Behaviourally informed approach to corporate criminal law: Ethicality as efficiency

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1. Introduction: Rethinking efficiency in corporate sanctioning

Almost none of us – according to pervasive empirical evidence – refrains from making an unlawful or unethical choice solely out of fear of being caught, and therefore sanctioned. Instead, we primarily follow our internalised moral norms, habits, and the social norms we consider relevant in each situation. This empirically backed proposition applies to human decision-making in all contexts, equally to managers and employees in the corporate universe.[1]

Yet, corporate criminal law, the most severe instrument for steering corporate choices, has traditionally relied on deterrence as the prevailing theory guiding doctrinal corporate criminal law. The traditional deterrence theory is based on threats of sanctions as the preventive argument underpinning its legitimacy. Each human decision is seen as a consequence of a rational choice, a balancing act between the positive and negative incentives of the act.[2] This line of thinking, however, appears to be based on an outdated behavioural model of human being and may lead to suboptimal regulatory results.

In order to regulate corporate behaviour efficiently, we need to know what drives individuals acting on behalf of the corporation. Once we know this, we may try to design appropriate regulatory models to motivate desired corporate behaviour. While corporate criminal law primarily addresses corporations as relevant legal subjects, any corporate criminal liability standard should account for behavioural evidence on

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1 E.g. Wells, *Corporations and Criminal Responsibility*, 2nd ed. (Oxford University Press 2001) pp. 31-32; Diamantis, Clockwork Corporations: A Character Theory of Corporate Punishment, *103 Iowa Law Rev.* (2018) pp. 507-569, at 507, 514, 518.

2 Critically, e.g. Simpson, *Corporate Crime, Law, and Social Control* (Cambridge University Press 2002) pp. 5-6, 22-23.

individual and group level decision-making as corporate behaviour is, ultimately, the result of individual agents acting for the corporation. Despite of the rich behavioural data accumulated in the fields of criminology, social psychology, behavioural economics and other disciplines, a structured theoretical approach applying such knowledge in doctrinal corporate criminal law remains missing.[3] This is evidenced by the fact that doctrinal research in corporate criminal law seldom considers value-based inhibitions or other behaviourally tested factors when discussing the design and/or preventive effects of law. The problem is partly caused by the fact that the term 'deterrence' often appears to be used in a general sense without contemplating the empirical facts assumed to explain the preventive effect of the corporate criminal sanction system.[4]

This article is an attempt to bridge the different modes of deterrence and fill the research gap between the empirical and doctrinal/policy-oriented research.[5] Considering the concurrent and increasing need to support compliant, ethical and – foremost – sustainable – corporate behaviour, especially as part of the global sustainability

3 See, however, Simpson 2002, which discusses the failure of deterrence based on criminological studies and compares, from a regulatory theory perspective, criminal liability and cooperative models. Simpson does not, however, address alternative ways to design liability standards. Doctrinal scholars who indeed have presented alternative models of corporate criminal liability do not refer to behavioural insights as a justification for the suggested regulatory models (see e.g. Laufer, Corporate Bodies and Guilty Minds, *43 Emory L.J.* (1994) pp. 647-730; Bucy, Corporate Ethos: A Standard for Imposing Criminal Liability, *75 Minn. L. Rev.* (1991) 1095-1184). For an interesting application of behavioural evidence in general criminal law see Robinson and Darley, Does Criminal Law Deter? A Behavioral Science Investigation, *24 Oxf. J. Leg. Stud.* (2004) pp. 173-205; Robinson, The Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst when Doing its Best, *91 Geo LJ* (2003) pp. 949-1002 (suggesting, *inter alia*, that deterrence should not be used as the guiding theory when formulating criminal law rules as such doctrinal manipulation rarely achieves the desired effect).

4 Robinson 2003 p. 972. It is, therefore, increasingly difficult to know what different authors mean when they refer to deterrence i.e. whether corporate and white-collar crime is assumed to be prevented because of the threat of punishment or due to some other related reason. See e.g. Weissman and Newman, Rethinking Criminal Corporate Liability, *82 Ind. L. J.* (2007) pp. 411-452, at 427-33; Hamdani and Klement, Corporate Crime and Deterrence, *61 Stan. L. Rev.* (2008) pp. 271-310; Slapper and Tombs, *Corporate Crime* (Longman 1999) pp. 183-188.

5 See Tonry, Learning from the Limitations of Deterrence Research, *37 Crime & Just* (2008) pp. 279-312, at 279 noting that '[p]ublic policy and scientific knowledge concerning deterrence have long been marching in different directions.' in the abstrac; Pogarsky, Identifying "deterrable" offenders: implications for research on deterrence, *19 Just. Q.* (2002) pp. 431-452, at 445 ('This disjunction between theory and evidence is perhaps symptomatic of how little deterrence theory has evolved beyond its initial formulation, despite the opportunity to draw on many recent advances in research on crime and on decision-making in general.'). Also see Andenæs, *Punishment and Deterrence* (University of Michigan Press 1974) p. 170 emphasising the importance of criminal policy being based on empirical and other research.

transformation,[6] this article argues that we ought to reconsider what we appreciate as functioning drivers for efficient corporate sanctioning. To this end, a novel behaviourally informed theoretical approach to corporate criminal law is suggested. While the behaviourally informed approach to law originates from behavioural economics, a line of research combining economics, sociology, and psychology,[7] this study adopts a wider approach as additionally criminological data is considered. Considering that criminological research provides the most relevant empirical evidence on corporate deviance, it would be misguided to discuss behavioural regulatory design in the context of corporate criminal law without taking into account such findings.

Behaviourally informed corporate crime prevention theory (BIPT) introduced in this article suggests that instead of restricting the motivation in corporate sanctioning to traditional deterrence thinking, the regulatory framework should additionally and expressly account for the influence of moral norms as behavioural constraints, and on a more general level, the moral and educative influence of criminal law as recognised, e.g., in the Nordic scholarship.[8] This 'ethicality approach' is based on the nature of moral values as efficient inhibitions against unethical and illegal behaviour, and on the argument that the functioning of such values appears to be best supported in corporate environments by adopting ethics based corporate compliance structures. The use of the term 'efficiency' in this article does not, therefore, mean that a purely utilitarian or consequentialist approach to the justification of the punishment is adopted. In line with Nordic punishment theories, this study argues that utility (i.e., efficiency) is not achieved merely through deterrence but by adopting a just and legitimate corporate criminal liability standard that motivates ethical corporate behaviour.[9] The objective of this article is to analyse what type of a liability model would be optimal in this regard.

The research problem is analysed by comparing the US and Finnish corporate criminal liability models and analysing the results against the efficiency assumptions under BIPT. The *respondeat superior* model applied in the US federal legal system is, in essence, a deterrence-based strict liability standard, whereas the Finnish model may

6 As an example, reference can be made to emerging corporate human rights due diligence regimes that require novel ways in approaching corporate sanctioning in the context of corporate sustainability regulation. See e.g., Bueno and Bright, Implementing Human Rights Due Diligence Through Corporate Civil Liability, *69 Int Comp Law Q* (2020) pp. 789-818, at 789.

7 E.g. Harel, Behavioral Analysis of Criminal Law in *The Oxford Handbook of Behavioral Economics and the Law*, Zamir and Teichman eds. (Oxford University Press 2014) pp. 568-598; Sunstein, Empirically Informed Regulation, *78 U Chi L Rev* (2011) pp. 1349-1429.

8 See sources in footnotes 18-26.

9 E.g., Lahti, Towards a Principled EU Criminal Policy: Some Lessons from the Nordic Countries in *EU Criminal Law and Policy: Values, Principles and Methods*, eds. Banach-Gutierrez and Harding (Routledge 2017) pp. 56-69, at 58-59

be classified as a derivative corporate negligence standard.[10] Under the *respondeat superior* standard, a corporation is liable for any offence by any agent acting within the scope of its authority and at least partially to benefit the firm. Under the Finnish model, corporate criminal liability necessitates corporate negligence, i.e., a breach of corporate due care obligation, that is in a causal connection with the offence by the individual agent. The liability standards are in this article analysed as behavioural incentives and thus, as motivations towards certain type of corporate compliance structures. The idea is to find out which liability standard most efficiently incentivises compliance structures that can nurture ethical value creation which, based on empirical evidence, appears to be the most efficient way to prevent misconduct in corporate environments.

The article is structured as follows. In order to understand the theoretical foundations of the liability models compared in the article and the relevance of the prevention theories guiding the regulatory choices, section 2 addresses the Anglo-American general deterrence and Nordic general prevention theories and related empirical evidence. Thereafter behavioural evidence regarding rational choice, moral inhibitions and the social context of decision-making is discussed. Finally, as a synthesis of section 2, a suggestion for a behaviourally informed corporate crime prevention theory (BIPT) is presented. Section 3 illustrates the practical significance of the suggested theoretical approach by comparing the US and Finnish liability standards. After describing the main features of each standard, these are analysed as incentives towards compliant corporate behaviour against the theory presented in section 2. Conclusions are drawn in section 4.

2. Behaviourally informed approach to corporate criminal law – Recognising the value of morals in decision-making

2.1 Prevention theories in the Anglo-American and Nordic scholarship

In order to understand the relevance of the prevention theories as guiding principles of corporate criminal law, it is essential to start here by describing the main features of Anglo-American general deterrence and Nordic general prevention theories.

[10] In addition to the basic structure of the liability standards, this article also considers the influence of the US Sentencing Commission's Organizational Guidelines as these can be considered to form an integral part of the *respondeat superior* standard (footnote 63 and text thereto). The article does not, however, profoundly analyse other concurrent factors affecting corporate behaviour, such as the influence of deferred prosecution and non-prosecution agreements, even if short remarks are made in section 3.2.1.

In the Anglo-American scholarship, the efficiency of criminal enforcement is typically explained by its assumed deterrent effect.[11] According to the classical deterrence theory, an individual is thought to refrain from committing an offence due to the perceived threat of sanction and the fear that the threat invokes in a potential offender. In its traditional form, deterrence relies on the severity and certainty of punishment and on the concept of rational choice, under which a decision to commit a crime is based on a rational calculation of the assumed positive and negative consequences of an offense.[12] If the potential benefits outweigh the costs of being caught, it is rational to commit an offense. The greater the level of severity and certainty, the greater the inhibitory deterrent effect for both offending individuals (specific deterrence) and the general public (general deterrence). General deterrence assumes that application of sanctions sends a message to the general public and, if the message is communicated effectively, these sanctions have an inhibitory effect amongst members of society.[13]

It has been argued that deterrence theory would be especially useful in understanding corporate offending in the sense that corporate offenders would, as particularly rational actors, be especially amenable to threats of sanction.[14] This belief has not, however, received sound empirical support over the last decades. Most empirical studies have found either very weak and conditional support for the traditional deterrence (formal sanction threat) in the field of corporate and white-collar crime, or none at

11 Simpson 2002 pp. 5, 9-10. Also see Tyler and Darley, Building a Law-Abiding Society: Taking Public Views about Morality and Legitimacy of Legal Authorities into Account When Formulating Substantive Law, *28 Hofstra L. Rev.* (2000) pp. 707-740, at 712 noting that the deterrence model and a belief in the deterrent effect of punishment has had a dramatic effect on American society, which is most evident when looking at the American prison population.

12 The calculation model reflects the roots of deterrence ideology in utilitarian philosophy, where individuals were seen as rational, self-interested and pleasure-seeking. The origins of deterrence are usually traced to the philosophers Cesare Bonnesana Marchese de Beccaria (1738-1794) and Jeremy Bentham (1748-1832) (Beccaria, *On Crimes and Punishments* (Bobbs-Merrill 1963); Bentham, *An Introduction to the Principles of Morals and Legislation* (Haftner 1948).

13 For descriptions of classical deterrence theory see e.g., Andenæs, General Prevention Revisited: Research and Policy Implications, *66 Crim L & Criminology* (1975); Simpson 2002 pp. 22-44.

14 E.g., Weissman and Newman 2007 pp. 428-429; Chambliss, Types of Deviance and the Effectiveness of Legal Sanctions, *1967 Wis. L. Rev. Review* (1967) pp. 703-719, at 709-710. Also see Paternoster and Simpson, Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime, *30 Law & Soc'y Rev.* (1996) pp. 549-584, at 550 and Simpson 2002 pp. 36-37 criticising the assumption.

all.[15] Based on these studies, it appears that deterrence is not only costly but neither a very effective approach to promoting compliance with law.[16] However, as is later explained,[17] deterrence and rational choice have gained support in empirical studies in which these theories have been redefined to also cover other than the purely instrumental factors that better reflect genuine human decision-making.

Against this background, it is interesting to note that Nordic legal theory has not traditionally justified the use of the criminal sanction system mainly by its assumed deterrent effect. Instead, the aim of the penal policy is considered to be so-called general prevention, which consists of several concurrent prevention mechanisms. An individual is supposed to refrain from committing an offense not only out of fear of punishment (general deterrence or negative general prevention) but also, and perhaps even mainly, because the individual has internalised the moral values behind criminal law (positive general prevention).[18] Criminal law is assumed to create or support coherence in the values of a group or society.[19] The idea is that criminal law has the ability to shape certain societal values and has, therefore, a socialising influence.[20] In

15 See e.g. Simpson and Koper, Deterring Corporate Crime, *30 Criminology* (1992) pp. 347-376; Braithwaite and Makkai, Testing an Expected Utility Model of Corporate Crime Deterrence, *25 Law & Soc'y Rev.* (1991) pp. 7-40 (suggesting that there is a 'stark failure of deterrence to explain compliance with regulatory law', at 29); Makkai and Braithwaite, Criminological Theories and Regulatory Compliance, *29 Criminology* (1991) pp. 191-220; Makkai and Braithwaite, The Dialectics of Corporate Deterrence, *31 J. Res. Crime & Delinquency* (1994) pp. 347-373. Also see Simpson 2002 pp. 26-44 (discussing the empirical studies testing the traditional deterrence theory) and Paternoster and Simpson 1996 pp. 550-552. Cf. Simpson et al., An Empirical Assessment of Corporate Environmental Crime-Control Strategies, *103 J. Crim. L. & Criminology* (2013) pp. 231-278, at 265 (suggesting that the perceived certainty and severity of legal sanctions that target responsible managers deter environmental wrongdoing).

16 Similarly, Tyler, Self-Regulatory Approaches to White-Collar Crime: The Importance of Legitimacy and Procedural Justice in *The Criminology of White-Collar Crime*, eds. Simpson and Weisburd (Springer 2009) pp. 195-216, at 200-201.

17 Section 2.2.

18 Lappi-Seppälä, General Prevention – Hypotheses and empirical evidence in Scandinavian Research Council for Criminology, *Ideologi og Empiri i Kriminologien* (1995) pp. 137-159, at 141. Andenæs 1974 p. 110-114. The moral dimension of general prevention has attracted scholars especially in Finland whereas Andenæs (Norway) and Vilhelm Lundstedt (Sweden) have probably been the most active supporters of the idea in the other Nordic countries. The moral dimension has not, of course, gone unnoticed in the Anglo-American scholarship, although deterrence has, over the last decades, played a dominant role in the discussion. See e.g. Hawkings, Punishment and Deterrence: The Educative, Moralizing and Habituative Effects, *1969 Wis. L. Rev.* (1969) pp. 550-565; Williams and Hawkins, Perceptual Research on General Deterrence: A Critical Review*, 20 Law & Soc'y Rev.* (1986) pp. 545-572.

19 Andenæs 1974 p. 8. Also see Nuotio, A Legitimacy-Based Approach to EU-Criminal Law: Maybe we are Getting there, after all, *11 New J. Eur. Crim. L.* (2020) pp. 20-39, at 26-28. cf Durkheim, *The Division of Labor in Society* (Free Press [1893] 2014) p. 83: '[punishment's] real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigor'.

20 Andenæs 1974 pp. 113-114.

line with the Nordic tradition, Tolvanen has argued that the central mechanism of the Finnish corporate criminal liability standard is trust and not deterrence. As social life is crucially based on trust, betraying this societal trust requires sanctioning. The punishment is needed to demonstrate that breaching of the common rules is not accepted.[21]

Under the moral and educative influence of criminal law,[22] compliant behaviour is primarily explained by an internal motivation and not by external threats of punishment. People behave in a certain manner because they have internalised the values reflected by the criminal provisions, out of habit or simply because others behave in the same manner as well.[23] The value of internalisation becomes apparent if we consider why stealing the neighbour's car is not an attractive idea to us.[24] In the Nordic general prevention theory,[25] the two preventive mechanisms are not seen as contradictory, but are thought to function in unison or as alternatives to each other, depending on the context. The deterrent effect may be significant for those who have not internalised the values behind the norms and do not see value in complying with commonly held norms, according to which stealing one's neighbour's car is wrong.[26]

Empirical testing of the moral influence of criminal law is demanding, because norm internalisation is hardly caused mainly or even crucially by criminal provisions, while other intervening variables (such as family, religion, school, individual characteristics etc.) may have a much stronger impact.[27] Therefore, rather than considering the moral influence of criminal law as a cause-and-effect relation we should regard soci-

21 Tolvanen, Trust, Business Ethics and Crime Prevention – Corporate Criminal Liability Standard in Finland, *115 Jurisprudencija* (2009) pp. 335-358, at 336, 345.

22 Varying terminology is used in this respect. See Andenæs 1974 pp. 112-113 arguing that the concept of 'moral influence of criminal law' does not imply a value judgement regarding the desirability of the assumed influence, and the most neutral term could be the 'attitude shaping influence of criminal law'. Hawkings refers to a similar preventive mechanism as an 'educative or socializing effect' (Hawkings, Punishment and Deterrence: The Educative, Moralizing and Habituative Effects, *1969 Wis. L. Rev.* (1969) pp. 550-565, at 560).

23 Lappi-Seppälä 1995 pp. 137–138; Robinson and Darley, Intuitions of Justice: Implications for Criminal Law and Justice Policy, *81 S Cal L Rev* (2007) pp. 1-68, at 19-21; Kahan, Social Influence, Social Meaning, and Deterrence, *83 Va L Rev* (1997) at 349. From a behavioural economics perspective see Harel 2014 pp. 587-588.

24 *Ibid* p. 141.

25 Positive general prevention is discussed in German scholarship as well. For a general description see, e.g., Markus Dirk Dubber, Theories of Crime and Punishment in German Criminal Law, *53 American Journal of Comparative Law* (2006) pp. 679-708.

26 Tolvanen 2009 p. 343.

27 Lappi-Seppälä 1995 p. 142; Andenæs 1974 p. 124.

etal values and criminal law as mutually interacting and conditioning.[28] The desired changes in social valuations occur slowly if ever, which also complicates empirical research.[29] As a consequence, it is not surprising that only mild empirical support for the moral influence of criminal law is available, and provided by studies where the long-term impact of criminal provisions is tested. These research results, however, suggest, at least in respect of certain types of offences, that criminal provisions have influenced moral views.[30] Importantly, however, relatively strong empirical criminological evidence is available in support of the inhibitory significance of internalised moral norms, even though it is not evident whether or not these derive from criminal law. Several studies have found that, regardless of an individual's deterrence perceptions, individuals with high morals are less likely to offend.[31] The related empirical findings regarding organisational decision-making are analysed in the following section.

2.2. From amoral calculator to moral and social human being

This section describes criminological and sociopsychological research regarding moral values as behavioural inhibitions against unethical and unlawful decision-making in corporate environments. This section, thus, sets out the empirical evidence that justifies the prevention theory which is presented in the following section 2.3.

28 Lappi-Seppälä 1995 p. 143. Also see Wikström, Individuals, Settings, and Acts of Crime: Situational Mechanisms and the Explanation of Crime in *The Explanation of Crime. Context, Mechanisms and Development*, eds. Wikström and Sampson (Cambridge University Press 2006) pp. 61-107, at 103 arguing that 'experiences of monitoring and sanctioning of moral rules breakings is an important part of an individual's moral education and moral habit formation'.

29 Lappi-Seppälä 1995 p. 147.

30 A study by Snortum finds circumstantial evidence that some combination of legal threat, public education, and moral persuasion led to substantial improvements in drinking-driving compliance among British drivers (Snortum, Drinking-Driving Compliance in Great Britain: Law as a "Threat" and as a "Moral Eye-Opener", *18 J. Crim. Justice* (1990) pp. 479-499). According to Lappi-Seppälä, other studies analysing long term prevention mechanisms have also demonstrated that attitudes towards drink-driving are more negative in the Nordic countries, where the related regulation is more stringent than in the US, where attitudes are less negative and drink-driving more common than in the Nordics (Lappi-Seppälä, *Rikosten seuraamukset* [Criminal Sanctions] (WSLT 2000) p. 67 referring to Snortum, Hauge and Berger, Deterring Alcohol Impaired Driving: A Comparative Analysis of Compliance in Norway and the Unites States, *3 Just. Q.* (1986) pp. 139-166; Grasmick and Arneklev, Reduction in Drunk Driving as a Response to Increased Threats of Shame, Embarrassment and Legal Sanctions, *31 Criminology* (1993) pp. 41-68).

31 See e.g., Bachman, Paternoster and Ward, The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault, *26 Law & Soc'y Rev.* (1992) pp. 343-372; Hirtenlehner and Hardie, On the Conditional Relevance of Controls: An Application of Situational Action Theory to Shoplifting, *37 Deviant Behav.* (2016) pp. 315-331; Schoepfer and Piquero, Self-Control, Moral Beliefs, and Criminal Activity, *27 Deviant Behav.* (2006) pp. 51-71; Cochran, Moral Propensity, Setting, and Choice: A Partial Test of Situational Action Theory, *37 Deviant Behav.* (2016) pp. 811-823; Tittle et al., Expected Utility, Self-Control, Morality, and Criminal Probability, *39 Soc. Sci. Res.* (2010) pp. 1029-1046.

Conventional rational choice theory, which relies on an instrumental, calculative rationality, has become heavily contested as a result of behavioural research in the fields of criminology, social psychology and other behavioural sciences.[32] As understanding of genuine human decision-making and other behavioural factors accumulates, it seems evident that individual behaviour quite seldom is the result of the calculative exercise assumed under the instrumental rational choice theory, but is affected by various factors depending on the context in which a decision is made. This development has led to broader versions of the rational choice model embracing a more complex view on human nature than previously assumed under the instrumental model.[33] Current empirical evidence suggests that corporate offenders are sensitive, like all other offenders, to the variations in the perceived cost and benefits of their actions, including several formal and informal variables.[34]

In their study testing a rational choice theory of corporate crime, Paternoster and Simpson included measures of perceived costs and benefits of corporate crime (for both the individual and the firm), perceptions of shame, persons' assessment of the opprobrium of the act, and contextual characteristics of the organisation. The authors found an individual's moral code to be a very important source of inhibition in corporate crime, so much so that, when moral inhibitions were high, considerations of the cost and benefit (i.e., the factors relevant in conventional rational choice theory) of corporate crime were virtually superfluous. However, according to the study, when moral inhibitions were weak, individuals were deterred by threats of formal and informal sanctions and by the organisational context. As a result of the study, the authors argue that any theoretical model of corporate crime and public policy efforts should contain both instrumental (threat of punishment) and deontological (appeals to morality) factors.[35]

32 E.g. Etzioni, *The Moral Dimension: Toward a New Economics* (Free Press 1988) pp. 12, 51-52.

33 For contemporary modifications of rational choice see e.g. Kahneman, Maps of Bounded Rationality: psychology for behavioral economics, *93 Am Econ Rev* (2003) pp. 1449-1475 (explaining the relation between rational choice theory and system 1 and system 2 thinking); Grasmick and Bursik, Conscience, Significant Others, and Rational Choice. Extending the Deterrence Model, *24 Law & Soc'y Rev*. (1990) pp. 837-862 (testing embarrassment and shame as variables in offender decision-making); Nagin and Paternoster, Enduring Individual Differences and Rational Choice Theories of Crime, *27 Law & Soc'y Rev*. (1993) pp. 467-496 (assessing simultaneously morality, the perceived instrumental costs and benefits of crime, and self-control as rational choice variables); Paternoster and Pogarsky, Rational Choice, Agency, and Thoughtfully Reflective Decision-making: the Short and Long-term Consequences of Making Good Choices*, 25 J Quant Criminol* (2009) pp. 103-127.

34 Paternoster and Tibbetts, White-Collar Crime and Perceptual Deterrence in *The Oxford Handbook of White-Collar Crime,* eds. van Slyke, Benson and Cullen (Oxford University Press 2016) p. 635. Deterrence is most likely to depend on what the certainty and severity of punishment is thought to be (perceptual deterrence) rather than on its objective or actual levels (objective deterrence). Paternoster, The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues, *4 Just. Q.* (1987) pp. 173-218, at 174.

35 Paternoster and Simpson 1996 p. 549.

The significance of moral factors was likewise evident in a study by Simpson with a sample of middle and upper-level executives of a Fortune 500 manufacturing company.[36] According to its findings, offending was less likely if the conduct was perceived to be against the respondent's personal moral code, if it would bring social censure, or if it would be seen to tarnish the reputation of the firm; and more likely, if the respondent had the opportunity to gain personally from the offense. Contrary to the findings of the aforementioned Paternoster and Simpson 1996 study, the threat of formal sanctions had absolutely no effect on managers' intentions to offend. Interestingly, the results were the same irrespective of an individual manager's moral code. In other words, formal sanction threats had a similarly weak deterrent effect for the managers whose moral constraints against offending were weak as for the managers with strong moral inhibitions.[37] The significance of moral constraints was also confirmed in a study by Simpson and Elis, who found that the certainty of informal sanctions, perceived immorality of the act, and several individual- and firm-level characteristics were significantly related to the decisions to offend. The authors found that the respondents were less likely to report committing the act if they had moral doubts about the act and if they believed that the firm's reputation would be damaged if they were to commit the act.[38]

As demonstrated by these and other studies, moral factors appear to have a substantial inhibitory influence against criminal and other unethical behaviour.[39] It is not, however, evident whether moral inhibitions fit into the contemporary rational choice models or how exactly they might do so.[40] A significant body of empirical and theoretical research importantly suggests that morals may also have an independent behavioural influence, which is stronger compared to the other variables covered by

[36] Simpson 2002 pp. 139-152.

[37] See Paternoster and Tibbetts 2016 p. 629 commenting the Simpson 2002 study.

[38] Elis and Simpson, Informal Sanction Threats and Corporate Crime: Additive Versus Multiplicative Models, *32 J. Res. Crime & Delinquency* (1995) pp. 399-424.

[39] Piquero, 'The Only Thing We Have to Fear Is Fear Itself: Investigating the Relationship Between Fear of Falling and White-Collar Crime, *58 Crime & Delinquency* (2012) pp. 362-379 (finding that perceived morality of price-fixing, among other things, was predictive of intentions to offend) and Moore et al., Why Employees Do Bad Things: Moral Disengagement and Unethical Organizational Behavior, *65 Pers Psychol* (2012) pp. 1-48 (reporting that those with higher propensity to morally disengage were more likely to cheat, lie, and steal at the workplace). Also see studies in footnote 31.

[40] In a study by Tittle et al. 2010 p. 1030, the problem is conceptualised by classifying the varying rationality approaches into three categories depending on the variables included in the rational choice model. The hard (or strict) version emphasises instrumental rewards and punishments whereas the medium version includes, for example, a mode of rationality called 'bounded rationality' and attempts to take into account the possibility that individual rationality may be affected and hampered by various extraneous elements. Soft versions of rationality cover various psychic costs and benefits (such as moral inhibitions) that are highly subjective. As an example of a hard version, the authors refer to Becker, Crime and Punishment, *76 J. Polit. Econ.* (1968) pp. 169-217 of a medium version to Kahneman 2003 and Simon, A Behavioral Model of Rational Choice, *69 Q. J. Econ.* (1955) pp. 99-118 and, finally, of a soft version to e.g., Paternoster and Pogarsky 2009.

the soft/extended rational choice theory.[41] Internalised moral norms appear to guide behaviour in an autonomous and unconditional way. This indicates that internalised moral norms would function differently from the variables in the cost and benefit calculation underlying the deterrence model. This suggestion is strongly supported by several studies testing the theoretical framework of situational action theory, according to which deterrence matters only when the moral filter does not exclude crime from the catalogue of perceived action alternatives and crime is seen as a viable option.[42]

The empirical findings provide good reasons to suggest that internalised moral norms would not, at least categorically, be classified as incentives under the rational choice theory due to their potential nature as independent inhibitory factors and therefore, not relevant factors in instrumental deterrence thinking. Moral constraints may function autonomously to the effect that a decision-maker who has internalised certain moral values, does not even consider alternatives in breach of those values, wherefore the certainty and severity of sanctions remain irrelevant.[43] The decision is made out of habit or automatically, and is not the result of a balancing exercise between costs and benefits, as assumed under the deterrence model. Illegal behaviour, as an immoral act, is left outside the realm of contemplation.[44]

This does not, however, imply that an instrumental assessment would never include moral factors. On the contrary, it seems likely that moral beliefs often influence rational decision-making if an instrumental judgement is not made redundant by internalised moral norms. According to Wikström, a distinction should be made between moral habits and moral judgements. Only in making a moral judgement does rational

41 Etzioni 1988 pp. 36, 77 (suggesting that moral rules create nonmarket areas for certain behaviours); Wikström and Treiber, The role of Self-Control in Crime Causation, *4 Eur. J. Criminology* (2007) pp. 237-266, at 246; Paternoster and Simpson 1996; Pogarsky, Identifying 'deterrable' offenders: implications for research on deterrence, *19 Just. Q.* (2002) pp. 431-452; Grasmick and Green 1981 (suggesting, however, that despite the inhibitory significance of moral values, moral commitment does not make deterrence redundant). Also see Tittle et al. 2010 p. 1029.

42 E.g. Hirtenlehner and Hardie, On the conditional relevance of controls: An application of situational action theory to shoplifting, *37 Deviant Behav.* (2016) pp. 315-331; Svensson, An examination of the interaction between morality and deterrence in offending: A research note, *61 Crime & Delinquency* (2015) pp. 3-18; Wikström, Tseloni and Karlis, Do people comply with the law because they fear getting caught?, *8 Eur. J. Criminology* (2011) pp. 401-420; Kroneberg, Heintze and Mehlkop, The Interplay of Moral Norms and Instrumental Incentives in Crime Causation, *48 Criminology* (2010) pp. 259-294. As to the application of the situational action theory in the field of white-collar crime see Craig, Extending Situational Action Theory to White-Collar Crime, *40 Deviant Behav.* (2019) pp. 171-186 (reporting that respondents with higher morals were significantly less likely to report intentions to engage in embezzlement, shoplifting, and credit card fraud than those with lower morals).

43 Paternoster and Simpson 1996. Also see Braithwaite and Makkai 1991.

44 See Wikström 2006 p. 102 suggesting that deterrence is irrelevant in this setting.

choice and deterrence play a central role in the process of choice.[45] It therefore seems fair to see moral inhibitory factors as functioning in a continuum. On one end we find internalised moral norms that gradually turn into 'lighter' moral beliefs and eventually may disappear completely.[46] The type of morals deployed in a certain act of decision-making depends on, *inter alia*, individual characteristics, the type of decision being made and the social environment.[47]

Individuals' morality appears not to be entirely fixed but is apt, at least partly, to evolve according to the relevant social environments. Therefore, many of us are likely to adopt shared values of the relevant social group, e.g., a work team.[48] Human beings are social animals that often see themselves as members of a group rather than just individuals; the human need to belong makes us apt for socialisation processes. Team members or other relevant individuals at a workplace establish a standard of ethical behaviour by their acts and omissions. The relevant others provide information on what is considered ethical and appropriate in the respective social context.[49] Even though the socialisation processes are 'agnostic about questions of morality', employees may acclimate to norms that are morally corrupting when adopting the prevailing social norms at the workplace.[50] According to Moore and Gino, much of our morality and immorality can be attributed to this phenomenon.[51] However, as a good news, just the presence of another person making ethical choices appears to improve our behaviour.[52]

Considering the previously discussed significance of moral constraints in preventing deviant behaviour and, on the other hand, the influence of moral climate of a workplace in shaping employees' ethical considerations, it seems justified to assume that supporting a healthy corporate culture and ethical climate would be an efficient strategy against unlawful and unethical workplace behaviour. This assumption is further discussed in light of criminological studies in section 3.3.[53]

45 *Ibid.* p. 103.

46 In a similar vein Wikström and Treiber 2007 p. 246.

47 *Ibid.* p. 245 noting that individuals do not act in an environmental vacuum but rather in particular settings. The authors define a setting as 'the social and psychical environment (objects, persons, events) that an individual, at a particular moment in time, can access with his/her senses'.

48 E.g. Scholten and Ellemers, Bad Apples or Corrupting Barrels? Preventing Traders' Misconduct, *24 J Financ. Regul. Compliance* (2016) pp. 366-382, at 373 ('…our professional ethical behaviour and the moral decisions we make at work are influenced by the work teams in which we function: our colleagues and managers').

49 *Ibid*. pp. 372-373. Also see Haidt 2001.

50 Moore and Gino, Ethically adrift: How others pull our moral compass from true North, and how we can fix it, *33 Res. Organ. Behav.* (2013) pp. 53-77, at 58.

51 *Ibid* p. 54.

52 *Ibid* p. 68.

53 See footnotes 106-113 and text thereto.

2.3. From deterrence to behaviourally informed prevention theory (BIPT)

Previous sections have described the evolution of the rational choice model and accumulated behavioural evidence on morals as behavioural constraints. The progress of rational choice and its uncertain relation to morals makes deterrence theory a blurred concept for doctrinal purposes.[54] Explaining deterrence often necessitates clarifying the historical background, as well as the type of rational choice adopted by a particular study/author.[55] It can therefore be argued that the explanatory power of the deterrence theory as such is fading, as it cannot convey, in a pedagogically meaningful manner, the significance of moral inhibitions in crime prevention. Due to its traditional instrumental form, deterrence theory as un umbrella concept appears not be informative enough to effectively communicate the significance of moral values as inhibitions. In other words, deterrence is not performative enough to guide evidence based regulatory policy, but a more informative theoretical framework is needed.

There are firm grounds to argue that an operational, pedagogical, and *communicatively performative* prevention theory should reflect the inhibitory power of morals and related habitual behaviour as a separate prevention mechanism. To increase the probability that a criminal law researcher and a policymaker would consider the relevance of moral factors as behavioural constraints, the theory guiding respective research and policy-making activities should expressly reflect the significance of moral constraints. Even though one might not accept the internalised moral values as separate from rational decision-making, it should nevertheless be rather straightforward to admit that deterrence theory, when understood as an overarching theoretical justification for corporate criminal liability, does not have the communicative power that a performative prevention theory should possess. This is evidenced by the fact that doctrinal corporate criminal research seldom takes into account morals as inhibitions when discussing the preventive effects of corporate criminal liability, even though their preventive influence is recorded in the empirical research.

The behavioural evidence discussed in section 2.2 allows for a conclusion, according to which human decision-making may be characterised by both extended rationality, which considers the perceived costs and benefits including formal and informal variables (such as shame and embarrassment), *and*, in the case of internalised moral norms, more autonomous and habitual behaviour. As a result, it is here suggested that a behaviourally informed corporate crime prevention theory (BIPT) should not only assume the instrumental threats of punishment but also expressly account for more

[54] See Andenæs 1974 p. 174 suggesting that it is 'somewhat inconsistent with common usage to let deterrence comprise also moral and habituative effects, and second, that this terminology leaves us without a convenient expression for the purely deterrent effects as something different from the moral and habituative effects.'

[55] E.g., Simpson 2002 pp. 22-60.

habitual value-based factors such as internalised moral norms. Therefore, an appropriate theoretical approach necessarily embraces at least two dimensions.

The first of these is the deterrence mechanism. Empirical evidence supports the view that the threat of punishment has, in certain circumstances and to a certain extent, a preventive effect, although the effect appears to be limited in nature, and inhibition is caused not only by the formal sanctions but also by its potential informal consequences. Empirical evidence supports the view that a credible formal sanction threat has a deterrent effect if the potential offender perceives that the informal consequences associated with offending, such as losing the respect of significant others, to be certain and costly.[56] In addition, a formal sanction threat can be more effective for those individuals whose moral inhibitions are weak.[57]

BIPT further involves an element that takes into account the inhibitory power of internalised norms as behavioural constraints. As described above, the preventive effect of moral considerations appears to be significant, even to the extent that deterrence becomes redundant if moral commitments are high. This prevention mechanism can be considered as a relative to the moral influence of criminal law as recognised in the Nordic scholarship, according to which criminal sanctions are assumed to indirectly affect the moral landscape of an individual either by reinforcing societal norms and thus existing moral values or, in the long run, even by establishing new moral norms.[58] The nature of internalised values as behavioural constraints as suggested in the aforementioned empirical studies does not, as such, mean that *criminal law* would be *the* source of the internalised norms, as an individual's moral code is a result of several concurrent factors including his/her personal characteristics. However, it seems logical to assume that formal sanctions are important indicators of the morality of certain forms of conduct and will influence the ethics of an act. In addition to the evidence regarding drink-driving referred to above, the claim is supported by a study by Smith, Simpson and Huang that tested a model of corporate offending with a sample of US managers.[59] The authors found, among other things, that formal sanction threats operate indirectly via influencing corporate managers' various ethical

56 Simpson et al. 2013. For similar findings regarding the significance of informal sanctions see Ugrin, and Odom, Exploring Sarbanes–Oxley's effect on attitudes, perceptions of norms, and intentions to commit financial statement fraud from a general deterrence perspective, *29 J Account Public Policy* (2010) pp. 439-458.

57 Paternoster and Tibbetts 2016 p. 635.

58 The classification made herein bears a certain resemblance to the taxonomy adopted by Williams and Hawkings in conceptualising perceptual mechanisms as separate from deterrence. Such mechanisms consist of enculturation (conforming out of respect for authority), moral condemnation (self-defined dislike of an act) and normative validation (seeing others punished reinforces the view that an act is wrong) (Williams and Hawkins 1986 p. 562).

59 Smith, Simpson and Huang, Why managers fail to do the right thing: An Empirical Study of Unethical and Illegal Conduct, *17 Bus Ethics Q* (2007) pp. 633-667. As to evidence regarding drink-driving see footnote 30.

evaluations and anticipated outcomes. According to the findings of the study, 'formal sanctions threats affect offending decision through moral evaluations of the act, consistent with the moral and educative effects rendered by criminal law'.[60] The empirical evidence available is nevertheless rather fractional and thus, the interaction between moral norms and criminal law remain admittedly unclear. As the empirical evidence regarding the significance of internalised moral norms, irrespective of their origin, as behavioural constraints is much stronger, this inhibitory mechanism is considered separately as it, as such, appears to justify the need for an ethical corporate culture to support value internalisation and other habitual behaviour.

3. How does behaviourally informed prevention theory (BIPT) affect the design of corporate criminal law? Comparative analysis

3.1. Corporate criminal liability standards as behavioural incentives

This section aims to demonstrate the practical significance of BIPT by assessing two existing corporate criminal liability standards against the efficiency assumptions under BIPT. The idea is to demonstrate how the behavioural approach suggested in this study affects the design of corporate criminal law. The objective of any corporate criminal liability standard is to provide an optimal incentive for corporations to organise their business operations in a lawful manner, that is to adopt effective internal compliance strategies, structures and measures.[61] Under BIPT, the efficiency of a liability standard and its compliance incentivising effect is not evaluated only by considering its deterrent effect, but also by its ability to incentivise such compliance structures and ethical corporate culture that make use of the strong inhibitory influence of moral values.

The methodological approach is to compare the *respondeat superior* standard applied in the US federal legal system with the Finnish corporate negligence standard. The article does not aim to provide a detailed analysis of the features of each liability standard, but the description is limited to such characteristics that are relevant for assessing the compliance incentives provided by each standard. The current section therefore first addresses the type of compliance incentives provided by each liability standard, after which the incentives are analysed against the efficiency assumptions under BIPT.

60 *Ibid* p. 655.

61 E.g., Fisse, Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions, *56 S. Cal. L. Rev.* (1983) pp. 1141-1246, at 1160-1163.

3.2. What type of compliance structures do the liability standards motivate?

3.2.1. Respondeat superior (US)

Under the *respondeat superior* standard, a corporation is liable for any offence by any agent acting within the scope of its authority and at least partially to benefit the firm. Rather than imposing liability on a corporation under a duty-based standard such as negligence, a corporation is strictly liable for the acts of its agents.[62] The compliance efforts of a corporation may, however, be considered at the sentencing phase in accordance with the US Sentencing Commission's Organisational Guidelines ("*Guidelines*"). Under the Guidelines, a fine can be mitigated if an organisation can demonstrate that it had adopted an effective compliance and ethics program. The Guidelines outline seven key criteria for establishing an effective compliance program, which include general features such as 'oversight by high-level personnel' and 'effective communication'.[63]

The traditional rationale behind and justification for *respondeat superior* relies on its assumed deterrence-incentivising nature. US courts have argued that strict liability increases incentives for corporations to monitor and prevent illegal employee conduct. The theoretical idea is that imposing a high risk of sanctions on a corporation will prompt a corporation to make its best effort to prevent the illegal conduct within its business operations, and therefore reduce the risk of offending.[64] At the outset, this seems a viable idea. The strict liability model combined with the Guidelines seem to provide a clear incentive for corporations to establish an effective ethics and compliance program.[65] However, according to scholarly views, the actual perceived incentivising effect is more complex. Three different lines of critique can be distinguished.

62 Criminal *respondeat superior* liability in its present form first emerged in the US Supreme Court decision in *New York Cent. & Hudson R.R. CO v United States* 212 US 481 (1909). For the background and evolution of the liability standard see Luskin, Caring about Corporate 'Due Care': Why Criminal Respondeat Superior Liability Outreaches its Justification, *57 Am. Crim. L. Rev.* (2020) pp. 303-330, at 306-309.

63 US Sentencing Guidelines Manual § 8B2.1(b) (US Sentencing Commission 2018).

64 *New York Cent. & Hudson R.R. CO v United States* 212 US 481, 494-95 (1909); *United States v Sun Diamond Growers of Cal*. 138 F3d 961, 971 (D.C. Cir. 1998) and *United States v Hilton Hotels Corp*., 467 F2d 1000, 1005, 1006 (9th Cir. 1972). Also see Luskin 2020 pp. 309-311.

65 The promulgation of the Guidelines was indeed followed by a significant increase in corporate compliance programs (Weaver et al., Corporate Ethics Practices in the Mid-1990's: An Empirical Study of the Fortune 1000, *18 J. Bus. Ethics* (1999) pp. 283-294, at 286, 289) and compliance becoming a large-scale business (e.g. Stucke, In Search of Effective Ethics & Compliance Programs, *39 J. Corp. L.* (2014) pp. 769-832).

Firstly, it has been suggested that strict liability motivates compliance structures that are based on the aggressive monitoring of employees.[66] This seems logical, as detecting and preventing potential employee misconduct is the only way to attempt to avoid criminal liability, and because effective monitoring may further function as a mitigating factor, as the efficiency of a compliance structure is determined at sentencing.[67]

Secondly, it has been suggested that the liability structure would risk misaligned and perverse compliance incentives. Arlen has argued that an increase in a corporation's monitoring efforts is likely to result in increase in detection rates and thus, assumedly, decrease employee misconduct. However, this same mechanism also increases the probability that the relevant authority will detect wrongdoing, which increases the corporation's expected criminal liability for the wrongdoing. As a result, under a strict liability standard, increase in monitoring efforts may perversely also increase the risk of criminal liability for the corporation.[68] It has also been argued that although compliance efforts are considered in sentencing and may thus reduce the amount of penalties, the incentivising impact is distorted because of the collateral consequences of criminal prosecution. The mere indictment is likely to result in profound effects such as a drop in stock value or severe reputational damage, irrespective of the size of the monetary penalties. Compliance measures do little to prevent such collateral effects of criminal indictment and sanctions.[69]

Finally, the third line of argument suggests that *respondeat superior* combined with the Guidelines may result in 'cosmetic compliance' or 'paper compliance programs', which refers to compliance programs that minimally or only superficially comply with the Guidelines' requirements. The seven steps described in the Guidelines may motivate the mimicking of compliance systems that seem effective, but the real effectiveness of which is very difficult for courts and regulators to determine ex post.[70] Langevoort notes that, although the Guidelines provide a general checklist of features of an objectively useful compliance program, they are 'unlikely to go to the heart of

66 Langevoort, Monitoring: The Behavioral Economics of Corporate Compliance with Law, *2002 Colum. Bus. L. Rev* (2002) pp. 71-118, at 72-73; Gobert 2008 p. 64 (noting that vicarious liability forces a corporation to supervise its employees and discussing the practical problems that such monitoring obligations pose).

67 Also see Langevoort 2002 p. 77.

68 Arlen, The Potentially Perverse Effects of Corporate Criminal Liability, *23 J. Legal Stud.* (1994) pp. 833-868, at 837.

69 Luskin 2020 p. 315. See also *ibid.* p. 836; Langevoort 2002 p. 80.

70 As to the practical problems of paper programs see Hess, Ethical Infrastructure and Evidence-Based Corporate and Ethics Programs: Policy Implications from the Empirical Evidence, *12 N.Y.U. J.L. & Bus.* (2016) pp. 317-368, at 361-362 and Stucke 2014 pp. 820-22; Luskin 2020 p. 316; Krawiec, Cosmetic Compliance and the Failure of Negotiated Governance, *81 Wash. U. L. Q.* (2003) pp. 487-544, at 491-492 (suggesting that mimicking the features of an effective compliance programme leads to under-deterrence as companies are able to benefit from reduced sentencing even in the absence of actually effective compliance program); Laufer, Corporate Liability, Risk Shifting, and the Paradox of Compliance, *52 Vand. L. Rev.* (1999) pp. 1341-1420, at 1390-1391.

efficient compliance' and give rise to the risk that firms may adopt procedures that superficially appear to provide an efficient compliance structure but which actually do not, and may steer a company's interest away from a more careful analysis of the compliance measures needed, i.e. real risks of deviant behaviour.[71]

The problem of the financial incentive under the Guidelines is that few objective criteria exist to assess the effectiveness of a compliance and ethics program, which may decrease the willingness of a corporation to invest in compliance. If no clear guidance on determining the efficiency of a compliance program is available, a corporation does not know under what circumstances and to what extent its investment in compliance is rational. As Stucke puts it, '… suppose you told a painter, "Paint me a pleasing picture, and you will receive $10 million." Surely the painter would want as much information as possible as to what you consider a pleasing picture.'[72] The reason for the non-existence of objective evaluative criteria is that the efficiency of a compliance structure must be assessed on a case-by-case basis and there is no 'one size fits all' option available.[73]

The Guidelines were amended in 2004 to include a specific reference to a compliance *and ethics* program (as opposed to a plain compliance program).[74] Under the Guidelines, to have an effective compliance and ethics program, an organisation shall exercise due care to prevent and detect criminal conduct, and otherwise promote an organisational culture that encourages ethical conduct and a commitment to compliance with the law.[75] The obvious goal is to encourage not just monitoring-based compliance but also motivate ethical corporate culture.[76] Several commentators have, however, expressed their concerns that, due to the strict liability standard, the reference to an ethical organisational culture in the Guidelines is not enough to actually incentivise the development of ethics-based corporate cultures. These concerns are further addressed in section 3.3.[77]

Despite the problems discussed above, it seems evident that the US corporate criminal liability system together with the Guidelines and related enforcement practices have inspired vivid global debate on the role and contents of an effective corporate

71 Langevoort 2002 p. 114.

72 Stucke 2014 p. 801.

73 *Ibid.* pp. 801-803; Kaptein, Understanding unethical behaviour, *64 Hum. Relat.* (2011) pp. 843-869, at 858; Hess 2016 p. 320. Soltes further notes that even corporations do not have the appropriate knowledge to measure the required effectiveness of their compliance structures (Soltes, Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms, *14 N.Y.U. J.L. & Bus*. (2018) pp. 971).

74 See Hess 2016 p. 334 (explaining the historical background and specific contents of the amendments made).

75 US Sentencing Guidelines Manual § 8B2.1(a) (US Sentencing Commission 2010).

76 Hess 2016 pp. 320-321.

77 See footnotes 114-119 and text thereto in section 3.3.

compliance and ethics program. This has resulted in growing awareness and, thus, undeniably, enhanced compliance practices in several corporations.[78] Further, it should be noted that certain commentators have considered the US legal system to be, due to prosecutorial discretion, in practise, moving away from pure strict liability towards a 'composite' system resembling corporate negligence.[79] Federal prosecutors seldom hold publicly traded corporations strictly liable but instead apply pretrial inversion agreements (PDA) which may take the form of a deferred prosecution agreement or a non-prosecution agreement. Under the first, the prosecutor files the charges but agrees not to seek conviction. Under the latter, no formal charges are filed.[80] When considering whether to bring criminal charges against a corporation, several factors, including the efficiency of an existing compliance program, is taken into account.[81] It is, however, necessary to keep in mind that the described prosecutorial discretion does not alter the applicable legal standard into a genuine negligence liability regime as liability is not dependent on, e.g., causation between the offense and a corporation's negligent behaviour. Consequently, similar concerns may apply to the adequacy of DPAs as an incentive towards a genuinely ethical corporate culture as presented above in the context of the Guidelines.[82] This line of argument is further elaborated in section 3.3.

3.2.2. Corporate negligence (Finland)

Under the Finnish Criminal Code, a legal entity (e.g., a corporation) is considered criminally liable for an offense committed by a corporate agent in the corporation's business operations, if the offense can be attributed to the corporation.[83] The attribution may take place through two alternative mechanisms. The attribution, and thus corporate guilt, may be based on either (1) a member of the management having been an accomplice in an offence, or having allowed the offence to occur; or (2) the

78 See e.g., Langevoort, Cultures of Compliance, 54 *American Criminal Law Review* (2017) pp. 933-977, at 933-5 and Hess 2016 p. 326.

79 Krawiec, Organizational Misconduct: Beyond the Principal-Agent Model, 32 *Fla. St. U. L. Rev.* (2005) pp. 571-616, at 582; Arlen and Kahan, Corporate Governance Regulation through Nonprosecution, 84 *The University of Chicago Law Review* (2017) pp. 323-387, at 333.

80 Arlen and Kahan 2017 pp. 327, 332.

81 US Attorney's Manual, Principles of Federal Prosecution of Business Organizations § 9-28.300.

82 Stucke 2014 p. 787, Krawiec 2003 pp. 491-492, Uhlmann, Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability, 72 *Md. L. Rev.* (2013) pp. 1295-1344, at 1327-1328, Arlen and Kahan 2017 pp. 348-352. The use of PDAs has generated also other type of critique. See, e.g., Arlen, Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements, *8 Journal of Legal Analysis* (2016) pp. 191-234 arguing that the process governing prosecutors' use of D/NPA mandates is inconsistent with the rule of law.

83 Section 9, Sections 1-3, the Finnish Criminal Code (39/1889). An unofficial English translation is available at <www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf>, accessed 5 July 2021.

fact that the due care and diligence necessary for preventing the offence has not been observed in the operations of the corporation. The first attribution mechanism can be classified as a strict derivative liability standard as no separate genuine corporate culpability is required. Corporate guilt is based on the manager's acts or omissions as such. Due to his/her position, the manager is thought to represent the corporation. The second mechanism can be classified as a derivative liability standard based on corporate negligence,[84] as liability results from the corporation's failure to prevent the offence by the corporate agent.[85] The analysis in this study is limited to the second mechanism.

In order for a corporation to be considered to have acted negligently under the corporate negligence standard, it must have neglected a specific obligation of due care that is in a causal connection with the criminal offense by a corporate agent. At the outset, a corporation must, in order to avoid liability, comply with all material norms applicable to its business operations (such as environmental and money laundering standards) and have in place a compliance program that ensures that business operations are carried out according to such material norms. However, due to the causation criterion, not all failures of due care are relevant in determining whether negligence has taken place, but it is required that the breach of due care has, at the minimum, significantly increased the possibility of the offence by a corporate agent being committed in corporate operations.[86]

According to a somewhat controversial assumption underlying the Finnish corporate criminal liability regime, a corporation is not considered an offender, but corporate

84 Finnish scholarship does not generally address this attribution mechanism as corporate negligence, but the term was, in the Finnish context, introduced in Korkka-Knuts, Oikeushenkilön toiminnassa tapahtunut rikos ja sen estämisen laiminlyönti [Corporate Crime and Failure of Due Care], *117 Lakimies* (2019) pp. 31-336, literal translation being 'organisational negligence'. The term was further adopted in a recent report published by the Ministry of Justice concerning the Finnish corporate criminal liability regime (Tapani, Oikeushenkilön rangaistusvastuu – Nykytila ja kehittämistarpeet [Corporate Criminal Liability – the Present State and Development Needs], Oikeusministeriön julkaisuja, Selvityksiä ja ohjeita 2021:22, 15). Also, the central idea reflected by the term has been accepted in a recent precedent by the Finnish Supreme Court (KKO 2021:6, Section 49).

85 For a general English language description of the Finnish corporate criminal liability doctrine see Tolvanen 2009; Nuutila, *Corporate Criminal Liability in Finland*, [2012] available at <www.sites.google.com/site/arimattinuutila/2012-corporate-criminal-liability-finland>. In Finnish, see e.g. Korkka-Knuts, Helenius and Frände, *Yleinen rikosoikeus* [Foundations of Criminal Liability] (Edita 2020) pp. 367–404; Jaatinen, *Oikeushenkilön Rangaistusvastuu* [Corporate Criminal Liability] (Kauppakaari 2000).

86 E.g. Korkka-Knuts, Helenius and Frände 2020 pp. 383–397.

liability is based on an offence by the individual corporate agent.[87] A corporation is, however, blamed for the offence by a corporate agent in accordance with the described attribution mechanisms. As the corporate negligence standard is based on a failure of due care by the corporate body, and as corporate acts and policies are not seen as an aggregation of individual choices, but as the acts and policies of the company,[88] there are solid grounds to argue that Finnish criminal law essentially recognises genuine corporate guilt.[89] For the same reason, the assumption of a corporation as a non-offender can be challenged. In support of this view, it is worth noting that the Finnish corporate criminal liability regime does not intend to depart from the principle of guilt, which is the very core of the Finnish penal system, wherefore strict liability-based sanctioning is not a viable regulatory option.[90]

The Finnish corporate negligence standard aims to incentivise law-abiding corporate behaviour without mandating the specific design of internal compliance structures, although certain rather obvious guidelines are provided in the preparatory works of the corporate criminal liability statute. The Finnish regime therefore gives corporations a more or less free hand to design an appropriate compliance and ethics program, while taking into account all regulatory compliance requirements such as environmental and health and safety norms. As a consequence, corporate criminal liability is, in practice, usually based on a failure to fulfil a certain regulatory compliance requirement, as this constitutes a clear regulatory basis for alleged negligent behaviour.[91]

Although the efficiency of liability standards is not, in this article, considered from the sanction certainty/severity perspective, getting a decent picture of the Finnish corporate criminal liability regime necessitates giving the following data. In 2015-2019 a corporate fine was imposed in 40-60 cases annually whilst the average monetary amount varied between approximately 12,000-20,000 euros (the maximum

87 *Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi* [Government Proposal for Corporate Criminal Liability Regulation] 95/1993 vp, 5 (Finnish Government Proposal 95/1993). Also see Alvesalo-Kuusi, Bittle and Lähteenmäki, Repositioning the corporate criminal: comparing and contrasting corporate criminal liability in Canada and Finland, *42 Int. J. Comp. Appl. Crim. Justice* (2018) pp. 215-231, at 222; Alvesalo-Kuusi and Lähteenmäki, Legislating for Corporate Criminal Liability in Finland: 22-year long debate revisited, *17 J. Scand. Stud. Criminol. Crime Prev*. (2016) pp. 53-69, at 55, 66 (suggesting that the legislative controversiality may be explained by the politically controversial background of the liability regime).

88 Tolvanen 2009 p. 345.

89 The official preparatory materials of the Finnish corporate criminal liability statute refer to a concept of 'blame based on corporative guilt', while leaving the exact implications of the concept unspecified. (Finnish Government Proposal 95/1993 p. 5).

90 Tolvanen 2009 p. 342.

91 For a description of the relevant Supreme Court case material see e.g. Tolvanen 2009 pp. 354-356.

amount being 850,000 euros).[92] According to an empirical study, it is evident that the monetary value of the sanctions imposed is not significant in comparison to the revenue of the convicted corporations.[93] Almost 90 % of the cases concerned occupational health and safety offences, which is a disproportionately large part considering that the application area of the Finnish corporate criminal liability statute covers 140 types of offenses. Although no empirical evidence exists, the Finnish corporate negligence standard is likely to have only a modest effect as an incentive towards efficient compliance structures. Even if efficiency under the positive general prevention (moral and educative influence of criminal law) is assumed not to require exceedingly severe sanctions, the infrequent enforcement of the liability regime and the low monetary value of the fines risks corporate criminal liability being left as a side note in the whole of criminal policy measures.[94]

3.3 Compliance incentives compared – How to tap the moral nerve of a corporation?

This section aims at comparing the US respondeat superior and the Finnish corporate negligence models and their compliance incentivising effect. The objective is to define the features of a corporate criminal liability model that are to be considered optimal considering the efficiency assumptions under BIPT. The twofold structure of BIPT consisting of deterrence and morals as concurrent preventive mechanisms can be argued to favour a regulatory option that incentivise compliance structures combining features of a 'command-and-control' approach and an ethics-based approach which accounts for the significance of internalised values as behavioural constraints. The first is based on monitoring and sanctioning, and is thus aligned with traditional deterrence thinking, whereas the latter seeks to persuade employees to comply, rather than commanding them, and emphasises the influence of social institutions such as trust and values and thus, is aligned with the moral dimension of BIPT. The tension between these two types of compliance structures has been the subject of an academic debate in compliance and business ethics literature over the

92 Tapani 2021 p. 28. Tapani notes that the maximum amount of EUR 850,000 does not, considering the objectives of general prevention, necessarily allow a large enough corporate fine for a corporate defendant with strong financial capacity (*ibid* p. 54).

93 Lähteenmäki et al., Yhteisösakot ja niiden mittaaminen työturvallisuusrikoksissa [Measurement of Corporate Fines in Occupational Health and Safety Offences], *114 Lakimies* (2016) pp. 1054-1079, at 1068–1069.

94 Alvesalo-Kuusi, Bittle and Lähteenmäki 2018 p. 216. Taking into account the low number of court cases and low monetary sanctions imposed, Tolvanen questions the criminal policy effects of the Finnish corporate criminal liability system, which risks making corporate fines into a 'public morality tax'. (Tolvanen 2009 p. 336). The fact that the Finnish Ministry of Justice has appointed a rapporteur to assess the reasons for the limited application of the corporate criminal liability regime (for the related report see Tapani 2021) reflects the general concern regarding the efficiency of the liability regime.

last 20 years.[95] The theme of the debate, when addressing the dichotomy of extrinsic versus intrinsic motivation, appears to be analogous to the behavioural explanations for corporate deviance discussed earlier in this study, that is, whether corporate compliance is better supported by evoking extrinsic/instrumental (deterrence-based) or intrinsic/value-based (moral-based) factors. In support of BIPT, modern compliance literature argues that the command-and-control approach and the ethics approach should not be seen as alternatives, but ought to complement each other.[96]

The basic claim of the supporters of the ethics-based compliance approach is that employees and other corporate agents will follow directions they find legitimate even in the absence of monitoring.[97] The functioning of this mechanism, however, requires that the employees feel that they are trusted. This does not mean a complete absence of monitoring, but it does appear to make intensive workplace surveillance an unattractive alternative.[98] There are several reasons to believe that an aggressive monitoring approach is not only costly and difficult, but may also be inefficient.[99] Some monitoring seem to be beneficial to detect unwanted behavioural patterns,[100] but certain evidence suggests that intense monitoring leads employees to feel mistrusted, which in turn can contribute to efforts to 'defeat the system'. Sociological studies show that

95 The starting point of this discussion is often located in Lynn Sharp Paine's famous article Managing for Organizational Integrity, *72 Harv. Bus. Rev.* (1994) pp. 106-117, in which she explained the dichotomy between the command-and-control/deterrence approach and integrity approach. On the material arguments presented and comparisons of the two approaches see Stucke 2014; Langevoort 2002; Tyler and Blader, Can Business Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings, *48 Acad. Manage. J.* (2005) pp. 1143-1158; Tyler, Dienhart, Thomas, The Ethical Commitment to Compliance: Building Value-Based Cultures, *50 Calif. Manage. Rev.* (2008) pp. 31-51.

96 See e.g., Hess 2016 (promoting a model for a corporate ethical infrastructure that combines the technical aspects of a compliance programme and an organisation's ethical climate and informal systems); Smith-Crowe et al., The Ethics "Fix": When Formal Systems Make a Difference, *131 J. Bus. Ethics* (2015) pp. 791-801; Kaptein, Ethics programs and Ethical Culture: A Next Step in Unraveling Their Multi-Faceted Relationship, *89 J. Bus. Ethics* (2009) pp. 261-281.

97 Langevoort 2002 pp. 104–105; Stucke 2014 pp. 816-817. Also see behavioural economist Ariely, *The Honest Truth About Dishonesty* (HarperCollins 2012) pp. 18-27 discussing empirical 'cheating' studies where many participants cheated, but their cheating did not, however, increase when the probability of detection was zero. 'We cheat up to the level that allows us to retain our self-image as reasonable honest individuals.'

98 Langevoort 2002 p. 105.

99 'Monitoring-based approach have unexpectedly serious (and probably immeasurable) costs, which society should not impose without strong reasons'. (Langevoort 2002 p. 117). Also see Gobert 2008 p. 64; Stucke 2014 pp. 816-817.

100 Tomlinson and Pozzuto, Criminal Decision-Making in Organizational Contexts in *The Oxford Handbook of White-Collar Crime* eds. van Slyke, Benson and Cullen (Oxford University Press 2016) pp. 377-378. Further, empirical research in the field of social psychology suggests that being monitored may increase our moral awareness and thus, reduce the influence of unethical behaviour of individuals we feel connected to (Moore and Gino 2013 p. 69).

workers resent monitoring, and consequently may exert lower work effort.[101] Economists Akerlof and Kranton have suggested that intense monitoring may foster an 'outside identity' amongst workers, which can lead to resentment towards the supervisor and decrease the quality and efficiency of work.[102] According to Akerlof and Kranton, monitoring is linked to the intrinsic incentives that depend on how workers see themselves in relation to the firm.[103] What matters is actually not more or less monitoring *per se*, but how workers think of themselves in relation to the firm.[104] A corporation's formal monitoring and sanctioning practices may promote ethical behaviour if these practices are considered legitimate and fair by the employees and the moral authority of the employer is accepted.[105] This evidence supports the proposition under BIPT, according to which, purely deterrence based liability standards that motivate intensive monitoring, such as *respondeat superior*, do not lead to genuinely efficient compliance structures. Deterrence and command-and-control approach should only be used to the extent employees perceive monitoring and sanctioning as legitimate.

The moral dimension of BIPT, i.e., the significance of moral constraints in preventing misconduct, speaks for corporate compliance structures, which accounts for the significance of an ethical corporate climate and moral values in corporate decision-making and thus, makes use of the strong inhibitory influence of internalised moral norms. As discussed earlier, decision-making is always relational to the context, which means that relevant social groups and societal surroundings significantly affect decision-making.[106] The corporate climate provides a platform for internalisation and other adoption of ethical (or, likewise, unethical) values, and thus support the functioning mechanism of moral constraints. Several studies suggest that employees may

101 Akerlof and Kranton, Identity, Supervision, and Work Groups, *98 Am. Econ. Rev*. (2008) pp. 212-217 refers to two classical workplace studies: Gouldner, *Patterns in Industrial Bureaucracy* (Free Press 1954) (proposing that the change in management style from lax to strict supervision led workers to resent their position in the firm); Homans, *The Human Group* (Routledge 1951) (proposing a similar finding). See also Akerlof and Kranton, Identity and the Economics of Organizations, *19 JEP* (2005) pp. 9-32, at 22-7.

102 Akerlof and Kranton 2008 p. 216.

103 See Akerlof and Kranton 2005 for an analysis and presentation of an economic model of identity and work incentives.

104 Akerlof and Kranton 2008 p. 212; Akerlof and Kranton 2005 pp. 22-24; Nagin et al., 'Monitoring, Motivation and Management: The Determinants of Opportunistic Behavior in a Field Experiment' *92 Am. Econ. Rev*. (2002) pp. 850-873.

105 Mulder, Two-Fold Influence of Sanctions on Moral Concerns in *Psychological Perspectives on Ethical Behavior and Decision Making*, ed. Cremer (Information Age Publishing 2009) 197. Gino and Moore suggest that monitoring could be beneficial insofar as it works as a subtle reminder of one's best self but may undermine the intrinsic motivation to behave ethically when monitoring provides an external, amoral reason to comply with an external workplace policy (Moore and Gino 2013 p. 69).

106 'Decision-making . . . cannot be disentangled from social context, which shapes preferences and thus what an individual perceives as rational.' Vaughan, Rational Choice, Situated Action, and Social Control, *32 Law & Soc'y Rev.* (1998) pp. 23-62, at 33.

become more inclined to misbehave if the ethical climate of the organisation tolerates or encourages wrongdoing.[107] For example, in a study by Piquero, Tibbetts, and Blankenship, the respondents were likely to choose an illegitimate course of action that was supported by their co-workers even if such behaviour would not be accepted by their close friends and former professors.[108] Paternoster and Tibbetts note that the study reveals the overwhelming influence of corporate cultural climate in terms of individual unethical decision-making.[109]

The significance of internalised moral values, legitimate monitoring and an ethical corporate climate may be supported by firm empirical evidence, even though the exact features of an effective compliance program remain unclear.[110] It appears, however, that the baseline of any corporate compliance program should draw on a moral message – 'we do good because it is the right thing to do' and not on a deterrence motivated message 'we do good because otherwise we get punished'. In support of the moral dimension of BIPT, a study by Tyler and Blader argues that ethical values shape employee behaviour and that ethical concerns efficiently motivate self-regulatory behaviour in organisational settings.[111] Ethical values shape behaviour if people believe them to be legitimate and therefore to be obeyed 'and/or that the values defining the organisation are more congruent with their own moral values, leading people to feel that they should support the organisation'.[112] Corporations should, therefore, promote a corporate culture which genuinely reflects their corporate identity and aims to inspire ethical values that, in turn, promote policy adherence among their employees.[113] As people are less likely to obey regulations that are not consistent with their moral values, a corporate compliance system appears to benefit from an approach where the system is tightly aligned with ethical values that employees (and other agents representing the company) are expected to internalise and comply with.

107 See e.g. Sutherland, *White-Collar Crime* (Yale University Press 1983) p. 245 (arguing that the cultural factors of a specific industry or business may provide both the normative approval of illegal acts and as well as incentives to reward compliance with these norms); Elis and Simpson 1995 p. 415; Kaptein 2011 p. 863 (reporting an empirical finding according to which a work group's ethical culture was inversely related to the frequency of unethical behaviour observed within the group); Kish-Gephart, Harrison, and Trevino, Bad Apples, Bad Cases, and Bad Barrels: Meta-Analytic Evidence About Sources of Unethical Decisions at Work, *95 J. Appl. Psychol.* (2010) pp. 1-31, at 21 (suggesting that organisations create bad and good social environments that can influence individual-level unethical choices).

108 Piquero, Tibbetts and Blankenship, Examining the role of differential association and techniques of neutralisation in explaining corporate crime, *26 Deviant Behav.* (2005) pp. 159-188.

109 Paternoster and Tibbetts 2016 p. 631.

110 In similar vein Stucke 2014 p. 793.

111 Tyler and Blader 2005; Tyler, Dienhart and Thomas 2008 p. 34.

112 Tyler 2009 p. 202; Tyler, Dienhart and Thomas 2008 pp. 35-36.

113 Tyler 2009 pp. 201–203.

Considering that both BIPT and modern compliance literature provide firm support for ethics-based compliance structures, the question remains, which corporate criminal liability standard is best equipped to motivate such compliance structures? The analysis of the liability models against the efficiency assumptions under BIPT indicates that a negligence-based corporate criminal liability standard (not necessarily the Finnish version of it) would provide a better incentive than a strict liability standard for building and maintaining an ethical corporate climate and compliance structures.[114] Based on the analysis above, it appears evident that diligent corporate behaviour does not benefit from overly strict monitoring but a holistic set of measures encouraging ethical behaviour is more desirable.[115] The negligence model allows for a compliance structure that incorporates both appropriate monitoring and reporting as well as commitment to ethical corporate behaviour in everyday business operations. Even though this is precisely the objective behind the amendment made to the Guidelines in 2004, the underlying *respondeat superior* as a strict liability standard and its deterrence-related justification appears to undermine any simultaneous encouragement towards real value-based and sustainable corporate behaviour.

The 2004 amendment to the Guidelines aimed to emphasise the role of corporate culture in preventing corporate misconduct, and therefore the idea that an optimal compliance program should concentrate not only on monitoring and sanctioning and other control measures, but also comprise features promoted by ethics-based compliance, such as a healthy corporate climate. The problem is, however, that for the purposes of sanction reduction under the Guidelines, determining the efficiency of an ethics-based compliance structure is just as difficult as establishing that of a more traditional monitoring-based compliance structure. The objective indicators of an

114 In American scholarship, varying duty-based liability standards have been supported. See e.g. Weissman and Newman 2007 (suggesting that the US' strict vicarious liability system should be replaced by a standard of corporate vicarious liability that would require the state to establish a defendant corporation's failure to implement an effective compliance system); Laufer, Corporate Bodies and Guilty Minds, *43 Emory L. J.* (1994) pp. 647-730 (proposing a constructive culpability model for corporations which is an intention to capture genuine corporate culpability); Bucy, Corporate Ethos: A Standard for Imposing Criminal Liability, *75 Minn. L. Rev*. (1991) pp. 1095-1184 (suggesting a corporate ethos standard of liability under which a corporation would be found criminally liable only in case 'its ethos encourages criminal conduct by agents of the corporation'); Gruner and Brown, Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation, *21 J. Corp. L.* (1996) pp. 731-766 (recommending a due diligence defence to criminal corporate liability); Walsh and Pyrich, Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul? *47 Rutgers L. Rev.* (1995) pp. 605-692 (suggesting a 'corporate consciousness' defence); Koehler, Revisiting a Foreign Corrupt Practices Act Compliance Defense, *2012 Wis. L. Rev.* (2012) pp. 609-660, at 654-655 (arguing that compliance defence would better incentivise robust corporate compliance and reduce improper conduct, and thus advance the FCPA's objective of reducing bribery).

115 See Tyler and Blader 2005 p. 1155 drawing a similar conclusion: 'The results presented suggest that considering both models [instrumental and value-based] together better explains such [rule-following] behavior than does considering either model alone.'

ethics-based compliance program are as easy to mimic as those of monitoring-based programs, wherefore emphasising the relevance of an ethical corporate culture in the Guidelines does not, as such, make the problem of window dressing redundant.[116] As it remains unclear what type of ethics code and ethical culture will deserve a penalty reduction under the Guidelines, some firms may feel tempted to copy the minimum level of ethics-based compliance measures. Further, as the penalty reductions are dependent on how the authorities estimate the efficiency, firms are likely to consider the risk of an 'efficiency bias', favouring the monitoring-based approach. A compliance structure based on strict supervision may appear more efficient in the eyes of an authority compared to lax supervision combined with strong corporate culture. This could result in it becoming difficult for a corporate defendant to justify an ethics-based approach in court proceedings.[117] It can be speculated that the long tradition of deterrence thinking has affected our basic understanding of human behaviour (people offend if the risk of being caught is low and the potential benefit being high) wherefore changing the theoretical approach to account for the behavioural facts is much needed.

The efficiency bias should be less significant in the context of a corporate negligence standard. Under the Finnish system, the efficiency of a compliance program is not the prime determinant of liability; only such failures of due care that have contributed to the offence by the corporate agent are relevant. This contextualisation of the failure of due care makes it easier for the prosecutor and the court to analyse the efficiency of the relevant compliance measures. Under the negligence standard, the prosecutor's claim that more monitoring would have made the compliance and ethics program more efficient is, as such, irrelevant. Instead, the prosecution is required to prove that the failure of due care, such as lack of monitoring, actually contributed to the offence by the corporate agent. In addition, the prosecution must show that such monitoring measures are covered by the standard of due care applied in a specific case, which can never exceed what is considered reasonable in the specific circumstances.[118] The negligence standard may, of course, be criticised for the difficulties it may create in proving corporate negligence in court proceedings.[119] This challenge could potentially be managed, without compromising the incentivising effect of the negligence-based li-

116 Langevoort 2002 p. 106; Stucke 2014 p. 800.

117 See Langevoort 2002 p. 113 nothing that such an 'environment will not easily tolerate the perception that low-level monitoring was reasonable, biasing outcomes in the direction of over-penalization.' In a similar vein, Stucke suggests that cognitive biases may affect prosecutors' and judges' decision-making when assessing the compliance risks of a corporation (Stucke 2014 pp. 812-813). The main hypothesis in a study by Sanderson and Darley, "I am Moral, But You Are Deterred": Differential Attributions About Why People Obey the Law, *32 J. Appl. Soc. Psychol.* (2002) pp. 375-405 (arguing that people tend to explain their own obedience to laws with internal factors such as morals, while they assume that external factors like fear of punishment motivate criminals) might also be interesting in this regard.

118 Finnish Government Proposal 95/1993, 31.

119 E.g. Krawiec 2005 pp. 580-581; Hamdani and Klement 2008 p. 301.

ability structure, by applying reversed burden of proof standard as regards the facts constituting the failure of due care.

It appears that ethical behaviour cannot be motivated by a purely financial incentive, as it taps the calculative nerve of a corporation to consider compliance as a balancing exercise between financial costs and benefits, and thus move away from the idea of genuinely ethical corporate behaviour.[120] The behavioural assumption of an amoral calculator underlying the deterrence-based liability becomes reality through the application of the model. While the liability structure flirts with the calculative features of a corporation and its managers, it makes a fatal mistake in ignoring the significance of morals as behavioural inhibitions in corporate environments. A regulatory model based on an amoral model of man should not be expected to motivate any other than amoral behaviour. In order to tap the moral nerve of a corporation and to incentivise genuinely ethical corporate behaviour, a value-based corporate criminal liability model recognising corporate guilt, such as corporate negligence, should be favoured.

A guilt-based corporate criminal liability standard, such as corporate negligence, can be argued to incentivise genuinely ethical corporate behaviour and ethical corporate culture because it builds on an idea of a corporation as an entity *capable* of ethical behaviour and moral considerations. If such an assumption is not present, a corporate criminal liability model hardly can be expected to motivate ethical behaviour. Corporate guilt necessarily involves at least a certain type of corporate moral responsibility, because, without moral responsibility, there cannot be genuine criminal guilt.[121] This, in turn, means that a corporate criminal negligence standard recognises a corporation as a morally responsible actor.[122] In a value-based penal system guilt is a fundamental requirement for criminal liability as it forms the necessary basis for criminal

120 Stucke 2014 pp. 800-803, 825-827, 832 (suggesting that an incentive-based approach can encumber an ethical organisational culture). Also see Bazerman and Tenbrunsel, *Blind Spots* (Princeton University Press 2011) p. 80 (suggesting that an incentive-based approach to ethics may promote more unethical behaviour than would be the case without the incentives); Nuotio 2020 p. 25 (suggesting that 'the more we stress bare sanctioning in how we set the sanction for breach, the more instrumentally actors themselves respond.')

121 E.g., Wells 2001 p. 78 noting a correlation between capability of moral decision-making, moral blame and criminal accountability.

122 The question of whether corporations can be considered moral actors is a classical debate in moral philosophy and business ethics. See e.g. *ibid.* pp. 78–80. The classification of the liability standards analysed in the article reflects the dichotomy between methodological individualism and a holistic or organic theory of corporation. The first is based on an approach in which 'human beings are the basic unit of social reality and explanation' (Phillips, How much does a corporate theory matter, *34 Am. Bus. L.J.* (1996) pp. 239-244, at 240) and therefore all actions of a company are traceable to and thus attributable to natural persons, whereas, according to the latter, a corporation is seen as a holistic entity with an identity separate and distinct from those of its shareholders, employees and other agents, and capable of collective decision-making. See Wells 2001 pp. 146-148 and Gobert, The Evolving Legal Test of Corporate Criminal Liability in *Corporate and White-Collar Crime*, eds. Minkes and Minkes (Sage Publications 2008) pp. 61-80, at 61-63 (making a connection between the *respondeat superior* and methodological individualism).

and moral blame; without guilt there cannot be blame. Placing criminal blame and guilt on a corporation reflects the societal view that corporations are expected to comply, and if this expectation is breached, sanctioning is necessary to demonstrate that common rules are to be respected to maintain the societal idea of corporations as criminally and morally responsible actors.[123] A corporation is an actor that is able to comply with all regulatory requirements and behave in accordance with high ethical standards. We blame a corporation for its failure to comply with a relevant standard of due care because it had the opportunity to do so.[124] Sustainable and thus efficient corporate criminal law should aim to communicate the societal role of a corporation as a responsible corporate citizen, which requires that the moral and criminal status of a corporation under the regulatory regime is clear.[125]

4. Conclusion

This article has argued that ethicality should be understood as efficiency in corporate criminal law. This means that efficiency in corporate sanctioning is best attained by opting for a value-based corporate criminal liability system that aims at motivating ethical and sustainable corporate behaviour. Based on an extensive body of behavioural evidence discussed in this article, individuals are primarily guided by internalised moral values and the social context of the decision-making. Because of such behavioural evidence, a liability standard that motivates ethics-based compliance structures appear to lead to optimal results in preventing corporate misconduct.

In this article, efficiency is approached by applying a novel empirically backed theoretical framework. The structure of the suggested behaviourally informed prevention theory is twofold consisting of both deterrence and moral constraints as concurrent preventive mechanisms. Despite of the accumulated behavioural evidence on the significance of morals in decision-making, doctrinal and policy-oriented corporate criminal law still often applies deterrence in its traditional form, which concentrates on the threats of sanction and an instrumental form of the rational choice theory where a decision to offend or not to is seen as a balancing act between the potential

123 As to the expressive function of criminal law within corporate criminal law see Fisse 1983 pp. 1152-1154, 1166 ('Because society views corporations as capable of committing unwanted or morally offensive acts, and because corporations can be held blameworthy and can be stigmatised as responsible agents, the stigma of criminal punishment warrants serious consideration as a device to deter corporations' at 1153).

124 See footnote 122 describing the dichotomy between methodological individualism and the organic theory of corporation. Under the latter, the corporation can be held criminally liable and be the object of criminal blame. According to Gobert, most of the traditional legal standards for corporate criminal liability are influenced by the former ideology, although there is a consensus that companies can and should be subject to criminal prosecution in their own right (Gobert 2008 pp. 61-63).

125 In similar vein see Buell, The Blaming Function of Entity Criminal Liability, *81 Ind. L.J.* (2006) pp. 473-538, at 522, 526, 537 ('With entity criminal liability, blame and utility go hand in hand').

positive and negative consequences of the act. The discrepancy between doctrinal research in corporate criminal law and relevant behavioural evidence available makes it evident that a novel theoretical framework is needed to replace deterrence to appropriately guide behaviourally informed regulatory policy.

The comparative analysis set out in this article has demonstrated that a regulatory model based on pure deterrence cannot efficiently motivate ethical corporate behaviour. This is because deterrence thinking addresses corporate actors as inherently amoral calculators that are best steered by financial incentives and strict liability, which view ignores the significance of morals and ethical corporate culture as behavioural constraints against corporate deviance. A regulatory model based on an amoral model of man and corporation should not be expected to motivate other than amoral behaviour. Therefore, if we endeavour to motivate ethical corporate behaviour and ethical corporate culture, we should bake the concept of a moral corporation capable of ethical considerations into the liability model. A liability model that recognises a corporation as an entity capable of acting morally and according to high ethical standards allows expecting similar behavioural results, as this regulatory approach appears to incentivise ethics-based compliance structures. In other words, the theoretical frame justifying a liability model should be streamlined with the results that are expected to be achieved by applying the regulatory framework. Moral influence requires moral talk[126] wherefore, a value-based regulatory model recognising corporate guilt should be favoured to support ethical and sustainable corporate behaviour.[127]

126 Lappi-Seppälä 1995 p. 144.

127 For a related proposition as regards general EU criminal law see Nuotio 2020. Also see Tyler and Darley, 'Building a Law-Abiding Society: Taking Public Views about Morality and Legitimacy of Legal Authorities into Account When Formulating Substantive Law, *28 Hofstra L. Rev*. (2000) pp. 707-740, at 707 suggesting that 'a law-abiding society is one in which people are motivated not by fears, but rather by a desire to act in socially appropriate and ethical ways.'