

# Morality Incorporated? Some Peculiarities of Legal Thinking

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In his monograph on freedom, Pettit defends a comprehensive theory of personal and political freedom which carries ‘fitness to be held responsible’ as its hallmark: “You are free ... just so far as you are fit to be held responsible.”<sup>1</sup> He argues, convincingly in our view, that this feature already entails two other well-known characteristics of full-blown free agency, namely under-determination and ownership. That is to say, (i) there is reason to think that any action  $\phi$  for which an agent A can be held responsible is an action that is not fully determined by antecedents, so that A is left with a choice either to  $\phi$  or not. And (ii), there is equal reason to think that if A is fit to be held responsible for  $\phi$ ,  $\phi$  is something that A can and must “own”, believing – in a first-person, reflexive mode – “this is (or was, or is going to be) *me*  $\phi$ -ing”. Note also that, throughout his argument, Pettit focuses on fitness to be held responsible in the specifically moral sense, which presupposes a basic distinction between good and bad in the following way: We proceed to impute blame on people for those actions we see as bad, and praise people for those we see as good. These imputations are rooted in moral sentiments such as resentment or gratitude, rather than in objective audits of one’s own or another person’s behavior. This, however, does not make them subjective or arbitrary. When asked what skills or accomplishments would allow us to say, in an objectified way, that A is fit to be held responsible, Pettit espouses a theory of “discursive control”<sup>2</sup> in both ratiocinative and relational aspects of discursive interaction.<sup>3</sup> Better than theories of freedom as rational (Davidson) or volitional (Frankfurt) choice, this theory is able to explain what it is for a person to be free; what it is, by extension, for a self to be free; and lastly, what it is for an action to be free. For instance, when I am threatened at gunpoint to hand over my wallet, I have a rational choice to do it or not, and I am in a position to exercise volitional control. But, being pressed hard, or indeed dominated, by another person, I am unable to engage in discursive interaction with the mugger on how I can be responsible for my choice. Apparently, this feature governs our understanding when we refuse to characterize handing over the wallet as exercising freedom. The organization of discursive control in society spills over into the political dimension of freedom as non-domination, and the institutional settings thereof in a democratic state under the rule of law. In the paper discussed in the present issue<sup>4</sup> Pettit

1 Philip Pettit, *A Theory of Freedom. From the Psychology to the Politics of Agency* (Oxford: Oxford University Press, 2000), 12. The following lines summarize the main thesis of the book.

2 *Ibid.*, 65ff.

3 *Ibid.*, 70ff; discourse as “argumentative dialogue” entails both parameters of logic and of communication.

4 Philip Pettit, “Responsibility Incorporated”, in this issue. All citations of this article are indicated directly in the main body of the text.

focuses on fitness of corporate agents to be held responsible in precisely this sense.<sup>5</sup> By consequence, his essay argues that corporate agents can be free. At the request of the editors, we look into fitness to be held responsible from a legal point of view, in particular, though not exclusively, from a private law viewpoint. Regarding both individual and corporate agency, we will first acknowledge (Section 1) that there are some difficult terminological questions to disentangle here, which should warn us that law is not a simple application or specification of morality. In Section 2 we explain that fitness to be held responsible may be a background assumption in law but, if so, one that works out differently in different areas of law; and, that in private law it even disappears behind imputations of consequences other than praise or blame. More specifically, we argue that fitness to be held responsible is neither necessary nor sufficient for legal imputability in private law, let alone for legal liability, and we suggest a possible explanation. Imputation to corporate agents will be the focus of Section 3, where we will see that ascribing liability to corporate agents is premised on one important parameter in particular: organization of representational competence (or “legal power”). We will comment on Pettit’s two general reasons to hold group agents responsible.

## 1 Responsibility, Accountability, Imputation, and Liability

On the first pages Pettit distinguishes responsibility from accountability, where praise or blame are apportioned, not in accordance with good or bad, but rather on the basis of “who carries the can?” or “who sits at the desk where the buck stops?” Pettit adds that “(t)he grounds on which someone can be held accountable are much less demanding than the grounds on which they can be held responsible”.<sup>6</sup> He illustrates the difference by the example of parents being held accountable, though not responsible, for what their teenager does, thus suggesting that accountability regards a legal rather than a moral question. Yet, as Hart observed, it is not easy to determine where we enter the realm of law when we follow the signs that read “responsibility”: “[A] wide range of different, though connected, ideas is covered by the expressions ‘responsibility’, ‘responsible’, and ‘responsible for’, as these are standardly used in and outside the law.”<sup>7</sup> Nor is it easy to discern whether the grounds for accountability are less demanding than those for responsibility. Moreover, as legal orders are often linked up with different natural languages, their idioms tend to differ.<sup>8</sup> For instance, the use of Dutch, German, or French equivalents of “responsibility” in legal discourse is much more limited than in the various branches of the common law.

5 *Ibid.*: “Holding responsible in the relevant sense has an implication that, if what was done is something bad, then the agent is a candidate for blame; if what was done is something good, then the agent is a candidate for approval or praise.”

6 *Ibid.*

7 H.L.A. Hart, *Punishment and Responsibility. Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1973 [1968]), 211.

8 For extensive research on this topic, see Sacha Prechal and Bert van Roermund, ed., *The Coherence of EU Law. The Search for Unity in Divergent Concepts* (Oxford: Oxford University Press, 2008).

Regimenting language just a little bit for the sake of discussion, we propose the following:

1. At bottom, law typically asks (and authoritatively decides), what *should* be the legal consequences of this or that state of affairs,<sup>9</sup> in particular, to which legal subject(s) these consequences should be justly attributed, or over which legal subjects they should be justly distributed, in order to end or prevent conflict in society. This is what we call (in a Kelsenian vein), “imputation”, or (in a Hartian vocabulary), “ascription”.<sup>10</sup> Often enough, a first step in this inquiry is to impute the action that brought about a certain state of affairs to a certain agent or set of agents. Thus, imputation can have a wider or a narrower meaning, depending on context.
2. We call “accountability” the legal duty for all those under the rule of a legal order<sup>11</sup> to answer these imputation questions in a certain case (or to take [their] part in answering them). Thus, accountability is a duty to fulfill a role in a discursive procedure that aims at attributing and distributing legal consequences of states of affairs. Accountability pertains to the discursive leg of imputation. Appearing before an arbiter, submitting arguments of excuse or justification, but also bringing charges, or making an authoritative decision, are ways of discharging the obligations captured by “accountability”.<sup>12</sup>
3. The legal duty to carry the burdens that come with the legal consequences so distributed and attributed is called “liability”. As is well-known, these burdens can vary: from (severe) punishment over paying remedies, to taking one’s own losses. Not always will they be carried (alone) by those who are held liable and, thus, *ought* to carry them: insurance, or a warrantor, may offer relief, on conditions to be specified. So, “liability” pertains (more) to the practical leg of imputation.

Now, holding someone “responsible” in legal parlance is often a place-holder for either of these practices, and one might venture that holding someone “accountable” or “liable” also tends to overlap with the others. This holds especially true in private law. There is no distinctive category of accountability, whereas, at most, responsibility is a more general category which underlies all sorts of civil liability, e.g., out of contract, tort, or risk.<sup>13</sup> It is so general that it tends to disappear behind the horizon of imputation questions. Imputation and liability are the central categories in private law, and the practical possibilities of the latter largely determine the

9 Note that these states of affairs are neither always ‘events’ in the narrow sense of the term (what should be the legal consequences of the presence of oil reserves under the earth surface at 51 28’ 0” N, Longitude: 3 7’ 60” E?), nor ‘behavior’ (what should be the consequences of lightning striking a house under fire insurance on September 11, 2008 at 51 28’ 0” N, Longitude: 3 7’ 60” E?).

10 See Hans Kelsen, *Reine Rechtslehre* (Mit einem Anhang: *Das Problem der Gerechtigkeit*. 2., vollst. neu bearb. und erw. Aufl., Wien, Deuticke: 1960) 79ff (and already in the first 1934 edition), where imputability is the antipode of causality in science.

11 I.e., officials as well as subjects.

12 For an analysis of law as discursive practice, see Jan Vranken, *Exploring the Jurist's Frame of Mind. Constraints and Preconceptions in Civil Law Argumentation* (Deventer: Kluwer, 2006).

13 See Cf. Gerhard Schut, *Rechterlijke verantwoordelijkheid en wettelijke aansprakelijkheid* (Zwolle: Tjeenk Willink, 1963).

methodology of the former.<sup>14</sup> Issues different from (deserving) blame or praise arise within the ambit of imputation and liability questions. Among them are typical accountability questions, such as: Who is fit to fulfill which role in the discursive procedure? They also give rise to typical liability questions, such as: Who is fit to carry which burden?

## 2 A Background Assumption Rather than a Necessary or Sufficient Condition

The freedom of association, and the organization thereof, is a basic liberty in private law, alongside the freedom to acquire property, the freedom of contract and last will, and the freedom to engage in personal relationships. These liberties are in the background of exceptions to imputability acknowledged by law. We may point to general exceptions like people under age or under custody, but also to special exceptions: excuses purporting to exclude “fault” in certain cases. It is also acknowledged in family law, where there are rules determining at which age adolescents become adults; under which constraints people are allowed to marry; or under which conditions they are allowed to adopt children.

But it would be artificial, or far-fetched, to read these freedoms directly into so many forms of fitness to be held responsible. Responsibility and imputability are not congruent. Imputation of legal consequences has criteria of its own, which may or may not concur with social or moral categories, but which are applied in ways autonomous to law.<sup>15</sup> Imputation may be only the first step in attributing the burden of legal consequences to a certain agent, thereby holding her *liable*, e.g., fit to perform or to pay damages. But this first step, as well as the subsequent ones, is determined by the ultimate perspective of legal liability which colors the account to be given from the very outset.

For instance, we may believe that we meet the criterion of “value relevance”<sup>16</sup> in the legal requirement that there has to be “harm” done in order for one to proceed, and ask the question concerning to whom it should be imputed. But then, the concept of harm is put under the constraints of legal norms, determining what *legal* or *illegal* harm is. There is plenty of harm that the law does not find illegal (e.g., harm done in fierce but fair competition); and there is harm that does not register as legal harm because it is set aside by law as “purely emotional damage, and therefore constituting insufficient interest”.<sup>17</sup> Similar observations would apply with regard to causation. In many cases, responsibility and imputability seem to run parallel in asking the question whose action caused a certain damaging effect, e.g., polluting a river. But the crucial difference is that, at the end of the day, legal norms determine

14 Some even deny the distinction between imputability and liability. They view liability as the only relevant category. See Ivo Giesen, “Annotation re HR November 25, 2005, NJ 2009, 103”, NJ (*Dutch Law Reports*) 2009: sub 9.

15 Similar problems of autonomy arise with regard to ‘interdisciplinarity’: can we give an account of the specific way law deals with results reported and methods used by other disciplines, or should we say that, in the final analysis, law collapses into these disciplines?

16 Or, in Christian catechisms’ terms, “grave matter”.

17 See HR (Dutch Supreme Court) October 9, 1998, NJ (Dutch Law Reports), 1998, 853 (Jeffrey case).

liability: Who caused whose damage (“relativity”), and in particular, who (from which point in time onwards), should have known that (s)he was causing the kind of damage to some particular other legal subject that the legal order, all things considered, would call illegal. The main point is that the law takes a *normative* view on each parameter: Sometimes an agent *ought* to be aware of certain risks, or *ought* to take measures, and judges often impute these liabilities in retrospect: some agent *should have been* aware of a risk or *should have taken* measures. The counterpart of that view of law as an order of norms is that agents are viewed as “bearing responsibility” in the sense that they acknowledge the authority of the legal norm over *their* actions. Thus, in this general background assumption regarding freedom, recognition in the sense of reflexivity (i.e., in Pettit’s terms, “ownership”), seems to be the issue, rather than deserving praise or blame.

Holding someone responsible is not a necessary condition for legal imputability of actions to agents: Sometimes an act can be legally imputed to an agent A, although A is not capable of value judgment or value-sensitive control. For instance, in some legal orders (though not in all), a tort may be legally imputed to A, although A may suffer from a mental or physical disability. A cannot excuse himself with an appeal to such disability in order to stop the imputation of legal consequences. A will perhaps not be held liable in person, but then the law will impute the act to him in order to track the representative who *may* be held liable. Often, at least in civil law systems, statutory law determines to whom a piece of behavior should be legally imputed, regardless of whether Pettit’s three conditions obtain. The obvious example is strict liability, or vicarious liability for persons, animals, or goods. A second example is group liability, e.g. liability of informal voluntary associations, where (as in Dutch and German law), the legal concept of an association allows the judiciary to construe liability if it needs to impute some unlawful behavior (e.g., squatting) to someone. Think also of the Belgian labor unions consistently refusing legal personhood (though not procedural standing), in order to avoid being held liable for the strikes they support. A third example is market share liability, where harm (e.g., harm caused by a medicine like DES or by the use of asbestos), is legally imputed to agents on the basis of their shares in the market of the product at a certain point in time, regardless, in point of fact, of who caused whose harm. In all three cases, the law acknowledges only very limited grounds to avert imputation in a specific case.

So Pettit’s three conditions for moral responsibility do not seem necessary for legal imputation. But neither are they sufficient. That is to say: Suppose that they obtain, then this does not imply that the act ought to be legally imputed. Suppose I rent a car at Schiphol Airport, which on the same night is stolen from the streets of Amsterdam. Whether the loss of the car is legally imputed to me is dependent on various factors. Things like foreseeability and negligence can probably be brought under the three conditions, but insurance usually undercuts a lot of these discussions and settles the question before legal imputation can become an issue. Thus, the legal consequences of the theft are distributed, by default, over a large number of people paying insurance premiums, as it is too cumbersome to find the perpetrator as far as private law is concerned. An agent, also a corporate one, can be responsible for certain behavior without its being imputable to the agent under the law. For instance, we may hold a political party morally responsible for members

making speeches that are deemed discriminatory against certain groups of the population. But only under very special circumstances will this behavior be legally imputed to the party.<sup>18</sup>

The foregoing observations lead to the conclusion that, although in private law legal imputability of consequences to some agent A perhaps builds on the general assumption of fitness to be held responsible in Pettit's sense, this assumption is not a substantive, let alone a decisive element in legal decision making.

Apart from what was said about liability as the predominant category of private law, we would like to point to another problem. Pettit advocates fitness to be held responsible in the specific mode of "discursive control". It is a genuine problem whether or not one can conceive of law as a form of "discursive control", even if one accepts "friendly coercion"<sup>19</sup> as compatible with discursive control. There is certainly room for discursive control in legal procedure. Moreover, the constraints of discursive control are admittedly derived from the avowable interests of others. But it is by authoritative decision rather than, for instance, discursive consensus that they are imposed, and the ultimate goal of taking a final authoritative decision determines the structure and the limits of legal procedure from the outset. We do not want to deny that a legal decision has to anticipate, by and large, consensus in order to be authoritative, but we certainly want to submit that "discursive control" in law is very different from discursive control in moral issues. As in the case of liability, the fact that law, in the end, is a discourse of decision casts a long shadow over the organization of the terms, the turns and the times of that discourse.

Thus, fitness to be held responsible disappears behind the horizon of default legal radars and seems to get absorbed by other considerations that private law typically takes into account. The least one can say is that such fitness is not an ontologically warranted property that can be ascribed to agents prior to their actually being held to account, or held liable on the basis of the normative parameters that the law holds fitting. In search of an explanation it would be an interesting question to start with whether similar observations would pertain to areas that are neither typically governed by law nor left to the unspecified concerns of general morality. One could look, for instance, into areas where morality is embedded (or perhaps embodied or incorporated) in important societal functions like producing wealth (business ethics), furthering health (medical ethics), and disguising stealth (legal professional ethics). We can only offer a suggestion here, starting out from the presumption that these functions require differentiation, institutionalization, and professionalization. As Luhmann famously pointed out, such processes reduce the complexities of social life, thus enlarging the field of what Hart called "role responsibilities". Role responsibility brings along duties or (simply) tasks as a sort of sedimented responsibilities. We join Hart in his modest, but ever so perceptive observation: "I think, though I confess not being sure, that what distinguishes those duties of a role which are singled out as responsibilities is that they are duties of a relatively complex or extensive kind, requiring care and attention over a protracted period of time, while

18 See Hof Amsterdam (Appellate Court), Jan. 21, 2009, commanding prosecution of Member of Parliament Geert Wilders, but not his political party.

19 Pettit, *A Theory of Freedom*, 75ff.

short-lived duties of a very simple kind, to do or not do some specific act on a particular occasion, are not termed responsibilities".<sup>20</sup>

This to say, in our view: the more potential sources of conflict in social life get differentiated and institutionalized, the more responsibility discourse seems to transform into a discourse of rights, duties, liabilities, and immunities. Where sedimentation is less feasible or possible, we continue to speak of responsibilities. Pointing (too) briefly to just one example: A litigator in criminal law will typically say that hers is a legal task to defend her clients, not a moral responsibility to make the judge (or the jury) tell guilt from innocence. As said, we put aside this hypothesis for further investigation. But we submit that the outcome would be relevant to the more general discussion on the relationship between Pettit's view on moral responsibility, on the one hand, and law on the other. It might lead to a differentiated view of this relationship itself. Perhaps the conceptual relationship between law and morality is not isomorphic, but polymorphic, and predicated on the degree to which a specific branch of law or morality is institutionalized. Note that a high degree of differentiation between moral and legal concepts does not necessarily come in support of the separability thesis regarding law and morality. It may well support the view that, even in legal areas where moral predicates are not licensed to do any work, there may be moral reasons why this is so, even those which law does not (explicitly) acknowledge.

### 3 Imputation to Corporate Agents

Law has remarkably few problems when it comes to holding corporate agents to account and finding them liable. The construction of corporate agency caused some doctrinal problems in criminal law (e.g., where to find a *mens rea* in a company if it does not have a *mens* (mind) in the first place?). But these embarrassments were largely premised on wider beliefs with regard to the appropriate means of coercive enforcement and sanctions. Trivially, you cannot put a corporate agent in jail, for instance. You first have to find appropriate punitive sanctions before you can go on attributing criminal liability. There is a parallel here with moral responsibility: The belief that at the Last Judgment all mankind will be held to account by God and receive His "praise or blame" stands in the way of construing corporate responsibility, unless one assumes that companies can go to heaven or hell. The ambivalent relationship between the concepts of "mind" and "soul", in particular with regard to the alleged immortality of the soul and its susceptibility of immediate judgment after the death of the human body, explain to a large extent the reluctance to think in terms of corporate responsibility.

Lawyers were well ahead of philosophers in realizing that "mind" is the concept of a capacity supervenient on complex organizations of biological hardware (neuronic synapses, for instance). Equally, they saw no problem in extending supervenience to other complex organizations of hardware (social relationships, for instance). The real conceptual bug came when, during the last decades, the question emerged if

<sup>20</sup> Hart, *Punishment and Responsibility*, 213.

the state as a corporate agent could be held to account in criminal matters, as criminal law in Modernity is largely premised on a state monopoly in holding agents to account. Thus, the problem was about fitness to *be held* accountable (personhood), given the premise of an exclusive fitness to *hold* accountable (statehood). Here we see once more that the construction of criminal responsibility is predicated on wider beliefs with regard to coercive enforcement. To the extent that the state loses its monopoly of enforcement (e.g., by a change in the parameters of statehood), it becomes fitter to be held criminally responsible. In general, being less premised on statehood, private law is much quicker to hold corporate agents liable than criminal law. It is not far fetched to say that, indeed, the whole idea of the legal person, as distinct from the natural person, was invented in order to organize and facilitate social functions, even create new ones, and attribute liability in view of exploring these possibilities.

Pettit offers two reasons to hold group agents responsible in general, apart from cases where there is “evidence of a shortfall in individual fitness to be held responsible”: (a) to guard against the possibility of a shortfall in enactor responsibility, in particular where behavior by blameless individuals causes blameworthy cumulative effects at a corporate level; and (b) to undercut individuals being exposed to perverse incentives in the absence of a corporate responsibility regime (hiding behind each others’ backs so that no one is responsible) (196 ff). These are desirables that the law acknowledges. But attribution of responsibility is only one of the considerations here. As we said, imputation is governed by liability right from the start. Although it is the first stage in imposing liability, it is already determined by such questions as: Can one identify and delineate the group agent with sufficient precision, for instance, if it comes to the question against whom a judiciary decision will have to be executed? And: Is it in the public interest that a group can deploy certain (for instance social) activities without having to worry about individual (or group) liability? Therefore, another important parameter for imputability seems to be the chances to limit the set of potential plaintiffs that would profit from liability being attributed in a certain case.

As to abuse, there is the possibility to abuse the situation where there is *no* corporate liability, as well as the situation where there *is* corporate liability. In the former case, individuals may hide behind each other’s backs, and in the latter, they may hide behind the legal person. Indeed, avoiding personal liability is the point of legal personality in the first place. It makes risks (for instance, entrepreneurial risks) manageable, and thus facilitates and favors wealth-enhancing activities in various socio-economic areas that individuals might otherwise prefer to refrain from. Piercing the corporate veil is subject to very severe legal restrictions in order to strike a balance between avoiding abuse and protecting initiative.

Private law readily acknowledges organizations, in particular legal persons, to whom behavior can be imputed. It is aware of the fact that an organization acts through individual agents. But it will typically focus on some default settings of the way in which they are organized. If agents have a certain established, sustained and (thus) identifiable “position” within the organization, their behavior can be imputed to the organization. The law determines rather strictly which positions qualify in this respect:



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- an organ of the organization (in some legal systems interpreted as referring to a person whose acts count in social life as acts of the legal person itself);
- a representative;
- a subordinate person;
- a non-subordinated contractor;
- an assistant;
- a subsidiary company.

Whether or not the judiciary will impute an act by one of these agents to the organization or corporate agent is determined by (often greatly differing) requirements and conditions. To refer to the example above: To impute behavior by members of a political party to the party itself would require that the members are the *representatives* of the party, which they are not (unless perhaps the party instructed them explicitly to behave like this). But note that even when they are most visible as members of this political party rather than another, i.e., as members of parliament, virtually no one can marshal a legal ground to say that they are representatives of a party. Under constitutional law, precisely as members of parliament they are the representatives of the people rather than the party. Again we should stress that legal personality is not attributed for reasons of responsibility. It is meant to create and facilitate an organizational form that allows people to jointly deploy activities in economic, social, financial, cultural, et cetera, domains.

Apart from the explicitly recognized positions, it is rather difficult to impute actions to corporate agents, even if these actions are performed in the interest of the organization. For instance, can Transnational Corporations (TNC's) like the Royal Dutch/Shell Group be held liable for violations of human rights<sup>21</sup> in the process of drilling oil in Nigeria? The Group holds the concession but involves numerous legal persons who do not fit into the pigeon holes that imply default imputability, for instance, independent off-shore constructors, governmental agencies at different levels, the Nigerian army, shipping and port agencies. In principle, the answer is in the negative. But one may try and find an anchor in Shell's code of conduct where it is said that protection of human rights is a number one priority in all the operations of the company.<sup>22</sup> Such a code is not legally binding in itself. But if it is advertised as a corporate merit, if there is a consistent corporate policy to live up to it, if similar corporations monitor each other on the basis of this code, if authorities regard such a code as a precondition for granting a concession, then it might just be the case that this moral duty will turn out to be legally binding and to entail imputability of the operations of the other legal persons to the Group.

21 Most notably the executions of Ken Saro-Wiwa and the Ogoni 8 (November 10, 1995), without due process.

22 Relevant also are non legally binding guidelines and declarations of international organisations, such as OECD, UN and ILO. See e.g. Nicola Jägers and Marie-José van der Heijden, "Corporate Human Rights Violations: the Feasibility of Civil Recourse in the Netherlands", *Brooklyn Journal of International Law* 33 (2008), and Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (named after its chairman: Ruggie report), 2008.

Another example is networks as, for instance, in franchising. Suppose franchisor F makes separate but identical contracts with individual franchisees J, K, and L. Can franchisee J hold L to account that he does not operate in accordance with the terms of L's contract with F, thus causing harm to J? Can J sue F and put him under an obligation to take action against L who allegedly is fulfilling the terms of the contract in good faith? Still another example is the role of advisors to a corporate agent. Suppose a company C seeks advice from an advisor A and fills out the tax form on the basis of this advice. Unfortunately, the advisor does a poor job. Will this be imputed to company C? Generally not, in cases where the advisor is not in one of the recognized positions mentioned above, e.g., a representative, an assistant, et cetera.<sup>23</sup> If, however, the contract is between professional parties receiving legal aid from attorneys, a judge will be inclined to impute the contract to the parties themselves, assuming that the text reflects their intentions correctly in case interpretation is required.<sup>24</sup>

In closing this section, let us return to the issue of role responsibility. Role responsibility seems to have some bearing also on Pettit's first condition of "value relevance" with regard to corporate agents. Pettit amply discusses the autonomy of corporate agents.<sup>25</sup> But he only briefly addresses the problem of a corporate agent facing "a significant choice between doing something good or bad or right or wrong". (177) He believes that this does not raise any special issues, since "[i]f a group constitutes an autonomous agent, then it is bound, sooner or later, to face choices involving options that differ in the dimension of value". (*ibid.*) We have some doubts here. The point is this: A corporate agent has a corporate business which defines its role in society. Even less incorporated collective agents are largely defined by a certain value in the sense of a shared preference, and are organized accordingly. For instance, one agent is all set to produce and sell pharmaceuticals while maximizing profits and minimizing costs; another is geared towards offering collective goods, e.g., high quality education or health services, where costs are distributed over all members of society. Moreover, society approves of these roles, thereby acknowledging that it is the responsibility of the respective agents to pursue these core businesses and realize these values. Thus they incorporate a one-dimensional default setting of values in which other values may be integrated, but always dominated by the core value.<sup>26</sup> Inevitably, the core business (or value) determines what registers as "a choice involving options that differ in value", "a significant choice between good or bad", or – to return to catechism discourse – "grave matter". In this they differ from individuals who lack a default value setting (which is why they need institutions). Corporate agents tend to dismiss responsibility claims and immunize

23 HR (Dutch Supreme Court) September 23, 2005, NJ (*Dutch Law Report*), 2007, 231 and HR (Dutch Supreme Court) March 16, 2007, NJ (*Dutch Law Report*), 2007, 232. HR (Dutch Supreme Court) March 28, 2008, NJ (*Dutch Law Report*), 2008, 353, among other cases.

24 HR (Dutch Supreme Court) June 29, 2007, NJ (*Dutch Law Report*) 2007, 576.

25 By the way, we are inclined to think that value judgment and value sensitivity are entailments, if not guises, of autonomy.

26 E.g., multinationals care about the environment mainly for two reasons: (a) their public reputation, and (b) their long term interests in profit-making. In principle, there are no inconvenient truths there, from their perspective.

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themselves by saying that they are just doing what society wants them to do in the interest of society.

#### **4 To Conclude**

Responsibility is a category that disappears into the background of private law as it deals with imputation of liability. Fitness to be held liable is determined by normative viewpoints different from moral ones, in particular by convictions on how society ought to be organized so as to avoid or end conflict between private citizens. Modes of discursive control are geared to making authoritative decisions in view of the same end, and corporate agency is created, restricted, or enlarged, as the case may be, sometimes to undercut, sometimes to impose individual liability.