice. England and Wales approved its first DPA in *SFO v Standard Bank Plc*.[537] The defendants failed to prevent bribery of Tanzanian officials during raising funds for the government through sovereign note private placement, which was in contravention of Section 7 of the Bribery Act 2010. Standard Bank Plc was ordered to pay financial penalties of US$25.2 million, pay US$7 million in compensation to the Government in Tanzania, pay reasonable costs of the SFO, and ordered to continue to cooperate with the SFP subject to an independent review of its existing compliance programme, and implement recommendations of an independent reviewer.[538] Sir Brian contended that

[536] Grimes et al. (n 222).
[537] *Serious Fraud Office v Standard Bank PLC* (2015) <https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf> accessed 27 September 2017; Serious Fraud Office, 'SFO Agrees First UK DPA with Standard Bank' (Serious Fraud Office, 30 November 2015) <https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/> accessed 27 September 2017.
[538] ibid.

pursuing a DPA was in the interests of justice and was fair, reasonable, and proportionate.[539]

It could conversely be argued that the use of DPAs and involvement of the judiciary is 'an unprecedented and possibly unwelcome involvement of the judiciary in approving execution action.'[540] Nevertheless, the case evidenced, as Padfield argues, that DPAs are not necessarily a process '[that provides] a way for companies to buy their way out of the criminal justice system or to brush the wrongdoing under the carpet.'[541] The DPA was a public event rather than a private event as the DPA Code of Practice stated; there was a statement of facts that identified key players in the conduct; the DPA included a clause that prevented those charged to contract the narrative of the facts; the defendants were ordered to continue cooperation and disclose documents to any local or international agency with regards to the matters described in the statement of facts.[542]

Although it is acknowledged that the decision positively requires the company to cooperate further with individuals impacted by the criminal misconduct and to implement processes to ensure that it would not be involved in future similar misconducts, there are still flaws in the current DPA process. In the case, the responsibility of the offence was imposed on the Bank's subsidiary and executives in Tanzania rather than any individuals being held responsible in England and Wales, even though the Bank has authorised a local agent to negotiate the dealings.[543] This clearly undermines public confidence because the investigation did not yield to accountability to all individuals involved.[544] Furthermore, the SFO relied on the defendant's internal investigations to obtain evidence on the statement of facts. This provides a risk of not obtaining a full investigation and holding all individuals responsible for the conduct in England and Wales accountable and undermines transparency and certainty goals.[545]

[539] ibid.
[540] M. Bisgrove and M. Weekes, 'Deferred Prosecution Agreements: A Practical Consideration' (2014) 6 Crim. L.R. 416, 429.
[541] Nicola Padfield, 'Deferred Prosecution Agreements' (2016) 7 Criminal Law Review 449, 450.
[542] Corruption Watch, 'the UK's First Deferred Prosecution Agreement' (Corruption Watch 2015) <http://www.cw-uk.org/wp-content/uploads/2015/12/Corruption-Watch-UK-Report-and-Analysis-UKs-First-Deferred-Prosecution-Agreement-December-2015.pdf> accessed 27 September 2017, 4.
[543] ibid 5.
[544] ibid.
[545] ibid 6.

Additionally, as explored in Section 2, Schedule 17 of the Crime and Courts Act 2013 sets requirements for the terms of every DPA, which include payment of a financial penalty; compensating victims; donating money to charity or a third party; disgorgement of profits; implementing a financial programme; cooperating with the investigation; and paying the costs of the prosecutors.[546] The calculation of the punishment did not include the revenue the Bank made by trading its bonds in the secondary market; any financial advantages that the Bank obtained over other competitors; and the full harm to Tanzania.[547]

DPAs provide an alternative way of controlling corporate misconduct and implementing a process that foreshadows three forms of deterrence: fear, incapacitation, and reform. Nevertheless, the application of DPAs in England and Wales and the USA, however, has been met with controversies. DPAs in their current state are likely to undermine public confidence in the criminal justice system, particularly their approach to punishing companies, and whether it adversely impacts their rights.

3.2 Other Challenges to Deterrence in the Context of Corporate Crime

Sentencing guidelines and DPAs are shaped by retribution and deterrence principles. The section examines the possible flaws of applying deterrence theories in practice and assesses their viability for a theory of punishment for companies.

3.2.1 Deterrence Theories Do Not Differentiate Between Different Types of Corporate Offenders and Offenses

Many deterrence theories assume that laws would have the same deterrent impact on all offenders. Deterrence policies focus on setting a suitable deterrent impact on members of the community.[548] Deterrence fails to consider that 'different actors have differing views about what constitutes rational behaviour.'[549] In the non-corporate context, deterrence would presumptively work if all individuals act rationally, and the government and individuals have a common understanding of suitable behaviours and defined situations and can be supported by social pressures and

[546] Transparency International Canada (n 528) 16.
[547] Corruption Watch (n 542) 8-9.
[548] Brooks, *Punishment* (n 13) 40.
[549] Freedman (n 445) 28.

punishment.[550] Deterrence wrongfully assumes that all individuals engage in a calculated cost-benefit analysis before committing a crime, does not consider that individuals may commit spontaneous crimes and that some crimes do not require proof of intent. Moreover, laws do not take regard to factors like unemployment, low income, and social condemnation.[551] Looking back at Becker's Economic Theory of Punishment in Section 2.2.3, empirical research has found mixed results regarding the impact of certainty, celerity, and severity on crime levels. They also found that threats and punishments have varying effects between individuals.[552]

Examining the issue in the corporate context reveals that companies have various corporate management structures: companies can be local or international, public or private, and the board can have different numbers of shadow directors, executive and non-executive directors, and/or could be stakeholder-oriented rather than shareholder-oriented. Decision making by companies is dependent on their profit-making margins, whether they are new entrants in the industry or have been established in the industry for years, and the types of goods and services offered. Although companies may engage in criminal activities due to the low risks of prosecution and high short-term material benefits, companies could be prosecuted for strict liability crimes where the intention is not present, but rather that the company failed to enact appropriate procedures that result in a violation of the law. In the case of federal law in the United States, companies may be found liable when low-level employees are proven to have engaged in criminal conduct without the knowledge or approval of the company.[553]

Companies may also change their management structure over time and expand to other industries, and/or pull out from other industries. Thom Brooks states, 'this is the problem of time and changing effect…the deterrent power of punishment constantly changes over time in response to social conditions. The deterrent potential of any punishment is always in flux and is subject to constant change.'[554] In competitive industries, the risk of being prosecuted and having to pay a fine may be seen as a lower risk than violating the law and acquiring short-term benefits. Laws based on deterrence fail to acknowledge that different groups respond to laws

[550] ibid 67.
[551] Kennedy (n 461) 8.
[552] Piquero et al. (n 490) 338.
[553] Desio (n 247).
[554] Brooks, *Punishment* (n 13) 41.

differently and that a company may have different responses to a law depending on their economic circumstances.[555]

3.2.2 Does Deterrence Work in Practice?

Some theoretical approaches to deterrence contend that applying deterrence based-laws and policies would reduce the levels of crime to zero. Crime exists solely due to a failure to communicate the threat of punishment in practice.[556] Freedman rightly contends that 'a reliable theory would offer confidence that if certain conditions are present a given outcome will follow.'[557] Testing a theory requires identifying the dependent variables, the casual or independent variables, and the mechanisms that link both. Deterrence presents propositions that could be tested.[558] Yet, punishment in practice does not have a confirmed deterrent impact.[559] Although there are conflicting results on deterrence in practice, it continues to be used as a goal of punishment for individuals and companies.[560]

Section 2.2.3 discussed a number of empirical studies that are based on modern theories of deterrence. They do not decisively conclude that it is effective in reducing crime. Kennedy states,

> [The] burgeoning docket of criminal cases illustrates that deterrence has not been effective to any substantial degree. The effectiveness of deterrence cannot be demonstrated conclusively because researchers employ a scientific method of inquiry which attempts to disprove a hypothesis rather than prove them.[561]

There is a disagreement amongst scholars on the measures of deterrence and calculating success and failure, and not many statistical reports on deterrence explicitly address corporate crime.[562] This argument is hereby explored in further detail.

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[555] ibid 41-2.
[556] Kennedy (n 461) 9.
[557] Freedman (n 445) 43.
[558] ibid.
[559] Brooks, *Punishment* (n 13) 42.
[560] Kennedy (n 461) 7.
[561] ibid.
[562] Simpson (n 315) 35; Assaf Hamdani and Alon Klement, 'Corporate Crime and Deterrence' (2008) 61 Stanford Law Review 271, 273.

First, studies assess deterrence in a variety of ways. Simpson categorises corporate crime studies into objective deterrence studies (which examine the impact of formal legal sanctions on the levels of offending), and perpetual deterrence studies (which consider the perception of companies of the certainty and severity of punishment rather than its objective level).[563] It is important not to generalise the results of applying deterrence-based laws, policies, and processes.

Particularly, the certainty of punishment could be interpreted in many ways. It could be understood as subjective or objective: subjective certainty relates to the perception of the risk, whilst objective certainty is the actual risk of being subject to punishment.[564] A University of Cambridge survey concluded: (a) for some classes of potential offenders, the perception of the risks of being punished affect their reported choices on whether to offend; (b) the studies with the least methodological issues address informal sanctions; and (c) the studies with the least methodological issues focus on certainty rather than severity.[565] Moreover, many studies examine the relationship between sentence severity, understood as the length of custodial sentences, and general deterrence. They conclude that the certainty of punishment rather than punishment severity is correlated with general deterrence. Threats of severe punishment have not been strongly linked to less crime and public benefits but rather contributed to higher costs.[566] Freedman states that one reason why certainty has a higher impact on behaviour than severity is the lack of knowledge on actual sentencing practices and substantial public underestimation of how tough punishments can be.[567]

Moreover, the success and failure of deterrent-based laws could be interpreted differently.[568] Brooks defines three categories for measuring success: '(a) deterrence theories that aim for any deterrent effect; (b) deterrent theories that aim for any substantial effect; and (c) deterrent theories that aim for a complete effect.'[569] Options (a) and (c) are problematic. Option (c) implies that there will be no crime if deterrent laws apply. It follows that any deterrent policy will never be successful, hence is not a realistic measure of success. Option (a) contends that deterrence is achieved even when there is no known effect. Deterrence should have a clear impact

[563] Simpson (n 315) 28.
[564] Kennedy (n 461) 5.
[565] Freedman (n 445) 64.
[566] Brooks, *Punishment* (n 13) 42-3.
[567] Freedman (n 445) 64.
[568] Brooks, *Punishment* (n 13) 42.
[569] ibid 44.

on crime rather than a tangible role to be called a deterrent policy.[570] Brooks compellingly argues that option (b) presents the best way to measure the success of deterrence theory. It is still difficult to define the exact parameters of achieving a substantial effect.[571]

Given the lack of knowledge on how to measure the success of deterrent laws, laws based solely on deterrence are more likely to be subject to abuse by governments than those based on other theories. Governments may enforce laws that do not have a negative impact on the level of crime. This may result in punishments that are not proportional, and companies being subject to high fines without justification. Since deterrence focuses on the effects of punishment through influencing individual behaviour, there would be a desire to implement a strategy to mislead the public about the threat of punishment. Nevertheless, the risk of the public gaining knowledge of manipulation makes these strategies problematic.[572]

Empirical studies reveal that the basic assumptions of many modern deterrence theories, as explained in the context of companies, fail to take account of important factors. As discussed in the previous section, Scholz identifies four assumptions that basic deterrence models are based on: companies are utility maximisers, statutes define misbehaviour, punishment encourages corporate compliance, and enforcement agencies use available resources to optimally detect and punish misbehaviour.[573] Scholz states that studies on deterrence for two decades reveal that these four assumptions do not reflect the reality of corporate behaviour. Based on four empirical tests, he finds that enforcing penalties on corporate bodies that have failed to comply with workplace safety improved their conditions, but the number of penalties had a little impact on safety improvements. He also finds that cooperative strategies that use punishments more intensely than frequently are more effective in reducing workplace injuries than deterrence-oriented strategies. Additionally, the intensity of enforcement activities varies across jurisdictions, and are impacted by different national and political demands. Lastly, taxpayers' trust in the government and duty to pay taxes has more impact on compliance rates than fear of being prosecuted for failure to comply.[574] The basic assumptions of deterrence simply categorise corporate misconduct into right and wrong and fail to take into

[570] ibid 44-5.
[571] ibid.
[572] ibid.
[573] Scholz (n 513).
[574] ibid 255.

consideration corporate error correction, voluntary compliance, agency accountability and cooperative enforcement. The empirical studies evidence that many factors can impact norm-compliant behaviour.

At a broader level, many deterrence proponents claim that punishment has a deterrent effect, even if evidence cannot conclusively determine that such a relationship exists. There are many assumptions to deterrence that are not necessarily reflective of the behaviour of individuals and companies: that society understands all the laws they are governed by, that the burdens of punishment outweigh the benefits of committing a criminal act, and/or that individuals engage in a cost-benefit analysis and choose to either commit or avoid crime. Proponents of deterrence theories claim that evidence to the contrary assumptions defies basic intuitions about criminal justice.[575] However, many individuals lack knowledge of various crimes and are not deterred by that threat of punishment since they do not have sufficient knowledge on the likelihood of prosecution. Intuitive deterrence is only applicable to individuals who have acquired knowledge about all crimes.[576] Moreover, threats of severe punishment have not been strongly linked to a reduction in the levels of crime.[577] Punishment should be designed to achieve a broader goal of directing corporate behaviour in ways that improve the general welfare.[578] The basic assumptions of deterrence do not account for controlling corporate misconducts in a way that minimises the impact on general welfare.

In sum, these discussion points lead to one conclusion: punishment models based solely on deterrence assumptions fail to respond to changing corporate attitudes and varying behaviours by companies. Having considered how legal retribution could contribute to a theory of punishment for companies, the next section accordingly explores how an approach to deterrence could contribute to a theory of punishment for companies.

4 Deterrence for Corporate Crime: An Alternative View

4.1 Purpose of Punishment

[575] Brooks, *Punishment* (n 13) 45.
[576] ibid 47.
[577] ibid 42.
[578] Scholz (n 513) 268.

Many approaches to deterrence positively add knowledge to understanding why companies violate the law and why they ought to be punished.

A compelling view that is parallel to classical deterrence and some modern approaches to deterrence is that companies may violate the law because there is a conflict of interest between them and society. Companies make decisions to achieve their identified goals, including maximising profits. Companies may make decisions that conflict with the rights of others if their perceived benefits are higher than their perceived costs. Conflicts of interest that result in a violation of the law should be punished.

Another justifying aim of punishment is reducing the levels of crime, which includes encouraging companies to develop norm-compliant behaviour. This view is adopted by many modern deterrence approaches arguing that future crime can be prevented by influencing the present and future behaviour of companies.[579]

These justifying aims of punishment should consider and recurrently identify various factors that drive and impact corporate decisions. Some modern deterrence theories further expand this idea by correctly contending that decisions are bounded by limited resources and knowledge, and the specific circumstances of each company, like the industry it operates in. Particularly, the rational actor model argues that corporate decisions are partially determined and partially bounded by the amount, quality, and type of knowledge held. Decisions are made based on the information available, and the specific experiences of companies.[580] Moreover, Becker's focus on the economic arguments about decision choices contributes to understanding the variety of companies' decision-making processes.

These approaches to deterrence can work together with legal retribution. A first-hand look at deterrence may reveal its stark contrast to retribution. Deterrence and retribution have different justifications to punishment: deterrence is a consequentialist theory that justifies punishment for its deterrent effects, whereas retribution justifies punishment when deserved.[581] In practice, current the Sentencing Commission Guidelines (USA) and the Definitive Guidelines (England and Wales) and punishment aims have not specified the theoretical approaches to deterrence and

[579] Kennedy (n 461) 1-2.
[580] Simpson (n 315) 24.
[581] Brooks, *Punishment* (n 13) 39.

retribution that are being followed; whether one goal of punishment could take primacy over the other; and how they could work together under one single framework. Chapter 2 explored how legal retribution could work with other penal aims under one model. Unlike other prominent approaches to retribution, legal retribution does not focus on the moral gravity of the act. Instead, legal retribution argues that states issue threats of punishment to those who break the law. The law only punishes individuals that fail to adhere to the threats of punishments for committing crimes.[582]

Therefore, the justifying aims of punishment adopted by legal retribution and deterrence, as explained previously, are not contradictory and could work under one model to provide a more coherent understanding of crime by companies and why they should be punished. Overall, the two justifying aims of punishment provide an important contribution to understanding punishment.

4.2 The Distribution of Punishment

Corporate criminal laws are based on deterrence and retribution. In both jurisdictions, the level of fines is set in proportion to the seriousness of the offence, considering the circumstances of the company. Fines are the main method of punishment, and ancillary orders are implemented in certain circumstances.

Proportionality is the main principle of deterrence theories. Classical deterrence applies the pain-pleasure principle and punishment is imposed in proportion to the harm inflicted to the society.[583] Bentham offers compelling ideas about punishing and rewarding to promote the happiness of society.[584] The pain-pleasure principle also considers severity, certainty, and celerity. The more severe the punishment, the more likely that individuals will abide by the law. The more certain laws are, the more likely individuals understand the consequences of crime and refrain from committing offences. The more swiftly punishment is imposed, the less likely individuals would commit crimes.[585]

[582] ibid.
[583] *Encyclopaedia of Prisons and Correctional Facilities* (n 448) 238, Transparency International Canada (n 528) 14-15.
[584] *Encyclopaedia of Prisons and Correctional Facilities* (n 448) 235; Brooks, *Punishment* (n 13) 40.
[585] ibid.

Nevertheless, proportionality under classical deterrence does not consider factors beyond the frightening impact of punishment, neither does it place public interests as central to its aims, despite Bentham's assertions that the public interest would be in mind. It also does not clarify the relative importance of severity, celerity and certainty. It is contestable whether public confidence is central to the theory of punishment if it does not account for the various types of offenders and how their decisions may be influenced by personal experiences, demographics, and environmental influences.[586] This is remedied by approaches to modern deterrence that do take individual prosocial habits into account, and that understand that laws should have an educative impact on citizens. For instance, the rational actor model understands human rationality as partially determined and partially bounded. They are bounded by the amount of knowledge a person has and are partially determined by demographic and environmental factors.[587] Becker's economic theory of punishment also considers the social loss of crime, including the costs of prosecuting offenders, the nature of punishments, and responses of offenders to changes in enforcement. This also suggests that the certainty of punishment has a greater impact than the severity of punishment in reducing crime.[588]

A broader view of proportionality that considers many factors, including demographic and environmental factors, and personal experiences, could contribute to a theory of punishment for companies. Punishment would be imposed in proportion to the impact on the community, taking in mind the circumstances of the company. It would also be enforced in a way that would impact the individual offender (specific deterrence) and other companies (general deterrence). This view advantageously does not contradict with legal retribution's view of imposing punishment in proportion to the gravity of the offence, defined by the impact on individuals in the community and the gains derived through the commission of the offence. It would not be based on moral grounds and is subject to change over time.[589] The varying interpretations of proportionality by retribution and deterrence would add value to a broader theory of punishment for companies.

5 Conclusion

[586] Simpson (n 315) 24.
[587] ibid.
[588] Becker (n 491) 169, 171, 176.
[589] Brooks, *Punishment* (n 13) 39.

The chapter examined the viability of deterrence theories to punish companies. Although a sentencing model based solely on deterrence is not practically coherent, some concepts of deterrence could contribute to understanding the punishment of companies and how they should be punished. Current sentencing guidelines and policies, and penal aims to advance retribution and deterrence.[590] Nevertheless, the theoretical approaches to deterrence and retribution are not defined. Section 2 thereby explored various theoretical approaches to deterrence, ranging from classical deterrence to modern views of deterrence. Section 3 discussed how sentencing policies and DPAs apply deterrence principles. It defined the premises and pitfalls of applying deterrence in these contexts. Section 4 discussed how deterrence could work as part of a theory of punishment for companies.

Overall, classical deterrence contributes to understanding that some companies may commit crime after conducting a pain-pleasure calculation. Modern varieties of deterrence advantageously show that other factors should be considered to understand what drives companies to violate the law and how they should be punished. Punishment should be imposed to deter specific company and other companies. Rehabilitation is also distinguished from deterrence; each aims to reduce the levels of crime by using different mechanisms. Incapacitation, on the other hand, is considered to be a form of deterrence rather than a separate penal aim because it does not meet the definition of punishment as a response to crime. The rational actor model and economic theory of deterrence present partial understandings of punishment and how it should be distributed, and show the relative importance of celerity, certainty, and severity of punishment. They also show that there are various interpretations and theoretical approaches to deterrence.

In practice, deterrence is a central aim of punishment, and distribution of punishment applies deterrence principles. It could successfully address certain types of offenders and offences that are parallel to deterrence's justified aim of punishment. The application of the proportionality principle is also inherent in other theories of punishment. Nevertheless, there are many theoretical challenges to deterrence principles in the Sentencing Commission Guidelines and the Definitive Guidelines,

[590] Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31); Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (n 31).

including the structure of the ‘good citizenship’ compliance model and fine payment by offenders, which do not encourage norm-compliant behaviour by companies. DPAs fundamentally provide alternative ways of controlling corporate misconduct but are currently structured in a way that is likely to allow companies to avoid liability and/or shield responsible individuals from criminal responsibility. Additionally, deterrence doesn't differentiate between different types of corporate offenders and offences, and there is skepticism on its capability to work in practice given mixed results from empirical studies in the context of individual and corporate crime.

A defined approach to deterrence could contribute to a broader theory of punishment for companies. Parallel to specific and general deterrence, companies ought to be punished when they violate the law to maximise their interests at the expense of other individuals’ rights. Companies should also be punished to reduce the levels of crime in the short and long term. Punishment in these circumstances is imposed taking into account the specific factors that led to the crime, and the specific circumstances of the company, and in proportion to the seriousness of the offence. These views compellingly do not contradict and could work under a single framework alongside legal retribution. The next chapter with test the suitability of including rehabilitation within a theory of punishment for companies.

Chapter Four

Rehabilitation

1 Introduction

Rehabilitation theories are offender-centric: they aim to rehabilitate offenders by transforming them from criminals to law-abiding individuals by choice.[591] This may include efforts by states to reduce the offenders' propensity to commit illegal acts.[592] As addressed in Chapters 2 and 3, there is a tension between retribution and consequentialist theories of punishment (deterrence and rehabilitation) because they '[use] different currencies and think different things to be important.'[593] Moreover, the significance and effectiveness of rehabilitation are uncertain.[594] Unlike retribution and deterrence, rehabilitation is not a main penal aim and is often used to supplement deterrence and retribution.

The chapter aims to explore rehabilitation as a potential component of a theory of punishment for companies. Section 2 examines the historical and theoretical development of rehabilitation in England and Wales and the United States and evaluates modern approaches to rehabilitation.

Section 3 identifies issues arising from the findings of Section 2 by studying whether rehabilitation is a complete theory of punishment for companies and whether it could work alongside other penal aims. Section 4 discusses rehabilitation in the context of corporate crime. Particularly, it examines Henning's theory of punishment based solely on rehabilitation; and the advantages and disadvantages of including rehabilitative regulatory tools and punishment methods, including DPAs, restitution orders, and compliance programmes.

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[591] Brooks, *Punishment* (n 13) 51; Marson, 'The History of Punishment: What Works for State Crime' (2015) 7 the Hilltop Review 19, 22.
[592] Steven Shavell, *Foundations of Economic Analysis of Law* (The Belknap Press of Harvard University Press 2004) 535.
[593] Paul H Robinson, 'The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime' (2010) 42 Arizona State Law Journal 1089, 1089.
[594] Braithwaite and Geis (n 303) 292.

2 Defining Rehabilitation

Like other theories of punishment, there is no single theory of rehabilitation.[595] Hudson defines rehabilitation as follows,

> Taking away the desire to offend, is the aim of reformist or rehabilitative punishment. The objective of reform or rehabilitation is to reintegrate the offender into society after a period of punishment and to design the content of the punishment so as to achieve this.[596]

Many rehabilitation theories of punishment aim to address moral failings by offenders and risk factors that lead to crime. This widens the causes of crimes beyond the responsibility of the individual as many retributivists contend; the conditions of the offender like income levels and environmental factors may lead to crime and the criminal justice system should consider the consequences of a crime. The interpretations of the factors that lead to crime and the consequences of crime vary between different approaches to rehabilitation. Robinson and Raynor state, 'we thus have a whole new vocabulary around rehabilitation, but we are arguably no closer to a common understanding of just what the rehabilitation of offenders entails.'[597] Some rehabilitation theories aim to remove the desire by offenders to offend and/or to reintegrate offenders to society. Reform or rehabilitation may be used interchangeably or have a different meaning under different approaches to rehabilitation.[598] Accordingly, to build a contemporary theory that may include rehabilitation, the section aims to historically evaluate rehabilitation in theory and practice.

2.1 The Origins of Rehabilitation

2.1.1 England and Wales

2.1.1.1 Rehabilitation in Prison

[595] Brooks, *Punishment* (n 13) 11; Fergus McNeill, 'When Punishment is Rehabilitation' in *Encyclopaedia of Criminology and Criminal Justice* (2014) 4195-4206; Kathryn McPherson, Barbara Gibson and Alain Leplege (eds) *Rethinking Rehabilitation: Theory and Practice* (CRC Press 2015) 9.
[596] B. Hudson, *Understanding Justice* (2nd edn, OUP 2003) 26.
[597] P Raynor and G Robinson, *Rehabilitation, Crime and Justice* (Palgrave Macmillan 2005) 2.
[598] ibid 4.

Prisons were temporary facilities that held offenders whilst they awaited public punishment. Offenders were punished in public. Sentences included whipping, branding, stocks, ducking stool, the pillory, and executions.[599] The idea of 'restraint to reform' emerged in Western European countries and British colonies in the Sixteenth century. Prisons were used to deter individuals from committing crimes. Solitary confinement was also used to rehabilitate the offenders through 'moral and spiritual enlightenment'.[600] Particularly, solitary confinement aimed to 'reduce moral contagion, but also with the intention of curing the offender's physical and spiritual defects. Such prisoners were kept in silence, subjected to a special diet, and allowed only the distraction of approved books.'[601] Notably, Henry VIII turned his palace to a 'house of correction' for London's undeserving poor and individuals that lived in environments most prone to crime. In contrast to monastic prisons, these houses provided opportunities for enforced labour.[602]

In the Eighteenth century, John Howard, a notable figure in the rehabilitation movement, published *The State of Prisons*, a draft bill detailing a plan to reform prisons and offenders. Inspired by his Christian beliefs, Howard advocated for 'penitentiary discipline', which aimed to morally correct prisoners through Bible readings and labour. This, in his view, would 'correct the faults of prisons, and make them for the future more useful to society.'[603] These proposals were sustained by the Government's commitment to developing a national system of penitentiaries. This resulted in the Penitentiary Act 1779, passed with the consultation of Howard. The Penitentiary Act marks the use of prisons as a central form of punishment in the British criminal justice system.[604] Nevertheless, the Penitentiary Act 1779 was never implemented due to ministerial reluctance to a prison system that would return prisoners to their own communities.

Another notable rehabilitation initiative in the Eighteenth century is the creation of a prison system that aimed to advance rehabilitation and deterrence. The Holford

[599] The Scottish Centre for Crime and Justice Research (SCCJR), 'What is Prison For?' (SCCJR) <http://www.sccjr.ac.uk/wp-content/uploads/2015/10/SCCJR-What-is-prison-for-.pdf> accessed 26 November 2017.
[600] Miethe and Lu (n 327) 600.
[601] Raynor and Robinson (n 597) 33.
[602] ibid.
[603] ibid 34-6.
[604] Politics.co.uk, *Prison Rehabilitation* (Politics.co.uk 2017) <http://www.politics.co.uk/reference/prison-rehabilitation> (accessed 26 November 2017).

Committee called Bentham, a utilitarian philosopher, Sir George (a manager of a penitentiary prison), and John Becher (a reverend of a house of correction), to build a prison system that 'works.' The Holford Committee rejected a number of Bentham's proposals because it diminished the importance of religious instruction and moral improvement. The Holford Committee initiative resulted in a new national penitentiary for young and first-time offenders. The system prioritised labour, religion, and solitary confinement. In theory, a prison system that combined two penal aims is promising. This, however, was not effective in practice. There were issues with recruiting staff that could implement and advance rehabilitation, and there was a prisoner rebellion against the system, which eventually led to riots in 1818. Prisons that were later built on this system did not survive the 1840's.[605]

From the 1850s, rehabilitation lost its prominence as a penal aim. Particularly, the Carnarvon Committee comparatively assessed deterrence and rehabilitation and concluded that rehabilitation harms deterrence, and the imposition of deterrent punishments was more effective. Additionally, Edmund De Cane, a chairman of the Prison Commission from 1877 to 1895, proposed the following: (a) general deterrence should be prioritised over individual deterrence and reform. Reform should not be objective and may be achieved within a deterrent system of punishment; (b) punishments should be uniform and should not vary according to the offenders' circumstances or characteristics, and (c) breaches of prison rules were followed by severe disciplinary actions.[606] This marked a move away from rehabilitation ideals in prisons.[607] This system was later criticised due to the high rates of recidivism following the release of prisoners and discourse in public confidence. This led to the appointment of the Department Committee of Inquiry, chaired by Herbert Gladstone, to respond to the criticisms and review the principles of the penal system.[608]

The Gladstone Committee Report, produced by the Departmental Committee on Prisons in 1895, is a report supporting rehabilitation as a prominent penal aim alongside deterrence.[609] It emphasised the importance of utilising prisons to inform the moral instincts of prisoners, and to eventually transform them into physically and

[605] Raynor and Robinson (n 597) 39.
[606] ibid 40.
[607] Howard League for Penal Reform, *History of the Penal System* (Howard League for Penal Reform 2017) <http://howardleague.org/history-of-the-penal-system/> accessed 26 November 2017.
[608] Raynor and Robinson (n 597) 40.
[609] Departmental Committee on Prisons, 'Gladstone Report of 1895' in Raynor and Robinson (n 597) 46.

morally stronger individuals by the end of their prison term.[610] It also optimistically envisioned that all prisoners are open to reform, including habitual offenders.[611] The Prison Act 1898 reasserted rehabilitation as integral to prisons, through 'productive' rather than merely 'hard' labour, hence enabling prisoners to reintegrate back to society following release.[612]

Subsequently, a number of laws based on rehabilitation were passed, despite a political turn in favour of 'getting tough on crime' and privatising prisons.[613] Three notable examples are worthy of mentioning: First, The Prevention of Crime Act 1908 created separate establishments for juvenile offenders and implemented a system of 'physical work, technical and education instruction' within a moral environment. Second, The Criminal Act of 1948 also created new forms of 'prison' through 'remand centres, detention centres and borstal institutions.'[614] Third, The Rehabilitation Act 1974 provided offenders protections the following release, through mandating labelling offenders as 'rehabilitated' after a period of completing custodial sentences, community orders, or youth rehabilitation orders.[615] The controversy of considering criminals to have 'spent' their convictions based on the length of the sentence rather than its nature, and providing protections solely to convicted offenders rather than victims, may reflect a misunderstanding of how rehabilitation principles should translate to practice.[616]

Overall, rehabilitation theories were largely influenced by religious beliefs, resulting in the creation of prison facilities that aimed to reform the offenders' morals through mandating labour, religious readings, and solitary confinement to enlighten the offenders into correcting their morals that led them to offenders. Initiatives combining deterrence and rehabilitation were not consistently effective in reducing the levels of recidivism, resulting in a rise and fall of rehabilitation as a penal aim. The resulting laws providing protections to offenders the following release and ensuring their reintegration back to the community are promising yet need to be targeted to specific types of offenders and crimes.

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[610] ibid 46.
[611] ibid 47.
[612] Howard League for Penal Reform (n 607).
[613] ibid.
[614] ibid.
[615] House of Lords, *Rehabilitation of Offenders (Amendment) Bill [HL]: Briefing for Lords* (LIF 2017/0005, 24 January 2017) 1-2.
[616] Gerald Dworkin, 'Rehabilitation of Offenders Act 1974' (1975) 38 Modern Law Review 429, 435.

2.1.1.2 Rehabilitation Outside Prison

Rehabilitation theories were also articulated in practice through resettlement programmes following release from prison, probation, and sentencing processes for juvenile offenders.

First, resettlement of offenders the following release was developed through the 'ticket of leave' system, discharged prisoners' aid societies, surveillance following release, and the provision of temporary refuges. The 'ticket of leave' system mandated ex-convicts to regularly report to the police, acquire employment, and to not associate with other offenders. The actual implementation lowered recidivism rates but was met with difficulties: ex-prisoners under the system had difficulties in acquiring employment and the public and police's trust.[617] The Discharged Prisoners' Aid Society was funded by public funds and voluntary subscriptions to discourage recidivism. Additionally, the Penal Servitude Act implemented a system of surveillance through interviewing convicts following release to determine their intentions, providing them with clothing and money, and endeavouring to find employment for them. There were also temporary refuges for released prisoners to live and complete productive work.[618]

Second, there were also historical attempts at separating juvenile offenders from adult offenders in the Nineteenth century. For instance, a system that appointed guardians to young offenders, and requested reports on their behaviour was implemented in Birmingham in 1839. In the mid-1850s, there was legal recognition of the reformatory school system, which mandating completing schoolwork, engaging labour, and engaging in religious worship as part of the punishment. The Youthful Offenders Act of 1854 mandated sending certain young offenders under the age of 16 to reformatory schools following completion of short prison sentences.[619]

Third, the formal practice of probation could be traced to initiatives like diversionary reformative practices with juveniles and adult offenders, practices of releasing suitable 'offenders of recognizance' (Later the Summary Jurisdiction Act of 1879), 'rescue work' of the Church of England Temperance Society to combat drunkenness

[617] Raynor and Robinson (n 597) 41-2.
[618] ibid 43-4.
[619] ibid 44.

and intemperateness.[620] The idea of more religious awareness and less crime led to an increase in the number of police court missionaries that assisted with developing open relationships with offenders. The Church of England Temperance Society supported released prisoners through providing them with accommodation, employment, and requiring offenders to sign pledges of abstinence of release.[621] The Probation Order 1907 created 'community sentences'. Community sentences included releasing offenders from prison and requiring them to meet guidelines set by missionaries and probation officers or requiring offenders to complete unpaid work in the community or get treated for drug use instead of being imprisoned.[622]

Regardless of a political turn in favour of deterrence and 'getting tough on criminals', a number of statutory acts were passed to formalise probation. Howard Vincent introduced the Probation of First Offenders Bill, which resulted in The Probation of First Offenders Act 1887. The Act evidenced a willingness for adopting a system that advocates for reform over harsh prisons in some circumstances.[623] There were also other rehabilitation programmes, including the Transforming Rehabilitation programme, which was passed following The Probation Order 1907.[624]

Overall, there are still conflicting opinions on whether rehabilitation should be an alternative to deterrence, could complement deterrence, or be integral to a deterrent punishment model.[625]

2.1.2 The United States

In the United States, rehabilitation could be traced back to the late 1700s. There was a shift from relying on public punishment methods; like marking thieves with the letter 'T', branding, and the use of stocks and the pillory, to developing reformatories and penitentiaries.[626] Like in Europe, imprisonment was only used in exceptional circumstances, for instance as a temporary abode for prisoners awaiting trial or when

[620] ibid 44-5.
[621] ibid 45.
[622] Howard League for Penal Reform (n 607).
[623] Raynor and Robinson (n 597) 46.
[624] Howard League for Penal Reform (n 607).
[625] ibid.
[626] Angela A. Dozier, 'Factors Influencing the Attitudes of College Students Toward Rehabilitation or Punishment of Criminal Offenders' (Masters of Public Administration, Texas State University 2009) 11.

offenders owe debts.[627] The Philadelphia Society for Alleviating the Miseries of Public Prisons, a group of Quakers, argued against a law passed in 1786, which authorised sentencing through public labour in city streets. These efforts led to the establishment of the first state prison in the United States in Philadelphia, Pennsylvania in 1790. The use of imprisonment gradually increased as a method of punishment following that.[628]

Different states adopted distinctive interpretations of punishment. In New York, individuals committed crime because they '[did not] respect authority and lacked strong work habits.'[629] This led to the establishment of the Auburn System in 1797, which required facilities to assign work to prisoners. The system was, however, criticised for maximising industrialisation initiatives at the expense of prisoner rights (poor working conditions, low pay, and physical abuse).[630] On the other hand, the Pennsylvania System of imprisonment was based on the belief that crime is caused because individuals are 'sinners', and the distribution of punishment should accordingly be based on ensuring offenders feel remorseful for their actions. Therefore, prisoners were isolated to reflect on their 'deviant actions' and repent, which was hoped to eventually reform their behaviour.[631] The system lost its popularity due to the mental implications of the prisoners and a large number of suicides.[632] Both systems failed to maintain discipline and isolation, often resulting in large yearly pardons, followed by high rates of reoffending upon release.[633]

The New York Prison Association assigned Wines and Dwight to evaluate penitentiaries in the United States and Canada. They concluded that reforms should be in line with the Irish prison system. The system mandated inmates to advance through a series of grades, eventually leading to their release upon good conduct. Consequently, the National Congress of Penitentiary and Reformatory Discipline adopted the Declaration of Principles, which established adult reformatories with indeterminate sentences, a classification system, academic and vocational instructions, constructive labour, humane disciplinary methods, and parole.[634] These

[627] ibid.
[628] Shanna L. Brown, 'Sentencing and Punishment – Sentencing Guidelines: The Sentencing Reform Act Precludes Courts from Lengthening a Prison Sentence Solely to Foster Offender Rehabilitation' (2011) 87 North Dakota Law Review 375, 379.
[629] Dozier (n 626).
[630] ibid 12.
[631] Randall Sheldon, *Controlling the Dangerous Class* in Dozier (n 626).
[632] ibid 12.
[633] Brown (n 628) 380.
[634] ibid 381.

principles were put into test through the Elmira Reformatory created in New York in 1877. It combined a military-style discipline with religious services, trade, academic education, and institutional newspapers.[635] New York also passed legislation providing for indeterminate sentencing, which gave managers of reformatories discretion to set the offenders' life sentence, as long as it is within the maximum statutory term of the offence, and courts were precluded from limiting the duration of the sentence.[636] Additionally, Congress in 1910 established a federal parole system that authorised using indeterminate sentencing. Under the system, Congress, the judge, and parole board collectively played a role in determining the sentence length; Congress sets the maximum sentences, judges impose a sentence within the statutory range, and the parole board determines when the offender would be released. The sentencing judge could sentence offenders to no time at all or opt to suspend a sentence.[637]

In the 1940s, correctional facilities were increasingly being used. In parts of the country, correctional systems provided living facilities to offenders the following release, implemented pre-release and work-release programmes, and day reporting programmes. Offenders were free to work and continue their livelihood in the community but their behaviour was monitored.[638] The 'medical model of corrections', where correctional officers were given wide discretion to set sentences specific to the offenders through assessing the causes of offending; treating the offender based on the diagnosis, and setting up follow up meetings to monitor the effects and outcomes of the treatment.[639]

During the 1950s to 1960s, California adopted rehabilitation and affirmed that the purpose of imprisonment was to reform and correct.[640] Remarkably, Texas implemented a rehabilitation programme in the 1950s that combined vocational training and religious programs. This was yet overturned by the following manager of the Texas Prison System in the 1960s, whose main objectives were cutting costs

[635] Randall Sheldon, *Controlling the Dangerous Class* in Dozier (n 626) 13.
[636] Brown (n 628).
[637] ibid.
[638] Daye S. Taxman, Douglas Young and James M. Byrne in Shadd Maruna and Russ Immarigeon (eds.) *After Crime and Punishment* (Willan Publishing 2004) 235.
[639] ibid.
[640] Tony Ward and Shadd Maruna, *Rehabilitation: Beyond the Risk Paradigm* (Routledge 2006) 8.

including medical care, facility upkeep, and further reliance on armed inmates to oversee inmates.[641]

In the 1970s, rehabilitation took a back-seat to a 'get tough on crime approach.'[642] Rehabilitation was not seen as effective in controlling or preventing crime, possibly spurred by the need to advance certain political agendas. Roberts and Hough argue that rehabilitation was opposed by liberals because it gave extensive discretion to judges and correctional officials, hence indirectly victimising offenders. It was also opposed by conservatives because it implemented short prison sentences.[643]
Although both agendas gave different reasons for the failure of rehabilitation to control crime, they agreed on discontinuing it as a guiding theory of punishment.[644]
A study conducted in the late 1980s concluded that community correction staff emphasised goals of deterrence and community protection over rehabilitation.[645] Again, this was largely influenced by political ideologies: conservatives argued that these programmes were 'soft on crime' and undermined the goals of retribution and deterrence, whilst liberals argued that consistency was difficult to achieve in parole sentences.[646]

Additionally, the Sentencing Reform Act 1984 also marked a move away from rehabilitation as a primary purpose of punishment: Congress reported the failure of the indeterminate sentencing model, which linked completion of treatment programmes in prison to release. The influence of parole boards is limited by lack of knowledge on when offenders are 'rehabilitated'; and parole boards and judges had too much discretion, impacting the consistency of sentences. They maintained that prison programmes, fines, and/or probation may be recommended by judges in certain circumstances.[647]

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[641] Gary Cohen, 'Punishment and Rehabilitation: A Brief History of the Texas Prison System' (*Texas Bar Journal*, *ABA* September 2012) <https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/Cohen_PunishmentandRehabilitation.authcheckdam.pdf> accessed 26 November 2017, 605.
[642] Etienne Benson, 'Rehabilitate or Punish?' (*American Psychological Association*, July/August 2003) <http://www.apa.org/monitor/julaug03/rehab.aspx> accessed 26 November 2017; Marson (n 591) 23.
[643] Julian Roberts and Mike Hough, *Changing Attitudes to Punishment* (Routledge 2013) 130.
[644] Randall Sheldon, *Controlling the Dangerous Class* in Dozier (n 626) 14-5.
[645] David May, Kevin Minor, Rick Ruddell, and Betsey A. Matthews, *Corrections and the Criminal Justice System* (Jones & Bartlett Learning 2007) 279.
[646] ibid.
[647] Brown (n 628) 387.

These arguments were driven by research by publishers like Robert Martinson and James Wilson.[648] Wilson, in his 1975 book *Thinking About Crime*, argued that 'nothing works' and challenged rehabilitation for '[requiring] not merely optimistic but heroic assumptions about the nature of man.'[649] Robert Martinson also wrote an article entitled 'What Works', where he contended that offender rehabilitation is 'nothing.' He further wrote a report, known as The Martinson Report, praising punitive measures over rehabilitation.[650] The report also reviewed 220 studies on correctional practice and concluded that the impact of correctional facilities on offender recidivism was minor.[651]

The pessimistic approach of 'nothing works' is seen to have been overstated. The contribution of psychologists on the influence of risk factors; including early exposure to substance abuse, psychology, and poverty, have been overlooked.[652] This includes a study by The Stanford Prison Experiment published by 1973, proving that the prison environment could have a large influence on prisoners' behaviour. Notably, one finding was that 23-hour continuous solitary confinements led to negative psychological mindsets, thus impacting the prisoners' social and occupational skills.[653]

In 2004, Frank Cullen, President of the American Society of Criminology, delivered a speech entitled, 'The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference.'[654] He argued,

> Three decades ago, it was widely believed by criminologists and policymakers that 'nothing works' to reform offenders and that 'rehabilitation is dead' as a guiding correctional philosophy. By contrast, today there is a vibrant movement to reaffirm rehabilitation and to implement [programmes] based on the principles of effective intervention. How did this happen? I contend that the saving of rehabilitation was a contingent reality that emerged due to the efforts of a small group of loosely coupled research criminologists. These scholars rejected the 'nothing works' professional ideology and instead used rigorous science to show

[648] Marson (n 591) 22.
[649] David Green, 'US Penal-Reform Catalysts, Drivers, and Prospects' (2015) 17 Punishment and Society 271, 275.
[650] Ward and Maruna (n 640).
[651] Taxman et al. (n 638).
[652] Benson (n 642).
[653] ibid.
[654] Ward and Maruna (n 640).

> that popular punitive interventions were ineffective, that offenders were not beyond redemption, and that treatment [programmes] rooted in criminological knowledge were capable of meaningfully reducing recidivism.[655]

Rehabilitation was seen as an important penal aim by Cullen. It distinctively rejected the pessimistic deterrent view of criminals as incapable of being reformed and focused on implementing programmes that addressed risk factors that lead individuals to commit crimes. David Frabee later published 'Rethinking Rehabilitation: Why Can't We Reform Our Criminals?', where he stated that rehabilitation 'has little or no lasting impact on recidivism.'[656] He alternatively recommended a deterrence system based on investing in satellite tracking technologies. He stated, 'we must return to basic principles and do a better job of detecting crimes and swiftly applying sanctions. Change is possible without workbooks, videos, and group meetings.'[657] Overall, the recurrent tension between deterrence and rehabilitation, and failure to combine both approaches under one system, resulted in the fall of rehabilitation as a prominent penal aim.

2.1.3 Lessons from the Historical Development of Rehabilitation

The historical use of rehabilitation foreshadows its contribution to understanding some of the risk factors that lead to crime, and how punishment could be distributed to benefit offenders and the community.

First, there are many interpretations and approaches to rehabilitation, evidenced in the variety of rehabilitative approaches used before, during, and after sentencing. Various rehabilitation approaches incorrectly focused on offenders 'breaking moral rules.' The Gladstone Committee report argued that criminality was a result of disassociation from religion and breaking from moral rules. Howard's 'penitentiary discipline' also emphasised public worship, prayer, and solitary reflection.[658] Additionally, rehabilitation in the community also highlighted the importance of religion. The Youthful Offenders Act 1854 enforced religious worship for offenders

[655] Francis T. Cullen, 'The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference' (2005) 43 Criminology 1, 1.
[656] David Frabee, *Rethinking Rehabilitation: Why Can't We Reform Our Criminals?* (American Enterprise Institution 2005) xvi.
[657] ibid 76-7.
[658] Cullen, 'The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference' (n 655) 34-6.

under the age of 16. It was no surprise that these approaches faced difficulties in practice.

From here, it is important to consider moral approaches to rehabilitation, to reinforce arguments made in support of distinguishing morality from legality, as argued in previous chapters. Somer identifies two moral approaches to retribution. First, rehabilitation is defined as returning the offender to a desirable state, particularly to a 'moral individual' state. Second, rehabilitation is defined as reshaping the offender into a new and improved form through curing their 'physical and spiritual defects'.[659] These definitions align with the deontological approach to rehabilitation, which argues that individuals are 'morally' significant to society, and the state should make reasonable attempts to assist offenders to transform to abiding citizens. The definitions do not define how rehabilitation is achieved.

Adopting a rehabilitation approach that (a) separates morality from legality and (b) broadens the risk factors of punishment beyond violating moral rules, is necessary to effectively respond to crime. There are benefits to adopting an approach that focuses on the positive impacts of rehabilitating criminals to society, through addressing the various risk factors (which differ in accordance to the type of offence and offender) and enforcing punitive measures, keeping in mind how these processes would help restore public confidence in the criminal justice system.

Particularly, the consequentialist approach to rehabilitation overcomes difficulties of moral approaches to retribution. It focuses on the positive impacts of rehabilitating criminals to society, particularly crime reduction.[660] Sentences could also incorporate education and training, and reintegration processes following the sentence could be implemented to ensure offenders have a support network.[661] Bertrand Russell states that criminals should be treated as individuals with illnesses that need to be cured, rather than individuals with moral failings, and prisons should implement strategies to cure these illnesses.[662] Brooks argues for combining treatment and punitive measures to address the risk factors associated with criminal offending.[663] Additionally, he clarifies that rehabilitation is achieved when criminals are reformed, which means that offenders have no propensity to commit further

[659] Somer (n 475) 24.
[660] Brooks, *Punishment* (n 13) 52.
[661] ibid 54-5.
[662] ibid 54.
[663] ibid.

crime because they understand the wrongness of their past actions. He emphasises that reformation requires acknowledging the guilt of the past criminal activity.[664]

Second, rehabilitation offers novel ways of dealing with crimes beyond imprisonment. As discussed, the distribution of punishment goes beyond imprisonment and aims to tackle some of the risk factors of crime with the aim of reducing the levels of crime. Many rehabilitation approaches positively support moving away from universalistic penal treatments to individualised elastic and varied approaches to punishment, through creating classes of offenders and punishment models that are less centred on prisons.[665] There may be advantages to adopting a more consistent and targeted system that does not give large discretion to judges and correctional officers to suspend sentences or provide very different sentences to offenders that have committed the same crime.[666]

Third, there were historical efforts to combine rehabilitation and deterrence under one framework, evidencing rehabilitation's capability to work alongside other penal aims. Notably, Howard's rehabilitative approaches were distinct from Bentham's deterrence approaches, yet both supported crime reduction. Fergus McNeill argues that Bentham's ideologies of 'requalifying' prisoners are 'a deontological conception of rehabilitation.'[667] The Holford Committee also advocated for merging different penal aims. It implemented seclusion and labour in prisons in combination with 'awakening the prisoners' conscious' through worship. Replacing rehabilitation and deterrence measures in prison with a sole deterrence-based approach increased the levels of recidivism.

Although the thesis disagrees with moral approaches to retribution, this illustrates that responding to crimes using rehabilitation for some criminals and deterrence for other criminals may be more efficient than choosing between the two.

Fourth, increasing public confidence in the criminal justice system is a key factor in the success of rehabilitation and other penal aims. It is evident that the decline of popularity of 'rehabilitation' as a solution to 'what works? 'was not mainly due to flaws in the theory of rehabilitation. It was rather influenced by political agendas in

[664] ibid 52.
[665] ibid 47.
[666] Brown (n 628).
[667] Fergus McNeill, 'Four Forms of 'Offender' Rehabilitation: Towards an Interdisciplinary Perspective' (2012) Legal and Criminological Psychology 1, 5.

favour of 'getting tough on crime' and the privatisation of prisons.[668] As William Kelly states, '[policy] has been swinging back and forth for the past 60 years and, unfortunately, it hasn't settled in the middle.'[669] Ward and Maruna convincingly argue that the debate between 'nothing works' and 'treatment works' is misdirected. The right question to ask is 'what helps people go straight?' Keeping public interest in mind is a key factor in the success of rehabilitation in practice. Further control trials, experimentations, and meta-analysis across different programmes are needed.[670] This line of positive thinking deviates away from targeting offender weaknesses and moves towards targeting the offenders' strengths. There is potential for rehabilitation to reduce re-offending if further research is conducted, taking in mind that the costs associated with implementing these programmes may reduce the costs associated with future crimes.[671]

Having discussed the potential of rehabilitation to contribute to the justifications of punishment and how punishment should be distributed, the next section aims to refute and understand possible challenges to rehabilitation.

3 Challenges to Rehabilitation

3.1 Is Rehabilitation a Theory of Punishment?

Unlike other theories of punishment, opponents of rehabilitation go to the extent of stating that rehabilitation 'is a myth [that] undermines the legitimacy of the indeterminate sentence law' and '[it] is either misnamed or wholly illogical.'[672] Somer argues that rehabilitation has been extended to mean 'anything.' A judge understood the effects of solitary confinement as a way to create self-reliant individuals, which is a function of rehabilitation.[673] William Saxbe, a former Attorney-General, argued that imprisonment is for punishment, not reform. A former California Director of Corrections stated, 'prison is for people society can't stomach. Can't kid yourself about rehabilitation.' A former spokesman for the Federal Bureau of Prison stated that requiring prisoners to engage in educational and provisional

[668] David Nelken (ed) *Comparative Criminal Justice and Globalisation* (Routledge 2011) 89.
[669] Cohen (n 641).
[670] Ward and Maruna (n 640) 15.
[671] Brooks, *Punishment* (n 13) 55.
[672] Somer (n 475) 22.
[673] ibid 23-4.

programmes is 'frank talk in a field renowned for its reliance on sugarcoating and obfuscation.'[674] Richard McGee, former Director of the Washington and California Prison systems, states that rehabilitation has its benefits for some correctional programs but should not be an aim for imposing a sentence. In other words, he distinguishes between rehabilitation as an aim of punishment (should not exist) and rehabilitation's benefits as a method of punishment (obligation of the state to provide rehabilitative opportunities).[675]

Some of these arguments are fueled by the realisation that some individuals are resistant to reform. Theoretically, if rehabilitation is applied as a pure theory of punishment, it would only punish individuals who are responsive to reform to achieve its aim. It may be difficult to define the risk factors that need to be 'rehabilitated'.[676] Nevertheless, if rehabilitation could work for some offenders, there should still be an effort to enforce rehabilitative measures within a theory of punishment.[677]

Viewing rehabilitation as 'informal justice' undermines its importance as a penal aim. Particularly, the conception of punishment is usually associated with 'pain' rather than 'pampering'.[678] The interpretation of rehabilitation as 'ineffective informal justice' rests on a mistake. Cullen states that the movement away from the rehabilitation ideal was due to low public confidence.[679] The 'ticket of way system' that mandated criminals to report to officers the following release and acquire employment decreased recidivism in the short term, but was met with difficulties in the long term, given the lack of public trust in the possibility of change by ex-offenders, especially since it was an informal programme.[680]

Brooks states that applying rehabilitative theories of punishment in and after prison would increase the chances of social integration by offenders, hence removing their tendency to engage in criminal activities. He also contends that popular political agendas have proclaimed going 'tough on crime' without investigating whether the

[674] ibid 117.
[675] ibid 119.
[676] Brooks, *Punishment* (n 13) 61.
[677] ibid 62.
[678] ibid 55.
[679] Cullen, 'The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference' (n 655) 718.
[680] Raynor and Robinson (n 597) 41-2.

approaches are actually successful and cost-effective.[681] Importantly, rehabilitation would not be viewed as a myth if punishment is understood as a response to crime. Although rehabilitation may challenge the understanding of punishment as 'imprisonment', there is no clear evidence that restricting the freedom of movement and association in prisons is more effective than a rehabilitation institution. Thus, rehabilitation should be viewed as a viable response to some types of crimes and offenders.[682]

3.2 Can Rehabilitation Work with Other Penal Aims?

The history of rehabilitation evidenced efforts to incorporate it within a deterrent and/or retributivist criminal justice system. In England and Wales, the Government's commitment to developing a national system of penitentiaries, resulting in the Penitentiary Act 1779, combined rehabilitation approaches (awaking of consciousness of sin) and deterrence approaches (socialising their instincts for pleasure through productive work).[683] In the United States, penitentiary facilities based on the strict application of one theory of punishment over the other has proven unsuccessful in reducing reoffending. The subsection seeks to understand the tension between rehabilitation and other theories of punishment, and whether rehabilitation contributes to addressing certain or all types of offences and offenders.

3.2.1 Rehabilitation and Deterrence

First, the relationship between rehabilitation and deterrence is mixed: some scholarly articles contend that rehabilitation is contrary to deterrence and may dilute its positive impacts, whilst other scholarly articles argue that rehabilitation is not a real theory of punishment and is a category of deterrence.[684]

Shavell states that rehabilitation may dilute deterrence. If an offender comes to believe that being imprisoned will assist him in gaining skills, the 'pain' of being in

[681] Brooks, *Punishment* (n 13) 55-56.
[682] ibid 56.
[683] Raynor and Robinson (n 597) 37.
[684] Shavell (n 592) 536; Regina A. Robson, 'Crime and Punishment: Rehabilitating Retribution as a Justification for Organisational Criminal Liability' (2010) 47 American Business Law Journal 109, 119.

prison may be lessened. The impact may be balanced by increasing the sanction's length, but there are difficulties in acquiring a balance between achieving the goals of rehabilitation and deterrence.[685] Some scholarly works have mistakenly failed to separate rehabilitation and deterrence. Robson states, 'the term 'deterrence' encompasses…rehabilitation…since [the objective] ultimately focuses on deterring misconduct.'[686] Franklin and Zawring state that rehabilitation is broader than theories of punishment that discourage criminal conduct by associating pain with criminality in the mind of the offender; it encourages criminals to reorient their values and be loyal to prevailing social norms.[687] Walker states, 'as soon as the aim of reformation is extended beyond individual deterrence, theories about the way it is to be attained begin to multiply.'[688] Nevertheless, they go on to state that that distinction is incorrectly made, and talk about rehabilitation in the context of deterrence. They argue that studies have mixed results on whether the punishment in prisons leads to attitudes towards compliance with social norms; the constant association with individuals who have criminal skills may lead to identification with anti-social and criminal values.[689]

Brooks correctly points out that defining punishment as a response to crime would assist in viewing deterrence and rehabilitation as two separate penal aims.[690] Some rehabilitative theories of punishment argue that crimes result from individual and social problems. The response to crime is to eliminate these factors by tackling these risk factors. This approach is absent from prominent deterrence and retributive theories of punishment. Deterrence means that an offender is fearful of enduring the punishment of crime but does not necessarily believe being involved in criminal activity is incorrect. Rehabilitation means that an offender does not engage in crime because they do not want to.[691] Although both aim to reduce crime, they achieve that aim using different approaches.[692]

3.2.2 Jean Hampton: 'Moral Education Theory of Punishment'

[685] Shavell (n 592) 536.
[686] Robson (n 684) 119.
[687] Franklin E. Zimring and Gordon J. Hawkins, *Deterrence: The Legal Threats in Crime Control* (The University of Chicago Press 1973) 231.
[688] ibid 232.
[689] ibid.
[690] Brooks, *Punishment* (n 13) 37-8, 59.
[691] Marson (n 591) 22.
[692] ibid; Brooks, *Punishment* (n 13) 37-8, 59.

The 'Moral Education Theory of Punishment' advances a theory of punishment that includes rehabilitation. Hampton states that her theory 'incorporates certain elements of deterrence, retributivist, and rehabilitation views' and justifies punishment if it provides an educative benefit to the wrongdoer.[693] The theory states, 'punishment is intended as a way of teaching the wrongdoer that the action she did (or wants to do) is forbidden because it is morally wrong and should not be done for that reason.'[694] Under this approach, criminals lack moral education; punishment may educate criminals for their good and public good, and criminals are rehabilitated when they are aware that their crimes are moral wrongs.[695] She discusses punishment in the context of families. Parents enforce harsh punishments and admonitions to encourage their children to not commit immoral acts and understand that their acts are immoral.[696]

Additionally, Hampton argues that the law should educate individuals on how to make moral decisions. She states, '[w]rong occasions punishment not because pain deserves pain, but because evil deserves correction.'[697] Having the requisite moral knowledge increases the level of responsibility of action, and makes punishment a proper response to a breach of one's moral duty.[698] States have the duty to enforce the law in a way that reflects the moral consensus of the community.[699]

With regards to the distribution of punishment, Hampton states that punishment should not damage a criminal's autonomy; should convey to the criminal and society that their acts are wrong; and requires an infliction of pain applied in proportion to advancing and achieving moral education. Hampton does not go beyond the above to clarify exactly how punishment should be distributed. She states that her theory will 'unlikely [be] 100 percent successful in moral education efforts.'[700] Thus, it remains unclear how punishment should fit the crime, and how punishment would effectively apply to all offenders.

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[693] Jean Hampton, 'The Moral Education Theory of Punishment' (1984) 13 Philosophy and Public Affairs 208, 208-9.
[694] Brooks, *Punishment* (n 13) 56.
[695] Hampton (n 693) 210.
[696] ibid 207-18.
[697] ibid 238.
[698] Lisa A Smith, 'The Moral Reform Theory of Punishment' (1995) 27 Ariz L. Review 197, 199.
[699] ibid 201.
[700] Hampton (n 693) 231.

The next question to consider is whether Hampton's theory is actually hybrid. Jean Hampton claims to advance a mixed theory of punishment. She states that contrary to retributivist and deterrence approaches, further punishment would be avoided because offenders have understood the immorality of their criminal wrongdoing, rather than fear punishment, and criminals are prioritised over the social good.[701] Under the theory, punishment aims to negate wrongs and reassert rights and should benefit the criminal.[702] Contrary to many deterrence approaches, the punishment should not simply be imposed to condition society to do what they want them to do, but rather to teach them the difference between moral and immoral acts, even if the pain is inflicted to achieve these goals.[703] The theory rejects indeterminate sentencing and parole boards and treating offenders for any mental illnesses.[704]

There are various interpretations of Hampton's theory. Adams states her theory combines retribution and rehabilitation because her interpretation of retribution requires a 'desire [by the state] to restore proper moral order.'[705] Moreover, he argues that her theory applies a modern approach to retribution; it rejects a strict interpretation of retribution's proportionality principle and the use of inhumane punishment (for instance, an offender throwing acid at someone's face should be punished with acid thrown at his/her face).[706] On the other hand, Christopher argues that her theory is retributivist because it does not reject the role of the pain in understanding the moral wrongfulness of an act, and could assist offenders in understanding their self-worth.[707]

Hampton's theory of punishment is not a hybrid theory of punishment, but rather a rehabilitation theory of punishment. It fails to explain how the penal aims of deterrence, retribution, and rehabilitation collectively come under one framework, but rather reject many fundamental and defining features from each of the penal aims. Contrary to many retribution and deterrence approaches, it rejects advancing the social good and imposing punishment because it is just. It justifies punishment to help offenders understand the immorality of their conduct. It is not clear how

[701] Smith (n 698) 198.
[702] Hampton (n 693) 215.
[703] ibid 212.
[704] ibid 233.
[705] Joseph Q. Adams, 'Retribution Requires Rehabilitation' (Master of Arts Thesis, Georgia State University 2008) 1.
[706] ibid 11.
[707] Russell Christopher, Deterring Retributivism: The Injustice of 'Just Punishment' (2002) 96 Nw. U. L Rev. 843, 957.

punishment should be distributed, whether proportionality is accepted as a principle, how the moral standard would be set, and clearly fails to address all types of crimes and offenders. As discussed in previous chapters, the problem with enforcing punishment based on moral grounds is that immorality does not always equate to illegality. Setting morality as a standard would make it difficult to rehabilitate offenders for illegal non-moral wrongs. Moreover, it is not compatible with current criminal laws in England and Wales and the United States, where corporate criminal liability is enforced for crimes that that are not necessarily immoral. Therefore, it has not been conclusively proven that punishment can an educative effect on all offenders in practice.[708]

3.3 How Have Rehabilitation Measures Been Applied in Practice?

Rehabilitation exists within a 'theoretical vacuum'.[709] Ward and Maruna state,

> [M]aybe more than any other area of criminological research, rehabilitation has been plagued with new discoveries, miracle cures, revolutions and silver bullets, all buffeted by that all-powerful justification of 'science'.[710]

Martinson further argues,

> But what specifically is the method? Probation-like placement? Small caseloads? Unadultered love? What is it? What is the actual process that takes place by which 'recidivism' is reduced? if [one of the rehabilitation supporters] knew which 'element' or 'dimension' of the [treatment] was having whatever effect he thinks he has found, he surely would not keep it such a secret. He would patent it, sell It around the country to our administers be given the congressional medal of honour, and retire to the Bahamas, an [honoured] and wealthy man. [The academic rehabilitation proponent] can talk for twenty pages in the special language we all know so well, but he cannot bring himself to say in plain English to my [neighbours], who are waiting with bated breath, just what this process is.[711]

[708] Brooks, *Punishment* (n 13) 57.
[709] Ward and Maruna (n 640) 27.
[710] ibid 7.
[711] ibid 29.

Some approaches to rehabilitation, like Hampton's theory, do not define how punishment would be distributed and how recidivism would be reduced. The literature on rehabilitation is empirical in nature and 'attempts to run before walking.' Empirical studies on rehabilitation reveal mixed results. There are studies that evidence a reduction of five to ten percent through targeted 'rehabilitative treatment programmes'. They consider risk factors of offending, and target these risk factors, finding rehabilitation as a more effective measure than deterrence.[712] Moreover, early intervention programmes have direct links to reduced recidivism.[713] Dutcher, who studied white-collar criminals, argues that rehabilitation measures can help offenders reflect on their poor decisions, and what changes could be done following release. He uses the example of Martha Stewart, who found her five-month sentence as 'life-altering'; and David Novak, who stated that '[prison gave him] the opportunity to be still and reflect upon a lot of the poor judgements [he] made.'[714] Nevertheless, Harris states that interviewing past offenders in prison conveyed a 'distaste' for the concept of rehabilitation and correctional treatment programmes, given that offenders are perceived as untrustworthy, possibly dangerous and misguided, which has impacted efforts to empower offenders to change through targeting their strengths.[715]

One issue to be addressed is the difficulty of determining whether rehabilitation has been successfully achieved. The success of rehabilitation measures may result in 'high levels of sensitivity to threats of punishment' or 'reduced re-offending rates.' How is sensitivity to threats of future punishment measured? Does rehabilitation consider that reduced recidivism may be due to other reasons than reform?[716] For example, parole boards require in some circumstances 'proof of rehabilitation' to release offenders sentenced for an indefinite period. Rehabilitation is often demonstrated through enrollment in educational programmes, and/or attending alcohol anonymous meetings. Somer correctly argues that institutional adjustment in prison is very different from adjustment outside of prison. There is a possibility that some offenders enroll in these programmes to serve less time in prison, rather than for the purposes of reform.[717]

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[712] Brooks, *Punishment* (n 13) 59.
[713] Francis T. Cullen, 'Make Rehabilitation Corrections' Guiding Paradigm' (2007) 6 Criminology and Public Policy 717, 721.
[714] J. Scott Dutcher, 'From the Boardroom to the Cellblock: The Justifications for Harsher Punishment of White-Collar and Corporate Crime' (2005) 37 Ariz. St. L.J. 1295, 1315.
[715] Ward and Maruna (n 640) 16.
[716] Zimring and Hawkins (n 687) 225, 246; Brooks, P*unishment* (n 13) 59.
[717] Somer (n 475) 118.

Accordingly, an approach to rehabilitation has to be defined and applied in practice. The right questions to ask are when to apply rehabilitation and 'what helps people go straight?'[718] Research has suggested that voluntary processes and applying personalised programmes according to a pre-defined set of principles are more effective. To maximise reintegration, targeting offender strengths, and intervention during and following the sentence, are required to address risk factors that have led to engaging in criminal activity.[719] Thus, rehabilitation could contribute to a coherent theory of punishment for companies.

Overall, challenges to rehabilitation include questioning whether it could be categorised as a separate theory of punishment; its ability to work alongside other penal aims; and how it could work in practice. Rehabilitation is viewed as a separate theory of punishment that could work alongside deterrence and legal retribution. The potential for retribution to be a prominent penal aim has been limited by historical political agendas in favour of a 'tough on crime' approach, thus impacting the development of rehabilitation programmes and resulting in inconsistent results in practice. There may be potential for rehabilitation to address certain types of corporate offenders. The next section explores how this could be achieved.

4 Rehabilitation for Corporate Crime

The section consolidates the findings of the previous section to illustrate how rehabilitation could contribute to a theory of punishment for companies.

4.1 The Justifying Aim of Punishment

Rehabilitation is not currently a penal aim for corporate crime in the United States and England and Wales. The Sentencing Commission Guidelines (USA) and Definitive Guidelines (England and Wales) include rehabilitation as an aim for the punishment of individuals, but the aim of corporate criminal punishment is limited to retribution and deterrence.[720] The MPC, a persuasive model for American state

[718] Ward and Maruna (n 640) 27.
[719] Cullen, 'Make Rehabilitation Corrections' Guiding Paradigm' (n 713) 15; Brooks, *Punishment* (n 13) 59-60.
[720]Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31); Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences:

laws, includes rehabilitation as a goal of punishment.[721]

Scholars like Henning argue that rehabilitation is more effective than other theories of punishment for corporate crime. He states, 'if the only result of corporate criminal prosecutions were monetary penalties, then prosecuting companies just so everyone feels better would base the criminal law.'[722] Empirical data set out in Section 3 has evidenced that rehabilitation could work for some types of crimes and corporate offenders. Nevertheless, rehabilitation cannot be effective for all companies. Violations of the law may occur for different reasons that do not fall under rehabilitation. Hence, the justification of punishment should not solely rely on a rehabilitative approach of 'educating the offenders', nor is rehabilitation suitable for offenders that are not willing to cooperate.

In Section 2, it was evidenced that the moral approaches to rehabilitation did not work in practice to address crime committed by individuals. As discussed in Section 3, non-moral approaches to retribution do not agree on whether rehabilitation should apply to address the 'risk factors' of offending or to reintegrate offenders to society or both.

Accordingly, a defined approach to rehabilitation could contribute to understanding why some companies should be punished. Rehabilitation is a separate penal objective that aims to reduce the levels of crime and to target internal risk factors. Particularly, companies ought to be punished for violations of the law resulting from the following,

> [Defective] control systems, insufficient checks and balances within the organisation to ensure the law is complied with, poor communication, and inadequate standard operating procedures which fail to incorporate safeguards against reckless behaviour. Sometimes these [organisational] defects are intentional, manifesting a conscious decision by the corporate hierarchy to turn a blind eye to corner cutting in order to get results. Sometimes the defects reflect sloppiness or managerial negligence.[723]

Definitive Guideline' (n 31); United States Sentencing Commission, 'Guidelines Manual 2016' (n 11) Ch. 1 Pt. A, section 4; Desio (n 247).

[721] American Law Institute (n 231) s 1.02 (2).

[722] Peter J. Henning, 'Should the Perception of Corporate Punishment Matter?' (2010) 19 J. L. & Pol'y 83, 87.

[723] Braithwaite and Geis (n 303) 309.

Companies are required to adopt processes that comply with the law. Failure to do so as a result of negligence and/or intent should be punished. Rehabilitation in some circumstances could (a) help companies reform their internal processes in a way that is compliant with the law, and/or (b) ensure or reduce the level of desire by companies to engage in criminal activities in the future. Empirical studies have evidenced that reforming the internal processes of companies lowers the chances of re-offending by the company in the future.[724] The aim of punishing such companies is to tackle the risk factors that led to the criminality, to ensure that the company itself complies with the law and that other companies within the industry are aware that similar behaviour would lead to punishment. Companies are not punished to be fearful of punishment but offered the incentives to comply with the law for long term success.

This approach to rehabilitation recognises that companies have to be willing to cooperate and participate in the process for it to work.[725] Moreover, risk factors may be subject to change for companies. For rehabilitation to work, legal institutions need to employ resources to identify new risk factors and trends to understand how companies make decisions.

4.2 Distribution of Punishment

The role of the criminal law is progressively broadening. Companies are encouraged to self-report and settle rather than be prosecuted through normal trial (e.g. through engaging in DPAs). Moreover, processes like restructuring compliance programmes and restitution could theoretically advance rehabilitation goals and need to be centralised (rather than be ancillary) to the punishment process where relevant.

4.2.1 DPAs

DPAs have been discussed in Chapter 3 in the context of deterrence. For instance, DPAs in England and Wales may create fear of criminal conviction if the terms of the agreement are not met by the company.[726]

[724] ibid 310.
[725] Peter J. Henning, 'Should the Perception of Corporate Punishment Matter?' (n 722).
[726] Carlsmith et al. (n 320) 285.

In relation to rehabilitation, DPAs have historically been used to rehabilitate juvenile offenders and drug offenders through mandating their participation in programmes that address risk factors as an alternative to incarnation.[727] They could be understood as a tool for 'structural reform prosecution' to '[leverage] the prosecutions to secure adoption of sweeping internal reforms.'[728]

As discussed in Chapter 3, the inconsistent implementation of DPAs has lowered its potential benefits. For instance, a DPA with KPMG allowed the government to force employees to cooperate in the investigation at the expense of losing their jobs and payment of attorneys' fees by the firm.[729] Moreover, the interpretation of what 'cooperation' entails is not clear, and there are no guidelines on when a DPA would be available, and how they should exactly be structured.[730] The adoption of the 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Companies' provides guidelines for selecting the monitors that will oversee the companies' compliance. Moreover, the Deputy Attorney General has to approve the monitor selected and prosecutors should 'decline to accept a monitor if he or she has an interest in, or relationship with, the company or its employees, impartiality.'[731]

Additionally, as explored in Section 2, Schedule 17 of the Crime and Courts Act 2013 sets requirements for the terms in every DPA, which include payment of a financial penalty; compensating victims; donating money to charity or a third party; disgorgement of profits; implementing a financial programme; cooperating with the investigation; and payment of reasonable costs to prosecutors.[732] The calculation of the punishment did not include the revenue the defendant made by trading its bonds in the secondary market; any financial advantages that the defendant obtained over other competitors; and the full harm to Tanzania.[733] The current structure of DPAs could allow companies to settle their way out of a crime without identifying the individuals responsible for the wrongdoing. This is likely to undermine the rights of

[727] Michael Yangming Xiao, 'Deferred/Non-Prosecution Agreements: Effective Tools To Combat Corporate Crime' (2013) 23 Cornell Journal of Law and Public Policy 233, 234.
[728] Peter J. Henning, 'Corporate Criminal Liability and the Potential for Rehabilitation' (2009) 46 Am. Crim. L. Rev. 1417, 1432.
[729] ibid.
[730] ibid 1433-4.
[731] ibid 1433.
[732] Transparency International Canada (n 528) 16.
[733] Corruption Watch (n 542) 8-9.

individuals whose rights have been violated. The goal of rehabilitation would unlikely to be advanced under these circumstances.

4.2.2 Restitution

Restitution orders are imposed as part of a criminal sentence, either primarily or as ancillary orders, mandating offenders to pay financial obligations to the victims for a range of losses, including disgorgement of profits and gains from criminality, and/or emotional and psychological losses by the victims.[734] Restitution in criminal law could be viewed as an application of rehabilitation theories if it contributes to further the rehabilitation of the offender rather than mere compensation for the harm inflicted on the victim.[735]

In England and Wales, restitution orders are ancillary orders that could be applied, through section 148 Powers of Criminal Courts (Sentencing) Act 2000, to offenders convicted of stealing goods. Specifically, those in possession or control of stolen goods should restore them to the victim; any goods directly or indirectly representing the stolen goods should be transferred to the victim, or a sum not exceeding the value of the stolen goods should be paid to the victim.[736] In the context of companies, the Definitive Guidelines, relying primarily on fines, consider whether a fine imposed should be changed based on the offender's ability to make restitution to the victim.[737] This implies that restitution orders may not apply in all circumstances, or the amount may vary according to the circumstances. There is no guidance on how they should apply beyond the fact that they are supplementary and cannot contradict deterrence and retribution.

In American federal law, The Mandatory Victims Restitution Act 1996 orders restitution for any offence that has an identifiable victim, or where victims have

[734] Cortney Lollar, 'What is Criminal Prosecution?' (1994) 100 Iowa L. Rev. 93, 93-95.
[735] *Karr v State* 686 P.2d 1192 (Alaska 1984) in Charles R. Pengilly, 'Restitution, Retribution, and the Constitution' (1990) 7 Alaska Law Review 333, 338.
[736] Sentencing Council, 'Ancillary Orders' (Sentencing Council 2017) < https://www.sentencingcouncil.org.uk/explanatory-material/item/ancillary-orders/> accessed 29 November 2017.
[737] Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31); Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (n 31).

suffered a physical injury or pecuniary loss.[738] The Sentencing Commission Guidelines require a court to order restitution when sentencing a company.[739] Restitution could be applied in combination with probation for up to five years, issuance of public notices of conviction, and/or exposure to forfeiture statutes.[740] If victims cannot be identified, the court would take into consideration public harm caused by the offence and other relevant factors.[741]

From here, questions to consider include: when should restitution orders be enforced? Should restitution orders aim to rehabilitate the offender or be supplementary to advancing the aims of deterrence and retribution? According to the American case of *Kelly v Robinson*,[742]

> Restitution is an effective rehabilitative penalty because it [forces] the defendant to confront, in concrete terms, the harm his actions have caused…Similarly, the direct relationship between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.[743]

Restitution under this definition advances an approach to deterrence; it 'forces' the defendant to confront the harms they have caused. This means that an offender who has the financial capability or has not pleaded guilty to a crime would not necessarily be rehabilitated under these cases. Alternatively, in the American case of *Karr v State*,[744] The Alaska Supreme Court stated,

> Restitution should not only compensate the victim for the harm inflicted by the offender but should also further the rehabilitation of the offender. If restitution is ordered in an amount that is clearly impossible for the offender to pay, the offender's rehabilitation will be inhibited and not furthered. If the offender is haled into court for nonpayment of restitution …, or if the offender petitions the court …to avoid this sanction, his reintegration into society will be disrupted. Also, an offender might simply give up and make no payments at all if the restitution ordered is clearly impossible to pay. This could result in [efforts by

[738] United States Code, Supplement 4, Title 18, section 366A (2006) (United States).
[739] United States Sentencing Commission, 'Guidelines Manual 2016' (n 11) §8B1.1(a).
[740] Desio (n 247).
[741] United States Sentencing Commission, 'Guidelines Manual 2016' (n 11) §5E1.1.
[742] 479 U.S. 36 (1986).
[743] ibid 49.
[744] *Karr v State*, 686 P.2d 1192 (Alaska 1984).

the offender] to avoid this sanction, neither of which would further the dual goals behind restitution.[745]

The case explains that rehabilitation should only apply when there is 'rehabilitative potential,' specifically when companies accept the responsibility of compensating the victims for the losses suffered.[746] Hanning states that punishments should 'focus on imposing a penalty that will allow the organisation to redress its wrongdoing while taking steps to ensure that the misconduct is less likely to occur.'[747] Corporate wrongdoings often involve harm and could be addressed through a form of remediation. Restitution in addition to fines should be central to correct the harmful impacts of corporate crime.

Overall, the subsection has illustrated that rehabilitation mechanisms, notably, through restitution orders, could be combined with other methods of punishment to advance the goals of rehabilitation. Given that restitution may advance goals parallel to rehabilitation, it may be more theoretically coherent to include rehabilitation as a penal aim.

4.2.3 Compliance Programmes

Compliance programmes are 'internal [programmes] and policy decisions made by a company in order to meet the standards set by government laws and regulations.'[748] Walsh and Pyrich further state that 'criminal liability is imposed not only to deter wrongful behaviour but also to rehabilitate or improve corporate conduct… companies should be rewarded for taking proactive steps to cure internal dysfunctions that foster criminal behaviour.'[749] Although not regarded as a punishment method, the implementation of legally compliant programmes may reduce the sentence imposed on a company when it commits a crime. In relation to the principles of rehabilitation, compliance programmes assist in instilling the

[745] ibid 1197.
[746] Pengilly (n 735) 340.
[747] Peter J. Henning, 'Corporate Criminal Liability and the Potential for Rehabilitation' (n 728) 1428-9.
[748] Investopedia, 'Compliance Program' (*Investopedia*, 2017) <https://www.investopedia.com/terms/c/compliance-program.asp> accessed 20 November 2017.
[749] Charles J Walsh and Alissa Pyrich, 'Corporate Compliance Programs as a Defence to criminal Liability: Can a Company Save its Soul' (1995) 47 Rutgers L. Review 605, 680-881.

'lawful mindset,' through adopting processes that ensure that the company would not violate the law.[750]

Chapter 8 of the Sentencing Commission Guidelines provides criteria for establishing effective compliance programmes,

> [Oversight] by high-level personnel; due care in delegating substantial discretionary authority; effective communication to all levels of employees; reasonable steps to achieve compliance, which include systems for monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal; consistent enforcement of compliance standards including disciplinary mechanisms; and reasonable steps to respond to and prevent further offenses upon detection of a violation.[751]

The criteria are designed to flexibly allow companies to construct a 'good citizenship model' that is suited for their company.[752] Companies are also encouraged to adopt 'best practice' models that have been developed by executive agencies like the Environmental Protection Agency, the Department of Health and Human Services, and/or the Department of Justice's Antitrust Division. The Sentencing Commission aims to develop a norm compliant culture that discourages criminal conduct.[753]
It is important to note that the standard of corporate criminal liability in federal American law is *respondeat superior* unless a statute adopts a different standard. This means that the criminal acts of any employee, regardless of their position within the company, could be imputed to the company. Even if a company attempts to safeguard against these convictions through enforcing a compliance programme that meets the standards set by law, it may still be subject to liability. The Sentencing Commission argues that companies should not be discouraged from complying with the law through taking cost-cutting measures, because enforcing a compliance programme that meets the standards set by law would mitigate the potential fine for up to 95 percent.[754]

[750] United States Sentencing Commission, 'Guidelines Manual 2016' (n 11) § 8B1.1(a) § 8B2.1(b)(2)(A).
[751] Desio (n 247).
[752] ibid.
[753] ibid.
[754] ibid.

In England and Wales, the implementation of compliance programmes has an impact on the interpretation of 'offence seriousness' when sentencing companies. The implementation of a compliance programme may indicate that the breach is an isolated incident rather than a systematic failure of the company, which corresponds to a more serious offence.[755] In relation to fraud, bribery, and money laundering offences, fines could be adjusted based on their impact on the offenders' abilities to implement effective compliance programmes.[756] In relation to environmental offences, the level of the fine could be increased if the company has a history of non-compliance with warnings from the regulator (aggravating circumstance), and reduced if it implemented an effective compliance programme.

The next question to consider is whether compliance programmes advance rehabilitation or are merely a factor that determines the gravity of the offence (based on deterrence). Diana Murphy states that encouraging the implementation of compliance programmes and providing guidance for doing so is a positive step to achieve deterrence and encourage compliance with the law.[757] Baker puts forward a persuasive argument regarding the authority of the government to 'reform companies' through attempting to create 'good citizens' out of companies by influencing them to enforce compliance programmes.[758]

It is important to note that the 'good citizenship' compliance programme guide is, prima facie, voluntary to enforce. Nevertheless, it has a great impact on sentencing if companies are convicted of engaging in a criminal act. The thesis sees this as a benefit rather than a detriment to encourage compliant behaviour within companies. Having considered Lee's corporate criminal liability theory, corporate decisions in many cases consist of group decisions. Corporate culture is created by the decisions of the group, and management is subject to change. The existence of a programme specifying how decisions are made is essential to the company's success in the short and long terms. Since punishment is a response to crime, companies could be required to report certain matters to committees of outside directors; sign consent

[755] Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31); Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (n 31).
[756] Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31).
[757] Diana E. Murphy, 'The Federal Sentencing Guidelines For Organisations: A Decade of Promoting Compliance and Ethics' (2002) 7 Iowa Law Review 697, 719.
[758] John S Baker, 'Reforming Companies through Threats of Federal Prosecution' (2004) 89 Cornell Law Review 310, 311.

decrees with regulatory agencies; establish internal compliance groups to report individuals that do not adhere to corporate policies; and/or acquire approval for specified actions.[759]

Additionally, it could be validly argued that issuing guidelines relating to compliance programmes may enhance public confidence in the criminal justice system. They provide early detection of misconduct and help prevent misconducts by discovering and addressing problems before they become serious. Accordingly, this helps in building 'consumer confidence and can counteract any negative publicity that may result from the unfortunate acted of isolated employees [in the case of American federal law].'[760] This supports reducing the level of offending.

For rehabilitation to work, companies who have been convicted of crimes require further support from an executive department on how to change their programmes and practices to minimise the probability of reoffending in the future. Companies, thus, are less likely to engage in cost-cutting measures, following conviction, by not enforcing these programmes.

5 Conclusion

The chapter aimed to gain a better understanding of rehabilitation theories in theory and practice, and how its principles have been applied to control crime historically and in modern criminal law practices.

Section 2 historically examined rehabilitation as a penal aim in the United States and England and Wales. Section 3 discussed potential challenges to modern approaches to rehabilitation in the non-corporate context. Section 4 identified an approach to rehabilitation that could contribute to a theory of punishment for companies.

The laws in England and Wales and the United States have shifted towards a deterrent and retributivist-based model of punishment, but still, incorporate processes that reflect and advance rehabilitation. Many rehabilitation approaches compellingly aim to reduce crime, and advantageously accept methods of punishment beyond imprisonment. Accordingly, a non-moral approach to

[759] ibid.
[760] Walsh and Pyrich (n 749) 680-881.

rehabilitation has the potential to deal with certain types of corporate offenders. Thus, incorporating rehabilitation as a penal aim is essential.

Chapter Five

Restorative Justice

1 Introduction

The previous chapters advanced approaches to retribution, deterrence, and rehabilitation, arguing that each contributes to partial understandings of what drives companies to violate the law; the aims of punishing companies; and how punishment ought to be distributed (i.e. a TOP for companies).

Deterrence, retribution, and rehabilitation proponents fail to account for the rise of international transactions and emerging types of companies and goods/services offered by companies, which bring on new challenges to controlling corporate crime. Accordingly, an innovative and multi-dimensional response to crime, which centralises building norm-compliant behaviour by companies, is required under these circumstances. The chapter assesses the potential of restorative justice, advanced as an innovative approach to dealing with crime,[761] to address these gaps.

The chapter aims to explore relevant literature and current practices to reach an understanding of how far restorative justice could contribute to addressing corporate crime.

Section 2 examines the use of the term 'restorative justice' in literature and practice to advance a distinctive definition of restorative justice that contextualises it as an instance of punishment not an alternative to punishment. Section 3 evaluates the five principles of restorative justice: accessibility, voluntarism, neutrality, respect, and restoration.[762] Section 4 explores the existent literature on restorative justice in the corporate context (including individual criminal liability and self-regulation of corporate bodies, environmental crimes, and foreign bribery), and assesses the

[761] Robin J. Wilson and Bria Huculak, 'Restorative Justice Innovations in Canada' (2002) 20 Behav. Sci. Law 363, 370-1; Belinda Hopkins, 'From Restorative Justice to Restorative Culture' (2015) 14 *Revista de Asistenta Sociala* 19, 19-20.

[762] Restorative Justice Council, 'Principles of Restorative Practice' < https://restorativejustice.org.uk/sites/default/files/resources/files/Principles%20of%20restorative%20practice%20-%20FINAL%2012.11.15.pdf> accessed 1 April 2019.

limitations and advantages of restorative justice for corporate crimes. Section 4 presents all the proposals set out in the chapter, particularly how restorative justice could contribute to a theory of punishment for companies.

2 What is Restorative Justice?

The starting point to any objective assessment of restorative justice is recognising that there is no uniform definition of restorative justice.

This view may be criticised for attempting to avoid the overwhelming body of literature that conceptualises restorative practices in a certain way. Yet, many key restorativists, like Zehr and Braithwaite, have offered contradictory accounts on what the term actually means over the years.[763] This provides scope to contribute to an original understanding of restorative justice.

Accordingly, the section aims to reach a unique understanding of restorative justice through investigating accounts of its historical significance, and its conceptualisations in theory (academic literature) and in practice (restorative justice programmes).

2.1 The History of Restorative Justice

The term 'restorative justice' has been traced back to the 1880s, often used in a religious context, 'without its meaning being explained.'[764] For example, the Christian Examiner and Church of Ireland Magazine in 1834 considered 'restorative justice' to be a 'great act' and an 'importance [circumstance] which has…been mainly instrumental …beneficial to the clergy, and to the people.'[765] Braithwaite notes that it 'has been the dominant model of criminal justice throughout most of human history for all the world's peoples.'[766] He argues that it is the traditional method of resolving conflicts before modern criminal justice processes developed. Moreover, he asserts that restorative practices trace back to ancient Arab, Greek, African, Native American, and Roman civilisations; German public assemblies;

[763] See for e.g. sections 2.1.2, 4.1.2, 4.2.
[764] Christian B.N. Gade, 'Restorative Justice and South African Truth and Reconciliation Process' (2013) 32 S. Afr. J. Philos 10, 14.
[765] Church of Ireland, *The Christian Examiner and Church of Ireland Magazine* (Dublin, William Curry, Jun and Company 1834) 2-3.
[766] John Braithwaite 'Restorative Justice' in M. Tonry (ed) *The Handbook of Crime and Punishment,* 323-344 (New York, OUP 1998) 323.

Indian Hindus in the Vedic civilisation (6000-2000 B.C.); and ancient Buddist, Taoist and Confucian traditions in Asia.[767] It was inserted in the Code of Hammurabi (c.2000 B.C.). In England, it formed the basis of Anglo-Saxon law before the Normans arrived. William the Conqueror moved away from these practices through defining crime as a violation against the state and communities that required intervention by the state to restore the peace through punishment, which included fines for reparative justice for financial and political reasons.[768]

Weitekamp, following examination of legal anthropology and practices of ancient indigenous communities, further emphasises,

> [Restorative] justice has existed since humans began forming communities…it is kind of ironic that we have… to go back to methods and forms of conflict resolution that were practised some millennia ago by our ancestors who seemed to be much more successful that we are today.[769]

Under this view, individuals have historically managed their conflicts and restored balances of power through 'restorative justice;' restorative justice defines crime as a victim vs defendant conflict rather than a state vs defendant conflict. This was later replaced by retributive and other justice systems that excluded the involvement of victims in the process of obtaining justice.[770]

Daly emphasises, '[there] are many stories [to restorative justice] and no real one.'[771] Restorative justice is often defined what it is not, and what it means is often left open for interpretation. Sylvester, in an examination of Weitekamp's sources that have led to his conclusions on the dominance of restorative justice in old communities, argues that 'there is little doubt that restorative scholars have only scratched the surface of the anthropological literature and…have been highly selective in the examples expressed.'[772] Although restorative practices have existed in ancient or pre-modern

[767] ibid.
[768] ibid.
[769] Kelly Richards, *Exploring the History of the Restorative Justice Movemen*t (5th International Conference on Conferencing & Circles, August 5-7 2004) 81,93.
[770] ibid 1.
[771] Kathleen Daly, 'Restorative Justice: The Real Story' (2002) 4 Punishment & Society 55, 55-6.
[772] Douglas Sylvester, 'Interdisciplinary Perspectives on Restorative Justice: Myth in Restorative Justice History' (2003) Utah Law Review 1, 12.

communities, they existed alongside a diverse range of other practices, including retributive practices.[773]

There are competing and contradictory histories of restorative justice. Many questions arise from looking back at the 1881 use of the term restorative justice, and other historical accounts of restorative justice: What is the 'act' of restorative justice? How is it instrumental and beneficial to 'the people'? What are the defining parameters of restorative justice? Is it simply a process or an 'act' or a 'theory'? Did it exist prior to or alongside retribution and deterrence? If it existed prior to retribution and deterrence and worked effectively, why was it replaced? The history of restorative justice is contested, yet there is scope for exploring both views as a potential for reforming current laws and policies for a better 'administration of justice' today.

2.2 Modern Restorative Justice

The modern use of the term 'restorative justice' has been largely influenced by literature from the 1950s, including publications by Eglash, Barnett, Christie, and Zehr.[774] Despite the large influence of these publications, restoravists did not adopt a uniform understanding of the term, including whether restorative justice should be contextualised as an 'instance of punishment' or an 'alternative to punishment.' Again, this provides scope for a broad interpretation of restorative justice.

Howard Zehr named the 'grandfather of restorative justice' by The Zehr Institute of Restorative Justice,[775] advances an influential definition of restorative justice:

> [An] alternate [framework, philosophy or lens] for thinking about crime and justice…Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible.[776]

[773] ibid 3-4.
[774] Albert Eglash, 'Creative Restitution: Its Roots in Psychiatry, Religion and Law' (1959) 10 Brit. J. Delinq. 114, 114.
[775] The Zehr Institute for Restorative Justice, 'Howard Zehr CV' (*Zehr Institute of Restorative Justice*, 2018) <http://zehr-institute.org/staff/howard-zehr/howard-zehr-cv/> accessed 29 February 2019.
[776] Howard Zehr and Ali Gohar, *Restorative Justice* (Good Books 2003) 32, 39-40.

Restorative justice provides a new way of thinking about the crime through collective action. Zehr advances three central concepts to restorative justice:

> (a) focusing on the harms and consequent needs of the victims, offenders, and communities (families and societies);
> (b) addressing the resultant obligations, or in other words, addressing the harm and causes of the harms to the victims, offenders, and communities (families and societies) using collaborative processes; and
> (c) involving those who have a stake in the situation (offenders, victims, communities; otherwise known as the stakeholders).[777]

How does restorative justice provide a unique understanding of crime and justice? It particularly places the focus on the victims, offenders, and other parties, rather than view crime as a state and offender conflict. His understanding of restorative justice as an alternative 'framework, philosophy or lens' for thinking about crime and justice provides scope for wide interpretation of what restorative justice actually means and the context in which it ought to operate to deal with crimes.

From here, how does Zehr contextualise restorative justice? what is the difference between restorative justice as an instance of punishment or an alternative to punishment?

2.2.1 Restorative Justice as an Alternative to Punishment

Restorative justice as an 'alternative to punishment' means that restorative justice is not punishment and does not fall within the category of punishment. Accordingly, it could translate to one or more of the following:

(a) an informal alternative to punishment or a diversion from prosecution, as a way of dealing with non-criminal conflicts or specific criminal conflicts outside the traditional criminal justice system; and/or
(b) a pre-sentence or post-sentence add on, or in other words, a practice or process applied prior to a sentence, or after a person is sentenced; or
(c) a complete replacement of the traditional criminal justice system or the only viable way to deal with conflicts.

[777] ibid 21, 28, 32-3.

In his early works, notably 'Retributive Justice, Restorative Justice', Zehr views restorative justice as a contrast to retributive justice. He discusses restorative justice in the context of the Old Testament's concept of Shalom, which emphasises 'making things right, of living in peace and harmony with one another in right relationship.'[778] Restoration of relationships should be prioritised over punishment. He argues that one roadblock to implementing restorative justice in practice is the politicised criminal justice system. He states,

> [Make] no mistake: the criminal justice industry is big business, shot through with all kinds of self-interest, and will not be changed easily. Can such a model actually work? …But are there limits? What are they? It is our responsibility to find out….Will [it] be just another alternative [programme], an alternative that becomes [institutionalised], ossified, coopted until it is just another [programme], and perhaps not an alternative at all? Or will [it] be a means of exploring, communicating, embodying an alternative vision? Will it demonstrate that there is another way? Could it even be the beginning of a quiet revolution?[779]

Here, Zehr views restorative justice as a complete alternative to punishment (form (c)). Nevertheless, he acknowledges that his theoretical ideals would be difficult to translate to practice given the 'big business' of the criminal justice industry, hence the application of restorative justice may be limited to institutionalised programmes within the criminal justice system (forms (a)-(b)). As discussed in further detail in Section 2.3, forms (a) and (b) are the predominant ways in which restorative justice applies in practice today (although this does not forgo the possibility of looking at restorative justice in a different way).

These arguments are parallel to Christie's influential article 'Conflicts as Property.'[780] Christie advances a 'lay victim-oriented court' to resolve conflicts, to 'help [restore] the participants' rights to their own conflicts.'[781] He argues that individuals have the right to participate in resolving their conflicts. The process is as follows: the starting point concerns identifying whether a law is broken, and the

[778] Howard Zehr, 'Retributive Justice, Restorative Justice' in MCC U.S. Office of Criminal Justice (ed), *New Perspectives on Crime and Justice: Occasional Papers of the MCC Canada Victim Offender Ministries Program and the MCC U.S. Office of Criminal Justice* (Mennonite Central Committee Office of Criminal Justice 1985) 11.
[779] ibid 14.
[780] Nils Christie, 'Conflicts as Property' (1977) 17 British Journal of Criminology 1.
[781] ibid 1.

individual(s) are responsible for the crime. The court would systematically apply a procedure that considers the victim's account of the crime and other circumstances, whether legally relevant or not, and their views on how it could be resolved. Following that, a judge would impose punishment. After sentencing, a discussion of the offender's options for 'restoring the victim's situation' would take place after understanding the offender's circumstances.[782]

At first instance, Christie advances a very persuasive idea: a 'court' system that centralises the rights of the victim and allows them to communicate the impact of the crime before sentencing. This could be formalised through reforms to the law in relation to the type of evidence that could be admitted, and the process used to admit the evidence. Victim impact statements, for instance, are currently used by courts for some crimes after conviction but before a sentence is imposed, similar to form (b).[783] After a sentence is imposed by a judge, the offender is provided with a chance to discuss their circumstances may offer the chance to resolve the impact of the crime. Community penalties, like education and/or treatment, are alternative ways to dealing with crimes (form (a)); and/or are currently imposed as an additional step after punishment (form (b)).[784] Section 2.3 will evaluate (a) and (b) in more detail.

However, a closer reading of the article reveals Christie's abolitionist views, or in other words, his view of restorative justice as a complete replacement to punishment (form (c)). He states,

> 'Maybe we should not have any criminology. Maybe we should rather abolish institutes, not open them. Maybe the social consequences of criminology are more dubious than we like to think…[Specialising] in conflict resolution is a major enemy…let us reduce specialisation and particularly our dependence on the professionals within the crime control system to the utmost…the ideal is clear; it ought to be a court of equals representing themselves, no judges are needed…should lawyers be admitted to court?... Maybe they should be admitted…where it decided if the man is guilty. I am not sure. Experts are as cancer to any lay body.'[785]

[782] ibid 1,10-11.
[783] Brooks, *Punishment* (n 13) 72.
[784] ibid 73-4; see Section 2.3 for a detailed evaluation of forms (a) and (b).
[785] Christie, 'Conflicts as Property' (n 780) 11.

There are apparent contradictions in Christie's work when his 'court' procedure replaces the traditional criminal justice system. Leaving the issue of resolving criminal 'conflicts' to the lay public, particularly the victim, comes with a risk of an inconsistent sentencing process, where sentences would depend on how vindictive or forgiving the victim is.[786] Dismissing a public criminal justice system because it is the 'enemy,' and viewing experts specialising in conflict resolution as 'cancer to any lay body', is dubious. It is not theoretically nor practically coherent for restorative justice to apply to all types of crimes and criminals: offenders may not wish to take part in the process or plead guilty; and may not be able to meet the victim's long term medical, psychological or financial needs.[787]

For serious crimes like sexual offences and domestic abuse cases, the victim may be harmed if pressured to enter into a restorative justice process without appropriate psychological treatments and counselling, whilst an offender that pled not guilty may also be reluctant to participate or understand the restorative justice process. Although there may be flaws to a public criminal justice system, there are dangers in forgoing independent and impartial judgements and a system that advances processes and sentences in accordance with the rule of law.

2.2.2 Restorative Justice as an Instance of Punishment

In later publications, Zehr changed his views on contextualising restorative justice as an alternative to punishment. He acknowledges that it may be a 'surprise' to those influenced by one of his earlier publications, but there is a potential of collaboration between restorative justice and retributive justice,[788]

> 'Restorative justice is neither a panacea nor necessarily a replacement for the legal system. By no means is it the answer to all situations. Nor is it clear that it should replace the legal system. A restoratively-oriented [legal system] would be needed as a backup and as guardian of basic human rights…on the philosophic or theoretical level, I no longer see restoration as the polar opposite of retribution…[Restorative] justice advocates may dream of a day when justice is fully restorative but whether this is realistic is debatable, at least in the immediate

[786] Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010) 54-55.
[787] Roger Graef, *Why Restorative Justice? Repairing the Harm Caused by Crime* (Calouste Gulbenkian Foundation 2011) 16.
[788] Zehr and Gohar (n 766) 10-1, 60.

> future. More attainable, perhaps, is a time when restorative justice is the norm while some form of the legal or criminal justice system provides the backup or alternative. Attainable, perhaps, is the time when all our approaches to justice are restoratively oriented'[789]

Zehr adopts a broader view of restorative justice – it can work alongside retribution, it can be the main mechanism to respond to crime, or states could enforce laws and respond to crime with a restoratively oriented legal system. In Zehr's proclaimed 'last contribution to a book' on restorative justice in 2019, he welcomed the expansion of the theory and practice of restorative justice, despite potential challenges and pitfalls, and praised its recent inclusion into the law in Colorado in the USA.[790] Although Zehr does not explain how a 'restoratively oriented legal system' would be structured, the idea of restorative justice as a core of a legal justice system, which includes retribution and other penal aims, is compelling.

Another innovative view of restorative justice is its view as an 'incomplete theory of punishment'.[791] Brooks states, 'the idea is that a complete theory of punishment would offer an account applicable to all crimes. The problem is that restorative justice offers us a partial account that is applicable to some crimes, but not all crimes.[792] Brooks defines punishment as a 'response to crime…that must be administered and imposed intentionally by an authority with a legal system, such as the state.'[793] He follows Hart's classification of any theory of punishment, particularly that 'any theory of punishment must first satisfy the definition of punishment. We must then identify the general justifying aim of punishment and how this aim may be achieved through the distribution of punishment.'[794] Correspondingly, restorative justice is imposed as a response to an individual breaking the law or committing a crime, and the state determines whether the restorative justice would apply, and in what form. It is not a 'complete' theory of punishment because it cannot apply to all types of offences and offenders.[795] Brooks argues that this view is consistent with what many restorivists argue. Restorative justice proponents do not state that restorative justice applies to all crimes.

[789] ibid.
[790] Howard Zehr, 'Foreword' in Theo Gavrielides, *Routledge International Handbook of Restorative Justice* (Routledge 2019) 8-9.
[791] Brooks, *Punishment* (n 13) 68.
[792] ibid 67.
[793] ibid 5-6.
[794] ibid 6; See Introduction, section titled Theory of Punishment.
[795] Brooks, *Punishment* (n 13) 67-8.

Restorative justice may not theoretically or practically work for all types of crimes and criminals: offenders may not wish to take part in the process or plead guilty; may not be able to meet the victim's long term medical, psychological or financial needs.[796] For instance, for serious crimes like sexual offences and domestic abuse cases, the victim may be harmed if pressured to enter into a restorative justice process without appropriate psychological treatments and counselling, whilst an offender that pled not guilty may also be reluctant to participate or understand the restorative justice process.

Brooks alternatively advances a 'distinctive approach to restorative justice called punitive restoration.'[797] His first account of punitive restoration in 2012 is persuasive. He states, 'our aim is to achieve rights restoration, but our restorative effort is also punitive; it is a project of punitive restoration. Punitive restoration places burdens on offenders in consultation with other stakeholders in the outcome.'[798]

In 2018, he states:

> My focus on restorative justice will be on approaches used as an alternative to the criminal trial and traditional sentencing by the court…[Punitive restoration] is a single type of approach taking a conference setting where the victim, the offender, their support networks, and some local community members are represented. Punitive restoration is restorative insofar as it aims to achieve the restoration of rights infringed or threatened by criminal offences.[799]

Brooks envisions 'punitive restoration' to be a practice taking the form of a conference. Punitive restoration does not reject imprisonment as a sentence if it advances restoration of the rights violated. Imprisonment could be used in conjunction with 'restorative justice conferences as a common feature of punishments'[800] Gardner understands Brooks' view of punitive restoration as 'an alternative to formal sentencing' where 'hard treatment' is permitted.[801] His view

[796] Graef (n 787).
[797] Thom Brooks, 'Restorative Justice and Punitive Restoration' in Molly Gardner and Michael Weber (eds) *The Ethics of Policing and Imprisonment*, 129-150 (Palgrave Macmillan 2018) 136.
[798] Brooks, *Punishment* (n 13) 197.
[799] Brooks, 'Restorative Justice and Punitive Restoration' (n 165) 131, 136-7.
[800] Brooks, *Punishment* (n 13) 85, 143.
[801] Gardner and Weber (n 797) 5.

centralises instilling public confidence in the criminal justice system and reducing offending.[802]

Zehr and Brooks' views are a stepping stone to an original definition of restorative justice, set out in Section 2.4. The next step is to examine how restorative justice theories have translated into different practices.

2.3 Restorative Justice in Practice

Ashworth states, 'the theory of restorative justice has to a large extent developed through practice and will probably continue to do so.'[803] The variety of restorative justice forms mask the answers to the aims of restorative justice and how these aims could be achieved in practice.[804]

Restorative forms include formal and informal programmes applied in schools, workplaces, prisons, and other settings, to deal with criminal and non-criminal conflicts.[805] Particularly, processes that advance 'restoration' have also been applied in England and Wales and the United States. They include (a) victim impact statements in court to determine appropriate sentences and to judge the impact of the crime on the victim; (b) community penalties like education and training, curfew and residence requirements, and/or treatment; and (c) shame punishment. Shame punishment includes 'disintegrative shaming', where the purpose of sentencing is to humiliate, and 'reintegrative shaming', where the purpose is to restore or change the offender.[806] These processes, as discussed in other chapters, could advance particular approaches to penal aims (rehabilitation, retribution, and deterrence).

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[802] Brooks, 'Restorative Justice and Punitive Restoration' (n 165) 129,130.
[803] Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' 43 British Journal of Criminology 578, 578.
[804] Richards (n 769) 1; Theo Gavrielides, *Human Rights and Restorative Justice* (RJ4ALL Publications 2018) 29; David O'Mahoney and Jonathan Doak, *Reimagining Restorative Justice: Agency and Accountability in the Criminal Justice Process* (Hart Publishing 2017) 1; Daly (n 771) 57; Department of Justice (Canada), 'A Plain Language Guide Bill C-45 – Amendments to the Criminal Code Affecting the Criminal Liability of Organisations' (n 257).
[805] Department of Justice (Canada) (n 257); Graef (n 787) 10.
[806] Brooks, *Punishment* (n 13) 75.

Additionally, restorative justice has been the centre of the '#metoo' movement in 2018, to express dissatisfaction with current laws relating to the possession of firearms, the punishment of juvenile offenders including school shootings and knife crimes, sexual offences committed by celebrities, and marijuana legalisation processes.[807] Restorative justice is defined by its practices, which is highly evident by the rise of 'restorative' movements, often without *specifically articulating* the purpose(s) of the programme, policy, and/or law, and how the purpose(s) ought to be achieved. The implementation of methods parallel to restorative justice could offer a creative and multi-dimensional way of addressing the risks of crime yet may be compromised by a lack of understanding of the theoretical groundings of restorative justice theories.

The section discusses various restorative justice models, focusing on three prominent models: (a) victim-offender mediation, (b) conferencing, and (c) sentencing circles. Variations to victim-offender mediation, conferencing, and circle sentencing exist in practice. These include victim-offender conference, community conferences, shuttle restorative justice, street restorative justice or police-led restorative justice, and neighbourhood justice panels.[808]

2.3.1 Victim-Offender Mediation

Victim-offender mediation, otherwise known as victim-offender conferencing or victim-offender dialogue, is the most common form of restorative justice in Northern America and Europe, including the United States and England and Wales.[809] It can be broadly understood as a process where the victims and offenders collectively discuss the crime and its impact in a safe environment, with the aim of correcting the wrong(s) resulting from the crime.[810]

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[807] See for e.g. Jo Deakin and Laura Bui, 'Violent Crime: Decades of Research Shows Punishing 'Risky' Young People Does Not Work- Here's What to Do' (The Conversation 7 March 2019) < http://theconversation.com/violent-crime-decades-of-research-shows-punishing-risky-young-people-does-not-work-heres-what-does-111143 > accessed 20 March 2019.

[808] Data.Paraliament.uk, 'Written Evidence from the Ministry of Justice' <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/restorative-justice/written/27888.pdf> accessed 30 March 2019.

[809] Estelle Zinsstag, Marlies Teunkens, and Brunilda Pali, 'Conferencing: A Way Forward For Restorative Justice in Europe' (European Forum for Restorative Justice 2011) 41; Shannon M. Silva and Carolyn G. Lambert, 'Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine' (2015) 14 Journal of Policy Practice 77, 79.

[810] Toran Hansen and Mark Umbreit, 'State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence' (2018) 36 Conflict Resolution Quarterly 99, 100.

There is no uniform form to victim-offender mediation programmes. The first form of victim-offender mediation emerged in Canada in 1974, though a programme named Victim Offender Reconciliation Program, later replicated in Indiana in 1978. In England and Wales, victim-offender mediation programmes could be traced to the early 1980s to tackle juvenile and adult offenders (community dispute resolution schemes; police-based reparation schemes; court-based reparation schemes; and victim assistance schemes).[811]

Today, offenders and victims have been referred to mediation programmes by judges, probation officers, victim advocates, prosecutors, defence attorneys, and law enforcement.[812] Victim-offender mediation is used to address a range of offences (from minor assaults to murder) and offenders (juvenile and adult offenders).[813] In 2018, there are more than 300 reported forms of victim-offender mediation programmes in the United States.[814]

In contrast to other restorative justice programmes, victim-offender mediation strictly defines the stakeholders of the offence as 'the victim(s)' and the 'offender(s)'. It thereby focuses on the relationship between the offender and the victim, rather than the crime.[815] It aims to empower the victim(s) and offender(s) to have the opportunity to discuss the crime in a safe environment and reach resolutions (e.g. financial compensation) on how to repair the harm resulting from the crime.[816]

The victim-offender mediation process varies depending on the stage it applies within the criminal justice process and the offence at hand. It primarily includes the following: referral of the case to a facilitator; preparation of the case by the facilitator; the meeting; and preparation of the file following the meeting. First, the mediator, a trained third party, takes steps to ensure that the victims and offenders have the capacity and willingness to participate. Second, the mediator meets

[811] David Miers and Michael Semenchuk, 'Victim-Offender Mediation in England and Wales' in Anna Mestitz and Simona Ghetti (eds) *Victim-Offender Mediation With Youth Offenders in Europe: An Overview and Comparison of 15 Countries* (Springer 2005) 24.
[812] Bazemore and Umbreit (n 810) 2.
[813] Bazemore and Umbreit (n 810) 2, 6; Sarah S Baele, 'Still Tough on Crime? Prospects for Restorative Justice in the United States' Utah Law Review 413, 421; Graef (n 787) 9, 43.
[814] Toran Hansen and Mark Umbreit, 'State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence' (2018) 36 Conflict Resolution Quarterly 99, 100; O'Mahoney and Doak (n 804) 5.
[815] Toran Hansen and Mark Umbreit, 'State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence' (2018) 36 Conflict Resolution Quarterly 99, 100.
[816] Zinsstag et al. (n 809) 42.

separately with the offenders and victims to explain the process and the expectations of the programme. Third, the mediation session(s) take place, where the victims and offenders, with the support of the mediator, explain their views of the events in question and ask questions. The victim will often have the chance to communicate the financial, physical, and/or emotional impact of the crime on them, acquire answers about the crime and offender, and are directly involved in constructing a restitution plan for the offender, if relevant.[817]

The process is dialogue driven (not settlement driven) and focuses on encouraging the victims and offenders to share their narratives, to maximise the potential for 'healing' following a crime and reaching an agreement on how to remedy the harm done. This could take place through a face-face meeting or 'shuttle type interactions' through the mediator.[818] Direct apologies are a common outcome of victim-offender mediations in England and Wales and the United States, but an agreement on next steps to be taken to resolve the impact of the offence is an important part of the process in certain cases.[819] Lastly, the mediator contacts the victim and offender to ensure the agreements reached in the mediation, if any, are being carried out until the process is finalised.[820]

2.3.2 Conferencing

Conferencing is another restorative justice model encompassing a number of practices, including family group conferencing, youth justice conferencing, and police-led conferencing.[821] Although there are variations within each model, conferencing generally includes more parties in the process.[822]

One notable model is a 'family group conference', otherwise known as family group decision making, which developed in New Zealand through Maori whanau

[817] Bazemore and Umbreit (n 812).
[818] O'Mahoney and Doak (n 804) 5; Anna Rypi, 'The Feeling Rules of Victim Offender Mediation' 7 Int. J. Work Organisation and Emotion 83, 83; Toran Hansen and Mark Umbreit, 'State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence' (2018) 36 Conflict Resolution Quarterly 99, 102.
[819] Greg Mantle, Darrell Fox, and Mandeep K Dhami, 'Restorative Justice and Three Individual Theories of Crime' Internet Journal of Criminology 1, 2; Zinsstag et al. (n 809) 41.
[820] Toran Hansen and Mark Umbreit, 'State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence' (2018) 36 Conflict Resolution Quarterly 99, 102; Mantle et al. (n 819)11; Zinsstag et al. (n 809) 43.
[821] Zinsstag et al. (n 809) 47.
[822] ibid 46.

(extended family) meetings, and family therapy meetings.[823] The Children, Young Persons and Their Families Act in 1989 was consequently passed to deal with juvenile offenders through restorative processes.[824] Under this model, stakeholders in family group conferencing extend to family members and other third parties, including lawyers, social care workers, and any other individuals requested by the family members.[825] It is a statutory restorative justice disposal system, directed by the court before or after hearing the offence, reflecting forms (a) and (b) above.[826] The Youth Court must refer the cases to a family group conference unless it is a murder or manslaughter offence.[827] The structure of the family group conference varies, and the outcomes may include making decisions, recommendations, and plans on resolving conflicts as it sees fit. The decision, recommendation, and/or plan is recorded, even where no agreement is reached, and made available to all the stakeholders. An official copy is left at the relevant government department.[828] An impartial facilitator usually ensures that everyone with a stake of the crime is satisfied with the outcome of the conference.[829]

Variations to the model have been adopted in many jurisdictions, including the United States and England and Wales. Similar to victim-offender mediation, flexibility is needed to tailor for the specific needs of the stakeholders, and to deal with the specific crime. Nevertheless, this has blurred the differences between family group conferencing and other forms of restorative justice.[830]

In England and Wales, conferences are often led by the police and organised by a trained facilitator from the Restorative Justice Council.[831] However, the degree of involvement of the victim(s), victim supporters, offender(s), and offender supporters are different in each case. Offenders could be accompanied by legal representation but are required to personally speak for themselves. The aim of the conference is to

[823] ibid 4.
[824] International Institute for Restorative Practices, 'Defining Restorative' (International Institute for Restorative Practices) <https://www.iirp.edu/defining-restorative/5-3-family-group-conference-fgc-or-family-group-decision-making-fgdm> accessed 1 April 2019.
[825] The Children, Young Persons and Their Families Act in 1989, section 22(1) (NZ); International Institute for Restorative Practices, 'Defining Restorative' (International Institute for Restorative Practices) <https://www.iirp.edu/defining-restorative/5-3-family-group-conference-fgc-or-family-group-decision-making-fgdm> accessed 1 April 2019.
[826] The Children, Young Persons and Their Families Act in 1989, sections 281, 281A-B, 282, 283 (NZ)
[827] ibid section 456A (NZ)
[828] ibid section 33 (NZ)
[829] Brooks, Punishment (n 13) 65.
[830] O'Mahoney and Doak (n 804) 151.
[831] Zinsstag et al. (n 809) 46.

reach an agreement, usually through a signed contract, on how the victims and offenders will be restored. This could include orders targeting the risks of the offence, like mental health or anger management issues; payment of compensation and/or community service; and/or providing an opportunity for the offenders to express remorse to the victims. Fulfilling these conditions would result in the offender being 'restored'. Failure to abide by the conditions of the agreement may result in drafting a less favourable contract, and/or the offenders going to trial and being imprisoned.[832]

The Northern Ireland youth conferencing model is a 'mainstream' model of restorative justice for juvenile offending, hence worthy of discussion.[833] The Justice (Northern Ireland) Act 2002 introduced Victim Information Schemes in probation and prison, and importantly, a restorative justice youth conference scheme. When a case is referred to the Public Prosecution Service, they determine whether the offender will be prosecuted, diverted from prosecution where he admits to the offence and agrees to the diversion, or whether the case ought to be dismissed. If the case is diverted, the offender may receive an 'informed warning, a restorative caution or a diversionary youth conference.'[834] which can be ordered by the court before or after sentencing ('court-ordered youth conferences'), or diverted by the police or Public Prosecution Service as an alternative to the court process.[835] Importantly, youth conference orders issued by the Youth Court are sentences by the court and constitute a criminal conviction.[836] Nevertheless, the court may not issue a youth

[832] Brooks, Punishment (n 13) 66.
[833] O'Mahoney and Doak (n 804) 151.
[834] The Criminal Justice (Children) (Northern Ireland) Order 1998, sections 10A, 24, 33A; John Graham, Stella Perrott, and Kathleen Marshall, 'A Review of the Youth Justice System in Northern Ireland' (Restorativejustice.org.uk) <https://restorativejustice.org.uk/sites/default/files/resources/files/Report%20of%20the%20Youth%20Justice%20System%20in%20Northern%20Ireland.pdf> accessed 30 March 2019, 25.
[835] The Criminal Justice (Children) (Northern Ireland) Order 1998, sections 10A, 33A; NiDirect Government Services, 'Youth Justice' <https://www.nidirect.gov.uk/articles/youth-justice> accessed 30 March 2019.
[836] Public Prosecution Service for Northern Ireland, 'Guidelines for the Use of Diversionary Disposals' (Public Prosecution Service, November 2018) 13 <https://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Public%20Consultations/Guidelines%20for%20the%20Use%20of%20Diversionary%20Disposals%20(Draft%20for%20Consultation....pdf> accessed 30 March 2019; John Graham, Stella Perrott, and Kathleen Marshall, 'A Review of the Youth Justice System in Northern Ireland' (Restorativejustice.org.uk) <https://restorativejustice.org.uk/sites/default/files/resources/files/Report%20of%20the%20Youth%20Justice%20System%20in%20Northern%20Ireland.pdf> accessed 30 March 2019, 25.

justice conference order without the consent of the offender, making it a voluntary and consensual process.[837]

Youth conference meetings are held to '[consider] how the child ought to be dealt with for the offence.'[838] They aim to control youth offending and encourage children to understand the impacts of a crime and take accountability for their actions.[839] The required participants are a youth-conference co-ordinator; chairing the meeting(s); the child; a police officer; and the child's parent, guardian, social worker, or a responsible adult over the age of 18. Other eligible participants are the victim or an individual representing the victim if the victim is not an individual; a legal representative of the child; and the supervising officer if a community or youth conference order is in force; and any other persons allowed by the youth conference coordinator to participate.[840] The coordinator proposes a 'youth conference plan' after the conference is completed, where an order for one or more of the following are issued: an apology, a reparation order, a compensation order, submission to an adult, community service, treatment, order to report location and/or conduct for a period of time, and/or an order to participate in educational or training activities. The plan has to be approved by the District Judge.[841]

2.3.3 Sentencing Circles

Sentencing circles broadly aim to resolve conflicts and restore order between the offender, victim, and the community.[842] They emphasise 'support and accountability' through the inclusion of all the stakeholders to have a say in the sentencing of the offender, particularly through identifying the necessary steps to assist in healing all the impacted parties and prevent future crime by the offender,

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[837] Public Prosecution Service for Northern Ireland, 'Guidelines for the Use of Diversionary Disposals' (Public Prosecution Service, November 2018) 13-4 <https://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Public%20Consultations/Guidelines%20for%20the%20Use%20of%20Diversionary%20Disposals%20(Draft%20for%20Consultation....pdf> accessed 30 March 2019

[838] The Criminal Justice (Children) (Northern Ireland) Order 1998, 3A (1)

[839] The Criminal Justice (Children) (Northern Ireland) Order 1998, 53(1)-(2)

[840] The Criminal Justice (Children) (Northern Ireland) Order 1998, section 3A (2)-(3).

[841] The Criminal Justice (Children) (Northern Ireland) Order 1998, section 3C; John Graham, Stella Perrott, and Kathleen Marshall, 'A Review of the Youth Justice System in Northern Ireland' (Restorativejustice.org.uk) <https://restorativejustice.org.uk/sites/default/files/resources/files/Report%20of%20the%20Youth%20Justice%20System%20in%20Northern%20Ireland.pdf> accessed 30 March 2019, 25.

[842] Zinsstag et al. (n 809) 62; Paul McCold and Ted Wachtel, 'In Pursuit of Paradigm: A Theory of Restorative Justice' (*International Institute for Restorative Practices*, 2003) 8 <http://www.iirp.edu/pdf/paradigm.pdf> accessed 15 March 2019.

and reaching a consensus on a sentencing plan that would be beneficial to all the stakeholders. In comparison to other restorative justice models, the stakeholders of the offence are a broader group of individuals, beyond the victim(s), offender(s), and their families.[843] The stakeholders could include friends of the victim and offenders, justice social service personnel, lawyers, judges, police offenders, and/or residents in the community. Follow up circles may be arranged to monitor the progress of the offender in achieving 'restoration', however, defined by the conference.[844]

Sentencing circles emerged in the early 1990s by Canadian native communities. The first case, *R v Moses*,[845] involved a repeat-offender pleading guilty of carrying a weapon with the purpose of assaulting a police officer. Sentencing was based on four factors: 'protection of the public, deterrence (general and specific), rehabilitation, and denunciation or retribution.'[846] The judge chose to depart from these factors and invited the family and friends of the offender to gain an understanding of the wishes of the community in dealing with this particular habitual offender. Rearranging the courtroom to a circle, he called community members, prosecutor and defence counsel, the victim, the offender, and their families, to participate in determining the sentence. Each shared their role in the process, their perspective on the problem, and their recommendation for a solution. The court order was consistent with the wishes of the stakeholders. The order was a two-year probation that included referral to alcohol treatment.[847]

Today, the use of sentencing circles is common in Canada and the United States, particularly by Native Americans and First Nations People, and are present as 'alternative measures' provisions of the Criminal Code.[848] There is no uniform structure to sentencing circles. The Founder of the International Institute for Restorative Practices states that the structure of restorative justice may be sequential or non-sequential. Sequential circles are guided by a facilitator to ask different questions to different participants in the meeting, each speaking in turn. Non-consequential circles are less structured, and the facilitator only has a role of recording the inputs and decisions emerging from the meeting.[849]

[843] Zinsstag et al. (n 809) 62.
[844] Taxman et al. (n 638).
[845] (1992), 71 C.C.C. (3d) 347 (Y. Terr. Ct).
[846] The Criminal Code R.S.C. 1985, section 718 (Canada).
[847] (1992), 71 C.C.C. (3d) 347, 366-372 (Y. Terr. Ct).
[848] The Criminal Code R.S.C. 1985, section 718 (Canada).
[849] McCold and Wachtel (n 842).

2.3.4 Restorative Justice Models and the Criminal Justice Process

Building on the discussion of the contextualisation of restorative justice in academic literature, restorative justice has been used as an alternative to punishment in practice (England and Wales and the United States), particularly as,

> (a) an informal alternative to punishment or a diversion from prosecution, as a way of dealing with non-criminal conflicts or specific criminal conflicts outside the traditional criminal justice system; and/or
> (b) a pre-sentence or post-sentence add on, or in other words, a practice or process applied prior to a sentence, or after a person is sentenced.

Gavrielides argues that 'UK restorative justice has historically been practised in the shadows of the law and through the community.'[850] This changed when The Criminal Justice Act 2003, amending Section 1 of the Powers of Criminal Courts (Sentencing) Act 2000, gave the courts the power to defer a sentence to require the offender and victims to complete 'restorative justice requirements.' The victim is defined as 'a victim of, or other person affected by, the offending concerned.'[851] This is a requirement for the offender and one or more of the victims to participate in an activity that 'aims to maximise the offender's awareness of the impact of the offending concerned on the victims, and …which gives an opportunity to a victim or victims to talk about, or by other means express experience of, the offending and its impact.'[852] The restorative justice requirements are implemented in accordance with official guidance issues on that activity, and the requirement will only be implemented if the participants' consent.[853] Additionally, the Code of Practice for Victims of Crime, established by the Domestic Violence, Crime and Victims Act 2004, provides victims with the right to information about restorative justice schemes.[854]

In the United States, restorative justice programmes also developed through community practices, like Native American practices. Although restorative justice is

[850] Theo Gavrielides, 'Victims and the Restorative Justice Ambition: A London Case Study of Potentials, Assumptions, and Realities' (2018) 21 Contemporary Justice Review 254, 256.
[851] The Powers of Criminal Courts (Sentencing) Act 2000, section 1, 1ZA.
[852] ibid.
[853] ibid.
[854] Ministry of Justice, 'Code of Practice for Victims of Crime' (Crown 2015) 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF> accessed 30 March 2019.

not used at the federal level, many states have adopted policies and laws 'to advance their commitment to restorative justice and justice reforms.'[855] Seventy percent of states use the term 'restorative justice' to describe alternative programmes and practices.[856] For instance, Article 2 of the Colorado Revised Statutes states,

> (1) … [The] intent of this article is to protect, restore, and improve the public safety by creating a system of juvenile justice that will appropriately sanction juveniles who violate the law and, in certain cases, will also provide the opportunity to bring together affected victims, the community, and juvenile offenders for restorative purposes…
> (2) The general assembly finds that the juvenile justice system should seek to repair such harm and that victims and communities should be provided with the opportunity to elect to participate actively in a restorative process that would hold the juvenile offender accountable for his or her offence.[857]

Colorado has adopted a structured formal approach to restorative justice; it incorporated restorative justice into the law to deal with juvenile offenders. This is advantageous given the definitional ambiguities to restorative justice in theory and practice. A number of states only refer to 'restorative justice' in the code or legislation without specifying how it would translate into practice.[858] Similar to England and Wales, restorative justice measures exist primarily as a diversionary tool for adult and juvenile crime but have been applied as a post-sentence measure or as part of a sentence for crimes committed by adults.[859]

Could it be argued that the operation of restorative justice as an alternative to punishment in practice makes the interpretation of restorative justice 'as a broad term about punishment' practically incoherent?

Marshall argues that there is scope for the implementation of restorative justice at the federal level through The Crime Victim Rights Act 2004 because it gives victims the right to be 'reasonably heard in a public proceeding,'[860] which if interpreted

[855] Sandra Pavelka, 'Restorative. Justice in the States: An Analysis of Statutory Legislation and Policy' (2016) 2 Justice Policy Journal 1, 4.
[856] Silva and Lambert (n 809) 85.
[857] Colorado Revised Statutes, Title 18, Article 2, Part 1, section 19-2-102 (2016) (United States)
[858] Silva and Lambert (n 809) 88.
[859] ibid 89; Pavelka (n 855) 8,11.
[860] United States Code, Title 18, section 3771(a)(4) (2009) (United States).

broadly, ought to allow victim participation in the sentencing process, at a federal level.[861]

The United Nations further encourages the incorporation of restorative justice. It outlines the principles of restorative justice programmes in criminal matters, as follows,

> 1. "Restorative justice programme" means any programme that uses restorative processes or aims to achieve restorative outcomes.
> 2. "Restorative outcome" means an agreement reached as the result of a restorative process. Examples of restorative outcomes include restitution, community service and any other programme or response designed to accomplish reparation of the victim and community, and reintegration of the victim and/or the offender.
> 3. "Restorative process" means any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of the restorative process include mediation, conferencing and sentencing circles.
> 4. "Parties" means the victim, the offender and any other individuals or community members affected by a crime who may be involved in a restorative justice programme.
> 5. "Facilitator" means a fair and impartial third party whose role is to facilitate the participation of victims and offenders in an encounter programme…
> 6. Restorative justice programmes should be generally available at all stages of the criminal justice process…
> 21. There should be regular consultation between criminal justice authorities and administrators of restorative justice programmes to develop a common understanding of restorative processes and outcomes, to increase the extent to which restorative programmes are used and to explore ways in which restorative approaches might be incorporated into criminal justice practices.[862]

[861] Jessica M. Marshall, '(I Can't Get No) Satisfaction: Using Restorative Justice to Satisfy Victim's Rights' (2014) 15 Cardozo J. Conflict Resol. 568, 582,595; Katie L. Moron, 'Restorative Justice: A Look at Victim Offender Mediation Programs' (2017) 4 21st Century Social Justice 1, 1.
[862] UNSC, 'Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters' (27 July 2000) U.N. Doc. E/2000/INF/2/Add.2, Annex.

The United Nations' broad definition of restorative justice as a programme that uses restorative 'processes' or 'aims', and could apply at any stage in the criminal justice process, strengthens the view of restorative justice as a broad term that could be incorporated into a theory of punishment. Restorative justice can be a process that involves the stakeholders of the offence, or a goal or outcome of a model based on deterrence, retribution, and/or rehabilitation. The ability of restorative justice to apply at all stages within the criminal justice means that it could also be conceptualised as an instance of punishment, to be formalised or incorporated into legislation.

Having discussed a wide range of views on restorative justice in literature and practice, and advanced proposals that support restorative justice as an instance of punishment, the next step is to build on these propositions to convey the author's understanding of restorative justice in more detail.

2.4 Restorative Justice Defined

Restorative justice is a conception of justice, and justice can be reached through punishment. It is best understood as a broad term describing a conglomerate of principles that provide a multi-dimensional lens for understanding the justifying aims of punishment and how punishment ought to be distributed. Restorative justice can be an instance of punishment because it provides a well-rounded understanding of crime and punishment.

The starting point lies in recognising that the relationship between the justification of punishment and the distribution of punishment is dependent. One informs the understanding of the other. Restorative justice is not necessarily an 'incomplete theory of punishment'[863] because it informs one's understanding of the causes and impacts of crime and punishment. In other words, it offers a broader understanding of crime and punishment, where stakeholder interests ought to be taken into account.

Restorative justice provides a multi-dimensional understanding of crime and punishment – it seeks to understand and take into account the causes of crime, the impact of a crime, and how the harm resulting from a crime can be remedied.

[863] See Brooks, *Punishment* (n 13) 68.

This has an impact on the liability standards set by the law (answering the questions of 'what to punish?' and 'whom to punish?') and sentencing processes and practices ('how do we prosecute offenders?' and 'what punishment should be imposed?'). Restorative justice ought not to be reduced to a single type of approach taking a conference setting.[864] Restorative justice offers a new understanding of the justification of punishment and how it ought to be distributed, and the latter can take many forms.

As to the distribution of punishment, one ought to take into account the process of sentencing the company and the amount of punishment it will incur. The focus is on resolving the conflict resulting from the crime, which is a broader view than simply dealing with the offender.

Some may argue that this view goes against the 'spirit of restorative justice.' In response, it may be worth considering Aersten's view on restorative justice in 2018,

> [Restorative] justice is a field of ongoing development, both in theory and practice, which does not need one uniform definition of its approach that is applicable worldwide and for all types of crime…restorative justice cannot be reduced to its well-known models of victim-offender mediation, conferencing and peacemaking.'[865]

The definition of restorative justice should not be reduced to a 'practice' or a model like victim-offender mediation, conferencing, or circle sentencing. Current practices predominantly apply restorative justice as an informal alternative to punishment or as a step prior to or after punishment. This contextualises restorative justice as an alternative to punishment, yet utilises it within a framework based on achieving other penal aims. This shows potential for further incorporation of restorative justice within a theory of punishment that aims to achieve different aims.[866] In Northern Ireland, youth justice conferencing orders afford offenders a criminal conviction. This aligns with the view of restorative justice as an instance of punishment. The principles of restorative justice encourage implementing policies, laws, and/or

[864] Brooks, 'Restorative Justice and Punitive Restoration' (n 165) 131, 136-7.
[865] Ivo Aertsen, 'Restorative Justice For Victims of Corporate Violence' in Gabrio Forti, Claudia Mazzugato, Arianna Visconti, and Stefania Giavazzi (eds), *Victims and Companies: Legal Challenges and Empirical Findings* (Wolters Kluwer 2018) 243.
[866] Theo Gavrielides, 'Restorative Practices: From the Early Societies to the 1970s' (2011) Internet Journal of Criminology 1, 2.

processes (including liability standards and sentencing practices) that identify and address the needs of the stakeholders.

It may also be worth considering that this conception of restorative justice does not completely deviate from existent descriptions of restorative justice in literature. First, Gavrielides, O'Mahoney and Doak, and Maruna have described restorative justice as a 'theory of justice that gravitates around the core notion of restoration.'[867] Justice could be attained through punishment. Second, Roger and Miller have defined restorative justice as 'a *broad term* that encapsulates an alternative philosophy for the administration of justice and entails a wide range of practices and [programmes].'[868] An alternative philosophy for the administration of justice could incorporate 'restoratively-oriented' sentencing practices, set liability standards and sentencing practices to achieve restoration in short or long term, depending on the case and offender. More importantly and lastly, Karp and Frank further describe restorative justice as a 'philosophy of punishment that focuses on stakeholder dialogue and efforts toward reparation and reconciliation as a response to the harm caused by crime and misconduct.'[869] Restorative justice does not equate to penal abolition.

The following principles of restorative justice should be adopted: restoration; voluntarism; neutrality; safety; accessibility; and respect.[870] Restoration should be an aim to be achieved within a law, process, and/or practice, resulting in a restoratively oriented law, process, and/or practice. A process or law could aim to achieve the ultimate goal of restoration, even if there is recognition that not all stakeholders wish to be 'restored'. If restorative justice is applied through a programme, participation ought to be voluntary. To achieve restoration, laws, processes, and practices should be fair and non-discriminatory, afford protection and a safe environment for all stakeholders to be given the opportunity to participate; and be respectful to the dignity of all the stakeholders.[871] On this basis, the principles of restorative justice could also be translated into programmes that act as informal

[867] ibid; Shadd Maruna, 'The Role of Wounded Healing in Restorative Justice: An Appreciation of Albert Eglash' (2014) 2 Restorative Justice: An International Journal 9,9; O'Mahoney and Doak (n 804) 1.
[868] Rachel Rogers and Holly Miller, 'Restorative Justice' in Mathieu Deflem (ed), *The Handbook of Social Control* (Wiley & Sons Ltd 2019) 167.
[869] David Karp and Olivia Frank, 'Anxiously Awaiting the Future of Restorative Justice in the United States' (2016) 11 Victims & Offenders 50, 50.
[870] Restorative Justice Council (n 762).
[871] ibid.

alternatives or conducted before or after sentencing. This does not forgo the understanding of restorative justice as punishment; the existence of restorative justice models can fit within a restoratively-oriented legislative framework.

3 Evaluating Restorative Justice

The section evaluates the definition and conceptualisation of restorative justice advanced in in Section 2.4, particularly in relation to the principles of accessibility, voluntarism, neutrality, respect and restoration.

3.1 Accessibility, Voluntariness, Neutrality, and Respect: Identifying and Involving Stakeholders

Involving the stakeholders is a unique feature of restorative justice, yet defining what counts as a stakeholder is a major challenge to restorative justice's legitimacy.

First, all approaches to restorative justice distinctively 'provide new avenues for incorporating a greater public voice in sentencing.'[872] Looking at the current implementation of restorative justice principles in practice, studies on victim-offender mediation report high levels of satisfaction for offenders and victims and are consistent across cultures and offences.[873] A review of research on restorative justice in comparison to conventional criminal concluded that it has worked more effectively with serious crimes.[874] Sherman states,

> [It has] substantially reduced repeat offending for some but not all offenders; it doubled the offences brought to justice; reduced crime victims' post-traumatic stress symptoms and related costs; provided both victims and offenders with more satisfaction with justice; reduced crime victims' desire for violent revenge against their offenders; and reduced costs of criminal justice.[875]

The listed benefits evidence a greater need for considering the interests of stakeholders. Restorative justice advantageously includes stakeholders in the

[872] Thom Brooks, 'Stakeholder Sentencing' (n 32) 1.
[873] William Bradshaw and David Roseborough, 'Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism.' (2005) 69 Federal Probation 15, 15.
[874] Lawrence W. Sherman, Heather Strang, Geoffrey Barnes, Caroline M. Angel, Dorothy Newbury-Birch, Daniel J. Woods, and Charlotte Gill, 'Restorative Justice: The Evidence' (The Smith Institute 2007) 5.
[875] ibid 4.

criminal justice system, which may contribute to improving public confidence.[876] Nevertheless, one ought to acknowledge that empirical studies have suggested that the evidence is limited with regards to the consistent effectiveness of restorative justice.[877] There are mixed empirical results on restorative justice programmes, especially with regards to re-offending. Moreover, empirical evidence suggests that restorative justice helps victims more than it helps offenders because it reduces the victim to fear, post-traumatic stress symptoms, victim anger, vengefulness, victim beliefs that victim rights have been violated; and increases victim feelings of personal safety.[878] Studies on sentencing circles were positive but with no clear results on recidivism rates.[879] A study by Hayes concluded that conducting youth conferences has high levels of offender and victim satisfaction, yet there are mixed results regarding reoffending.[880]

Does this diminish the attractiveness of involving the stakeholders in the criminal justice process? Looking back at the definition of restorative justice may help address this challenge. These restorative justice programmes use different processes and protocols, apply in different settings, and manage dialogues differently. These mixed empirical results may be due to the lack of agreement on what restorative justice theory encompasses and does not encompass, which makes measuring the consistent effectiveness of restorative justice programmes difficult.[881] For instance, McCold and Wachtel state that the measures of restorative justice should include '(1) the [percentage] of victims and offenders expressing satisfaction with the way their cases [were] handled, (2) the [percentage] of victims and offenders who rate their experience as fair and (3) the balance of ratings between victims and offenders.'[882] They do not include the essential variable of recidivism as a measure of the effectiveness of restorative justice programmes.[883] An appropriate comparison of all these studies needs to consider the methodologies and elements of effectiveness used by all these studies. As Brooks states, 'the structure by which restorative conference participants agree to contract with offenders is purposefully vague but within a clear

[876] Brooks, *Punishment* (n 13) 71.
[877] John Braithwaite, 'Restorative Justice and Responsive Regulation: The Question of Evidence' (2016) RegNet Research Papers: Australian National University 2016 No. 51 (Revised version of 2014 No. 51) 1, 18.
[878] ibid 7.
[879] Bradshaw and Roseborough (n 873).
[880] Hennessey Hayes, 'Assessing Reoffending in Restorative Justice Conferences' (2005) 38 Australian and New Zealand Journal of Criminology 77, 96-7.
[881] Bradshaw and Roseborough (n 873) 16.
[882] ibid.
[883] ibid.

framework.'[884] Flexibility is needed to address the needs of different groups and is viewed as a strength of restorative justice given that restoration is tailored to the specific situation.[885]

Second, applying the principles of 'neutrality' and 'respect' are essential to achieving the ultimate goal of restoration. However, Ashworth argues that incorporating restorative justice in the criminal justice process may violate the rule of law and the principles of independent and impartial judgement.[886] Ashworth argues that the principle of proportionality may not be as important to a criminal justice process based on restorative justice theories.[887] Nevertheless, respect, neutrality, and impartiality are central to restorative justice. Restorative justice theories emphasise centralising the rights of stakeholders, because that may help the offender understand the impact of their criminal acts. Restorative justice recognises and applies 'proportionality'. This may be communicated in different ways depending on the restoratively oriented-law, process, or programme.

Third, as established in Section 2, there are different approaches to restorative justice in theory and practice, resulting in different definitions and interpretations of 'stakeholders'. Are the differing definitions of a stakeholder an advantageous feature of restorative justice or a hindrance to achieving the goal of restoration?

Wichtel argues that the question of what counts as a stakeholder 'is more oblique within restorative justice.'[888] He identifies three groups of stakeholders: the victims, the offenders, and the community.[889] The primary stakeholders are the victim(s), offender(s), and the families. The secondary stakeholders are neighbours and officials. The primary stakeholders incur direct harm and have specific needs, requiring an active response. The secondary stakeholders incur indirect harm and have aggregate needs, requiring a supportive response.[890] Wachtel draws a distinction between restorative justice and restorative practices, with restorative

[884] Brooks, *Punishment* (n 13) 66.
[885] ibid 79.
[886] ibid 72.
[887] Ashworth and Redmayne (n 786) 23.
[888] William Wood, 'Victims as Stakeholders: Research from a Juvenile Court on the Changing Roles of Victims in Restorative Justice' (2013) 13 Journal of Western Society of Criminology 1, 6.
[889] Ted Wachtel, 'Defining Restorative' (*IIRP Graduate School*, 2013) 5 <http://www.kipp.org/wp-content/uploads/2016/11/Principles_and_Practices_of_Restorative_Justice_in_Schools_Defining_Restorative.pdf> accessed 15 March 2019.
[890] McCold and Wachtel (n 842).

justice being a subset of restorative practices.[891] The extent of the involvement of stakeholders determines whether a practice is or is not restorative.

O'Mahoney and Doak agree with McCold and Wachtel in drawing a distinction between 'restorative justice' and 'restorative practice.' Under this view, the former involves all the primary stakeholders, whilst the latter 'falls short of the restorative ideal.'[892] They argue that restorative justice meets 'all the core elements of restorative justice' as defined by Marshall. Marshall defines restorative justice as a 'process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.'[893]

There is no benefit to distinguishing between 'restorative justice' and 'restorative practices' and stating that some practices fall short of the restorative ideal. Looking back at the definition of restorative justice in section 2.4, restorative practices are an illustration of how restorative justice plays out in practice. The impact of a crime on a stakeholder is different in each case and cannot be resolved through a defining a universal set of stakeholders for all cases. A strict interpretation of a stakeholder would limit the stakeholders to the victims and offenders, whilst a broad interpretation of stakeholders would take into account the interests of the community at large. Restorative practices are one-way restorative justice has been applied in practice, not vice versa. The context would define who the stakeholders are. A process of defining who the stakeholders are in each case, through national guidelines, is the way forward. This already exists in practice. In Northern Ireland, the Youth Conference Coordinator has the discretion to allow certain parties to participate in the youth conference meeting.[894] Different restorative justice programmes have defined stakeholders differently to target the specific type of crime and criminal.

Restorative justice provides that crime impacts different groups. The law should take account of that. The criminal justice system should also implement processes that take account of the rights of different individuals who are impacted by the crime.[895] Guidelines could be developed to identify primary, secondary, and tertiary

[891] ibid.
[892] O'Mahoney and Doak (n 804) 9.
[893] Tony Marshall, *Restorative Justice: An Overview* (Home Office 1999) 5.
[894] The Criminal Justice (Children) (Northern Ireland) Order 1998, 53(1)-(2) (NZ).
[895] O'Mahoney and Doak (n 804) 9.

stakeholders. Not all these groups of stakeholders may be present in all cases. However, an understanding that there is a possibility that a crime may impact a wider group of individuals is in itself influential; a crime is moved from a state against a defendant conflict to a conflict impacting the victim and other parties. Formalising this idea and aiming to draw laws, policies, and processes to restore the rights of those impacted is advantageous.

Fourth, when viewing restorative justice as an instance of punishment, implementing processes, policies, and laws to account for the rights of further parties assumes that stakeholders have confidence in the criminal justice system, and that all parties are willing to participate in the process, have parallel interests, and have knowledge of the appropriate procedures and direction of the criminal justice system. The same argument is advanced when restorative justice is viewed as an alternative to punishment. Referring to forms (a), (b), and (c) identified in section 2.1, viewing restorative justice as a complete replacement of the punishment model (form (c)) means that it requires a unified view and full confidence of a system that resolves conflicts outside 'a punishment-based model'. Victims in some cases may agree to participate in the process of restoration. Even if restorative justice is interpreted as forms (a) and (b), offenders may agree to engage in restorative justice programmes to avoid punishment. They may not always admit their responsibility and guilt, which are two conditions that are central to achieving restoration. Ashworth states,

> [If] the broad aim is to restore the 'communities affected by the crime'… as well as the victim and the victim's family, this will usually mean a geographical community; but where an offence targets a victim because of race, religion, sexual orientation, etc., that will point to a different community that needs to be restored.[896]

Members of one community may have conflicting interests. Achieving restoration with conflicting interests is difficult. In practice, there may not be a conflict between the interests of the victims and the community. If there is, guidelines could be adopted where experts are appointed to collect information about the stakeholders' interests and develop, and enforce guidelines where a balance between all these interests could be made, to ensure that the restorative justice principle of neutrality is met.[897]

[896] Ashworth, 'Responsibilities, Rights and Restorative Justice' (n 803) 583.
[897] Brooks, *Punishment* (Routledge 2012) 79.

Overall, the core elements of restorative justice emphasise involving all the relevant parties of the offence to discuss the offence and find solutions that will remedy the harms resulting from the offence. The decision of how to resolve the conflict is carried out by lay individuals and legal actors.[898] Restoration could be the ultimate aim to be achieved from a criminal process, law, or programme (a case disposal programme implemented in response to a crime).

3.2 Achieving Restoration: Restorative justice and Other Penal Aims

As an instance of punishment, restorative justice is a separate idea from deterrence, retribution, and rehabilitation, but is essential to a comprehensive theory of punishment that advances deterrence, retribution, and/or rehabilitation. The subsection evaluates the advantages and disadvantages of viewing restorative justice as distinct from rehabilitation, and how restorative could work alongside retribution, deterrence, and/or rehabilitation.

Is restoration 'rehabilitation by another name'?[899] Raynor and Robinson discuss rehabilitation theories of punishment that aim to involve the offender in the community through the criminal justice process. They state, '[rehabilitation] should not be seen simply as meeting offenders' needs or correcting their deficits, but as harnessing and developing their strengths and assets.'[900] Assisting the offenders through focusing on their strengths will rehabilitate them in the short term, which in the long term, helps reintegrate the offenders back into the community. The 'strengths-based' approach advocated justifies the aim of punishment as enabling the offender to contribute to the community as needed.[901]

Additionally, Eglash views restorative justice as a technique to achieve 'creative restitution,' understood broadly as an instance of rehabilitative punishment.[902] He explains creative restitution a 'correctional technique in aid in the rehabilitation of criminal offenders…found in such disciplines [like] psychoanalysis, religion and

[898] Daly (n 771) 55-6.
[899] Raynor and Robinson (n 597) 29.
[900] ibid.
[901] ibid.
[902] Albert Eglash, 'Creative Restitution: A Broader Meaning for An Old Term' (1958) 48 The Journal of Criminal Law 619, 620; Albert Eglash, 'Beyond Restitution: Creative Restitution' in Joe Hudson and Burt Galaway (eds), *Restitution in Criminal Justice* (Lexington Books 1977) 91.

law, but with some differences in meaning.'[903] In practice, it can be accomplished when the offenders go 'beyond simple repair, by offering to resituate despite punishment, or by helping others like himself.'[904] It can aid in repairing and restoring the harm between the offender and the victim, by helping the offender make amends to the harm done.[905] Therefore, centralising the rights of the defendants and how they could be reintegrated into the community can be viewed as an aim of both rehabilitation and restorative justice.

There are distinctive differences between rehabilitation and restoration: although they both aim at offender reformation, rehabilitation is offender centric whilst restorative justice is stakeholder-centric. Moreover, rehabilitation theories aim to rehabilitate offenders within prison settings in some circumstances, whilst many restorative justice approaches reject the use of imprisonment. Therefore, restorative justice and rehabilitation offer distinctive approaches in pursuit of different goals but include the reformation of offenders.[906]

Having established the distinction between restorative justice and rehabilitation, this may lead one to think about how restorative justice could not work with rehabilitation, deterrence, and/or retribution. Restorative justice distinctively integrates victims back into the criminal justice system. Giving victims an integral role in determining sentences may be inconsistent with modern legal criminal justice systems that have replaced or displaced the role of victims in sentencing with the state.[907] Nevertheless, section 2.3.4 addressed this point, showing potential for restorative justice to apply within a system that advances retribution, deterrence, and/or rehabilitation. The next chapter will further examine how those aims could be collated into one framework.

4 Restorative Justice and Corporate Crime

This section firstly engages with existent literature on restorative justice as an alternative to punishing companies that have violated the law. This will assist in reaching a better understanding of whether some kinds of corporate misbehaviour are especially well-suited, or especially badly-suited, to being addressed, through

[903] Albert Eglash, 'Creative Restitution: A Broader Meaning for An Old Term' (n 902).
[904] Albert Eglash, 'Creative Restitution: Its Roots in Psychiatry, Religion and Law' (n 774).
[905] Albert Eglash, 'Creative Restitution: A Broader Meaning for An Old Term' (n 902).
[906] Brooks, *Punishment* (n 13) 68-9.
[907] ibid 70.

restorative justice. Secondly, the section applies the general theorising on restorative justice to address the potential strengths and limits of restorative justice in the specific context of companies. Lastly, the section presents a compelling argument regarding the potential for restorative justice to address corporate crime.

4.1 Restorative Justice for Corporate Misbehaviour in Literature and Practice

4.1.2 Braithwaite and Fisse on Restorative Justice, Corporate Regulation, and White-Collar Crime

Braithwaite and Fisse have published on restorative justice; corporate self-regulation, civil and criminal liability; and how restorative justice could address white-collar crime. They are discussed in turn.

In relation to individual accountability and corporate criminal liability, Braithwaite and Fisse brand themselves as 'dogged [individualists].'[908] They reject corporate criminal liability (corporate crime) in favour of individual liability (white-collar crime). They state, 'the solution to problems of accountability for corporate crime is simple: we should abandon reliance on corporate criminal liability and rely instead on individual liability.'[909] Prosecuting individuals within companies are more effective than prosecuting the corporate entity.

Particularly, enforcing corporate criminal liability faces two issues: (a) 'individual accountability is frequently displaced by corporate liability, which now serves as a rough-and-ready catch-all device.'[910] Targeting companies undermines the accountability of members within the corporate body acting on behalf of the entity. (b) If companies are prosecuted for an offence, the impact of enforcement does not ensure that the company is changing its 'internal disciplinary systems to sheet home individual accountability.'[911] Not prosecuting individuals within the company is likely to reduce public confidence and promote a criminal justice system where defendants with resources can avoid liability.[912]

[908] Fisse and Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (n 384) 474.
[909] ibid.
[910] ibid 469.
[911] ibid.
[912] ibid 472.

To resolve these issues, they propose 'enforced accountability', which aims to monitor individuals within the company that is responsible for the crime and force companies to enforce changes at the individual level following prosecution.[913] In practice, provided it has the appropriate statutory powers, the court would require companies to '(a) [conduct] its own enquiry as to who was responsible within the organisation, (b) [take] internal disciplinary measures against those responsible, and (c) [return] a report demonstrating that due steps had been taken to discipline those responsible.'[914]

If the court finds that the company took due steps to discipline individuals within the company, criminal liability would not be enforced. Otherwise, criminal liability would be enforced on both the company and the individuals, which will include methods like 'court-ordered adverse publicity, community service, and punitive injunctive sentences.'[915]

Having introduced Braithwaite's views in relation to corporate criminal liability and individual criminal liability, the next steps are to discuss his publications on restorative justice in the corporate context.

In 2002, Braithwaite writes on restorative justice and corporate misbehaviour. He understands restorative justice to be 'a process where all the stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm.'[916] Restorative justice is a non-punitive measure that can come in many forms, one which Braithwaite argues has always existed to address criminal wrongs by companies.[917]

Similar to his claims on restorative justice as the 'traditional way' of dealing with conflicts between individuals, he states, 'the regulation of companies in most countries was rather restorative. The reasons for this were far from ennobling, being about corporate capture combined with high costs of complex corporate crime investigations that states were unwilling to pay.'[918] Restorative justice has always been used as a cost-effective way of regulating companies. Braithwaite illustrates his

[913] ibid 511.
[914] ibid.
[915] ibid 512.
[916] John Braithwaite, 'Restorative Justice and De-Professionalization' (2004) 13 The Good Society 28, 28.
[917] John Braithwaite, *Restorative Justice & Responsive Regulation* (OUP 2002) 16.
[918] ibid 16.

assertions through four examples: nursing homes, Asian community policing, trade practices, and regulatory inspections.[919] They are summarised below.

First, Braithwaite and others evaluate nursing home regulations. Historically, regulations defined a set of quality of care inputs, and companies that violated the set would be prosecuted. When the Australian Federal Government took over in 1988, they implemented measures that Braithwaite interprets as restorative. Particularly, they appointed representatives from the industry and major stakeholders (consumer groups, union, aged care interest group) to create thirty-one outcome standards that are victim-centred. It aimed to shift regulation to a resident-centred process. A conference consisting of the inspection team, management, and representatives of owners, residents, and family members, was conducted to discuss the thirty-one standards. The appointment of different stakeholders to develop and discuss nursing home standards improved the quality of life of clients and the rates of compliance by Australian nursing home facilities.[920]

Second, Braithwaite investigates the reasons behind high levels of compliance by Japanese companies. He finds that resources are invested in implementing processes to encourage dialogue about collective obligations and relationships rather than on investigating crimes.[921]

Third, Braithwaite discusses a process invoked to regulate an Australian insurance company that violated civil insurance laws by misrepresenting their policies. To respond to the violation, top-management was ordered to meet with the local community council, the regulators, local officials of the Department of Social Security, and some consumers in a community impacted by these violations. Following that, meetings were held with insurance regulators, industry associations, and the Prime Minister about follow up regulatory reforms. A list of remedies was created, including establishing a funded consumer education programme to reduce future attempts of misconduct and generating an internal investigation team to examine the company's compliance programme and to identify the responsible parties for the crime. Additionally, eighty agents of the company were dismissed, and a new internal compliance policy was created. Braithwaite commends this

[919] ibid 16-24.
[920] ibid.
[921] ibid 18.

problem-solving strategy because it avoided formal court processes and involved many knowledgeable actors to resolve the legal violation.[922]

Fourth, Braithwaite observes studies on Occupational Safety and Health Administration inspectors and Mine Safety and Health Administration inspectors in the United States, and studies on pollution inspectors and coal and mining safety offences in the United Kingdom.[923] He concludes that regulatory inspectors having dialogues with workers impacted by violations and managers responsible for safety problems on how to fix the issues and be compliant with the law was more effective than threats of punishment and/or punishment.[924]

Throughout these studies, Braithwaite argues that 'dialogue' and 'persuasion'; measures he interprets as restorative, are more effective than traditional punishment, but should only be applied if backed up by traditional punishment.[925]

In 2004, he develops his proposals to a 'theory of democratic professionalism' and model entitled 'toward an integration of restorative, deterrent, and incapacitative justice.'[926] Braithwaite argues, 'while persuasion works better than punishment, credible punishment is needed as well to back up persuasion when it fails…Deterrence and incapacitation are needed, and needed in larger measure than these regimes currently provide, when restorative justice fails'.[927] Braithwaite views restoration as a non-punitive and a cost-effective measure that has to be backed up by a 'responsive regulatory strategy' based on deterrence and incapacitation theories.[928] Using the combination of 'persuasion' and 'different forms of punishment' as more effective than solely using restorative justice and a one-size-fits-all approach is unlikely to deter or have an impact at individual and corporate levels.[929]

Braithwaite proposes to integrate restorative justice, deterrence, and incapacitation under one model: restorative justice applies as an alternative to punishment for the 'virtuous [actors]'; deterrent punishment applies to 'rational [actors]'; and

[922] ibid 22-4.
[923] ibid 62-6.
[924] ibid 62-3.
[925] ibid 30-4.
[926] ibid 63, 65.
[927] ibid.
[928] Braithwaite, 'Restorative Justice and De-Professionalization' (n 916) 29.
[929] Braithwaite, 'Restorative Justice and Responsive Regulation: The Question of Evidence' (n 877) 16.

punishment based on incapacitation applies for 'incompetent or irrational [actors].'[930] He argues that while restorative justice works well with corporate crime (the corporate entity), it would not be able to effectively deal with white-collar crime (business executives who do not acknowledge how they have hurt their victims).[931] When restorative justice does not work for certain business executives, deterrence measures are enforced on the corporate body to target change at the individual level. If the corporate body that the business executives may be inversely impacted by a deterrence measures, for instance, may lead for the company to go bankrupt, incapacitation can apply to remove the license of white-collar criminals within the company and enforce prison sentences. Overall, Braithwaite argues that moving away from restorative justice strategies towards 'interventionist strategies' is necessary when restorative justice fails to protect communities from injustice.[932]

4.1.2 Spalding on Restorative Justice for Foreign Bribery

Spalding proposes that foreign bribery is best addressed through restorative justice. In his article, *Restorative Justice for Multinational Companies*, Spalding does not trust the ability of deterrence to deal with corporate crime, especially with the rise of international commerce. Using quantitative methods, he finds that deterrence is likely to increase rather than decrease the levels of corporate crime in developing countries.[933] He states,

> The ever-increasing power of multi-national companies thus calls for a new theory of punishment, one that uses criminal enforcement to address the systematic causes of crime. That theory, quite ironically, is restorative justice. By involving the perpetrator, victim, and community in the sentencing process, restorative justice does not merely punish the wrongdoer, but remedies the harm caused by the crime prevents future harm and reintegrates the defendant into the very community it violated.[934]

Moreover, he argues,

[930] Braithwaite, 'Restorative Justice and De-Professionalization' (n 916) 29.
[931] ibid.
[932] ibid.
[933] Andrew Spalding, 'Restorative Justice for Multinational Corporations' 75 Ohio State Law Journal 357, 357.
[934] ibid 357.

> [Literature] is not typically associated with the multinational corporate practice. But might it be? Can multinational companies, who have committed crimes, heal social wounds? Can corporate defence counsel, and federal prosecutors, be peacemakers?[935]

Spalding argues that his theory of punishment on restorative justice is already embedded in sentencing guidelines for companies; Chapter 8 of the Sentencing Commission Guidelines include restorative justice principles. Additionally, sentencing practices for white-collar crime in the context of domestic environmental law also apply restorative justice principles through 'supplemental sentences.'[936] Particularly, corporate bodies understand the benefits of community service over simple fines for long term profits and personal reputation; and judges prefer the benefits of settlement funds being paid back to the community, rather than being deposited to the U.S. Treasury.[937] Additionally, he provides a number of examples of supplemental sentences. First, a gas company convicted of illegally storing mercury was ordered to pay $6 million criminal fines and $12 million in payments for local communities to support education projects, children health initiatives, and environmental remediation.[938] BP paid $4 billion for criminal misconducts from a spill, where more than 50 percent was ordered to fund projects in communities harmed by the spill, including The National Academy of Sciences. They are also required to appoint monitors; and complete audits, internal reforms, and training programmes.[939] These supplemental orders reflect ways to deal with crime through supplementing deterrence theory with practices that reflect restorative justice principles.[940]

His theory focuses on regulating multinational companies for international corruption and bribery crimes.

When allegations arise, the companies would retain a law firm to perform an independent investigation and report its factual findings. The company would receive a 'cooperation credit' when they voluntarily disclose the investigation report. The prosecution would invite the company to enter a DPA with conditions on how

[935] ibid 385.
[936] ibid 359.
[937] ibid 389.
[938] ibid 389.
[939] ibid 391.
[940] ibid 392.

the companies could remedy the damages done by the crime including a fine ‘range' (e.g. thirty-five million to sixty-five million). The prosecution would grant a thirty percent downward departure through requiring the defendant to pay approximately twenty-four million when it agrees to adopt a number of policies to minimise the risk of further violations. This includes hiring an independent corporate monitor and reforming compliance programmes.[941]

Furthermore, the company would develop three projects with anti-corruption experts, with specific deadlines and costs for each. That could lead to a further reduction of the allocated fine. First, a small business loan programme for merchants that have been materially impacted due to the company's crimes. Second, funding towards training centres for local businesses, attorneys, and government officials to avoid violating anti-bribery laws, with certifications for graduates of these programmes. Third, the company would be required to complete a report on its experience of paying bribes in the foreign jurisdiction where the crime was committed; including the bribes paid and the reasons they were paid. The report would be publicised in the foreign jurisdiction and translated into the local language.[942] The report would explain the reasons for the bribes and behaviour of the company in relation to governmental officials, and the conduct of local and foreign competitor companies.[943]

Overall, restorative justice is viewed as a viable alternative to punishing companies who commit bribery through a deterrence-based sentencing practice. Engaging a restoratively oriented DPA would assist in paying a fine that is appropriately allocated to remedy the harm incurred by many stakeholders.

4.1.3 British Columbia: Restorative Justice for Environmental Offences

In Canada, The Ministry of Environment in British Columbia initiated the Community Environmental Justice Forum[944] Based on restorative justice, the process provides opportunities for ‘participants to engage in meaningful dialogue,

[941] ibid 402.
[942] ibid 404.
[943] ibid 404-5.
[944] Ministry of Environment, ‘Community Environmental Justice Forums Policy' (Ministry of Justice, Canada, June 2012) 1 <https://www2.gov.bc.ca/assets/gov/environment/research-monitoring-and-reporting/reporting/reporting-documents/environmental-enforcement-docs/cejf-policy.pdf> accessed 25 March 2019.

collaborative problem-solving, and relationship building.'[945] The Ministry of Environment enforces the Compliance and Enforcement Policy, which provides guidance to staff to address any non-compliance with the law, and whether a restorative justice forum is an appropriate avenue[946] The forum is one tool available to ensure compliance with the law, and investigation review processes exist to ensure that the company is willing and has the capacity to participate.[947]

The process aims to deal with companies who have committed certain environmental offences outside the criminal justice system. It is a voluntary process and only applies in cases where the offenders want to take responsibility for the crime, and members of the community and ministry enforcement staff agree to participate.[948] The stakeholders of the offence are community members impacted by the offence, the enforcement agency, and the offender- a party regulated by environmental legislation.[949]

A trained impartial facilitator conducts a pre-forum meeting with the stakeholders to understand their views and explain the structure and expectations of the forum.[950] A meeting takes places (2-2.5 hours), where the stakeholders discuss the cause of the incident and its impact on all stakeholders, including the company. The group agrees on a restitution plan, and it is recorded in a written signed agreement. Monitors are appointed to ensure the company completes the terms of the agreement. This may include 'environmental restoration projects, financial penalties, community service, and a public declaration by the company of their responsibility and remorse.'[951]

A notable example is Trail Teck Metals. In 2010, Trail Teck Metals participated in a restorative justice process, following a spill of mercury into Stoney Creek, resulting in violations of the Fisheries Act 1985 and the Environmental Management Act 1999.[952] The conclusion of the forum included payment of a financial penalty to be

[945] ibid.
[946] ibid 2.
[947] ibid.
[948] ibid.
[949] ibid 1.
[950] ibid 2.
[951] Government of British Columbia, 'Restorative Justice' (Government of British Columbia) <https://www2.gov.bc.ca/gov/content/environment/research-monitoring-reporting/reporting/environmental-enforcement-reporting/enforcement-actions/restorative-justice> accessed 25 March 2019.
[952] ibid; Fisheries Act R.S.C. 1985; Environmental Protection Act S.C. 1999.

used for community environmental initiatives; and reviewing the company's sanitary sewer system and piping configuration processes.[953]

The process is theoretically expected to result in the following outcomes:

> [Restore] or compensate for harm done to the environment; promote a sense of responsibility in the offender; acknowledge and repair harm done to a community; improve long term compliance (reduce the likelihood of recidivism); build positive relationships between the offender, the community and regulators; [and] promote general deterrence.[954]

It is notable that the process is limited to offences where a company 'unintentionally commits non-compliance.'[955] Guidance for when a case *should* be referred to restorative justice *may* be referred to restorative justice, and *would not* be referred to restorative justice is published. Particularly, restorative justice is not suitable in the following circumstances: intent crimes; the offender takes no responsibility for the offence; the impact extends beyond a single community; restorative justice would be expected to do 'more harm than good'; or 'it is felt that a more public forum (courts) would provide better deterrence than a closed forum, even if the prosecution is not successful.'[956] Additionally, the regulatory history of the offender, the public interests, and implications for other operations are taken into account to determine whether a case is suitable for restorative justice.[957]

4.2 Evaluating Restorative Justice for Corporate Misbehaviour

The section sets out the potential benefits and limitations of using 'restorative justice for corporate crime', particularly through evaluating the models and propositions set out by Spalding, Braithwaite, and The Ministry of Environment in British Columbia, Canada. This will be followed by the potential advantages of using restorative justice to address corporate crime.

4.2.1 The Disadvantages of Applying Restorative Justice Corporate Crime

[953] Marketwired, 'Teck Metals Reaches Agreement at Community Justice Forum' (Marketwired, 11 May 2011) <http://www.marketwired.com/press-release/teck-metals-reaches-agreement-at-community-justice-forum-tsx-tck.a-1513466.htm> accessed 1 April 2019.
[954] Ministry of Justice, 'Community Environmental Justice Forums Policy' (n 944) 1.
[955] ibid.
[956] ibid 3.
[957] ibid 4.

The subsection focuses on three potential limitations that potentially male restorative justice badly suited for dealing with corporate crime.

The first limitation builds on previous discussions on the potential limitations of restorative justice in theory and practice. If there is no uniform theory of restorative justice, why should it be used to regulate and/or punish serious crimes?

Bromwich states,

> [Restorative] practices developed in contemplation of natural person may not be easily applicable to the corporate context. Where an [organisation] wrongs a community, as is the case when environmental harm is effective by a company, the notional circle model of restorative justice becomes more complex.[958]

Restorative justice is continuously developing in theory and practice. Corporate criminal laws have also developed from borrowings of criminal law as applied to individuals rather than a clear assessment of the objectives of imposing punishment and how these objectives could be achieved. Hence, there is a danger of regulating and/or punishing serious and complex crimes committed by companies through practices that are not theoretically coherent.

There are clear gaps in the models and proposals presented in the previous sections, suggesting the importance of agreeing on the theoretical groundings of restorative justice before advancing restorative justice as a practice.

Looking at the programme in Canada, it is arguable whether restorative justice processes targeted at unintentional non-compliance with the law will promote general deterrence. Companies may adopt policies in compliance with the law, yet violations of the law can occur without fault (strict liability offences). In these circumstances, it doubtful whether companies who choose to engage in the wrongdoing are ‘restored' by engaging in a restorative justice process to

[958] Rebecca Bromwich, ‘Restorative Justice Processes and Complex Cases Involving Corporate Liability for Environmental Harms in Canada: Pitfalls, Problems, Promise and Potential’ (2018) Internet Journal of Restorative Justice 1, 12.

acknowledge the responsibility of the corporate body and be 'remorseful and demonstrate a sincere interest in 'repairing the wrong.'[959]

Additionally, Spalding misunderstands and does not clarify which theoretical approach to restorative justice he is basing his framework on, nor defines what approaches to deterrence are currently being followed under the law, except stating that it is based on a cost-benefit analysis.[960] For instance, he fails to distinguish between rehabilitation and restoration. He asserts,

> The criminal theory provides three basic possibilities: deterrence, retribution and rehabilitation/restoration…(RJ) emerged in the 1970s in response to widespread perceptions that the criminal justice system 'neither effectively deterred crime nor successfully rehabilitated offenders.'[961]

Using 'rehabilitation/restoration' evidence that Spalding has not carefully examined existent theories of punishment. As Chapter 1 discussed, it is clear that the Sentencing Commission Guidelines do not include restorative justice principles. Additionally, he argues that deterrence is one-dimensional because it is offender-centric whilst restoration is three-dimensional.[962] As discussed in previous chapters, a number of modern rehabilitation theories of punishment are offender-centric, whilst modern deterrence theories of punishment aim for specific and general deterrence. Applying retribution theory (without identifying which retributive theory of punishment he is referring to), he states that companies would be punished because they deserve punishment, rather than due to an activity where the costs to society are higher than benefits to society as a result of the crime (deterrence theory). He states that just desert fails in the context of bribery, where crime reduction and taking count of general deterrence is essential.[963]

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[959] British Columbia Ministry of Environment and Climate Change Strategy, 'Community Environmental Justice Forums Questions and Answers' (Government of British Columbia) 3 <https://www2.gov.bc.ca/assets/gov/environment/research-monitoring-and-reporting/reporting/reporting-documents/environmental-enforcement-docs/cejf-qas.pdf> accessed 30 March 2019.
[960] Spalding (n 933) 360-1, 378, 384-5.
[961] ibid 383, 386.
[962] ibid 383, 385.
[963] ibid.

Additionally, many difficulties arise from Braithwaite's proposals. His early publication, *Restorative Justice and Responsive Regulation,* advances the general premise of 'all conflicts have always been resolved through restorative justice',' 'restorative justice works – it worked in Japan, Australia, the UK, and the USA!' He advances the advantages of 'restorative justice' through existent practices, naming them 'restorative measures'. Any practice defined as a restorative practice or fitting within the restorative justice label should define its aims and how its aims ought to be achieved, and how it fits within the criminal justice system, to have the potential of being a restorative measure. Do all case studies define 'dialogue' and 'persuasion' the same way, and are the outcomes parallel? That is important for assessing their effectiveness.

Looking back at his definition of restorative justice, it is 'a process where all the stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and decide what should be done to repair the harm.'[964] Many questions emerge: How is 'dialogue and persuasion' a form of restorative justice, and if it is a new form of restorative justice, do all the case studies meet the theoretical foundations of this new form of restorative justice? What is the process of restoration? Is there a consistent process of identifying the stakeholders? How is restoration achieved? Are these restorative measures used to address civil wrongs or criminal wrongs?

Braithwaite does not explain the laws of the jurisdictions he is assessing (Japan, Australia, United States, United Kingdom) to clarify whether the companies were violating a civil law or a criminal law, and how restorative justice 'dialogues' and 'persuasion' were a better mechanism than enforcing formal sanctions and/or punishment in some of the circumstances. Additionally, Braithwaite fails to explain how 'persuasion' and 'dialogue' are restorative measures, and generalises their application to reach a conclusion that 'restorative justice' has always been used to regulate companies and prevent corporate crime.

Braithwaite argues that restorative justice was the traditional way to deal with conflicts before that right was displaced by the state, implying that restorative justice could appropriately deal with all conflicts, and should work to deal with all conflicts, including serious and complex crimes. If this stands true, then that creates many gaps

[964] Braithwaite, 'Restorative Justice and De-Professionalization' (n 916) 28.

in his hybrid theory that integrates restorative justice, deterrence and incapacitation, advanced in a later publication in 2004.[965] It is even more incoherent to claim that restorative justice was the traditional way that societies dealt with their conflicts, and then advance a theory that uses deterrence and incapacitation as a back-up measure when restorative justice does not work.[966]

He states that 'it is not a static triage theory that says these are the cases that are suitable for restorative justice, and these are the more serious matters we must deter or incapacitate,'[967] yet the hierarchy of his model suggests otherwise. Restorative justice would be applied in cases where the actor is 'virtuous,'[968] followed by deterrence-based measures applied to 'rational actors', and lastly, incapacitation would be enforced for 'incompetent or irrational actors.'[969] It is not clear why incapacitation is seen as a tougher approach than deterrence and restoration.

If Braithwaite emphasises the importance of persuasion and dialogue in preventing corporate misbehaviours,[970] why is it an alternative informal measure rather than an integral part to a theory of punishment? Additionally, incapacitation is not a theory of punishment because it fails to recognise that crime may occur following prosecution, amongst other reasons. Incapacitation is a form of deterrence alongside reform and fear.[971]

Accordingly, the theory can be interpreted as a deterrence theory of punishment. In other words, Braithwaite's model is better understood as a deterrence theory of punishment to address white-collar crime. It is not a hybrid theory of punishment and does not address corporate crime.

It is also worth noting that Braithwaite highlights the importance of rehabilitation to a theory of punishment for companies in some of his other scholarly articles.[972] In an article rejecting retribution as a penal aim, he proposes,

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[965] Braithwaite, 'Restorative Justice and De-Professionalization' (n 916).
[966] See Braithwaite 'Restorative Justice' (n 766).
[967] Braithwaite, 'Restorative Justice and De-Professionalization' (n 916) 29.
[968] Braithwaite implies that companies owe moral duties like individuals.
[969] J Braithwaite, 'Restorative Justice and De-Professionalization' (n 916) 29.
[970] Braithwaite does not clarify whether the corporate misbehaviours are civil law or criminal law violations.
[971] See Chapter 3, section 2.2.2; Brooks, *Punishment* (n 13) 37.
[972] Braithwaite and Geis (n 303) 309.

> Even though rehabilitation has failed as a doctrine for the control of traditional crime, it can succeed with corporate crime…it has been argued that the largely discredited doctrines of crime control by public disgrace, deterrence, incapacitation, and rehabilitation could become highly successful when applied to corporate crime.[973]

Rehabilitation is not recognised or rejected in his later publications on the 'democratic de-professionalization' theory and punishment model, nor is 'public disgrace' explained or defined in the article. Is that a form of restorative justice or another theory? Not acknowledging rehabilitation as a penal aim and failing to define 'what counts as a restorative justice measure' are the main flaws in Braithwaite's proposals.

As Daly states, 'there are many stories to [restorative justice] and no real one.'[974] The gaps in existent models place limitations on advancing a broader application of restorative justice, through restoratively-oriented policies, laws, and programmes, to address corporate misbehaviour. Nevertheless, as this thesis has sought to achieve, finding answers to the justifying aims of punishment and how punishment ought to be distributed is profound to presenting a compelling liability and sentencing model to address corporate crime. A theory of punishment for companies should define when the corporate entity and when individuals within the corporate entity will be held liable. Defining the aims of the restoratively-oriented process, programme, or legal measure, in theory, is important to its practical coherence and in understanding how restorative justice will operate in practice.

Having justified corporate crime as 'team member responsibility' in Chapter 1, this thesis defines circumstances in which violations of the law would be imputed to the corporate entity.[975] This thesis focuses on prosecuting the corporate entity. There are also circumstances where individual criminal liability would be imposed in addition to corporate criminal liability. Companies should not be put in a position that enables them to pay their way out of a crime. Braithwaite's 'extended accountability' proposal suggests 'selling out' individuals within the company to avoid criminal prosecution. It is also not viable to reject corporate criminal liability or limit its

[973] ibid.
[974] Daly (n 771) 55.
[975] Lee (n 145) 771.

applications to avoid complex investigations and save costs.[976] It is better to set the foundations through defining whether the corporate entity should be responsible and when a violation of the criminal law warrants corporate punishment and then work on ways to improve its enforcement. Additionally, defining the understanding and conceptualisation of restorative justice could help in providing a multidimensional understanding of why companies commit a crime and how they can be sentenced. The same applies to agree on the viable approaches to retribution, deterrence, rehabilitation, to form an understanding of the appropriate standards of liability and sentencing processes. The next chapter of the thesis will address the latter point.

The second limitation relates to the current categorisation of restorative justice as an alternative to punishment, hence if used, will allow companies to avoid a criminal conviction.

Braithwaite views restorative justice as an informal alternative to punishment, demonstrated through self-regulation methods and regulation through expert bodies.[977] Spalding offers a restoratively-oriented DPA that considers stakeholder interests, including the offender's interests. The company would not be charged with a criminal conviction if it meets its duties under the contract.[978]

Should companies be provided with the opportunity to avoid punishment when they commit crimes? Braithwaite states that certainty of punishment is more deterrent than the severity of punishment. Risk of exposure and loss of reputation incur social costs on the senior managers of the company.[979] The community's involvement in the restoration process will deter both the specific company from committing future crimes (specific deterrence) and other companies within the industry (general deterrence).[980] Moreover, Braithwaite has placed restorative justice as one way of targeting corporate crime. He recognises that restorative justice does not work for all types of offenders. His theory of 'democratic professionalism' uses deterrence and incapacitation as a backup when restorative justice does not work.[981] Even if the

[976] ibid 471.
[977] ibid 509.
[978] Spalding (n 933) 383, 386.
[979] Braithwaite, *Restorative Justice & Responsive Regulation* (n 917) 118.
[980] ibid 121-2.
[981] ibid 63, 65; Braithwaite, 'Restorative Justice and De-Professionalization' (n 916) 27-9; Braithwaite, 'Restorative Justice and Responsive Regulation: The Question of Evidence' (n 877).

process results in no criminal conviction, recognition of wrongdoing in a public forum and public apologies can be punitive.[982]

The Ministry of Environment in British Columbia markets Trail Teck Company's restorative justice forum as a notable example of how restorative justice is beneficial to addressing corporate crime, stating '[i]n the end, Teck agreed to all recommendations sought by the Ministry of Environment and Climate Strategy and then looked internally for additional actions to avoid future discharges. What could have taken years in the criminal justice system took only 33 days to complete.'[983] An informal avenue to resolving a crime that Teck did not intent on committing resulted in benefits to the community and the company. A simple search of the company, Teck Metals Ltd., however, reveals various violations by the company in Canada and other jurisdictions since 2010.[984]

Going back to the inquiry above- should companies be provided with the opportunity to avoid punishment when they commit crimes? Companies can manipulate the restorative justice process to avoid a criminal conviction. Corporate crime is often more serious than crimes committed by individuals. George Manbiot compellingly argues for prosecuting companies for environmental crimes,

> There are no effective safeguards preventing …companies…from wreaking havoc for the sake of profit or power. Though their actions may lead to the death of millions, they know they can't be touched. When governments collaborate…how can such atrocities be prevented? Citizens can pursue civil

[982] Nicole L. Piquero, Stephen K. Rice and Alex R. Piquero, 'Power, Profit, and Pluralism: New Avenues for Research on Restorative Justice and White-Collar Crime' in Holly V. Miller (ed), *Restorative Justice: From Theory to Practice* (Emerald Group Publishing, 2008) 215.
[983] Government of British Columbia, 'Restorative Justice' (n 951).
[984] Government of Canada, 'Teck Metals Fined $3 Million For Polluting Columbia River' (Government of Canada, 4 March 2016) <https://www.canada.ca/en/environment-climate-change/services/environmental-enforcement/notifications/teck-metals-polluting-columbia-river.html> accessed 1 April 2019; United States Environmental Protection Agency, 'Case Summary: Teck Agrees to Clean Up Lead-Contaminated Residential and Allotment' (United States Environmental Protection Agency, 13 August 2015) <https://www.epa.gov/enforcement/case-summary-teck-agrees-clean-lead-contaminated-residential-and-allotment-properties> accessed 1 April 2019; Government of Canada, 'Teck Metals Ltd. Sentenced to Pay $210,000 for Discharging Sodium Hydroxide Into the Columbia River (BC)' (Government of Canada, 6 November 2013) < https://www.canada.ca/en/news/archive/2013/11/teck-metals-ltd-sentenced-pay-210-000-discharging-sodium-hydroxide-into-columbia-river-bc-.html> accessed 1 April 2019; Government of Canada, 'Teck Metals Ltd. Agrees to Pay $100,000 to Environmental Damages Fund for Recent Chemical Spills' (Government of Canada, 14 May 2011) < https://www.canada.ca/en/news/archive/2011/05/teck-metals-ltd-agrees-pay-100-000-environmental-damages-fund-recent-chemical-spills.html> accessed 1 April 2019.

> suits if they can find the money and time, but the worst a company will face is fine or compensation payments. None of its executives [are] prosecuted, though they may profit enormously from murderous destruction. They can continue their assaults on the living planet.'[985]

There are two different justice systems for companies and individuals; companies can acquire distinctive political and legal positions. Serious crimes like corporate crime deserve harsh punishment, and companies should not be able to 'talk' their way out of a crime. Recent research reveals that following the Paris Agreement, the five largest publicly traded oil and gas companies have invested funds to mislead climate-related branding to maintain their licenses to operate and grow their operations.[986] BP continuously advances a message of providing a 'cleaner, greener, smarter energy,' yet evidence shows that it has lobbied the Trump Administration against methane regulations.[987]

Chapter 1 discussed difficulties in prosecuting companies under current corporate criminal liability laws. Laws that provide avenues to companies to avoid a criminal conviction is counterproductive to increasing public confidence in the criminal justice system and narrowing the equality gap between individuals and companies. Companies can manipulate the opportunities provided by restorative justice and use them as a marketing strategy to further their own interests. It is difficult to assess their whether they are engaging in the process in an honest manner, to be held accountable for their wrongdoing, and empower dialogue if such exists in an informal setting and an alternative to punishment.

The conceptualisation of restorative justice as a theory about punishment could help overcome the view of restorative justice as a 'soft option' and as a diversion from the criminal justice system. While deterrence, retribution, rehabilitation, and 'cooperative approaches to social control may be thought of as opposing or contradictory systems…they are best regarded as complementary or viewed as ends

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[985] George Monbiot, 'The Destruction of the Earth is a Crime. It Should be Prosecuted' (*Guardian*, 28 March 2019) <https://www.theguardian.com/commentisfree/2019/mar/28/destruction-earth-crime-polly-higgins-ecocide-george-monbiot?CMP=share_btn_tw> accessed 30 March 2019.

[986] InfluenceMap, 'How Oil Majors Have Spent $1Bn since Paris on Narrative Capture and Lobbying on Climate' (InfluenceMap, March 2019) <https://influencemap.org/report/How-Big-Oil-Continues-to-Oppose-the-Paris-Agreement-38212275958aa21196dae3b76220bddc> accessed 30 March 2019.

[987] Lawrence Carter, 'BP Lobbied Trump Administration to Roll Back Key US Climate Rules' (Unearthed, 12 March 2019) <https://unearthed.greenpeace.org/2019/03/12/bp-lobbied-trump-climate-methane-obama/> accessed 30 March 2019.

of a continuum where there is some shared or common middle ground.'[988] Section 3.4 and Chapter 6 will seek to address this in more detail. For now, restorative justice, if conceptualised as a theory about punishment, is not necessarily a soft option for companies; they are required to actively resolve the harms resulting from the crime instead of 'buying their way' out of an offence.

The last limitation to restorative justice relates to centralising the rights of 'powerful' offenders as stakeholders of the offence. One may argue that goes against the spirit of restorative justice to consider the rights of 'large companies' and balance them with the rights of individuals and communities impacted by the offence. In other words, restorative justice should not take into account the rights of 'the offender', here the company, but rather just centralise the rights of the 'people and communities.'[989] Umbreit et al. argue that Spalding's framework 'lacks a central component that gives restorative processes their primary power, namely, empowered dialogue between the parties…[to] generate the internal motivation for offenders to make positive amends and not repeat future [offences].'[990] Spalding does not clarify the process of communicating the needs of the victims and other stakeholders to reach conclusions on how restoration would be achieved.

Nevertheless, these limitations could be addressed and 'simply [invites] further work in the context of actual practice.'[991] Going back the conceptualisation of restorative justice in Section 2.4 is a preliminary way of addressing this concern. Restorative justice provides a multi-dimensional way of understanding crime, justice, and punishment. As Umbreit et al states, 'restorative justice is grounded in [humanising] the justice process.'[992] Restorative justice allows the legal process, policy, or programme to consider the rights of all the stakeholders. In Canada, a trained and impartial facilitator is appointed by the Community Environmental Justice Forum to select the stakeholders of the offence. He conducts a pre-forum meeting with company representatives and interviews with prospective community members.[993]

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[988] AR Piquero et al. 'Power, Profit, and Pluralism: New Avenues for Research on Restorative Justice and White-Collar Crime' (n 982) 216.
[989] Mark Umbrett, Janine Geske, and Ted Lewis, 'Restorative Justice Impact to Multinational Companies: A Response to Andrew Spalding's Article' (2015) 76 Ohio State Law Journal 41, 47.
[990] ibid.
[991] ibid 48.
[992] ibid 47.
[993] Government of British Columbia, 'Community Environmental Justice Forums' (*Ministry of Environment*, April 2012) 1 <https://www2.gov.bc.ca/assets/gov/environment/research-monitoring-and-reporting/reporting/reporting-documents/environmental-enforcement-docs/cejf-infosheet.pdf> accessed 30 March 2019.

Thus, a framework could be developed to appoint neutral expert facilitators and adopt guidelines that balance the rights of all the stakeholders. Taking into account the rights of offenders should be afforded by the law and is also beneficial for the long-term success of the company and other companies in the industry. These benefits include lowering the chances of further violations of the law and encouraging norm compliant behaviour by companies.

4.2.2. The Benefits of Applying Restorative Justice to Corporate Crime

The subsection focuses on two benefits of applying restorative justice to corporate crime.

First, restorative justice 'could be expanded throughout all levels of the justice system…[and] has found applications for situations of community problem-solving.'[994] Restorative justice theoretically provides a better understanding of the rights and needs of the victims and other stakeholders impacted by the crime committed by a corporate body.

As discussed above, Corporate misbehaviours often impact individuals at a macro-level and may have a direct and indirect impact on the victims and community. A noteworthy example is the case of Navassa County, where environmental law violations resulted in the largest fine settlement between the United States Government and a company. It resulted in a $13 million clean-up fund, and possibly an additional $9 million to help restore wildlife and natural resources in a small town in North Carolina, named Navassa County. However, it did not involve the community affected in collaborating with the state on how the funds ought to be allocated to restore the damages done by the company. The impacts included financial losses, loss of heritage of the citizens as farmers, health impacts on crops and citizens of the community, and continuous violations by further companies. The citizens were still left unsettled after the Government has decided on how the funds should be spent. Residents requested information on the impact of the contamination on their health and water quality, whether jobs related to the clean-up would be given to residents, and whether the process would be transparent. One resident stated, 'right now we're concentrating on the fish and the bugs and the birds, and all of that is good, but we are concerned about the humans that have been affected by this

[994] Umbrett et al. 'Restorative Justice Impact to Multinational Companies: A Response to Andrew Spalding's Article' (n 989) 41, 44.

contaminant.' Another resident who was a seventh-generation resident expressed, 'rice plantations produced our culture... We're trying to save some of that heritage.' However, officials responded that such inquiries are beyond the scope of their duties.[995]

Restoratively oriented policies and laws would aim at bridging the 'disparities in outcome and injustice,' and effect a change in a 'system that relies heavily on inside information and testimonies' to collect evidence on the wrongdoing.[996] As Aersten states, 'all victims want to talk to the [company].'[997] Harm by corporate misbehaviour, which results from violations by companies of civil and criminal law (however categorised by the law in the specific jurisdiction), results in different types of harm: physical harm ('death, disability, disease'),[998] financial or economic harm ('costs of medical care and revalidation, and loss of income'),[999] and/or psychological harm ('uncertainty of the consequences, lack of clarity and transparency with regard to responsibilities and accountability, and the prolonged absence of financial compensation').[1000] From here, a quote by Spalding is worth noting. He asserts,

> A restoratively oriented process and sentencing practice will facilitate 'a process of dialogue and reform [that] can educate the public on the nature of corruption, induce the company to implement necessary reforms, [penalise] the company in ways that benefit the local community, and work toward creating a set of [norm compliant] business practices.[1001]

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[995] Chris Pleasance, 'North Carolina's contaminated town: Former rice farmers struggle to survive on poisoned land after decades of abuse by irresponsible companies' (Daily Mail 10 October 2015) <http://www.dailymail.co.uk/news/article-3267787/North-Carolina-s-contaminated-town-Former-rice-farmers-struggle-survive-poisoned-land-decades-abuse-companies.html> accessed 28 November 2016; Summit County Citizens Voice, 'Part of Huge Environmental Settlement to Help Clean Tainted Coastal Wetlands in North Carolina' (16 February 2015) < https://summitcountyvoice.com/2015/02/16/part-of-huge-environmental-settlement-to-help-clean-tainted-coastal-wetlands-in-north-carolina/> accessed 28 November 2016; The United States Department of Justice, 'Historic $5.15 Billion Environmental and Tort Settlement with Anadarko Petroleum Corp. Goes Into Effect' (23 January 2015) <https://www.justice.gov/opa/pr/historic-515-billion-environmental-and-tort-settlement-anadarko-petroleum-corp-goes-effect-0> accessed 28 November 2016.

[996] Ivo Aertsen, 'Restorative Justice for Victims of Corporate Violence' (n 865) 240.

[997] ibid 239.

[998] ibid 238.

[999] ibid.

[1000] ibid 238-9.

[1001] Spalding (n 933) 380.

Spalding validly argues that involving the stakeholders will assist in understanding the impact of the crime and finding solutions to remedy the harms resulting from the bribery. Hence, 'restorative justice processes offer non-monetary restoration for victims as well.'[1002] The measures suggested by Spalding would assist in forcing the companies to confront the stakeholders it has harmed. Victims are restored through remediation (loan programme) and prevention (training centre and political pressure). Through these measures, victims' rights are remedied and the company would be able to repair its reputation and goodwill in the jurisdiction it committed the criminal act in.[1003] The fine is greater than a traditional fine but is reduced by projects that are paid towards the community and the steps the company takes to remedy its wrongs.[1004] His propositions could also apply in practice to deal with other criminal law violations, and contributes to ideas on developing restoratively oriented processes, policies, and programmes for criminal law violations by companies.

Second, as well as securing the rights of the victims and other stakeholders impacted by the offence by involving them in the process, restorative justice also has benefits to the offender in the long term. Devi-McGleish and Cox advocate for restorative justice as an alternative to punishing white-collar criminals and fraud within companies. They state,

> If utilised efficiently, [restorative justice] could provide… behavioural change for corporate and business cultures…[and] encouraging businesses to consider their offending behaviour and the harm it has caused may inspire some behavioural change and provide more reasonable and ethical work practices and behaviour resulting in community-wide benefits.[1005]

Holding companies accountable for their actions by actively taking steps to understand the impact of the harm caused by their actions has the potential to build public confidence in the company and influence their decision-making processes. Building on corporate criminal liability as team member responsibility, it could help members within companies reassess their priorities and whether they want to continue being part of the corporate entity.[1006]

[1002] Zvi D. Gabbay, 'Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime' 8 Cardozo Journal of Conflict Resolution 421, 465.
[1003] Spalding (n 933) 406.
[1004] ibid 407.
[1005] Yasmin Devi-McGleish and David J. Cox, ''We humbly beg parson…' The Use of Restorative Justice in Fraud Offences, 1718-2018' (2018) Internet Journal of Restorative Justice 1, 6.
[1006] Lee (n 145) 764, 781.

Thomas further argues that restorative justice could also allow companies to achieve further goals, like corporate social responsibility.[1007] Corporate social responsibility '[encourages] dialogue, participation and development of initiatives to improve the societal conditions that result from a company's actions.'[1008] The company's performance long-term profitability requires active involvement in society. Zadek identifies five stages to achieve 'corporate responsibility': defensive, compliant, managerial, strategic, and civil. At the defensive stage, the company does not take responsibility for addressing any issues that will impact short-term performance. At the civil stage, the company recurrently invests in promoting its brand to 'enhance its long-term economic value and [realise] gains through collective action.'[1009] Restoratively-oriented legal mechanisms could help companies that violated the law and other companies understand the impact of restoring and building long term relationships with the community.

Future business decisions may not be solely based on cutting costs and maximising profits. Expectations from companies change with time, given the emergence of new services and technological developments, hence presenting further challenges for companies to comply with the law. The growth of the company also brings upon new challenges in maintaining the standards expected by the law. Involving expert bodies to reinforce the expected standards of the company, specific to its current stage of growth and industry it operates in, to prevent future violations, is advantageous to all stakeholders. Involving the stakeholders to encourage a greater understanding of the circumstances that led to the wrongdoing, the impact of the wrongdoing on different parties, and how the conflict could be resolved to remedy the harm resulting from the wrongdoing, will likely maximise the chances of implementing changes in compliance with the law by the company and other companies in the same industry.

Overall, section 4.2 evaluated the potential benefits and limitations of applying restorative justice to address corporate crime. The limitations of restorative justice were addressed. If restorative justice is set within a clear theoretical framework, it has the potential to positively contribute to understanding corporate crime and how it should be punished.

[1007] Anu Thomas, 'A Reimagined Foreign Corrupt Practices Act: From Deterrence to Restoration and Beyond' 30 Temple International and Compliance Law Journal 385, 404.
[1008] ibid 405.
[1009] Simon Zadek, 'The Path to Corporate Responsibility' (2004) Harvard Business Review 1, 5.

4.3 How Can Restorative Contribute to a Theory of Punishment for Companies?

This section collates the discussions in the chapter to convey how restorative justice is well suited for dealing with corporate crime and could contribute towards improving corporate behaviour.

Restorative justice provides a multi-dimensional understanding of corporate crime and how it should be punished –by taking into account the interests of all stakeholders, it seeks to reach an understanding of the causes of corporate crime, the impact of a corporate crime on the identified stakeholders, and how the short- and long-term harm resulting from the crime can be remedied. As to the distribution of punishment, one ought to take into account the process of sentencing the company and the amount of punishment that should be imposed. The focus is on resolving the conflict resulting from the crime, which is a broader view than simply dealing with the offender. This opens the door to gaining knowledge on the various factors that may lead the company to commit a crime, rather than accepting one view. This is crucial in the context of companies: companies change their behaviour in response to economic circumstances, and the decisions of a company vary in accordance to the type of company and the industry it operates in, thus, to be meaningful, punishment ought to identify and target the cause(s) of the offence.

With regards to the imposition of punishment, it should aim to advance the 'project of restoration',[1010] and to amend the harmed relationships between the stakeholders of the crime. Restoration should be an aim reflected in liability standards set out in the law, processes of sentencing and sentencing guidelines, and not be a diversion from the criminal justice system. This requires punishment that aims to encourage the offender to comply with the law, thereby contributing to a reduction in the levels of crime in the long term. With regards to the prosecution process, encouraging input from various stakeholders places the resulting problem, rather than the offender, at the centre of the discussion. This advantageously lessens the power imbalances between the company and other stakeholders, because all stakeholders can be involved in the criminal justice process.[1011]

[1010] Brooks, *Punishment* (n 13) 197.
[1011] Braithwaite, *Restorative Justice & Responsive Regulation* (n 917) 82.

Incorporating restoration means that offenders would have to acknowledge their responsibility to the offence and express remorse for their crimes. There are promising potentials to Spalding's proposals: imposing a downward fine on companies in combination with completing a report that is publicised to acknowledge the reasons for committing the offence; investing in projects in the community related to the criminal activity; hiring independent monitors and completing required changes to compliance programmes; and/or writing a report can help the company comply with laws in the long run.[1012] This could inspire a sentencing model that is based on restoration. This programme would be advantageous in circumstances where the company is a willing participant and acknowledges the guilt of the crime.

Thus far, the thesis has addressed the potential for specific approaches to retribution, deterrence, and rehabilitation to contribute to a theory of punishment for companies. Restoration could also be an integral principle in a theory of punishment for companies. The next chapter will unravel how these propositions could be structured and implemented within a legal framework.

5 Conclusion

The chapter aimed to understand restorative justice, and how its principles could apply to control corporate crime. Current laws have failed to effectively create norm compliant behaviour by companies, and the emergence of various structures and priorities of companies have increased the difficulty for regulation and enforcement.[1013] Attitudes of companies towards compliance and non-compliance with criminal laws vary with changing economic circumstances, and responding to corporate crime with a restoratively-oriented multi-dimensional model is more suitable than simply advancing deterrence/retribution.[1014]

Section 2 discussed the historical significance of restorative justice, and the contextualisation of restorative justice in literature and practice – as a theory of punishment or an alternative to punishment. It discussed three restorative

[1012] Spalding (n 933) 404-5.
[1013] Hope M. Babcock, 'Corporate Environmental Social Responsibility: Corporate "Greenwashing" or a Corporate Culture Game Changer?' (2010) 21 Fordham Envtl. L. Rev. 1, 10.
[1014] Heinz Messmer and Hans-Uwe Otto (eds), *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation—International Research Perspectives* (Springer Science & Business Media 2013) 1.

programmes: victim-offender mediation, conferencing, and sentencing circles. Accordingly, it presented a working definition of restorative justice.

Section 3 evaluated the five principles of restorative justice in light of the definition advanced in Section 2.4. Section 4 engaged with existent literature on restorative justice and the regulation or punishment of corporate misbehaviour. It explored and evaluated three propositions and models relating to restorative justice and corporate misbehaviour, and illustrated how the understanding of restorative justice outlined in Section 2.4 could overcome the limitations of the models.

The last subsection collated the proposals presented throughout the chapter to illustrate how restorative justice is well suited to understanding and dealing with corporate crime and improving corporate misbehaviour. The aim of restoration accounts for changing criminal behaviour and aims at resolving the harm from the crime through a multi-dimensional and problem-solving angle. As to the distribution of punishment, the penal aims discussed in the previous chapters could be targeted to advance the aim of restoration. The next chapter considers how the different penal aims can work together with restoration under a single framework.

Chapter Six

The Unified Theory of Punishment

1 Introduction

Previous chapters explored the various theoretical groundings and practices of retribution, deterrence, rehabilitation and restoration. It is now clear that a 'one size fit approach' to punishment is problematic. Previous chapters have explored hybrid theories of punishment, defined as 'alternative theories [of punishment] that bring together elements of the theories… into new combinations.'[1015] They distinctively bridge theories of punishment that aim to advance one goal.[1016] The hybrid theories explored are Rawls and Hart's negative retribution theory combining deterrence and retribution; Duff's communicative theory of punishment combining deterrence and retribution; Jean Hampton's moral education theory; and Braithwaite's hybrid theory of punishment that includes restorative justice.[1017] The theories have failed to demonstrate how the goals of punishment could work under one single framework, resulting in the possibility of being construed as advancing one aim of punishment. Notably, Jean Hampton's moral education theory is clearly a rehabilitation theory rather than a hybrid theory of punishment.

The chapter will collate the proposals in previous chapters to advance a theory of punishment for companies. The need for a theory of punishment that is theoretically and practically coherent, i.e. responds to crime in a multidimensional manner; takes account of the fast-changing nature of corporate misconduct and rise of international transactions and types of companies; and encourages norm-compliant behaviour, is pivotal.

Restorative justice, defined in section 2.4 of Chapter 5, can address these concerns. Moreover, there is potential for this understanding of restorative justice to fit within an alternative hybrid theory of punishment, named the Unified Theory of

[1015] Brooks, *Punishment* (n 13) 87.
[1016] ibid 87.
[1017] See chapters 2-5.

Punishment (Hereinafter 'the UTP').[1018] Distinctively, the UTP collates retribution, deterrence and rehabilitation under one framework. Punitive restoration is advanced as one form that the theory might take.[1019] The chapter will look back at proposals and discussions in previous chapters to study the merits of the UTP in the context of corporate crime. Section 2 explores the foundational principles of the UTP in the context of companies. It recommends changes to the aims of punishments and the sentencing process. Section 3 discusses potential challenges to the UTP.

2 SOC: Restorative Justice, The Theory, and Corporate Crime

Brooks advances an alternative theory of punishment named the UTP.[1020] To philosophically support the UTP, he explains that Hegel, often misinterpreted as advancing a retributivist theory, innovatively collates different penal aims including retribution, deterrence and rehabilitation, under one broad theory of punishment.[1021] Additionally, he finds support to his theory through the works of Bosanquet, Bradley, Green, and Seth (The British Idealists) in the late Nineteenth century. Each rejects the idea that different penal aims are mutually exclusive and support Hegel's proposal that punishment should collate multiple penal aims.[1022]

Brooks develops a theory that 'offers a compelling hybrid theory of punitive restoration that brings together multiple penal goals into a coherent and unified theory.'[1023] It structures a framework to unify these goals. He states,

> [Punishment] need not be either retributivist, deterrent, or rehabilitative, but all at once. Punishment aims at the restoration and protection of our rights. The penal outcome justified is what best enables restoration to be secured.[1024]

[1018] Thom Brooks, 'In Defence of Punishment and the Unified Theory of Punishment: a Reply' (2016) 10 Crim Law and Philos 629, 629.
[1019] Brooks, 'Stakeholder Sentencing' (n 32) 183; Brooks, *Punishment* (n 13) 83.
[1020] Brooks, 'In Defence of Punishment and the Unified Theory of Punishment: a Reply' (n 1018).
[1021] Thom Brooks 'Hegel's Philosophy of Law' in Dean Moyar, *The Oxford Handbook of Hegel* (OUP 2017) 453, 464.
[1022] Brooks, *Punishment* (n 13) 127; Thom Brooks (ed) *Hegel's Philosophy of Right* (Blackwell Publishing 2012) 3, 103; Thom Brooks, 'What did the British Idealists Ever Do for Us?' in Thom Brooks (eds), *New Waves in Ethics* (Palgrave MacMillan 2011) 28, 41.
[1023] Brooks, *Punishment* (n 13) 83.
[1024] ibid 211.

One form that the UTP might take is 'punitive restoration' or 'restoring rights in the context of a stakeholder society.'[1025] In 2018, Brooks states that punitive restoration is a 'single type of approach taking a conference setting.'[1026] Deterrence, retribution, and rehabilitation should be seen as 'different components of one unified theory of punishment…that fit together in an unequal way.'[1027] The UTP demonstrates how multiple penal aims are compatible rather than showing how different theory of punishment could be combined under a single framework.[1028] Compellingly, punishment is not imposed to protect the rights of the state at the expense of the rights of individuals within the state.[1029]

For the purposes of this thesis, a distinctive view of restorative justice is adopted, in line with the definition of restorative justice defined in section 2.4 of Chapter 5. Restorative justice is a conception of justice. It can be contextualised as an instance of punishment. It seeks to understand the causes of crime, the impact of a crime on different parties (the offender, victim, and the community, if applicable), and how the harm resulting from a crime can be remedied. The principles of restorative justice are restoration; voluntarism; neutrality; safety; accessibility; and respect.[1030] The principles of restorative justice encourage implementing policies, laws, and/or processes (including liability standards and sentencing practices) that identify and address the needs of the stakeholders. Accordingly, restorative justice is not necessarily an incomplete theory of punishment nor is punitive restoration reduced to one form, particularly a conference setting.[1031] Restorative justice is better understood as a conglomerate of principles providing a multidimensional and broader understanding of the justifying aims of punishment and the distribution of punishment, where stakeholder interests ought to be taken into account.

The understanding of The UTP in line with the advanced restorative justice definition reflects a SOC approach to punishment. It is the starting point to any meaningful reforms to corporate criminal liability standards, and sentencing processes and methods. Referring back to the elements of a theory of punishment in the introduction of the thesis, the discussion progresses to examine these elements in the context of corporate crime.

[1025] ibid 148; Brooks, 'Stakeholder Sentencing' (n 32) 183.
[1026] Brooks, 'Restorative Justice and Punitive Restoration' (n 165) 131, 136-7.
[1027] ibid 126-7.
[1028] ibid 126.
[1029] ibid 133.
[1030] Restorative Justice Council (n 762).
[1031] Brooks, 'Restorative Justice and Punitive Restoration' (n 165) 131, 136-7.

2.1 The Aims of Punishment

The UTP aims to build a new framework that combines persuasive ideas from retribution, deterrence, and rehabilitation to achieve a broader aim that involves different parties to address the impact of the criminal act. According to restorative justice and the UTP, a restoratively-oriented legal system requires identifying the causes of crime and responding to a crime in the context of a broad goal of protecting the rights of individuals in a stakeholder society.

2.1.1 Why do Companies Commit Crime?

Crime is related to 'failure of individuals to see themselves as having a stake in their political community.'[1032] Offenders believe laws do not relate to them because of their distinctive legal and political positions or the lack of legal and political positions in the community. These propositions find support through Hegel, who states that disassociation of individuals from their community may stem from poverty or excess wealth.[1033] This may lead some, but not all individuals, to opt out of their position in the society.[1034] The 'stakeholder society' idea would propose viewing crime as violations against individuals in society rather than solely against the state and would help individuals to not disassociate from society. In other words, the state, through its laws, should aim to protect the rights of individuals and not set laws that compromise such rights nor solely aim to protect the state. In the long term, this would lessen the proportion of individuals not perceiving themselves as lacking a stake in the community, increase public confidence, and reduce recidivism.[1035]

Companies have domestic and international legal rights, and also have the ability to operate in virtual locations and obtain material and political resources beyond a single individual in society. Companies also have political influences in the government, can fund campaigns, promote social causes, and advertise their products and services.[1036] This theoretically gives some companies distinctive legal and political positions that may lead them to disassociate from the society, and

[1032] Brooks, *Punishment* (n 13) 144.
[1033] ibid 144-5.
[1034] ibid.
[1035] ibid 145.
[1036] Andrew E. Taslitz, 'Reciprocity and the Criminal Responsibility of Companies' (2011) 31 Stetson Law Review 73, 75.

believe that they could avoid prosecution. This may also be enhanced by the current difficulties of prosecuting companies under current corporate criminal liability laws. Chapter 1 discussed reforms to current liability standards in consideration of these arguments.

This idea is broader than the current causes of crime as perceived by other theories of punishment. Retribution, rehabilitation, and deterrence theories of punishment provide partial understandings of what drives some companies to commit crimes, and all fit in within a common and broader idea explained above. According to many deterrence theoretical approaches, companies engage in crime because they calculate the potential benefits of crime to be higher than its costs.[1037] Companies may violate criminal laws due to defective compliance systems and internal procedures, leading to interference with the rights of others, and punishment should correspondently be imposed as just deserts.[1038] Rehabilitation informs the theory by stating that crime could arise from defective control systems, insufficient accounts, poor communication, and inadequate operating procedures. This may be due to turning a blind eye or taking cost-saving measures reflecting managerial negligence or intent.[1039] Therefore, the understanding of restorative justice has allowed a multidimensional rather than a partial understanding of the causes of punishment. Moreover, the UTP includes ideas from other approaches to punishment and adopts them collectively under one framework.

2.2.2 Why Should Companies be Punished?

Punishment is a response to crime, and crime and punishment should be understood in relation to each other. Brooks states, 'if we cannot justify a particular act or omission, then we cannot justify its punishment. There can be no just punishment to an unjust crime.'[1040] Justifying the aims of criminalising conduct results in just punishments. The aim of punishment is to restore and protect individuals' rights while making offenders feel they have a stake in society. Brooks emphasises that crimes are 'violations that threaten the substantial freedom protected by law.'[1041] Any community requires a legal system, set through procedures and rules, to mediate conflicts between members of the community. The legal system aims to protect

[1037] Fisse (n 10) 1143.
[1038] Brooks, 'Punishment: Political, not Moral' (n 402) 434.
[1039] Braithwaite and Geis (n 303) 309.
[1040] Brooks, *Punishment* (n 13) 127.
[1041] ibid 128.

individual legal rights as members of the community. It follows that some rights, like the right to life, affords more protection than other rights like the protection of private property.[1042] From here, laws should aim to protect individual legal rights rather than be based on morality.[1043] These ideas are parallel to what is argued by James Seth, as referred to in Brooks' article. He states,

> [The] view of the object of punishment gives the true measure of its amount. This is found not in the amount of moral depravity which the crime reveals, but in the importance of the right violated, relatively to the system of rights of which it forms a part.[1044]

The UTP is different from what is argued by British Idealists that understand crimes as 'threats to individual rights' requiring punishment to protect such rights and safeguard the public from criminal conduct.[1045] Rather, there is interconnectivity between rights, where criminalisation and punishment makes crime necessary but not a sufficient condition to punishment, and should only be imposed when justified. This view would exclude punishment of conduct just because it is immoral.[1046]

Accordingly, the UTP adopts principles recognised by some theoretical approaches to retribution, deterrence, and rehabilitation principles. The law punishes companies that fail to respect the rights of individuals.[1047] Legal retribution punishes companies that violate the law regardless of whether it was intentional or not, as long as it interfered with the rights of other individuals. According to deterrence, companies should be punished to ensure they do not commit future crimes at the expense of the political community. Rehabilitation also informs the theory because companies should also be punished in a way that would allow them to redress their wrongdoing and remediate any rights violations. Companies who do not have norm compliant processes should be punished if it results in the violation of the rights of other individuals. Deterrence and rehabilitation justify punishment for the reduction of future levels of crime. This comes in line with ideas explored in Chapter 1 relating

[1042] ibid 127-8.
[1043] ibid 128.
[1044] J. Seth, *A Study of Ethical Principles* (as cited in Thom Brooks (2014) 'Ethical citizenship and the Stakeholder Society' in Thom Brooks (ed), *Ethical Citizenship: British Idealism and the Politics of Recognition* (Palgrave Macmillan 2014) 135).
[1045] Brooks, *Punishment* (n 13) 129.
[1046] ibid.
[1047] ibid 40.

to Lee's *Corporate Criminal Responsibility*.[1048] Parallel to the stakeholder theory, corporate criminal responsibility is not related to companies owing moral responsibilities. It is the 'shared responsibility of the members of the incorporated enterprise for wrongdoing by one or more of its members, [and where] under certain conditions, the members of a team bear shared responsibility for the wrongdoing of their teammates.'[1049] Corporate criminal liability is 'team member responsibility'. The purpose of criminalising corporate misconduct is to alert companies that misconduct could create a setback to the achievement of corporate goals.[1050]

2.2.3 What Wrongs Should Be Criminal?

Acts should be criminal if they violate the rights of individuals in a stakeholder society.[1051] Brooks argues, 'punishment… [is] a reaction to crime, not a reaction to immorality.'[1052] Some traffic offences are justified as criminal not because they are immoral but because they may lead to rights being violated.[1053] Consequently, punishment is distributed in accordance with the rights violated and should be set in proportion to the centrality of rights violated. In the context of 'standard' offences like murder, assault, or theft, it is assumed, at first instance, that assault should incur a higher sentence than theft. There are still circumstances in which theft could afford a higher sentence than assault.[1054] Brooks finds support for his 'centrality of rights' proposal through Seth's statement, as referred to in Brooks article: 'the measure of punishment is, in short, the measure of social necessity, and this measure is a changing one.'[1055] This comes in line with a later argument of imposing criminal laws only when necessary. Moreover, as opposed to legal moralism approaches, murder would always be punished more severally than theft but not because of its higher degree of immorality, but rather for violating a more central right. Punishment

[1048] Lee (n 145) 755.
[1049] ibid 764, 771.
[1050] Slye (n 186).
[1051] Brooks, *Punishment* (n 13) 140.
[1052] Thom Brooks, 'What did the British Idealists Ever Do for Us?' in Thom Brooks (eds), *New Waves in Ethics* (n 1022) 28, 36.
[1053] Brooks, *Punishment* (n 13) 139.
[1054] ibid.
[1055] J. Seth, *A Study of Ethical Principles* 37-8 (as cited in Thom Brooks (2014) 'Ethical Citizenship and the Stakeholder Society' (n 1044)).
[1055] Brooks, *Punishment* (n 13) 129.

of murder has changed over time from the death penalty to various imprisonment terms, reflecting that the centrality of rights is appropriately subject to change.[1056]

There are circumstances where punishment would not be a sufficient response to criminal conduct, and the protection of individual fundamental rights, hence, should only be imposed if necessary, for the protection and restoration of rights. Punishing companies for violating the rights of individuals in a community considers and accepts different types of mens rea. This includes strict liability offences, negligence, knowledge, and intent. This is advantageously consistent with current laws in England and Wales and the United States.

Additionally, it comes in line with proposals in Chapter 1 relating to separating morality from illegality, team member responsibility, and the broad identification doctrine for non-strict liability offences. The justification of punishment and standard of liability is set in accordance with Lee's *Corporate Criminal Responsibility*.[1057] This is a standard of liability that accounts for the responsibility of team members acting as part of a team. Chapter 1 advanced a parallel corporate criminal liability standard model.

The model is as follows: in relation to crimes requiring a mens rea of negligence, an organisation is a party to an offence if a senior officer departs from the reasonable standard of care expected to prevent a representative or representatives of the organisation, by way of act or omission, from being party to the offence. In relation to crimes with mens rea standards other than negligence, an organisation would be party to an offence if, with the intent to benefit the organisation, (a) a senior officer acting within the scope of their authority is party to the offence; (b) with the mental state required to be party to the offence and acting within the scope of their authority directs another representative of the organisation to act or make the omission specified in the offence; or (c) knowing the representative of the organisation is or about to be party to offence, does not take all reasonable measures to stop them from being a party to the offence.[1058]

[1056] Thom Brooks, 'What did the British Idealists Ever Do for Us?' in Thom Brooks (eds), *New Waves in Ethics* (n 1022) 38.
[1057] Lee (n 145) 755.
[1058] The Criminal Code R.S.C. 1985 (Canada), s 22.

The standard accounts for different types of corporate crimes and corporate offenders. Parallel to team member responsibility, it takes into consideration the possibility of delegation of duties by senior managers to avoid liability. It also rejects holding criminally liable for intended and unauthorised acts of employees, which may lead companies to be in positions where they could not be rehabilitated within the society or be encouraged to have a stake in the community. This addresses the lack of consideration by the American federal standard for reasonable steps that companies have taken to avoid violating the law. The balanced approach for mens rea offences is consistent with punitive restoration. It would encourage norm compliant behaviour and increase public confidence in the criminal justice system in the long term.

2.3 Distribution of Punishment

2.3.1 The Sentencing Process and Types of Punishment

This subsection collates proposals in previous chapters to understand how the state deals with companies who have violated criminal laws and methods of punishment that are parallel to the UTP. As reiterated, punishment is a response to crime; crime and punishment should be understood in relation to each other.[1059] Punishment is distributed through a restoratively oriented law, policy, and/or programme, in line with the understanding of restorative justice in section 2.4 of Chapter 5. Companies could commit crimes as a result of negligence, intent, or recklessness. Companies may also commit strict liability offences. The decision whether or not to prosecute lies on whether it is in the public interest to prosecute, informed by evidential sufficiency. Prosecutors would decide the following: no charge, proceed with a restorative agreement or prosecute through trial.

Following the decision to charge a company, a company could be offered to enter into a restorative agreement. The company would retain a law firm to perform an independent investigation and report its factual findings. If agreement on the terms is not reached and/or a company does not wish to proceed with the agreement, the case would proceed through a normal trial. A company being aware of violating a criminal law can self-report, which would positively impact the process of prosecution through a restorative agreement. This would be in cases where the

[1059] Brooks, *Punishment* (n 13) 127.

companies genuinely adopt a proactive approach when the violation of the law became apparent to corporate management.[1060]

Importantly, restorative agreements would replace current DPAs and would apply to advance punitive restoration. Previous chapters have illustrated the changing nature of criminal law in the context of companies. Early cases recognising corporate criminal liability may have not theoretically explained its recognition, but saw it as an additional safeguard, in the interests of public policy, to ensure that companies are bought to justice and are stigmatised when subject to 'punishment' when they fail to adhere to the laws of the state. The recognition of DPAs in the early 1990s in the United States, and in 2014 in England and Wales, reflects that the role of the criminal law is expanding. Companies are encouraged to self-report and settle rather than be prosecuted through a normal trial. This positively reflects the alignment between current measures and the UTP, through acceptance of a broader aim of punishment and different methods of punishment distribution, and advancing penal aims beyond retribution and deterrence. However, the current structure of DPAs in the context of a theoretically incoherent deterrence and retribution punishment model, disadvantageously allows companies to buy their way out of a crime. In other words, the process of DPAs as it stands focuses on the ability of companies to 'payback', without holding any members of the companies accountable, nor is there consistency on how they are executed. As has been continually argued, enforcement of DPAs and sentencing practices without theoretical explanation has hindered the development of the law.

In accordance with the understanding of restorative justice as an instance of punishment, the thesis advances the use of a new regime of 'restorative agreements' as part of the sentencing process. They are distinctive from 'deferred' prosecution agreements because they apply in a broader sense as part of the criminal justice process. This means that restorative agreements should no longer act as a method of disposal that falls short of a criminal conviction. For companies who do not wish to engage in such a process, the case would proceed to a normal trial process.

[1060] Elly Proudlock and Christopher David, 'Bribery and Corruption: Negotiated Settlements in a Global Enforcement Environment' (Thomson Reuters 2014) <https://uk.practicallaw.thomsonreuters.com/9-586-2485?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 19 May 2018.

The motivation of being involved in a restorative agreement is as follows: The company would receive 'cooperation credit' through voluntarily disclosing the investigation report. If companies agree to self-report, disclose their wrongdoings from the outset, that would avoid lengthy proceedings. The prosecution would invite the company to enter an agreement with conditions on how the companies could restore the rights violated. Prosecutors would assign a fine 'range' which could be reduced in the long-term subject to the company agreeing to adopt a number of policies and taking a number of steps.[1061]

The next question to consider is how restorative agreements work in practice. They would be based on the following preliminary guideline.

When allegations arise, the prosecution would invite the company to enter into negotiations. The invitation letter would detail the alleged criminal misconduct, would invite the company to enter into a restorative agreement, and set a preliminary fine to inform the company that engagement in the restorative agreement may result in an incremental reduction of the fine or allocation of the fine as decided from the results of the findings of the investigation and the conference. The company would have a deadline for replying to the negotiation invitation and acknowledging a willingness to engage in the process, with the understanding that choosing to not engage in the process would result in prosecution through a normal trial.

The process of identifying the victims, offenders, and other stakeholders is uniform, yet it is important to acknowledge that each crime involves different stakeholders, and the number of stakeholders may differ from case to case. The process involves establishing a new governmental body, named the Corporate Justice Board (Hereinafter 'CJB'). The new governmental body would recruit facilitators to conduct independent investigations, and prepare a report with their factual findings. The facilitators would also identify the respective victims and stakeholders of the particular crime. This would advantageously enable all parties, including the offenders, the victims and other stakeholders, to communicate the particulars of the offence and the impact of the crime on their particular interests. The company will likely appoint its own independent counsel to communicate with the respective facilitators. When appropriate, facilitators can hold a public inquiry in cases with large corporate misconducts to collect information regarding the impact of the crimes

[1061] Spalding (n 933) 402.

on the victims and stakeholders, and report back prior to the conference with the appropriate actions to take to remedy the rights violated.

Assuming that the company agrees to engage in the restorative process, the prosecutor's office would schedule the date of the conference and set deadlines for the CJB to appoint facilitators, and submit the report with its findings.

The participants of the conference are as follows: the appointed facilitator from the CJB, independent counsel from the company, representatives from the company who are party to the crime, and where appropriate, a select of identified victims and stakeholders, as chosen by the facilitators.

The conference would aim to and advice on actions that could be taken to remedy the harm done by the crime. Particularly, it aims to address reasons that led the company to engage in the criminal misconduct, ensure the company publicly acknowledges their wrongdoing in a statement and members of the community speaking for the purpose of reaching an understanding of the event. The prosecutor would hear the findings of the report and set terms of the restorative agreement, importantly identifying how the funds would be allocated. The terms of the agreement would also require the company to identify the specific representatives of the companies responsible for the crime.

As discussed above, prosecutors would assign a preliminary fine when it invites the company to be involved in the negotiations. During the agreement, the prosecutor would reach an agreement on how punishment would be distributed. The next subsection discusses the application of proportionality in the prosecution process.

The process would only be applicable in situations where victims, individuals within the company who are involved in the crime, and other stakeholders are identified; and the company in question would be willing to engage in the conference through admitting guilt. The process is punitive because it is part of the criminal justice process rather than a way for the company to avoid criminal prosecution.

Companies that do not want to engage in restorative agreements would proceed through a normal trial. The next subsection discusses changes to sentencing in the trial.

2.3.2 Proportionality

Punishments are set in proportion to the rights violated. This would depend on how the particular punishment would best protect and maintain the rights of individuals in a community. In other words, the principle of proportionality is applied in accordance with the centrality of the rights violated or threatened with the violation. The more central the rights are, the more severe the punishment.[1062]

One important consideration is determining how central the rights are. The centrality of rights is subject to change with time, and the severity of punishment would depend on the type of crimes and corporate offenders.[1063] Proportionality has ordinal and cardinal variants: ordinal proportionality provides that crimes that have the same level of seriousness should receive similar punishments, whilst cardinal proportionality broadly ensures that punishments are not too harsh or lenient.[1064] Each jurisdiction would define how such would be set, keeping in mind these principles. Although it may be argued that this flexibility creates uncertainty in the law, defining the framework for justifying the aims of punishment and how it would be distributed advantageously provides a long-term solution for addressing the vast amount of crimes and types of offenders. In other words, responding to crimes in a multidimensional manner is advantageous given the vast amount of corporate crimes, the heightening levels of corporate internationalisation, and the fast-changing nature of corporate development and the increasing size, power and variety of corporate structures.[1065]

Previous chapters have demonstrated that the principle of 'proportionality' is inherent in all penal aims. Legal retribution provides for punishment to be proportional to the gravity of the offence (rather than the gravity of immorality as other approaches to retribution confer). In practice, this translates to the removal of gains derived through the commission of the offence.[1066] Some approaches to deterrence set punishment in accordance with the seriousness of the crime, keeping

[1062] Brooks, *Punishment* (n 13) 130-1.
[1063] ibid.
[1064] Von Hirsch 1993, 18-19 (as cited in Sam Lewis, 'Rehabilitation: Headline or Footnote in The New Penal Policy?' (2005) 52 Probation Journal 119, 124).
[1065] Spalding (n 933) 357.
[1066] Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31); Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (n 31).

in mind the financial circumstances of the offender, harm, and culpability factors.[1067] Some rehabilitation approaches set punishment in accordance with the seriousness of the offence and in the context of a determinate sentence.[1068] This supports the view that proportionality could be applied in a modified manner to ensure that offenders are 'restored', and the rights of identified stakeholders are 'restored'. This would depend on the circumstances, but limited punishment to the removal of gains committed by the offence and applying fines in accordance with culpability and harm will unlikely to achieve these goals for all offenders. This overrides current over-reliance on fines set to remove the gains committed by the offence, and seriousness of the offence judged in accordance with harm and culpability, keeping in mind the financial circumstances of the offender. This structure does not work in the long term for companies that have vast and continuous access to financial resources.

With regards to the fine range, the prosecution could grant a percentage departure equal to a guilty plea in a normal criminal trial for cooperation in the conference. The conferences, run by a facilitator, would be targeted towards how this downward departure would apply, having heard statements of the victims and stakeholders. Punishment is distributed through fines, restitution orders, probation orders like changing compliance programmes, and public notices. One or a combination of the methods would be applied when appropriate towards achieving the broad goal of restoration. No method of punishment would preside in importance over the other, but it is likely to be fines in combination with other methods rather than just solely fines. Depending on the circumstances of the crime, methods of punishment would respond to target the cause. As discussed above, some companies may violate the law without intent or knowledge with a result that impacts the rights of other individuals in the community (retribution). This may be applicable in strict liability offences, and punishment is still appropriate in this situation. Other companies violate the law in pursuit of their self-interests as utility maximisers (deterrence). Companies may have committed crime due to systematic failures or improper processes within the firm (rehabilitation). These causes fit within the broader cause of disassociating from society and not taking any political or legal responsibilities.

Distribution of punishment parallel to suggestions by Spalding could be suitable in some cases: small-business loans for stakeholders that could evidence that they have

[1067] The Criminal Justice Act 2003, s 164; Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31).
[1068] Hudson, *Understanding Justice* (n 596) 63.

been materially impacted due to the company's crimes; funding towards training centres for local businesses, attorneys, and government officials related to the crimes; and completing reports on the crime itself that are publicised to explain the reasons the company engaged in the crimes.[1069] To ensure that the safeguards afforded to offenders in a normal criminal trial are guaranteed, the terms of the agreement would be signed by a judge to ensure the process is fair and in the interests of justice. This advantageously ensures the company does not simply pay a fine but rather be forced to confront the victims it has harmed. Victims are restored through remediation (loan programme) and prevention (training centre and political pressure). Through these measures, victims' rights are theoretically remedied and the company would be able to repair its reputation and goodwill in the jurisdiction it committed the criminal act in.[1070] The fine is reduced by projects that are paid towards the community and the steps the company takes the remedy its wrongs.[1071] Theoretically, punitive restoration aims to change corporate behaviour by applying a downward fine that could be paid towards helping the victims and involving the community. This would help resolve criminal misconduct if companies admit guilt and want to participate in the process.

Previous chapters have discussed that the existence of measures beyond the imposition of fines, like requiring companies to restructure their compliance programmes and restitution orders. They are also essential to safeguard against widening the justice gap between companies and individuals and hindering the violation of the rights of individuals in society. Changing the compliance programmes would help prevent companies from recidivism, address issues leading to companies engaging in corporate behaviour, help create norm compliant behaviour by companies, and foster public goodwill and a positive image of the company.[1072] Restitution orders advantageously correct the rights violated by crime because they would send a message to offenders, through removing the gains from the offence and compensating the victims and other stakeholders, to understand the impact of their wrongdoings on other parties.

The distribution of punishment through trial would still include and enforce the same methods of punishment without the ability to reduce the fine for a 'guilty plea' or

[1069] Spalding (n 933) 404-5.
[1070] ibid 406.
[1071] ibid 407.
[1072] Walsh and Pyrich (n 749).

enforcing a departure in the fine for completing certain methods of punishment beyond the fine. The criminal justice system still attempts to achieve punitive restoration to protect the rights of individuals in the community. This system would provide incentives for companies to cooperate with the prosecution and be incentivised in a model that ensures their rights are protected, and that steps are being taken to ensure that companies are compliant with the law in the long run.

2.4 Legitimacy of Restorative Justice, the UTP, and the Sentencing Model

Chapter 5 addressed challenges to the understanding of restorative justice and its contexualisation as an instance of punishment. The interpretation of the UTP in line with this particular understanding of restorative justice has theoretical and practical legitimacy if applied in England and Wales and the United States. Compellingly, it reflects a SOC approach, which is imperative for meaningful reforms to corporate criminal laws in England and Wales and the United States.

It overcomes the flaws of Spalding's non-punitive restorative justice model for foreign bribery. Spalding incorrectly asserts, when he advances a new theory based purely on non-punitive restoration for companies facing prosecution for committing briberies in foreign jurisdictions, that restorative justice is already embedded in Chapter 8 of the Sentencing Commission Guidelines for companies. The Guidelines clearly limit the goals of punishment to deterrence and retribution. Spalding advances compelling proposals on how restorative justice could translate to practice, yet the significance of his proposals are minimized because he does not clarify of the theoretical foundations to his arguments and how restorative justice could be a complete theory of punishment. The current punitive model would diversify the way in which companies are punished. It considers approaches to deterrence, retribution, and rehabilitation as penal aims and through the prosecution process and applies proportionality when distributing punishment.

The proposals require legislative changes to become restoratively oriented laws and policies. First, there needs to be an alignment between the purposes of punishment for companies and individuals. Second, restorative justice agreements need to be set under a statute, and binding guidelines need to be passed to ensure transparency within the process and that all internal issues that have led a certain company to

commit misconduct are resolved to minimise the potential of reoffending. Third, restorative justice agreements would have to be approved by the court when the company is invited to engage in them and when finalised, to ensure that the interests of justice are not compromised and that the proposals are fair, reasonable, and proportionate. Similar to DPAs in England and Wales and the United States, failure to comply with the requirements of a restorative justice agreement could be used in evidence in subsequent criminal proceedings.[1073]

Overall, the model is theoretically and practically coherent. It aligns with a persuasive hybrid theory of punishment, the UTP, and considers approaches to deterrence, retribution, and rehabilitation. Restorative justice, as conceptualised in this thesis, emphasises identifying stakeholders impacted by the crime to understand how the rights of individuals have been impacted by a law violation, and how sentencing would assist in restoring these rights. Companies would need to identify individuals responsible for the wrongdoing to be eligible for a restorative agreement, and such individuals would be prosecuted to the full extent of the law. Moreover, restorative agreements would only apply where the company has demonstrated a willingness to reform and cooperate with prosecutors. The Theory, through collating different penal aims under one framework, provides a better understanding of the aims and causes of punishment. It allows corporate criminal frameworks to account for these various causes through providing new modes of punishment distribution that would be targeted towards addressing the various types of corporate structures, types of crimes, and corporate offenders. It changes the perception of restoration being ‘non-punitive' and shows its potential to address corporate crime.

3 Challenges to Restorative Justice and the UTP

Chapter 5 defended and addressed potential challenges relating to the definition and contextualisation of restorative justice. This section builds on these views and identifies and addresses some challenges to using restorative justice and the UTP to address corporate crime.

[1073] Grimes et al. (n 222).

3.1 Is it a Hybrid Theory of Punishment?

One potential argument against the UTP, in general, is its status as a hybrid theory of punishment. Is the theory 'unified' and 'coherent'? As provided in previous chapters, a well-defended theory of punishment would provide its definition, justifications, and punishment distribution methods. The principles relate to each other because no justified punishment can be imposed for an unjustified crime.[1074] If they are not defined or clearly articulated, the theories have the potential to advance contrary goals and methods of punishment. Any hybrid theory would be theoretically incoherent if it suggests aims that contradict the methods of distribution.[1075] Previous chapters have explored the weaknesses to a number of hybrid theories of punishment, citing their inability to explain how the aims could work under one framework, and/or explain conflicts to perceptions of the various theories of punishment. Accordingly, the theories incoherently advanced an aim in accordance with one theory, yet distributed punishment in accordance with another theory. This is illustrated, as detailed in previous chapters, through current hybrid theories of punishment in practice. Robinson considers the aims of the United States MPC and Sentencing Commission Guidelines. He states,

> [One] would wish for such legislative direction in all jurisdictions in the form of an articulated distributive principle that can assure rationality and internal consistency in drafting penal codes and sentencing guidelines and the exercise of judicial discretion in interpreting statutes and imposing specific sentences.[1076]

The 'laundry list' approach of the MPC and current purposes governing the Sentencing Commission Guidelines fail to explain how the aims work together, for instance by providing no more guidance than that the aims should be 'justly harmonised' if they are at conflict, which leaves discretion for decision makers to make decisions based on their own priorities, reflecting an inconsistent criminal justice system.[1077] Applying a hybrid theory of punishment by addressing various sentencing aims and imposing 'the most severe punishment' does not necessarily work. For instance, if the theoretical approach to deterrence recommends the longest

[1074] Thom Brooks, 'Defending Punishment: Replies to Critics' (2015) 5 Philosophy and Public Issues 73, 80.
[1075] Brooks, *Punishment* (n 13) 123.
[1076] Paul Robinson, *Distributive Principles of Criminal Law* (n 14) 6.
[1077] ibid 5-6, 19.

prison sentence, the theory of punishment would advance deterrence.[1078] In other words, the aims of punishment lack unity because there is no justification for why these goals are set under the specific framework nor how they may work together. Justifying a practice without consideration on how each of the penal aims works together is a major flaw.[1079]

The MPC still advantageously incorporates goals of retribution, deterrence and rehabilitation.[1080] This is consistent with the UTP as it supports penal pluralism and does not go against but develops what is already applied in practice in England and Wales and the United States. It also overcomes the difficulties of applying pure theories of punishment as discussed in previous chapters. From here, the UTP, as a hybrid theory of punishment, should aim to provide such through combining the chosen principles in a coherent and principled manner.[1081] Dempsey argues that it is not clear how the Theory is 'coherent', and how coherence advances a 'successful theory of punishment', nor is it clear how the theory is 'unified' through the combination of multiple goals under one unified framework.[1082] Tunick argues that there is an internal tension between the competing goals and that the UTP fails to explain how the goals could be set under one coherent framework.[1083] Moreover, he argues that the UTP cannot be unified because the purposes of 'restoring rights' and 'preventing future rights violations' can conflict.[1084] He explains that Brooks' emphasis on the importance of 'desert, culpability, punitive measures, and punitive measures in a criminal justice system' could be construed as leading back to a retributive standpoint.[1085] He also states that Hegel's account of punishment does not completely depart from morality.[1086]

The arguments fail on a number of grounds. Looking back at the definition of restorative justice and the definition, justifications, and methods of punishment

[1078] Brooks, *Punishment* (n 13) 133.
[1079] ibid.
[1080] Mark Tunick, 'Book Review: Hegel's Political Philosophy: A Systematic Reading of the Philosophy of Right by Thom Brooks' (2009) 118 Mind 449, 449; Brooks, 'In Defence of Punishment and the Unified Theory of Punishment: a Reply' (n 1018) 636.
[1081] Richard Lippke, 'Elaborating Negative Retributivism' (2015) 5 Philosophy and Public Notices 57, 67.
[1082] Michelle M. Dempsey, 'Punishment and Coherence' (2015) 5 Philosophy and Public Issues 43, 47.
[1083] Mark Tunick, 'Should we Aim for a Unified and Coherent Theory of Punishment?' (2016) 10 Crim Law and Philos 611, 613, 614, 620.
[1084] ibid 627.
[1085] Brooks, 'In Defence of Punishment and the Unified Theory of Punishment: a Reply' (n 1018) 637.
[1086] Mark Tunick, 'Book Review: Hegel's Political Philosophy: A Systematic Reading of the Philosophy of Right by Thom Brooks' (n 1080) 450.

distribution articulated by the UTP would help explain why. Crime is understood as a 'right violation' and the justification of punishment is to restore and maintain those rights. Punishment is justified as just deserts if it results in a right being violated (legal retribution). The aims of crime reduction and reforming the offenders could contribute to restoring the rights (deterrence and rehabilitation). The imposition of crime would be in proportion to the centrality of rights violated, as defined by the community. This is subject to change and would vary over time.[1087] The goals only clash in the absence of a framework that unifies them.[1088] Tunick misunderstands that restoring rights and preventing future rights being violated cannot clash, as the Theory justifies punishment as an infringement of individual rights with an overarching aim of restoring rights.[1089] It follows that the Theory could reject punishments that do not reduce re-offending (as those against the aim of restoring rights and reflects a recurring infringement of the same individual rights), and that proportionality in relation to the right infringed by the crime would advance the aim of restoring rights.[1090] As to the potential of the UTP being retributivist, looking back at Hegel's proposals would show how Tunick's claims are based on misinterpretations of Hegel's and Brooks' propositions. Hegel, as referred to in Brooks' article, states,

> The fact that an injury to one member of society is an injury to all others does not alter the nature of crime in terms of its concept but in terms of its outward existence… its *danger to civil society* is a determination of its magnitude…This quality or magnitude varies, however, according to the condition of civil society.[1091]

Hegel rightly asserts that crimes are not punished as moral wrongs (i.e. a view of crime's outward existence rather than its inner moral existence), and the understanding of desert is that an individual who commits a crime deserves to be punished.[1092] Like the British Idealists, Brooks opposes traditional retribution

[1087] Thom Brooks, 'Defending Punishment: Replies to Critics' (n 1074) 80-1.
[1088] Brooks, 'In Defence of Punishment and the Unified Theory of Punishment: a Reply' (n 1018) 636.
[1089] ibid.
[1090] ibid.
[1091] Hegel (1991) 218 in Thom Brooks, 'What did the British Idealists Ever Do for Us?' (n 1022) 28, 41.
[1092] Thom Brooks, 'What did the British Idealists Ever Do for Us?' in Thom Brooks (eds), *New Waves in Ethics* (n 1022) 28, 31.

theories that impose 'pain in return for pain' and proposed a system of law that attempts to protect rights.[1093] Furthermore, as referred to in Brooks' article, he states,

> Punishment…has various determinations: it is retributive, a deterrent example as well, a threat used by the law as a deterrent, and also it brings the criminal to his senses and reforms him. Each of these different determinations has been considered the ground of punishment, because each is an essential determination, and therefore the others, as distinct from it, are determined as merely contingent relatively to it. But the one which is taken as ground is still not the whole punishment itself.[1094]

Hegel states that retribution, deterrence and rehabilitation are components of justified punishment. The correct approaches to deterrence, rehabilitation, and retribution, are as follows: deterrence approaches arguing that just punishment should reduce recidivism; rehabilitation approaches that argue that punishment should assist offenders in reforming themselves and reducing recidivism; and retribution approaches that argue that punishment is justified when deserved and set in proportion to their crime. The thesis has demonstrated how a theory of punishment can be built to accommodate the core principles of the aforementioned approaches and coherently combine them to build a broader theory of punishment.[1095] The gaps between theory and practice are bridged through the thesis' proposals on restorative justice and the UTP.

3.2 Is Punishment Distributed Consistently?

One important consideration is whether punishment is distributed consistently. This relates to the methods of punishment, and whether the aims of punishment are achieved by a certain method(s) of punishment.

3.2.1 Treating Similar Crimes and Offenders Differently

One concern is whether treating similar offenders and crimes differently and not having fixed sentences may have an impact on legal certainty. The application of proportionality overcomes this issue: punishments are set in accordance with the

[1093] ibid 28, 41.
[1094] Hegel (1969) 465 in Brooks (ed) *Hegel's Philosophy of Right* (n 1022) 104.
[1095] Brooks (ed) *Hegel's Philosophy of Right* (n 1022) 104-5.

'penal perception', or perceptions about threats to right.[1096] The more central the rights violated are, the more severe the punishment. Brooks states that 'some difference is permitted within a fixed range to be determined in light of circumstances subject to future revision and review.'[1097] This is advantageously already in line with sentencing guidelines in England and Wales and the United States. Brooks differentiates between the crimes and the circumstances of the crimes. If punishment is aimed at the restoration of rights, it has to be tailored to the specific circumstances and address the specific cases.[1098] One offender may have committed a crime due to drug abuse, whereas the second offender committed the same crime because they didn't think they would be caught. Different punishments are sufficient in the circumstances given the varying circumstances of the offence.

It follows that legal certainty may also be impacted if the punishment is recurrently changing in accordance with the circumstances. Brooks contends that 'penal realism' may lead different communities to punish the same criminal act differently, because of the varying perceptions of the centrality of rights being violated.[1099] This may not be a disadvantage because different communities may have different perceptions of the centrality of rights.[1100]

Therefore, punishments should not be fixed but should be viewed in the context of the specific crime and offender to be justified in a particular circumstance. They are subject to judicial review.[1101]

Third, another challenge to the UTP is identifying the community members to be restored. This challenge was addressed in section 3.1 of Chapter 5. Particularly, it was acknowledged that there are difficulties in identifying the stakeholders in a specific circumstance. Yet, building a framework to identify the stakeholders of a specific crime is a possible option that would still afford all parties their rights. Stakeholders differ from one case to another, but that should not be a reason to depart from the advantages of a broader theory of punishment that centralises improving public confidence and reducing recidivism. Stakeholders could be identified through defining 'those who have a stake in penal outcomes' in the particular case. In other

[1096] Brooks, *Punishment* (n 13) 139.
[1097] ibid 137.
[1098] ibid 136.
[1099] ibid 137.
[1100] ibid 123, 137, 138.
[1101] ibid 138.

words, it includes individuals who are directly affected like the victim and their support network; individuals and groups that claim that they have been impacted by the crime, which may include the general public (this may work through representation and kept to a small number to facilitate constructive dialogue and focus on the needs of those with the largest stake).[1102] The use of a new governmental body, the CJB, would help in appointing and training facilitators, and developing guidelines, that would ensure consistency in the selection of the stakeholders of a particular offence.

3.2.2 When is Restoration Achieved?

The second point to address is when punitive restoration and protection the rights of individuals occurs. Lippke states that the Theory fails to define how protection and restoration of rights would be achieved. He provides and criticises three possible ways of achieving restoration: restitution, censuring, and ensuring that individuals who do not wish to abide by laws would understand that they 'cannot get away with it' and would suffer 'censure and hard treatment.'[1103]

He states that restitution is not relevant in cases where no one's rights are violated, and civil law is better equipped than criminal law to deal with these circumstances. Nevertheless, previous chapters have illustrated how restitution could be targeted to address criminal laws when it is just, would deter the company, and/or help them understand the consequences of their conduct as part of rehabilitation. Current sentencing practices in England and Wales and the United States already apply restitution as ancillary orders. As argued in the previous section, restitution is essential.

Furthermore, Lippke contends that it is unclear how censuring is 'punitive' if it does not collectively resolve the issue, and would lead to crime reduction in the long term.[1104] Censuring involves communicating the importance of rights to offenders, victims, and other individuals. Corporate criminal liability as team member responsibility ensures that punishment would communicate a set back to the team's goals. The company's goals are impacted by its ability to engage in contracts with clients and partners. Chapter 5 emphasised how public notices as punishment would

[1102] Thom Brooks, 'Stakeholder Sentencing' (n 32) 190-200.
[1103] Lippke, 'Elaborating Negative Retributivism' (n 1081) 69-70.
[1104] ibid 69.

ensure the company explains what led to the wrongdoing; the behaviour of the company to governmental officials; and the impact of their conduct on stakeholders and victims.[1105] This is parallel to the idea of ensuring that the company would not disassociate from the community. It is likely to speed up the process of companies achieving their long-term goals; lessen the impact of a crime on the company's future engagement in contracts and maintenance of clients, and provide the company with the opportunity to acknowledge and understand the implications of its crime. This is more advantageous than being in a cycle of companies settling or paying fines and engaging in continuous criminality.

Additionally, Lippke states that the lack of incentives to abide by the law may lead to the destabilisation of a community. Individuals may attempt to take matters into their own hands by engaging in vengeful actions to deal with lawbreakers. The protection of rights would be achieved by ensuring companies do not 'get away with the crime'. However, the arguments fail on the ground that the process of achieving punitive restoration could be defined within certain parameters that ensure that incentives for abiding with the law are in place, and that companies that violate the criminal law would still go through a criminal trial, and distribution of punishment would be in accordance with a mix of fines and other methods that would communicate the state's effort at involving stakeholders and reducing re-offending in the long term. The model sets the foundation for enforcing a criminal justice system that holds corporate bodies legally accountable for violating other individual's rights, and where punishment is distributed in proportion to the violation of these rights. Such could be enforced in a way that ensures fundamental principles like procedural safeguards and legal certainty are not violated.

3.2.3 Justifying and Identifying the 'Stakeholder Community'

One possible theoretical and practical challenge to the Theory is the justification and identification of the 'stakeholder community'. Brooks states,

> [How] much voice, if any, should the public have regarding sentencing decisions? Which institutional framework should be constructed to better incorporate public opinion without betraying our support for important penal principles and support for justice?[1106]

[1105] Spalding (n 933) 404-5.
[1106] Thom Brooks, 'Stakeholder Sentencing' (n 32) 183.

As proposed above, parties to the offence (individuals within the company, members of the community and victims) would be identified in each case. To reiterate, this is subject to change. There may be difficulties in defining 'stakeholders', and applying a consistent process of identifying 'stakeholders' when a crime is committed.

One argument against stakeholder sentencing is that involving the public in the criminal justice process may lead to more punitive measures that are disproportionate to the centrality of rights violated.[1107] This argument runs in line with victim displacement in current criminal justice processes to preserve the rule of law and impartiality in sentencing.[1108] Brooks points out that disproportionate sentences may be due to the lack of public confidence.[1109] Public opinions on sentencing outcomes may be influenced by the lack of information; sentencing decisions are more likely to be subject to a lack of consistency if handled by the public rather than judges and trained lay magistrates; and lack of public confidence may support the punishment that may, for example, support retribution, and undermine rehabilitation.[1110]

On the other hand, one should not assume a link between public confidence and the severity of punishments.[1111] Moreover, public participation in sentencing is not a new idea in England and Wales and the United States' sentencing practices. Lay magistrates determine the punishment of less serious crimes in England and Wales; juries are used to determine issues of fact in more serious crimes in England and Wales and the United States, and judges are allowed to consider victim impact statements to determine penal outcomes (although have a limited extent to sentencing preferences).[1112] Current practices like victim statements in trials, enable victims to voice their opinions on the impact of the crime on their wellbeing, without it necessarily impacting the offenders' sentence nor having an impact on an offender that did not plead guilty.[1113] This may be counterproductive to increasing public confidence. In such circumstances, the inclusion of other methods of punishment within an overarching measure of achieving punitive restoration would be better suited for the parties in the circumstances. That comes in hand with distributing different punishments to the same crime. Restorative measures would be used in

[1107] ibid 183.
[1108] ibid.
[1109] ibid 185.
[1110] ibid 187.
[1111] ibid 186.
[1112] ibid 185.
[1113] Thom Brooks, 'The Stakeholder Society and the Politics of Hope' (2015) 23 *Renewal* 44, 49.

cases where offenders agree to participate in the assigned model of restorative justice and acknowledge their guilt.[1114]

Overall, institutional reforms could be implemented to ensure consistency in identifying stakeholders and their roles in the case, and how restoration would be achieved. This would require processes that give the public opportunities to collect information and make better decisions.[1115] Restorative justice and the UTP advantageously consider the importance of public confidence in sentencing to achieve punitive restoration, thereby reducing recidivism and creating norm compliant behaviour by individuals within the stakeholder community. The stakeholder is supported by British Idealist theories in the late nineteenth and early twentieth centuries. They emphasise the importance of minimising political alienation by providing opportunities for individuals to engage in the community, thereby creating a social and political space to find a common identity.[1116]

4 Conclusion

The chapter collates proposals from the previous chapters and advances a restoratively-oriented theory of punishment for corporations. Section 2 defined UTP in line with the understanding of restorative justice advanced in Chapter 5. It advanced changes to punishing companies who have been alleged of committing a crime, through introducing a 'restorative agreement' process and implementing changes to the process of sentencing companies. Section 3 addressed potential challenges to the restoratively oriented theory of punishment, including potential challenges to its status as a hybrid theory of punishment, and whether the process of sentencing and sentencing methods are consistent.

Attitudes towards compliance and non-compliance with criminal laws vary with changing economic circumstances. There is also skepticism on the effectiveness of current laws in creating norm-compliant behaviour by companies, especially given the emergence of various structures and priorities of companies that have increased the difficulty for regulation and enforcement.[1117] The current hybrid deterrence and retribution-based model in England and Wales and the United States have failed to

[1114] Thom Brooks (2014) 'Ethical citizenship and the Stakeholder Society' (n 1044).
[1115] Thom Brooks, 'Stakeholder Sentencing' (n 32) 187.
[1116] Thom Brooks (2014) 'Ethical citizenship and the Stakeholder Society' (n 1044).
[1117] Messmer and Otto (n 1014) 1; Babcock (n 1013).

identify the causes of crime and how punishment should be distributed to achieve the aims of deterrence and retribution.

Therefore, a SOC approach requires a restoratively-oriented model of punishment that encompasses viable approaches to retribution, deterrence, and rehabilitation. The UTP; interpreted in line with the definition and contextualisation of restorative justice in Chapter 5, successfully collates all the aforementioned penal aims effectively and presents convincing arguments to address corporate crime. The chapter provided a comprehensive understanding of the following: why corporations commit crimes? Why they should be punished? and how they should be punished? This is the starting point to meaningful and practical reforms to corporate criminal liability and sentencing policies in the future

Conclusion

Courts in England and Wales and the United States have recognised, over a century ago, that companies, like individuals, should be held criminally accountable when they violate the law. Current policies, processes, and laws governing corporate crime have failed to achieve their identified goals of retribution and deterrence. This is due to three interlinking reasons: (a) uncertainty surrounding the theoretical justification(s) for holding companies liable under the law; (b) the divergence of views regarding suitable standards of liability; and/or (c) current methods of punishment and existent alternative processes for bringing companies to justice once they have violated the law.

The thesis contributes to knowledge on corporate crime and restorative justice through moving away from the 'tough on crime' vs. 'soft on crime' debate, and towards a SOC approach. The arguments and contributions of the thesis are thereby summarised.

1. Corporate criminal liability is necessary but was not theoretically justified in early cases.

Chapter 1 places the thesis in a historical context. The development of corporate law and civil liability laws for companies could not coherently regulate companies and combat rising economic and social harms.[1118] Courts in England and Wales, followed by the United States, recognised corporate criminal liability for strict-liability and non-strict liability offences.[1119] The challenges of proving the mens rea elements of intent and negligence were overcome by creating an exception for public policy reasons.[1120] *Respondeat superior* and the identification doctrine, tort law principles, were extended to criminal law to prove the mens rea elements of crimes committed by corporate bodies.[1121] The recognition of corporate criminal liability because of 'shifting legal trends', without coherently assessing the goals of law and how they

[1118] Kathleen F. Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (n 2) 398.
[1119] See Chapter 1, section 2.1.
[1120] *Great North of England Railway Company* (n 67) 319.
[1121] Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (n 1) 401-3.

ought to be achieved, has contributed to scepticism on the basis of corporate crime, and stagnant development of the law, even a century later.[1122]

2. Corporate criminal liability is 'team member responsibility'.

This necessitated exploring the theoretical basis for corporate criminal liability. The group moral agency approach, which argues that companies should be held to criminal law for owing obligations as individuals do, does not align with the development of corporate law and criminal law as applied to companies.[1123]

The thesis alternatively advances Lee's proposal, which justifies corporate criminal liability as team member responsibility.[1124] Companies should be criminally responsible for the wrongdoing of one or more members if it is partially or completely motivated by the team's norms; and/or team member(s) contribute to or commit the unlawful act or omission in pursuit of the team's goals. In the latter case, the team members who committed the act and/or were responsible can incur personal liability. These acts reflect violations of the rights of others, regardless of whether the acts conducted are moral or immoral. It would be just to impose liability in these circumstances to restore the rights of individuals, create a setback to the company's goals, and help team members re-evaluate their commitment to the team, thus preventing further legal violations.

Lee's model advantageously provides a non-moral basis for corporate criminal liability. It also reinforces the necessity of criminal law in addition to civil law to regulate corporate misconduct. It clarifies the role of members in a corporate entity and identifies situations where personal liability and corporate liability would be imposed, which overcomes difficulties of justifying the extension of *respondeat superior* and the identification doctrine to criminal law. It is theoretically and practically coherent, and appropriately bridges the gap between the theoretical foundations of the criminal law and possible arguments against the historical recognition of corporate criminal liability. Therefore, any reforms to the law should seek to modernise corporate criminal laws rather than abolish them.[1125]

[1122] Weissmann and Newman (n 88); W. R. Thomas (n 56) 9; Baer (n 81) 2-3.
[1123] See Chapter 1, section 2.2.1.
[1124] ibid 755.
[1125] See Chapter 1, section 2.2.3.

3. The Canadian framework overcomes flaws of current liability standards for non-strict liability offences.

The second part of Chapter 1 contextualises the findings of the first part through exploring the current scope of the law in England and Wales and the United States. Having considered Lee's proposals, the *respondeat superior* standard for non-strict liability offences is too broad and does not consider that companies have varying sizes and management structures. It is not justifiable that an employee's criminal act, not motivated by the team's norms, would be imputed to a company, even if a due diligence defence exists. The 'due diligence' standard and requirements are subject to change and may be uncertain.[1126] On the other extreme, the identification doctrine also fails to recognise the variety and varying nature of corporate structures; the larger the company is, the more difficult it is to identify the individuals responsible for the crime. It also encourages companies to decentralise responsibilities to avoid liability.[1127]

The thesis advances the Canadian framework. It adopts standards of liability created by statute for non-strict liability offences and has two different liability standards (for crimes requiring proof of negligence and other offences requiring mens rea other than negligence). The standards distinctively account for delegation within companies. The Canadian framework aligns with Lee's basis for corporate criminal liability and is more theoretically and practically coherent than current frameworks in England and Wales and the United States. Reforms to current liability frameworks are a welcomed step, provided that careful consideration is given to align liability standards with sentencing practices.[1128]

4. Sentencing guidelines, processes, and laws do not identify the theoretical approaches to retribution and deterrence.

Retribution (removal of gain derived through the commission of the offence) and deterrence are prominent penal aims. Accordingly, the distribution of punishment is primarily through the payment of fines. In England and Wales, courts may enforce confiscation orders, compensation orders, and/or other ancillary orders. Fines are

[1126] Baer (n 81) 5; Desio (n 247).
[1127] Tariq (248); Wells, 'Corporate Liability for Crime: The Neglected Question' (n 104) 44; Ministry of Justice (n 35); see Chapter 1, section 3.1.3.
[1128] See Chapter 1, section 3.1.3.1.

determined by harm and culpability, whether the company assisted the prosecution, and whether the company pleaded guilty.[1129] In the United States, courts may issue remedial orders, orders of notice, and restitution orders.[1130]

A wide disparity exists between the goals of punishment in theory and what they have been translated to in practice. The aims of punishing individuals are not parallel to the aims of punishing companies, and it is not clear why rehabilitation and restoration are not penal aims. The identified goals of retribution and deterrence are not theoretically studied to a great extent. There are many theoretical approaches to each penal aim, and it is not clear whether sentencing guidelines advance one aim in a way that would not contradict another aim.

5. Legal Retribution, Deterrence, and Rehabilitation Can Work Together as Part of a Broader Theory of Punishment that Aims at Restoration

5.1. Legal retribution, deterrence, and rehabilitation each provide partial understandings of the aim of punishment and the distribution of punishment

Chapters 2 to 5 explored the viability of retribution, deterrence, rehabilitation, and restoration, to advance an understanding of corporate crime and the punishment of corporate bodies. The chapters (a) historically examine the development of the theoretical foundations of each penal aim; (b) evaluate various modern interpretations of the penal aims, including hybrid theories of punishment that include one of the penal aims; (c) critique the compatibility of the penal aim in the context of companies; and accordingly, (d) advance proposals relating to the justifying aim of punishment and how punishment should be distributed.

Legal retribution specifies that companies may break the law, with or without fault, resulting in economic and personal consequences on other individuals. Punishment should be imposed when it is just. It is just to punish conduct that violates the rights of other individuals, whether the law is immoral or moral, and whether the company

[1129] Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31); Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (n 31).
[1130] United States Sentencing Commission, 'Guidelines Manual 2016' (n 11) Ch.8, 525.

was at fault or was not.[1131] Many approaches to deterrence provide that companies engage in crime because they calculate the benefits to be higher than the costs.[1132] It follows that many approaches to rehabilitation argue that crime could arise from defective control systems, insufficient accounts, poor communication, and inadequate operating procedures.[1133] It is also just to impose punishment in these circumstances as a response to crime. As to the distribution of punishment, the principle of 'proportionality' is inherent in the aforementioned penal aims.[1134]

Each of the penal aims provides partial contributions to the understanding of corporate crime and punishment and could be collated under a hybrid theory of punishment.

5.2 Restorative Justice is a Theory about Punishment: It Provides a Multidimensional Understanding of the Justifying Aims of Punishment and How Punishment Ought to Be Distributed

In Chapter 5, a theoretical and historical analysis of restorative justice reveals many misunderstandings of what restorative justice means in theory and practice: it is speculative whether it has achieved its theoretical aims; it is often perceived as an alternative to punishment and not a theory of punishment, and there are difficulties in understanding how it would work with other penal aims.[1135]

Nevertheless, restorative justice offers many compelling principles that could contribute to a theory of punishment for corporations. Restorative justice is advanced as a theory about punishment, articulated through five principles: restoration; voluntarism; neutrality; safety; accessibility; and respect.[1136]

Chapter 5 advances the following understanding and contextualisation of restoration justice. Restoration should be an aim to be achieved through law, a process, and/or practice, resulting in a restoratively oriented law, process, and/or practice.

[1131] Brooks, 'Punishment: Political, not Moral' (n 402) 434.
[1132] Kennedy (n 461) 8.
[1133] Braithwaite and Geis (n 303) 309.
[1134] The Criminal Justice Act 2003, s 164; Sentencing Council, 'Environmental Offences: Definitive Guideline' (n 31); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (n 31); Sentencing Council, 'Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline' (n 31).
[1135] Brooks, *Punishment* (n 13) 64.
[1136] Restorative Justice Council (n 762).

Restorative justice provides a multi-dimensional understanding of crime and punishment – it seeks to understand and take into account the causes of crime, the impact of a crime, and how the harm resulting from a crime can be remedied. Thus, it considers that corporate behaviour may change in response to economic circumstances, and the need to respond to crime in accordance with the circumstances presented. Restorative justice advocates for effective communication about the crime, which would lessen the power imbalances between companies and individuals, because all stakeholders would be involved in the decision-making process of what remedies would be applied to the particular corporate wrongdoing.[1137]

This has an impact on the liability standards set by the law (answering the questions of 'what to punish?' and 'whom to punish?') and sentencing processes and practices ('how do we prosecute offenders?' and 'what punishment should be imposed?'). Restorative justice ought not to be reduced to a single type of approach taking a conference setting.[1138] Restorative justice offers a new understanding of the justification of punishment and how it ought to be distributed, and the latter can take many forms. Going back to the issues presented at the beginning of the thesis in relation to corporate crime, restoration should be an integral part of any theory of punishment.

5.3 Restorative Justice and The Unified Theory of Punishment

Restorative justice and the UTP can provide a comprehensive understanding of corporate crime and the punishment of corporate bodies. One form that the theory might take is punitive restoration, which is restoring the rights of individuals as part of a stakeholder society.[1139] The UTP is interpreted in line with the definition and contextualisation of restorative justice advanced in Chapter 5. Deterrence, retribution, and rehabilitation are different components that equally fit within one theory of punishment.[1140]

Accordingly, the thesis advanced new interpretations of the justification of punishment and how punishment should be distributed.

[1137] Braithwaite, *Restorative Justice & Responsive Regulation* (n 917) 82.
[1138] See Brooks, 'Restorative Justice and Punitive Restoration' (n 165) 131, 136-7.
[1139] Brooks, *Punishment* (n 13) 148; Brooks, 'Stakeholder Sentencing' (n 32) 183.
[1140] Brooks, *Punishment* (n 13) 126-7.

Companies commit crimes because of their distinctive political and legal positions. They may have distinctive legal and political positions in the community in comparison to individuals in non-corporate settings. This may be due to obtaining a wealth of resources, adopting political positions in recurrent community debates, influencing human behaviour through their products and campaigns, and obtaining local and international rights, amongst other reasons.[1141] Having a distinctive political and legal position is a broad idea that encompasses the justifying aims of punishment provided by retribution (violation of laws without fault and/or decisions leading to a violation of rights of other individuals), deterrence (costs of committing a crime is lower than the benefits), and rehabilitation (cost-saving measures resulting in poor communication, insufficient accounts, and defective control systems).

Punishment is a response to crime and is justified when it violates the rights of individuals in a community.[1142] According to legal retribution, punishment ensures that the rights of individuals who have been impacted by a criminal act are restored. Deterrence provides that companies would not commit future crimes and reap benefits at the expense of individuals in the community. Rehabilitation provides that companies should be punished in a way that would allow them to address their wrongdoing, remediate rights violated, and change their internal processes to ensure that they do not re-offend in the future.

Parallel to the proposals of Lee, the UTP and restorative justice support the imposition of punishment for strict liability and non-strict liability offences (requiring negligence, recklessness, or intent). It also does not contradict proposals of the Canadian framework supporting a broad standard of liability that accounts for different types of corporate misconducts and corporate structures, thereby responding to crimes in a multidimensional manner and overcoming difficulties of prosecution.

The thesis argues that the role of the criminal law has broadened to ensure that companies adopt norm compliant behaviours to reduce the overall levels of crime in the long term. Bringing companies that have violated the law to justice does not always require punishment through a trial. The thesis advances a 'restorative agreement' proposal in place of DPAs to advance its interpretations of restorative

[1141] Taslitz (n 1036) 73.
[1142] Brooks, *Punishment* (n 13) 6, 127.

justice and the UTP. This advances the stakeholder community proposal, which emphasises the involvement of members of the public that are impacted by the crime in the criminal justice process.[1143]

Distinctively, restorative agreements are not a method of disposal falling short of a criminal conviction. Companies that do not want to engage in restorative agreements would proceed through a normal trial. The criminal justice system still attempts to achieve punitive restoration to protect the rights of individuals in the community. Restorative agreements are targeted at changing corporate behaviour and culture. This is evident through the following: First, the downward fine range and corporate credit through voluntary disclosure. The downward fine would be impacted by the steps taken by the company and the fine could be used to fund business loans to stakeholders in the industry impacted by the crime, or funding towards training centres for local businesses, attorneys, and government officials related to the crimes. Second, the ability to impose restitution orders, reforming compliance programmes, and/or completing reports on the crime that would be publicised, where relevant. Third, a new body is created, The CJB, to recruit facilitators to conduct independent investigations and prepare a report with the factual findings in relation to the crime, identify the respective victims and stakeholders, to communicate the particulars of the offence and specific impact of the crime on their particular interests. Fourth, a conference is conducted to resolve the crime and would include the appointed facilitator from the CJB, independent counsel from the company, representatives from the company who are party to the crime, and where appropriate, a select of identified victims and stakeholders, as chosen by the facilitators.

Overall, the thesis contributed to a distinctive understanding of restorative justice and corporate crime. It approached the contested issue of corporate crime through a SOC approach, particularly by considering the existent philosophies of punishment and responses to crime to gain an understanding of corporate misbehaviour and how the criminal justice system could be reformed to address it. The outcomes of approach produced a new understanding of restorative justice, arguing that restoratively oriented liability standards and sentencing policies are the starting point in responding to corporate crime. In practice, this may translate to a ‘restorative agreement' sentencing model, which requires the establishment of the CJB. The thesis comparatively studied the laws in England and Wales and the United States

[1143] Brooks, ‘Stakeholder Sentencing’ (n 32) 183.

because many common law jurisdictions have adopted models similar to theirs. This thesis thereby proposed needed reforms to corporate criminal liability laws at an international level and assisted in evaluating the advantages and disadvantages of different standards of liability and sentencing models.[1144] It provided new insights to current restorative justice thinking and applied it in a new context, corporate crime, and generated back new interpretations and perspectives to restorative justice and the UTP.

[1144] Tolaini (n 17).

List of Abbreviations

1.	CID	Company's internal decision structure
2.	CJB	Corporate Justice Board
9.	Commission Guidelines	
3.	Definitive Guidelines	The Sentencing Council's definitive guidelines
4.	Deputy Attorney General Guidelines	Deputy Attorney General guidelines for the enforcement of DPAs
5.	DPA	Deferred Prosecution Agreement
7.	Mixed model, hybrid model	Theory that advances retribution, deterrence, rehabilitation, or restoration
6.	MPC	The American Law Institute's Model Penal Code
8.	Pure model	Theory that advances retribution, deterrence, rehabilitation, or restoration
12.	Sentencing Commission	United States Sentencing Commission
10.	SOC	Smart on Crime approach, Smart Justice
13.	UK	United Kingdom
14.	USA, United States	United States of America
15.	UTP	Unified Theory of Punishment

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