

How and Why Should the Criminal Law Punish Corporations?

by

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DEDICATION

To Megan, who foolishly let this whole thing happen, and for which I will be forever grateful.

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* I learned early that a dissertation is not a magnum opus; it is a first draft towards a career that takes a lifetime to complete. I am hoping that the same rule applies to acknowledgements. As with the substance of the dissertation, mistakes and errors of omissions here are mine.

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ABSTRACT

Courts established over a century ago that a corporation, like an individual, should be held criminally responsible for its misconduct. Nevertheless, the practice still faces steep resistance rooted in skeptical worries about both the possibility of, and the purpose behind, holding collectives accountable. My dissertation refutes both skeptical worries—and, in doing so, brings together diametrically opposed approaches to corporate regulation.

Chapter I situates the project in its historical context. Regulation of commercial activity originally occurred through corporate law: states looked inside the corporation to oversee its structure, purpose, and even day-to-day managerial decisions. The development of corporate-criminal liability reflects first corporate law's inability to regulate sophisticated commercial entities and second the inadequacy of the conception of personhood this strategy presupposed. Chapter II draws on contemporary scholarship to offer a pragmatic conception of personhood, one consistent with the nascent conception courts developed to justify the expansion of criminal liability to corporations. On this account, corporations can satisfy stringent prerequisites for legal personhood—in particular, criminal law's *mens rea* requirements.

The second half of the dissertation reimagines corporate law as a tool for improving criminal punishment, rather than as a standalone, alternative approach to corporate regulation. Chapter III defends the use of criminal fines against complaints that fines merely harm innocent individuals, and further demonstrates that the State could better deter corporations while minimizing harm to innocents through corporate-law reforms that encourage those inside the corporation to voluntarily shift the distribution of harm towards culpable members. Chapter IV goes further to use corporate-law reform as punishment in and of itself. Among other things, standard objections to reform fall away when relocated from the ordinary commercial

context to the rarefied space of criminal punishment. Meanwhile, corporate-reform-as-punishment expresses penological justifications traditionally inapplicable to corporations because of the lack of suitable alternatives to punishments like imprisonment. Incorporating corporate-law reform into our criminal practices thus expands the range of justifications for punishing corporations.

CHAPTER I

HOW, WHEN, AND WHY CORPORATIONS BECAME PERSONS UNDER THE CRIMINAL LAW: RECONSIDERING THE BIRTH OF CORPORATE-CRIMINAL LIABILITY

1 PREFACE

Consider the following, prevailing myth explaining how and why corporate-criminal liability developed. Courts long refused to hold corporations criminally responsible for good reason: corporations cannot satisfy the requirements of criminal law. In particular, a corporation is incapable of producing intentional attitudes. Thus, insofar as a corporation can never satisfy criminal law's mens rea requirement, the notion of corporate-criminal liability is conceptually confused. Nevertheless, the myth continues, at the turn of the twentieth century courts traded theoretical coherence for practical expedience. Legislatures sought to deter corporate harm by amending criminal law; courts obliged by substituting tort law's vicarious liability for genuine corporate mental states (which, according to the myth, are impossible).

This historical just-so story otherwise might not matter, except that it has considerable impact and durability today. Several scholars argue that the

practice of holding corporations criminally responsible remains as conceptually incoherent today as the myth claims it was in the 1800s. Other scholars rely on the myth to argue that corporate-criminal liability is a practice whose time has past. On this view, perhaps the need to deter corporations once outweighed the loss of theoretical consistency; however, with regulatory alternatives to criminal law now available, corporate-criminal liability has outlived its usefulness. In short, critics today suggest that corporate-criminal liability was and remains unjustified, while deterrence arguments no longer excuse our historical tolerance of conceptual incoherence.

The myth of corporate-criminal liability's development gets the history, and its consequences, entirely backwards. Corporate-criminal liability is not a conceptually confused practice created to fill a now-irrelevant regulatory need. Rather, the practice of holding corporate criminally responsible has in its history solid conceptual and moral foundations. Indeed, our current practice of corporate-criminal liability would stand on firmer footing than it now does if we were to pay closer attention to the judicial reasoning of those courts first grappling with the challenge of holding corporations responsible for tortious and criminal conduct.

As to how the development occurred, critics of corporate-criminal liability's development rely on a contestable theory for attributing intentional attitudes, which stems from a longstanding view about the grounding relationship between personhood and attribution. As it turns out, courts largely abandoned this conception of personhood at the end of the nineteenth century and, in doing so, articulated justifiable methods for attributing intentional attitudes to corporations. Thus, today's critics rely on a conception of personhood that the law abandoned over a century ago.

As to why corporate-criminal liability developed when it did, appealing to deterrence cannot alone explain criminal law's expansion to corporations. For one, absent from virtually every discussion of corporate-criminal liability's development is a simultaneous transformation in the content and purpose of corporate law. Corporate and criminal law embody diametrically op-

posed approaches towards corporate regulation; the rise of the latter cannot be understood in isolation from the decline of the former. The timing of the expansion reflects the fact that commercial corporations were then becoming sophisticated-enough collective agents to be, for the first time, eligible for criminal liability. In other words, corporate-criminal liability arose just at a time when, owing largely to the liberalization of corporate law, corporations became reliably capable of satisfying the requirements of criminal law.

Having established corporations' newfound eligibility, I consider the rationales courts actually gave for beginning to hold corporations criminally responsible. Contemporary judicial opinions reveal that courts were overwhelmingly preoccupied by a cluster of fairness considerations as justification for expanding corporate liability. These fairness considerations reflect a procedural heuristic, according to which courts endeavored to treat all persons equally, but at a minimum sought not to discriminate against individual persons¹ in favor of corporate persons.² Thus, with respect to criminal liability, courts refused to favor corporations over individuals by exposing the latter, but not the former, to the harsh sanction of criminal responsibility. Commitment to this qualified antidiscrimination sentiment applies at least as powerfully today as it did a century ago: Far from being a once-excusable, now-superfluous practice, corporate-criminal liability has as much reason to exist today than as it did upon inception.

¹ For want of a better term, I use the term "individual persons." The common practice is to refer to individuals (presumably humans) as "natural persons," but this presentation loads the dice in favor of the skeptic on precisely the issue of the nature of personhood, which I take to be up for grabs. Thanks are due to Peter Railton for pressing me to abandon the standard term.

² Relatedly, although scholars refer interchangeably to "corporate persons" and "artificial persons," the latter invites troubling (and avoidable) ambiguity. See Saul Kripke, *Unrestricted Exportation and Some Morals for the Philosophy of Language*, in *PHILOSOPHICAL TROUBLES*, 322–50 (2011). Accordingly, I restrict myself to the term "corporate person." My thanks to Dan Jacobson for this point.

2 THE MYTH OF HOW AND WHY CORPORATE-CRIMINAL LIABILITY DEVELOPED (AND WHY IT MATTERS)

2.1 How Did Courts Hold Corporations Criminally Responsible?

How did corporate-criminal liability first develop? For the purposes of this Chapter, I focus on the expansion of corporate-criminal liability to general- and specific-intent crimes—or, more generally, crimes for which some type of intentional attitude is an essential element.³ With that in mind, how did courts overcome then-prevalent skepticism about a corporation’s ability to satisfy criminal law’s mens rea requirement?

Start with the conceptual challenge that courts had to overcome. Until the turn of the twentieth century, courts routinely held that it was impossible to attribute to the corporation an intentional attitude.⁴ This conclusion followed from a strain of reasoning then common in corporate law. Courts routinely invoked, as reason to deny corporations’ legal rights and responsibilities, the absence of some feature common to individual persons. For example, Lord Coke is credited, perhaps ungenerously, with denying a corporation’s liability because “corporations have no souls.”⁵ Chief Justice Mar-

³ I limit my attention to crimes for which an intentional attitude—understood broadly to include at least states of knowledge, maliciousness, or recklessness—is a required element. Unless otherwise specified, I understand the term “corporate-criminal liability” to exclude strict criminal liability.

⁴ *E.g.*, *Owsley v. Montgomery & W. Point R.R. Co.*, 37 Ala. 560, 563 (Ala. 1861) (“[I]nasmuch as a malicious motive and criminal intent cannot be attributed to a corporation, in its corporate capacity, it is not indictable for those crimes, of which malice, or some specific criminal intent, is an essential ingredient.”); *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. 339, 345 (1854) (“Corporations cannot be indicted for offenses which derive their criminality from evil intention.”); *State v. Morris & Essex R.R.*, 23 N.J.L. 360, 364 (1852) (“[A] corporation cannot, from its nature, be guilty of treason, felony, or other crime involving malus animus in its commission.”).

⁵ *Sutton’s Hop. Case*, 77 Eng. Rep. 960, 973 (K.B. 1612) (Coke, J.). *But see* *Murfreesboro & Woodbury Turnpike Co. v. Barrett*, 42 Tenn. (2 Cold.) 508, 510–

shall argued in dissent that a corporation, being “destitute of the natural organs of man,” should be prohibited from entering into a contract except through writing.⁶ Similarly, the Supreme Court of Missouri gave the following reason for denying that a corporation could be liable for intentional torts:

The bank is a corporation—it cannot utter words—it has no tongue—no hands to commit an assault and battery with—no mind, heart or soul to be put into motion by malice; therefore, if it was an action for an assault and battery, or for a malicious prosecution, or for slander, we should at once say, that such could not be maintained.⁷

Part 3 confirms that similar reasoning featured prominently in discussions of the expansion of corporate liability for both torts and crimes; it met with judicial approval, particularly with respect to proscribing corporate-criminal liability, until well into the nineteenth century.

These sorts of impossibility claims, at their most general, posit a limiting relationship between the concepts of personhood and attribution. Adherents argue, or sometimes assume, that certain classes of attribution be applied only to individual persons—that is, to humans. For example, attributing speech to a person presupposes that the person has a mouth with which to speak; attributing action to the person presupposes that it has a body with which to act, etc. As a result, determining the range of available attributions requires first determining whether the entity is an individual person. Call this limiting relationship the **INDIVIDUAL-PERSON PREMISE**.

How did the individual-person premise constrain the expansion of criminal law to corporations? Although the law treats corporations as persons under various constitutional and statutory schemes,⁸ for the purposes of

11 (Tenn. 1865) (interpreting Coke’s quotation to mean that corporations diffuse responsibility across individuals in a manner that produces malicious outcomes).

⁶ *Bank of U.S. v. Dandridge*, 25 U.S. (12 Wheat.) 64, 92 (1827) (Marshall, C.J. dissenting).

⁷ *Childs v. Bank of Mo.*, 17 Mo. 213, 215 (Mo. 1852).

⁸ *E.g.*, *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (Fourteenth Amendment); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839) (jurisdic-

criminal liability courts limited the term “person” to entities for which it is possible to attribute intentional attitudes. This limitation derived from the ordinary requirements of criminal law, which holds a person accountable for the commission of a proscribed act (*actus reus*) performed concurrently with a proscribed attitude (*mens rea*). Per the individual-person premise, an entity must possess a single, natural mind in order to have attributed to it intentional attitudes. However, as courts had long noted, a corporation does not possess a mind distinct from its members. Accordingly, courts reasoned, corporations are ineligible for attributions of intentional attitudes, and therefore cannot be persons for purposes of the criminal law.

How did courts resolve conceptual obstacles to the possibility of genuine corporate attitudes? According to the myth of corporate-criminal liability, there was no resolution. Instead, courts avoided the conceptual challenge by importing vicarious liability—specifically, the doctrine of *respondeat superior*—from tort law into criminal law.⁹ Under the doctrine of *respondeat superior*, “a master is subject to liability for the torts of his servants committed while acting in the scope of their employment.”¹⁰ Analogizing *respondeat superior* to the corporate context, a court could impute to the corporation the actions and intentional attitudes of an employee acting in the scope of his or her employment. Crucially, a court thereby would not have needed to consider the corporation’s capacity to possess its own inten-

tion, Privileges and Immunities Clause); *Bank of U.S. v. Dandridge*, 25 U.S. (12 Wheat.) 64, 70 (1827) (contract law); *cf. Burwell v. Hobby Lobby Stores, Inc.*, — U.S. —, 134 S. Ct. 2751, 2769 (2014) (“[T]he term ‘person’ sometimes encompasses artificial persons, . . . and it sometimes is limited to natural persons.” (citing the Dictionary Act, 1 U.S.C. § 1 (2012))).

⁹ Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 416–21 (1982) (discussing vicarious liability’s development and importation into criminal law); *accord* Sarah Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability* (draft).

¹⁰ RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

tional attitudes; under the doctrine of respondeat superior, the only attitudes of interest are those of the individual servant.¹¹

There is a kernel of truth in the myth. Some courts did in fact hold corporations vicariously liable for the criminal misconduct of their employees. Most prominently, in *New York Central & Hudson River Railway v. United States*, the Supreme Court of the United States affirmed Congress's power to create a general-intent criminal statute that applies to corporations.¹² In doing so, the Supreme Court expressly incorporate tort doctrine into the criminal law to hold that a corporation could be "charged with the knowledge and purpose of their agents."¹³ Eventually, it would become standard practice for federal courts to hold corporations "guilty of 'knowing' or 'willful' violations of regulatory statutes through the doctrine of respondent superior."¹⁴

Where the myth goes astray is in casting too narrow a gaze on judicial practice. Although the Supreme Court is the law of the land, its role during this period in shaping corporate and criminal law—both traditionally state doctrines—was comparatively minor. State courts, especially state supreme courts, were the true source of innovation. And state supreme courts throughout the 1800s rejected the individual-person premise—as invoked in criminal law, but also in tort law and corporate law. Moreover, many states, and some even federal courts, expanded corporate-criminal liability without appeal to the doctrine of respondeat superior. Section 2.3 illustrates this historical oversight affects our current practice. First, however, let me place the other half of the myth on the table.

¹¹ As Gerhard Mueller derided the development of corporate mens rea, "by ignoring the problem, they have solved it." Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 39 (1957).

¹² *N.Y. Cent. & Hudson River Ry. v. United States*, 212 U.S. 481 (1909).

¹³ *Id.* at 495.

¹⁴ *United States v. A & P Trucking Co.*, 358 U.S. 121, 125 (1958).

2.2 Why Did Courts Hold Corporations Criminally Responsible?

Assume the myth is correct in describing *how* courts avoided the conceptual obstacle to holding corporations criminally responsible. It still stands to be explained *why* courts changed their position in the first place. Here, the myth invokes deterrence: states suddenly needed some method for discouraging corporations from doing harm.

On this point, Kathleen Brickey argues that early criminal prosecutions of corporations reflect the fact that “corporate criminal accountability constituted a more effective response to problems created by corporate business activities than did existing private remedies.”¹⁵ Going further, V.S. Khanna argues that criminal law provided the only forum through which the State, as opposed to private individuals, could deter corporate misconduct:

For activities causing public harm, public enforcement was essential. Holding individuals liable through public enforcement was, of course, one option for addressing public harms. However, when the culpable individual within the corporate hierarchy was judgment-proof or not easily identifiable, maintaining optimal deterrence necessitated imposing liability on the corporation. Given the absence of widespread public civil enforcement prior to the early 1900s, corporate criminal liability appears to have been the only available option that met both the need for public enforcement and the need for corporate liability. At that time, corporate criminal liability may indeed have served a useful purpose.¹⁶

In other words, corporate-criminal liability developed because criminal law provided the best, and potentially the only, forum for the State to incentivize corporations to avoid acts of misconduct. On this view, there is nothing special about the fact that courts began to hold corporations *criminally* liable; had another legal forum been available, corporate-criminal liability may never have been necessary.

Again, there is a kernel of truth here. To return to *Hudson River*, the Supreme Court notes that to give corporations “immunity from all punish-

¹⁵ Brickey, *supra* note 9, at 423.

¹⁶ V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1486 (1995); accord Brickey, *supra* note 9, at 422.

ment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.”¹⁷ More generally, Part 3 demonstrates that states embraced corporate-criminal liability directly in response to the failure of corporate law to serve as a viable regulatory mechanism.

Nevertheless, again the myth fails to tell the whole story. Courts expanding criminal liability were especially preoccupied by a constellation of fairness considerations, which I put off enumerating until Part 5. Suffice to say, courts proved uncomfortable maintaining a system of criminal law that, by immunizing corporations from liability, discriminated against individual persons and in favor of corporations.

2.3 The Pernicious Effect of Historical Myth on Modern Practice

Up to this point, all I have suggested is that there is a myth that tells the truth, but not the whole truth, about how we came to hold corporations criminally responsible. Putting aside an interest in historical fastidiousness for its own sake, why should we bother to care?

As it turns out, the historical myth behind the development of corporate-criminal liability is employed to offer a purportedly devastating critique of the modern practice of holding corporations criminally responsible. Put simply, the myth suggests that corporate-criminal liability is a conceptually unjustifiable practice whose development was excused by the lack of regulatory alternatives. Inasmuch as those excusing conditions no longer obtain, there is no longer any reason to hold corporations criminally responsible.

Begin with the conceptual challenge posed by the possibility of corporate attitudes. Federal doctrine continues to impute attitudes to a corporation through respondeat superior, for which the federal courts have been roundly criticized. I focus my attention on one strain of modern criticism.

¹⁷ *Hudson River Ry.*, 212 U.S. at 496.

Several scholars echo the individual-person premise: they argue that a corporation lacks a distinct mind, that a mind is required to attribute intentions, and that thereby a corporation is incapable of being held criminally liable. So, for example, Jeffrey Parker derides the development of corporate-criminal liability as “brush[ing] aside concerns about the lack of mens rea at the corporate level,” which occurred when “[t]he corporate entity was treated as a person and endowed with a corporate ‘mind’ that could be found guilty.”¹⁸ Similarly, Richard Epstein argues that “[o]n first principles, the law should reject corporate criminal liability on the widely acknowledged ground that corporations do not have the state of mind to authorize actions, to turn a blind eye to their occurrence, or to display callous indifference to their effects.”¹⁹ Likewise, Professors Fischel and Sykes claim that “[c]orporations are legal fictions, and legal fictions cannot commit criminal acts. Nor can they possess mens rea, a guilty state of mind. Only people can act and only people can have a guilty state of mind.”²⁰ Nor is this reasoning limited to the legal scholars; philosophers like Marion Smiley, for example, note that “collectives do not appear to have minds and hence do not appear to be capable of formulating intentions.”²¹

The myth behind corporate-criminal liability’s development bolsters the view that genuine corporate attitudes are impossible. The proffered ex-

¹⁸ Jeffrey S. Parker, *Corporate Crime, Overcriminalization, and the Failure of American Public Morality*, in *THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW* (F.H. Buckley ed., 2013).

¹⁹ Richard Epstein, *Deferred Prosecution Agreements on Trial*, in *PROSECUTORS IN THE BOARDROOM* 45 (2011).

²⁰ Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 *J. LEGAL STUDS.* 319, 320 (1996).

²¹ Marion Smiley, *From Moral Agency To Collective Wrongs: Re-Thinking Collective Moral Responsibility*, 19 *J.L. & POL.* 171, 185 (2010); accord Michael McKenna, *Collective Responsibility and an Agent Meaning Theory*, 30 *MIDWEST STUDS. PHIL.* 16, 31 (2006); see also LARRY MAY, *THE MORALITY OF GROUPS* 65 (1987) (arguing that “collective intentions proper, that is, to say that the group can intend in just the same way that the individual persons can intend, is a fiction”).

planation for how corporate-criminal liability developed—through respondeat superior, rather than through identification of genuine corporate attitudes—reaffirms the longstanding belief that there is no principled way that corporations can satisfy the requirement of criminal law. In short, argues the critic, courts avoided giving a principled method for extending criminal liability to corporations because no such principled method exists.

Turn now to why corporate-criminal liability developed. The myth—the practice arose to deter corporations—takes for granted that no other rationales could apply. Thus, Brickey’s and Khanna’s analysis “treat[s] deterrence, not retribution, as the aim of both corporate criminal liability and corporate civil liability.”²² This approach is clearly the majority view. In support, Regina Robson demonstrates that there has occurred a “virtual elimination of retribution as an acknowledged goal of [corporate-]criminal sanctioning,” with only deterrence left standing to explain why the State should hold corporations criminally responsible.²³

Deterrence alone is a weak foundation upon which to rest a practice of corporate-*criminal* responsibility.²⁴ To be sure, there are those who argue that criminal liability deters in a manner unique from civil liability.²⁵ Nevertheless, once we accept the myth, it becomes much harder to maintain the practice. In particular, argues the critic, the historical circumstances that once excused corporate-criminal liability no longer obtain. Civil and regulatory avenues now exist through which the State can regulate corporate activ-

²² Khanna, *supra* note 16, at 1494 & n.91 (collecting citations).

²³ Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 121 (2010).

²⁴ Cf. Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTING L.J. 1, 6 (2012) (“Criminal liability for corporations exists in large part to deter undesirable corporate conduct and to encourage desirable corporate practices, *but carrots and sticks are not sufficient justification for the imposition of criminal liability on corporations.*” (emphasis added)).

²⁵ E.g., Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006).

ity. Plausibly, these avenues offer more effective methods of regulation than criminal law: the State can prevail on lower standards of proof, corporations lack constitutional protections otherwise available in the criminal context, etc. Thus, Khanna concludes that the practice of holding corporations criminally responsible should be abandoned:

[T]he circumstances in which substantially all of the traits of corporate criminal liability are socially desirable are nearly nonexistent. . . . [S]ome justification for corporate criminal liability may have existed in the past, when civil enforcement techniques were not well developed, but from a deterrence perspective, very little now supports the continued imposition of criminal rather than civil liability on corporations.²⁶

This conclusion encapsulates how the historical myth purports to at once explain and undermine our current practice. The development of corporate-criminal liability was an excusable, but conceptually unjustifiable, historical aberration. Given its questionable deterrent value, the longstanding theoretical challenges that still plague the practice, and the real harm that individuals experience in its service, the practice should be confined to the dustbin of history.

3 THE HISTORICAL INTERPLAY BETWEEN CORPORATE LAW AND CRIMINAL LIABILITY

The myth gets things backwards. Corporate-criminal liability was justified at its inception—not because corporations have always been eligible for criminal liability, but because they *became* eligible late in the nineteenth century. The liberalization of corporate law during and immediately following the nineteenth century enabled the creation and proliferation of corporate persons sophisticated enough to satisfy criminal law’s mens rea requirement. Appreciating the development of corporate-criminal liability requires situating it alongside the corporate-law backdrop against which it occurred. Accordingly, Part 3 connects the development of corporate-criminal liability

²⁶ Khanna, *supra* note 16, at 1532, 1534.

at the turn of the twentieth century to the liberalization of corporate law in the preceding decades.

3.1 Special Charters and Corporate Nuisance

At the dawn of the nineteenth century, the private commercial corporation was rare, small, and intertwined with the State. Fewer than four hundred commercial corporations existed nationwide in 1800; most commercial activity occurred instead through partnerships and sole proprietorships.²⁷ For many, the benefits of the corporate form—legal status as an independent entity, and to a lesser extent limited liability²⁸—simply did not outweigh the inconvenience of incorporating. This is because, at the time, incorporation was a power exercised on a case-by-case basis by state legislatures.²⁹ An entity seeking the benefits of the corporate form had to petition the legislature, which would then draft the entity its own special charter.

²⁷ Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1145 (2012). Brickey claims that 225 private charters existed in 1800, of which less than a third were commercial in nature. Brickey, *supra* note 9, at 404. Hurst identifies 317 business corporations chartered before 1801. JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970* at 14 (1970).

²⁸ Status as a single agent allowed a corporation to own property and to contract for itself—that is, separate from its members. *See* 1 WILLIAM BLACKSTONE, *COMMENTARIES* *465–66; *cf.* *Head & Armory v. Providence Ins. Co.*, 6 U.S. (2 Cranch) 127, 169 (1804) (acknowledging a state’s ability to vest contracting powers in a corporation). Status as a single entity was likely the most attractive feature of the corporation early in its history. Limited liability would not matter until later. *See* Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. REV. 785, 794 (2013); *accord* HURST, *supra* note 27, at 28.

²⁹ The constitutionality of federal incorporation would not be settled until 1819. *McCulloch v. Maryland*, 17 U.S. 316 (1819); *accord* *Luxton v. N. River Bridge Co.*, 153 U.S. 525, 529 (1894). The political unpopularity of federal incorporation ensured that the practice remained rare. Kyle Noonan, Note, *The Case for a Federal Corporate Charter Revocation Penalty*, 80 *Geo. Wash. L. Rev.* 602, 608–09 (2012).

Compounding the inconvenience of obtaining legislative approval was a strong norm, albeit not an explicit requirement, that incorporation should serve a public purpose.³⁰ As Chief Justice Marshall put the point: “The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant.”³¹ Thus, Virginia’s Supreme Court of Appeals would describe incorporation at the time as follows:

With respect to acts of incorporation, they ought never to be passed, but in consideration of services to be rendered to the public. . . . It may be often convenient for a set of associated individuals, to have the privileges of a corporation bestowed upon them; but if their object is merely private or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privilege.³²

Legislatures construed this public-purpose norm narrowly, which is reflected in the fact that most early commercial corporations existed to perform a quasi-governmental function. Nearly two-thirds of the early commercial corporations built or maintained a bridge, turnpike, or highway; of the remaining commercial corporations, a plurality operated state-chartered

³⁰ See Johnson, *supra* note 27, at 1145 (“[T]his public-service dimension seems not to have been an express legal prerequisite to corporate formation but instead reflected in practice a shared belief about the proper focus of corporate activity.”); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 207 (1990) (“At least through the mid-19th century, incorporation primarily for private business objectives was relatively unusual. Instead, the typical corporation was chartered to pursue some sort of public function.”).

³¹ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 637 (1819). As to why a state employed private corporations to perform public functions, Hurst identifies the “need to promote a volunteer muster of capital for sizable ventures at a time when fluid capital was scarce and there were severe practical limits on government’s ability to tax in order to support direct intervention in the economy.” HURST, *supra* note 27, at 23 (1970); accord Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1609 (1988).

³² *Currie’s Adm’rs v. Mut. Assurance Soc’y*, 14 Va. (4 Henry & M.) 315, 347–48 (Va. 1809).

banks.³³ Meanwhile, although incorporation did not guarantee a state grant of monopoly power, many early charters had the effect, explicitly or implicitly, of thwarting unincorporated commercial competition.³⁴

Corporate liability, in either tort or crime, played at best a negligible role during this period. As Dodd concludes, “the cases in which the courts had occasion to consider corporate liability in tort were surprisingly few.”³⁵ Where liability did occur, it frequently involved nuisance suits, and reflected the idea that corporations implicitly owed a reciprocal duty to perform the specialized power chartered to them by the State.³⁶ Meanwhile, criminal liability remained extremely circumscribed, though courts occasionally enforced the aforementioned duties through criminal suits.³⁷ That said, these infrequent suits involved strict criminal liability. The old rule, attributed to Coke and stating that corporations were incapable of committing any crime requiring an intentional attitude, provided the background against which corporate liability would develop over the coming decades.

³³ HURST, *supra* note 27, at 22, 37–41; Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst’s Study of Corporations*, 49 AM. U. L. REV. 81, 93 (1999) (“As . . . the early decades of the nineteenth century unfolded, state legislatures began to issue significant numbers of corporate charters for banks and transportation projects.”).

³⁴ Hovenkamp argues that subsequent corporate-law jurisprudence—in particular, the Supreme Court under the guidance of Chief Justice Taney—sought to construe special corporate charters narrowly in order to avoid vesting in a corporate entity any monopolistic privilege. Hovenkamp, *supra* note 31, at 1601–25.

³⁵ EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 at 113 (1954); *id.* at 114 (“[T]he volume of corporate tort litigation had not become substantial by 1830.”).

³⁶ *See, e.g.*, *Murfreesboro & Woodbury Turnpike Co. v. Barrett*, 42 Tenn. (2 Cold.) 508 (Tenn. 1865); *Commonwealth v. Hancock Free Bridge Corp.*, 68 Mass. (1 Gray) 58 (Mass. 1854); *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. 339, 345 (Mass. 1854); *People v. Corp. of Albany*, 11 Wend. 539, 542–43 (N.Y. Sup. Ct. 1834).

³⁷ *See Corp. of Albany*, 11 Wend. at 543; *accord Hancock Free Bridge Corp.*, 68 Mass. at 67; *New Bedford Bridge*, 68 Mass. at 345–46.

3.2 General Incorporation and Corporate-Tort Liability

During the middle of the nineteenth century, populist distrust set in concerning the tight relationship between the State and private, commercial corporations.³⁸ More mundanely, the task of responding to special-charter petitions consumed an inordinate amount of legislative resources, while the practice of crafting bespoke charters prevented uniformity in corporate law.³⁹ States responded by standardizing and democratizing corporate law. Most states adopted a general-incorporation statute by the 1850s, while a majority went further and prohibited the creation of special charters by the 1880s.⁴⁰

A general-incorporation statute permits any enterprise to incorporate upon satisfying minimal administrative requirements. In exchange for the benefits of incorporation—again, primarily independent-entity status and the possibility of limited liability—an entity received a generic charter specifying the entity’s new structure, including “powers of directors and officers, amendment of articles, share structure, capital requirements, and sources of dividends.”⁴¹

The creation of general-incorporation statutes enabled a dramatic increase in the number of commercial corporations. Without *ex ante* legislative inquiry into an entity’s public-serving purpose, businesses were free to in-

³⁸ Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 792 (2005); Johnson, *supra* note 27, at 1146.

³⁹ See *Or. Ry. & Navigation Co. v. Oregonian Ry.*, 130 U.S. 1, 21 (1889) (identifying “the desire to fix some more uniform rule by which the rights and powers of private corporations, or those for pecuniary profit, should come into existence....”); HURST, *supra* note 27, at 29.

⁴⁰ See Hamill, *supra* note 33, at 178–79 (tabulating all general-incorporation and special-incorporation statutes).

⁴¹ HURST, *supra* note 27, at 56.

corporate for any commercial purpose they saw fit.⁴² It would be reductive to conclude that the general-incorporation statute singlehandedly accounts for the tremendous economic growth of the nineteenth century. Nevertheless, it is fair to say that the regime change opened the floodgates to exploitation of the corporate form. As Blair explains, the corporate form enabled speculative, large-scale commercial projects that would come to dominate the latter half of the nineteenth century.⁴³ It should not surprise, at least, that the general-incorporation era coincides with a marked expansion of the commercial corporation's presence in the American economy. Indeed, as early as 1868 the Supreme Court remarked that "[t]here is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them."⁴⁴

Notwithstanding the shift to general-incorporation statutes, states continued to exercise tight control over commercial corporations. However, instead of regulating corporations by limiting access to the corporate form, states now specified in detail the corporation's structure, size, duration, and permissible activities. For example, legislatures capped the length of a corporate lifespan to twenty, thirty, or fifty years.⁴⁵ Legislatures implemented industry-specific capitalization limits.⁴⁶ Courts likewise prohibited one cor-

⁴² Although states required that a charter contain a corporate purpose, incorporators were left to identify their own purpose without legislative consultation. *Id.* at 44; *cf.* *Oregonian Ry.*, 130 U.S. at 26–27 (noting that the articles of a corporation “do not take place under the supervision of any official authority whatever”).

⁴³ Margaret Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers During the Nineteenth Century*, 51 U.C.L.A. L. REV. 387 (2003).

⁴⁴ *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181–82 (1868).

⁴⁵ *Liggett Co. v. Lee*, 288 U.S. 517, 555 n.22 (1933) (Brandeis, J., dissenting) (citing Report of the Committee on Corporation Laws of Massachusetts (1903)).

⁴⁶ *Id.* at 550–54 & nn. 5–26 (collecting statutes).

poration from owning shares in another corporation.⁴⁷ Federal courts gave legislatures broad authority to discriminate, to the point of exclusion, against out-of-state corporations.⁴⁸ Courts hampered managers' and directors' decisionmaking capacities by prohibiting any fundamental changes to the corporation without unanimous shareholder approval.⁴⁹ Legislatures restricted limited personal liability,⁵⁰ which courts further constrained.⁵¹

The ultra vires doctrine best exemplified the pitfalls of using corporate law as a regulatory tool. Over time, the ultra vires doctrine proved a hopeless tool for regulating economic activity with any sophistication. No incorporator could reasonably anticipate the varieties of business decisions that the doctrine required to be covered in a charter's stated purpose. Nor was interpreting a charter like interpreting either a statute or a contract. Courts depended on the corporate purpose, provided at the time of incorporation,

⁴⁷ *E.g.*, *De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, 175 U.S. 40, 54 (1899) (“[I]t is not within the general powers of a corporation to purchase the stock of other corporations for the purpose of controlling their management.”); *People v. N. River Sugar Ref. Co.*, 3 N.Y.S. 401, 408 (1889); *see HURST, supra* note 27, at 43.

⁴⁸ *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839) (denying corporations protection under the Privileges and Immunities Clause and deeming corporate access to out-of-state markets a matter of interstate comity); *see Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 187 (1888) (“The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the State.”). A state's ability to condition entry by a foreign corporation was subsequently constrained by the Fourteenth Amendment. *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 21 (1910).

⁴⁹ Courts adopted unanimity requirements from partnership law. As seen in the next section, the comparison of the corporation to a general partnership proved increasingly untenable. *See infra* notes 64–68.

⁵⁰ New York made shareholders personally liable for twice their capital contribution. Act of Feb. 17, 1848, ch. 40, 1848 N.Y. Laws 54; Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 208 (1985) (describing New York's approach as “[t]he most typical provision”).

⁵¹ *Sawyer v. Hoag*, 84 U.S. (17 Wall.) 610 (1873) (establishing the trust-fund doctrine), *affirmed in Handley v. Stutz*, 139 U.S. 417 (1891). For detailed discussion of the trust-fund doctrine and its decline, *see Horwitz, supra* note 50, at 207–14.

to identify the scope of a venture. Yet, a corporation's chartered purpose was a self-serving statement drafted by incorporators without any sort of adversarial review.⁵² Meanwhile, the remedy for ultra vires conduct was harsh; action taken beyond the corporation's charter could be voided in its entirety. Although the doctrine may have been capable of carving out broad domains where corporations could not participate—the doctrine survived for a while as a tool for keeping corporations out of the political sphere⁵³—it was always more hatchet than scalpel. In response, courts, and state courts in particular, developed countless exemptions and modifications meant to ameliorate the harshness of the doctrine.⁵⁴

The harsh outcomes predicted by strict application of the ultra vires doctrine encouraged courts to instead expand corporate-tort liability. Corporate defendants during this period routinely argued that the logic underwriting the ultra vires doctrine established a comprehensive bar on corporate liability in both tort and crime. After all, a corporate charter could never authorize the corporation to commit tortious or criminal misconduct. Accordingly, the ultra vires doctrine would preclude attributing any tortious or criminal act to the corporation; by its nature, a corporation was incapable of performing such an action.

This reasoning highlights the absurdity of the ultra vires doctrine. That the State would not recognize as legally enforceable a corporate action does not mean that the action did not occur. Thankfully, courts largely dismissed appeals to this “technical” reasoning,⁵⁵ particularly when embracing it

⁵² *Or. Ry. & Navigation Co. v. Oregonian Ry.*, 130 U.S. 1, 26–27 (1889).

⁵³ Daniel Lipton, Note, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VA. L. REV. 1912 (2010).

⁵⁴ See Avi-Yonah, *supra* note 38, at 802.

⁵⁵ For courts deriding the ultra vires argument against corporate liability as a “technical” argument, see *Jordan v. Ala. Great S. R.R. Co.*, 74 Ala. 85, 88 (Ala. 1883); *Wheless v. Second Nat'l Bank*, 60 Tenn. 469, 475 (Tenn. 1872); *Goodspeed v. E. Haddam Bank*, 22 Conn. 530, 537 (Conn. 1853).

would have worked to the disadvantage of injured parties.⁵⁶ Accordingly, courts steadily expanded corporate liability in tort. Just as courts upheld corporate actions beyond the scope of a charter’s purpose, so too courts held corporations responsible for actions beyond the narrow confines of the corporate charter.⁵⁷ Importantly for the subsequent development of corporate-criminal liability, courts even held corporations liable for intentional torts like libel and malicious prosecution.

3.3 Enabling Acts and Corporate-Criminal Liability

Around the turn of the twentieth century, “drastic change set in toward removing regulatory emphasis from the general incorporation acts, with a high premium on giving the greatest freedom and vigor to central management.”⁵⁸ This enabling-act era marks a shift towards using criminal law, instead of corporate law, as a means for regulating corporate activity.

Two considerations inform the sudden liberalization of corporate law. First, corporate law and its enforcing judicial doctrines had proven incapable of keeping pace with the large-scale economic activity conducted by sophisticated commercial corporations.⁵⁹ Bear in mind that corporations were becoming more than just commonplace. An infrastructure of railroads provided previously local businesses access to national markets, as well as a

⁵⁶ *Phila., Wilmington, & Balt. R.R. Co. v. Quigley*, 62 U.S. 202, 209 (1858) (rejecting petitioner’s claim that corporate libel is impossible); *Boogher v. Life Ass’n of Am.*, 75 Mo. 319, 323 (Mo. 1882) (citing *Cooley on Torts*); *Scofield Rolling Mill Co. v. Georgia*, 52 Ga. 635, 638 (Ga. 1875); *Goodspeed*, 22 Conn. at 542; *State v. Morris & Essex R.R.*, 23 N.J.L. 360, 369 (N.J. 1852). *But see* *State v. Great Works Milling & Mfg. Co.*, 20 Me. 41, 44–45 (Me. 1841) (“A corporation is created by law for certain beneficial purposes. They can neither commit a crime or misdemeanor, by any positive or affirmative act, or incite others to do so, as a corporation.”).

⁵⁷ *Cf. Fowle v. Common Council of Alexandria*, 28 U.S. 398, 409 (1830) (“[T]hat money corporations . . . are liable for torts, is well settled.”).

⁵⁸ HURST, *supra* note 27, at 57.

⁵⁹ *See supra* notes 52–57; *see also* HURST, *supra* note 27, at 109–110.

prominent example of the power of the corporate form to aggregate capital.⁶⁰ Whole industries previously thought not to need large amounts of capital suddenly saw a reason to incorporate, and burgeoning equity markets supplied them capital.⁶¹ A corporation could thereby become broader and more geographically diverse in its shareholder base. As ownership further separated from control, the corporation looked increasingly dissimilar to other commercial organizations like the general partnership.⁶² On top of all of this, the increasingly national reach of corporations incentivized corporations to develop for themselves singular, coherent corporate personas.⁶³ As the twentieth century grew near, scholars began to develop and advocate for a real-entity conception of corporate personhood, one that understood the corporation to exist as a single agent distinct and independent from both its membership and the State.⁶⁴

⁶⁰ See Avi-Yonah, *supra* note 38, at 703 (“This state of affairs began to change with the advent of the railroads, followed by the steel and oil companies. With the rise of large corporate enterprises, massive amounts of capital were required, and between 1865 and the 1890s the widely held, publicly traded, non-owner managed enterprises gradually became the norm for U.S. business activities.”).

⁶¹ See generally Thomas R. Navin & Marian V. Sears, *The Rise of a Market for Industrial Securities, 1887–1902*, 29 BUS. HIST. REV. 105 (1955).

⁶² Blair, *supra* note 28, at 805 (“[T]he railroads had been financed by selling equity and debt securities to thousands of small investors, and by the early 1890s, other industrial organizations were beginning to finance themselves the same way. It was no longer credible, then, to think of the great railroad corporations, or the big trusts that dominated oil, steel, tobacco, and sugar, as just some sort of partnership of shareholders.”).

⁶³ *Id.* at 798, 810 (arguing that development of a singular corporate identity reflects a conscious market strategy to both consumers and employers).

⁶⁴ See, e.g., Avi-Yonah, *supra* note 38, at 797–98 (arguing that “the period between 1890 and 1906 marked the height of the debate” about corporate personhood, which ended with the triumph of the real-entity view); Horwitz, *supra* note 50, at 180–85 (tracing the intellectual history of the real-entity view in German social thought, arguing that it first emerged in the United States during the 1890s, and concluding that “by 1900, the ‘entity’ theory had largely triumphed and corporation and partnership law had moved in radically different directions”); Millon, *supra* note 30, at 213 (“The triumph of the new [real-entity] theory therefore sig-

Second, the general-incorporation regime existed in a state of perpetually unstable equilibrium. That equilibrium broke when New Jersey passed a series of acts liberalizing corporate law.⁶⁵ New Jersey’s revamped corporate law allowed incorporation for “any lawful act or activity,” thereby removing the textual hook for the ultra vires doctrine.⁶⁶ Perhaps more importantly, New Jersey became the first state to allow its commercial corporations to own shares in any other corporation. At the time, corporations had already tried a variety of methods to skirt size limits, with limited success. Business trusts were initially thought to avoid the strictures of corporate law. However, two spectacular decisions—one in Ohio against Standard Oil in Ohio, the other in New York against the sugar-manufacturing industry—rejected trusts as a non-corporate strategy for aggregation.⁶⁷ Outright purchase of another corporation’s assets was permissible in theory, but impossible in practice. This is because courts, analogizing from partnership law, concluded that such a fundamental change to a corporation could occur only with unanimous consent by the shareholders.⁶⁸ Through New Jersey’s reformed corporate code, corporations for the first time could easily merge.

The effect of reform was drastic. Corporations quickly abandoned their home states to reincorporate in New Jersey—so many that an estimated 95%

naled a willingness to dispense with the use of corporate law as a regulatory tool designed to address the special social and economic problems that Americans saw as stemming from the rise of the business corporation.”).

⁶⁵ Act of Apr. 4, 1888, ch. 269, § 1, 1888 N.J. Laws 385; Act of Apr. 7, 1888, ch. 295, §1, 1888 N.J. Laws 445; Act of May 9, 1889, ch. 265, § 4, 1889 N.J. Laws 412, 414; Act of Mar. 14, 1893, ch. 171, §2, 1893 N.J. Laws 301.

⁶⁶ Avi-Yonah, *supra* note 38, at 802 (“The ultimate demise of the [ultra vires] doctrine resulted not from a court decision but from the competition among states to attract corporate charters, which was begun by New Jersey in 1890 and continued by Delaware in the 1900s.”). New Jersey was not the first state to relax the corporate-purpose requirement. *See, e.g.*, Act of Apr. 14, 1874, ch. 165, § 1, 1874 Mass. Acts 109; Act of June 21, 1875, ch. 611, § 1, 1875 N.Y. Laws 755.

⁶⁷ *People v. N. River Sugar Ref. Co.*, 3 N.Y.S. 401 (1889); *State v. Standard Oil Co.*, 30 N.E. 279 (Ohio 1892).

⁶⁸ *See* Millon, *supra* note 30, at 215.

of major corporations were New Jersey entities by 1901.⁶⁹ Thus, when American Sugar Company's home state of New York busted its attempt to form a trust consisting of every sugar manufacturer nationwide,⁷⁰ the corporation immediately reincorporated in New Jersey and did directly what New York prevented it from doing indirectly.⁷¹ By 1902, filing fees and franchise taxes generated so much revenue that New Jersey not only retired the entirety of its debt, but also abolished its property tax.⁷²

Other states responded, initiating a race to the bottom to attract corporations and their fees. The concentration of corporations in a few jurisdictions means that the race's effects were quickly felt.⁷³ "Any lawful act" requirements neutered the ultra vires doctrine. Legislative creation of no-par stock circumvented judicial limitations on limited liability.⁷⁴ States removed limits on capitalization size, corporate lifespan, and ownership restrictions. Legislatures facilitated a corporation's ability to make fundamental changes by requiring only majority, rather than unanimous, shareholder approval to implement the change. Courts further inoculated corporations from judicial inquiry into the corporate structure through the development of the Busi-

⁶⁹ Daniel Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 13 (2008) (citing Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 AM. J. LEGAL HIST. 160, 164 (1982)).

⁷⁰ *People v. N. River Sugar Ref. Co.*, 3 N.Y.S. 401 (1889).

⁷¹ *See United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). The Supreme Court declined to apply the Sherman Antitrust Act on the basis that the Commerce Clause did not extend to manufacturing. *Id.*

⁷² Crane, *supra* note 69, at 13.

⁷³ For example, although the Supreme Court would enforce the ultra vires doctrine as late as the 1930s, enforcement had no effect on New Jersey corporations. *See Avi-Yonah, supra* note 38, at 803.

⁷⁴ Horwitz, *supra* note 50, at 213. Previously, violations of the trust-fund doctrine resulted in damages calculated as the difference between a share's par value and the price a shareholder actually paid to acquire the share. Once corporations could set the par value of shares at zero, recoverable damages disappeared.

ness Judgment Rule, which prohibited a court from second-guessing a broad swath of decisions made internal to the corporation.⁷⁵

Corporate-criminal liability developed alongside this dramatic liberalization of corporate law. Several reasons make it implausible to dismiss the timing as mere coincidence. First, the same legislatures turning corporate law over to private negotiation simultaneously passed criminal statutes applicable to all persons, including corporations.⁷⁶ Second, regulation via criminal law sidesteps the race-to-the-bottom dynamic then weakening regulation through corporate law. While a state's corporate law applies to only corporations incorporated in the State, criminal law applies to all persons whose misconduct falls within the State's jurisdiction, be they in-state or out-of-state corporations. Third, criminal law is a better tool for regulating corporate activity.⁷⁷ For one, tinkering with the corporation's internal structure is a clunky process; it is easier to regulate corporate activity directly, as tort and criminal law do. For another, criminal law aligns regulatory strategy with institutional competence, as neither courts nor legislatures are experts when it comes to commercial decisionmaking.

Courts could have refused to expand corporate-criminal liability, holding to old doctrines that mostly excluded corporations from liability. They did not do so. Most famously, the Supreme Court blessed Congress' deci-

⁷⁵ Although the first statement of the doctrine occurred in 1888, *Avi-Yonah* establishes that within fifteen years the Business Judgment Rule had become a settled feature of corporate law. *Avi-Yonah*, *supra* note 38, at 799–800 (citing *Leslie v. Lorrillard*, 18 N.E. 363 (N.Y. 1888)).

⁷⁶ *See, e.g.*, *Crane*, *supra* note 69, at 15 (noting that the Sherman Act “goes out of its way to make clear that corporations and associations are covered as well”); *cf.* *Ohio v. Gen. Fire Extinguisher Co.*, 20 Ohio Dec. 240, 245 (Ohio. Ct. Common Pl. 1910) (“It is hardly to be presumed that the general assembly of Ohio . . . could have intended to relieve the corporation, doing 99 per cent of the mischief, from punishment by penalty of law, and legislate against only the individual doing 1 per cent of the mischief.”).

⁷⁷ *But see* *Crane*, *supra* note 69, at 27–50 (discussing the problems of applying a tort-crime model, rather than a regulatory model, to antitrust law).

sion to expose corporations to liability for a general-intent crime.⁷⁸ The Supreme Court was hardly at the vanguard of innovation; several state supreme courts had already held corporations criminally responsible for general-intent crimes, and courts soon extended these holdings to include specific-intent crimes.⁷⁹ Granted, courts did not expand corporate-criminal liability indiscriminately. For example, courts were slow to recognize that a corporation could commit manslaughter because no one had previously suspected longstanding manslaughter statutes referring to “persons” to cover corporations.⁸⁰ Similarly, courts recognized that certain crimes were beyond the purview of a corporation.⁸¹ Nevertheless, the enabling-act era set the stage for both the modern corporation and the practice of holding corporations criminally responsible as if they were individual persons.

4 REEVALUATING HOW AND WHEN COURTS BEGAN TO HOLD CORPORATIONS CRIMINALLY RESPONSIBLE

I now return to the myth of corporate-criminal liability—specifically, how courts overcome longstanding skeptical challenges to the possibility of attributing intentional attitudes to a corporation. Recall that, according to the myth, courts expanded corporate-criminal liability by importing tort

⁷⁸ *N.Y. Cent. & Hudson River Ry. v. United States*, 212 U.S. 481 (1909).

⁷⁹ *E.g.*, *Grant Brothers Constr. Co. v. United States*, 114 P. 955, 957 (Ariz. 1911); *State v. Belle Springs Creamery Co.*, 111 P. 474, 476 (Kan. 1910); *State v. Rowland Lumber Co.*, 69 S.E. 58, 58–59 (N.C. 1910); *People v. Rochester Ry. & Light Co.*, 88 N.E. 22 (N.Y. 1909); *State v. Eastern Coal Co. v. Warren*, 70 A. 1, 7 (R.I. 1908); *S. Express Co. v. State*, 58 S.E. 67, 69 (Ga. 1907); *People v. Palermo Land & Water Co.*, 89 P. 723, 725 (Cal. Ct. App. 1907); *United States v. Alaska Packers’ Ass’n*, 1 Alaska 217, 222–23 (1901); *Telegram Newspaper Co. v. Commonwealth*, 52 N.E. 445, 446 (Mass. 1899); *State v. First Nat’l Bank*, 51 N.W. 587, 587 (S.D. 1892); *State v. Passaic Cnty. Agric. Soc’y*, 23 A. 680, 680 (N.J. 1892).

⁸⁰ *See, e.g.*, *Commonwealth v. Ill. Cent. R.R. Co.*, 153 S.W. 459 (Ky. 1913); *Rochester Ry. & Light Co.*, 88 N.E. 22.

⁸¹ *United States v. John Kelso Co.*, 86 F. 304 (N.D. Cal. 1898) (listing crimes).

law's doctrine of respondeat superior into criminal law. Implicit in the myth is an assumption that genuine corporate attitudes are impossible; because corporations do not have a mind, they cannot produce intentions. I identified this claim as a species of the individual-person premise. In general, the individual-person premise constrains attributions according to whether the underlying entity is an individual person.

4.1 An Alternative Approach to Attitudinal Attribution

Here I preview an account of legal personhood that reverses the relationship between personhood and attribution from that articulated by the individual-person premise. This account of legal personhood makes space for the possibility of attributing intentional attitudes to a corporate person. A full treatment of this conception will have to wait for Chapter II, but a quick sketch is invaluable to understanding the intellectual development of judicial thinking about personhood as it evolved during the nineteenth century. In particular, those courts expanding corporate liability rejected the individual-person premise in a manner consistent with the account of legal personhood developed here.

What is it to be a legal person subject to the criminal law? Following Professors List and Pettit, I argue that “[t]o be a person is to have the capacity to perform as a person.”⁸² The term “person” picks out a narrow class of agent: one who “can perform effectively in the space of obligations” in which it relates with other agents.⁸³ Legal personhood thus describes an agent that can perform effectively in the space of legal obligations. Crucially, nothing in this performative approach to personhood presupposes the existence of a single, physical body or mind. Assessment of personhood turns on whether an entity has demonstrated its capacity to satisfy admittedly strin-

⁸² CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* 173 (2011).

⁸³ *Id.*

gent conditions of effective performance—not on whether the agent is made of flesh and blood.⁸⁴

This framework reverses the relationship between personhood and attribution. Recall that the individual-person premise limits attributions to individual persons; thus, it inquires into the inner features of an entity to determine what attributions are (im)permissible. By contrast, I assess personhood according to an entity’s observable performance. Attribution, on this picture, is an interpretive practice. As Professors Anderson and Pildes put the point:

To interpret what an action means, we try to identify what the agent is doing. Deeds are identified, not by mere physical descriptions of bodily movement, but by the intentions that they express and that give them meaning. Interpretation is a matter of making sense of the speech or action in its context.⁸⁵

On this view, whether an entity is capable of expressing attitudes—and the content of those attitudes—is a matter of public interpretation of the entity’s actions, whereby expressions of intentional attitudes through words or action embody and make recognizable those attitudes.⁸⁶

My preferred approach to attribution and personhood draws from a long pedigree. Worth mentioning is John Dewey’s seminal contribution to debates over corporate personhood, offered shortly after corporate-criminal liability had developed:

The postulate, which has been a controlling principle although usually made unconsciously, leading to the merging of popular and philosophical notions of the person with the legal notion, is the conception that before

⁸⁴ See LIST & PETTIT, *supra* note 82, at 173 (mapping “the distinction between persons and non-persons onto the divide between agents who can be incorporated in a conventional system of mutual obligation and agents . . . that do not have this capacity.”); cf. Thomas M. Powers, *On the Moral Agency of Computers*, 32 TOPOI INT’L REV. PHIL. 227 (2013) (offering a broadly similar approach).

⁸⁵ Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 PENN. L. REV., 1503, 1507 (2000).

⁸⁶ *Id.* at 1513 (noting that “[e]xpressive theories of action hold people accountable for the public meanings of their actions.”).

anything can be a jural person *it must intrinsically possess certain properties, the existence of which is necessary to constitute anything a person.*⁸⁷

Here Dewey plainly describes the individual-person premise, which he explains “reflect[s] a definite metaphysical connection regarding the nature of things” and “proceeds in terms of an essential and universal inhering nature.”⁸⁸ After cataloguing the legal confusion generated by the individual-person premise, Dewey suggests instead that “person” should instead be defined pragmatically—that is, that personhood should be assessed according to whether the entity in question is capable of “display[ing] the specified consequences” of personhood.⁸⁹ Particularly relevant for our purposes is Dewey’s suggestion for how courts should attribute intentional attitudes to individual and corporate persons alike: they should “determine the absence or presence of ‘intent’, and the kind of ‘intent’, by discrimination among concrete consequences, precisely as we determine ‘neglect.’”⁹⁰

How does this alternative view of attribution inform the development of corporate-criminal liability? In reviewing the early development of corporate-criminal liability, it is clear that state courts rejected the individual-person premise in a variety of legal contexts. For example, when asked to preserve the longstanding prohibition on attributing intentional attitudes to corporations in the criminal context, many courts noted that they already rejected the individual-person premise with respect to a corporation’s liability for intentional torts. Accordingly, these courts reasoned, it would be disingenuous to maintain in the criminal context that corporations, by their

⁸⁷ John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655, 658 (1925) (emphasis added); see Blair, *supra* note 28, at 807 (noting that enduring effect of Dewey’s contribution).

⁸⁸ Dewey, *supra* note 87, at 660.

⁸⁹ *Id.* at 661. Dewey traces his conception of personhood to a pronouncement by Pope Innocent IV in 1246 CE. *Id.* at 665. List and Pettit identify similar strains in the philosophies of Hobbes and Locke. LIST & PETTIT, *supra* note 82, at 170–73.

⁹⁰ Dewey, *supra* note 87, at 663.

very nature, could not have attributed to them intentional attitudes. As New Jersey's Supreme Court put the point:

The very basis of the action for libel or for malicious prosecution is the evil intent, the malice of the party defendant. It is difficult, therefore, to see how a corporation may be amenable to civil suit for libel and malicious prosecution and private nuisance, and mulcted in exemplary damages, and at the same time not be indicted for like offenses where the injury falls upon the public.⁹¹

Supreme courts in Alaska,⁹² Georgia,⁹³ Massachusetts,⁹⁴ New York,⁹⁵ and Rhode Island,⁹⁶ as well as federal courts across the country,⁹⁷ offered identical rationales. Other courts reached the same conclusion via contract law. For example, noted one federal court, "it seems to me as easy and logical to ascribe to a corporation an evil mind as it is to impute to it a sense of

⁹¹ State v. Passaic Cnty. Agric. Soc'y, 23 A. 680, 681 (N.J. 1892).

⁹² Alaska Packers' Ass'n, 1 Alaska at 219 ("[W]here life is taken by a corporation in pursuing its business, and it is compelled to answer civilly because of such wrongful death, there is no good reason why it may not be required to answer criminally for the same act done in the line of its business, if the law so provides.").

⁹³ Cf. Scofield Rolling Mill Co. v. Georgia, 52 Ga. 635, 640-41 (Ga. 1875) (discussing corporate-criminal liability in a civil action to recover state funds).

⁹⁴ Telegram Newspaper Co. v. Commonwealth, 52 N.E. 445, 446 (Mass. 1899) ("There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil.").

⁹⁵ People v. Rochester Ry. & Light Co., 88 N.E. 22, 23 (N.Y. 1909).

⁹⁶ State v. Eastern Coal Co. v. Warren, 70 A. 1, 7 (R.I. 1908) ("If corporations have the capacity to engage in actionable conspiracy [in tort], they have the power to criminally conspire.").

⁹⁷ See, e.g., United States v. N.Y. Herald Co., 159 F. 296, 297 (S.D.N.Y. 1907) ("To fasten this species of knowledge upon a corporation requires no other or different kind of legal inference than has long been used to justify punitive damages in cases of tort against an incorporated defendant."); United States v. MacAndrews & Forbes Co., 149 F. 823, 836 (C.C.S.D.N.Y. 1906) ("[T]here is no more intellectual difficulty in considering [a corporation] capable of homicide or larceny than in thinking of it as devising a plan to obtain usurious interest."); United States v. John Kelso Co., 86 F. 304, 306 (N.D. Cal. 1898) ("[T]he same evidence which in a civil case would be sufficient to prove a specific or malicious intention upon the part of a corporation defendant would be sufficient to show a like intention upon the part of a corporation charged criminally with the doing of an act prohibited by the law.").

contractual obligation.”⁹⁸ More generally, concluded the Supreme Court of Alaska, “[i]f . . . the invisible, intangible essence of air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can also intend to do those acts, and can act therein as well viciously as virtuously.”⁹⁹ Joel Bishop’s then-influential treatise on the law of corporations reflected a similar sentiment, concluding “the powers of these artificial beings are limited; but, since the capacity to act is given them by law, no good reason appears why they may not intend to act in a criminal manner.”¹⁰⁰

To be sure, appealing to prior tort and contract cases pushes the theoretical question back one step; for what reason did courts reject the individual-person premise in civil cases? Reviewing these earlier cases reveals that courts rejected the individual-person premise on its merits. Courts expanding corporate-tort liability took the fact of deliberate activity as circumstantial evidence sufficient to prove that corporations are apt for attitudinal attributions. Consider the following from the Supreme Court of Connecticut:

To say that a corporation can not have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one—they can intend to do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be.¹⁰¹

The New Jersey Supreme Court embraced a similar approach, concluding that “[n]o technical difficulties” prevented a jury from inferring that a

⁹⁸ *United States v. MacAndrews & Forbes Co.*, 149 F. 823, 836 (C.C.S.D.N.Y. 1906); *accord* *McDermott v. Evening Journal Ass’n*, 43 N.J.L. 488, 491–92 (N.J. 1881) (“But it is obvious that mind, in its legal sense, means only the ability to will, to direct, to permit, or assent. A corporation exerts its mind each time that it assents to the terms of the contract.”).

⁹⁹ *United States v. Alaska Packers’ Ass’n*, 1 Alaska 217, 220 (1901).

¹⁰⁰ JOEL PRENTISS BISHOP, *NEW COMMENTARIES OF THE CRIMINAL LAW UPON A NEW SYSTEM OF LEGAL EXPOSITION* at § 418 (1892).

¹⁰¹ *Goodspeed v. E. Haddam Bank*, 22 Conn. 530, 542 (Conn. 1853).

corporation committed a “wrongful act *intentionally done*.”¹⁰² Supreme courts in Alabama,¹⁰³ Georgia,¹⁰⁴ Indiana,¹⁰⁵ and Kentucky,¹⁰⁶ similarly rejected the individual-person premise. They trusted, and sometimes expressly stated, that a jury was capable of ascertaining a corporation’s intentional attitudes, and did not bother to develop some special method for ascertaining corporate attitudes. In this respect, these courts treated the process of attributing attitudes to corporate persons the same as they did the process of attributing attitudes to individual persons. In doing so, courts appreciated that attribution is an interpretative practice, deriving intentional attitudes from observable actions. In summary, in criminal cases across a variety of jurisdictions we see courts rejecting the individual-person premise either on its merits or on the basis that the premise had already been debunked in either tort law or contract law.

4.2 Respondeat Superior vs. Genuine Corporate Attitudes

Courts expanding the scope of corporate liability did more than simply reject the individual-person premise. Several courts articulated principled methods for attributing intentional attitudes to corporations. In other words, courts did not uniformly rely on respondeat superior as a substitute for genuine corporate mental states.

From the moment they began expanding corporate liability for intentional torts, courts sought to standardize how to attribute intentional attitudes to a corporation. They did so, in part, by inquiring into the source of corporate intentions. In doing so, they appropriated the rhetoric of the individual-person premise while identifying structural counterparts capable of

¹⁰² *Vance v. Erie Ry. Co.*, 32 N.J.L. 334, 337 (N.J. 1867) (emphasis added); *accord* *McDermott*, 43 N.J.L. at 493.

¹⁰³ *Jordan v. Ala. Great S. R.R. Co.*, 74 Ala. 85, 88–89 (Ala. 1883).

¹⁰⁴ *Scofield Rolling Mill Co. v. Georgia*, 52 Ga. 635, 638–39 (Ga. 1875).

¹⁰⁵ *Jefferson R.R. Co. v. Rogers*, 28 Ind. 1, 6–7 (Ind. 1867).

¹⁰⁶ *Lyne v. Bank of Kentucky*, 28 Ky. (5 J.J. Marsh.) 545, 559 (Ky. 1831).

producing corporate intentional attitudes. For example, early tort cases identify as the corporate “mind” the set of interactions between directors or managers.¹⁰⁷ Consider this reasoning by a district court—reasoning eventually endorsed by the Supreme Court—with respect to a corporation’s capacity to satisfy the elements of malicious prosecution:

[Petitioner argues] that a corporation is incapable of malice, and technically that may be true; but is it really and practically so? There must be a controlling and governing power in every corporation. This is usually found in a board of directors who are chosen by the members or stockholders, and this board in some way selects the officers and employes of the corporation. *It is not true that a corporation has no mind. Its mind is the joint product of the minds of its officers and directory in a united organization*, and in point of fact corporations bring into their service the highest order of ability and the best executive talent in the country.¹⁰⁸

Contra appeals to respondeat superior, this analysis does not conflate the attitudes of a director, manager, or employee with the attitudes of the corporation. Rather, it recognizes that the attitudes of directors and managers, mediated through the corporate structure through which these individuals interact, produce genuine corporate intentional attitudes. As I suggest in the following section, this account describes genuine corporate attitudes.

Return now to the myth’s reliance on respondeat superior. Many courts eschewed straightforward applications of vicarious liability in favor of comparatively sophisticated approaches to corporate intentional attitudes. For example, California and Missouri limited attribution of corporate intentions to those attitudes held by corporate directors, provided further that the attitudes concerned actions taken “within the scope of the objects and purposes of the corporation.”¹⁰⁹ Arizona adopted a similar rule, albeit focusing on

¹⁰⁷ *Maynard v. Fireman’s Fund Ins. Co.*, 34 Cal. 48, 55 (Cal. 1867); *Lyne v. Bank of Kentucky*, 28 Ky. (5 J.J. Marsh.) 545, 559 (Ky. 1831).

¹⁰⁸ *Copey v. Grover & Baker Sewing-Mach. Co.*, 6 F. Cas. 517, 519 (C.C.S.D. Ala. 1875), *cited with approval in City of Salt Lake City v. Hollister*, 118 U.S. 256, 262 (1886).

¹⁰⁹ *Maynard*, 34 Cal. at 57, *cited with approval in Gillett v. Mo. Valley R.R. Co.*, 55 Mo. 315 (Mo. 1874).

the personal intentions of corporate officers rather than directors.¹¹⁰ Other courts focused on the type of conduct that might merit attribution. For example, the Alaska Supreme Court concluded that “[n]ot every misfeasance which would be indictable in an individual is so in a corporation. It must be within, or not too far outside of, the corporate duty.”¹¹¹ Separately, Maryland limited attribution of an intentional attitude to only those cases where an employee, committing the underlying misconduct, acted with express authority.¹¹² These historical approaches resonate today. For example, the attributive framework advocated by Arizona foreshadows the Model Penal Code’s method of attributing to a corporation only those intentional attitudes demonstrated by “high managerial agents.”¹¹³ That is not to say that any of these approaches is ideal; for example, they all run the risk of conflating individual attitudes with corporate ones. Nevertheless, they represent efforts to standardize corporate attribution in a more principled manner than the doctrine of respondeat superior.

Of all such efforts, the Supreme Court of Michigan articulated perhaps the most sophisticated approach to attribution of its day. Faced with a plaintiff seeking exemplary damages against a newspaper corporation for libel, the court affirmed that a corporation could be so held liable.¹¹⁴ However, the court explained that “no amount of express malice in his employees” would suffice to expose a corporation to exemplary damages where the corporation implemented “the establishment and habitual enforcement of such rules as

¹¹⁰ *Grant Brothers Constr. Co. v. United States*, 114 P. 955, 957 (Ariz. 1911) (“[A] corporation, as well as an individual, is capable of forming a guilty intent and capable of having the knowledge necessary, provided the officers of the corporation capable of voicing the will of the corporation have such knowledge or intent.”).

¹¹¹ *United States v. Alaska Packers’ Ass’n*, 1 Alaska 217, 222 (1901).

¹¹² *Carter v. Howe Mach. Co.*, 51 Md. 290 (Md. 1879).

¹¹³ MODEL PENAL CODE § 2.07(1)(c) (1962). Twelve states still substantially follow this approach. See Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107 app. B (2006).

¹¹⁴ *Detroit Daily Post Co. v. MacArthur*, 16 Mich. 447, 454–55 (1868).

would probably exclude [libelous] items” of publication.¹¹⁵ On the other hand, a poorly managed publication—for example, one with a “frequent recurrence of similar libels”—risked exemplary damages. In other words, a malicious act of liable should not be attributed to a corporation when the corporate structure implies that libel occurred because of a rouge employee. By contrast, malice should be attributed to a corporation when the corporate structure creates a libelous environment. As Part 5 explores further, this approach does a good job of distinguishing between attitudes properly attributed to a corporation and attitudes that should be attributed instead to an individual inside the corporation. Indeed, inasmuch as federal courts still rely on respondeat superior, adopting this approach articulated by the Michigan Supreme Court would vastly improve the extent to which legal doctrine picks out genuine corporate attitudes.¹¹⁶

4.3 When and How the Criminal Law Saw Corporations as Persons

I return now to the broader question of a corporation’s eligibility for criminal responsibility. Even without the constraints of the individual-person premise, it is difficult for an entity—particularly a collective entity—to satisfy the requirements necessary for legal personhood. In this Section, I briefly sketch the requirements of legal personhood necessary for criminal liability.¹¹⁷ Corporations can satisfy the high bar set by these requirements. More importantly, the expanded availability of the corporate form, the relaxing of corporate-purpose requirements, and the general liberalization of corporate law created the conditions that made it possible for corporations to meet this high bar. In short, courts began holding corporations criminally

¹¹⁵ *Id.*

¹¹⁶ Chapter II demonstrates that the current federal practice, but not the current federal doctrine, approximates this approach to attitudinal attribution with respect to corporate-criminal liability.

¹¹⁷ Again, all of this is spelled out comprehensively in Chapter II.

liable just at a time when corporations themselves became capable of qualifying for criminal responsibility.

What do I mean in claiming that legal personhood is limited to agents capable of effective participation in the space of legal obligations? Stephen Darwall's concept of second-personal competence elucidates the relevant idea. According to Darwall, our making a claim or demand on another "presupposes a common competence, authority, and therefore, responsibility."¹¹⁸ This requires a capacity to offer and respond to reasons whose "validity depends on presupposed authority and accountability relations between persons."¹¹⁹ Thus, a person who can participate effectively in the space of obligations can make claims on other persons, have claims made against it, hold accountable those who fail to honor legitimate claims, and be held accountable for likewise failing to honor legitimate claims.

Making, and being subject to, claims of accountability presuppose a sophisticated degree of agency. As a starting point, all agents possess, at a minimum, both intentional attitudes and a capacity to act on those attitudes. On the first requirement, an intentional attitude might describe the way things are—these attitudes include beliefs, knowledge, etc.—or it might identify the way things ought to be from the agent's perspective (e.g., desires, preferences).¹²⁰ On the second requirement, even a simple agent can attempt to bring its environment into alignment with its attitudes concerning how the environment ought to be.¹²¹ Going further, agency of any sophistication requires an ability to learn from one's mistakes. More carefully put, performance in the space of obligations requires that the agent be capable of self-regulating its rational processes, where rationality refers to standards of per-

¹¹⁸ STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* 21 (2006).

¹¹⁹ *Id.* at 8.

¹²⁰ LIST & PETTIT, *supra* note 82, at 21.

¹²¹ *Id.* at 20.

formance regarding an agent's attitudes and actions.¹²² Such an agent recognizes the benefit of improving its rational performance and can develop and impose checks to do so. This suggests that a sophisticated agent can recognize failures of rationality in itself and others. Put another way, a sophisticated agent is sensitive to criticism; it is able to learn from past mistakes by taking action designed to avoid repeating irrational missteps in the future. More would be required of, say, a full-fledged *moral* agent—perhaps, for example, a capacity for emotional reactivity.¹²³ Nevertheless, these conditions suffice to satisfy legal personhood.

Can a collective agent satisfy these requirements? I follow Margaret Gilbert's work on group agency, which is largely sympathetic to my approach to attribution and personhood.¹²⁴ Briefly, Gilbert's account requires three features to establish a collective agent. First, there must a delimited population of individuals, who I refer to as the MEMBERSHIP. Second, there must a JOINT COMMITMENT amongst those members to act "together to constitute, as far as is possible, a single body that intends [or believes, accepts, values, hates, etc.] to do that thing."¹²⁵ Third, there must be

¹²² To describe an agent as rational is to observe that the agent succeeds in one or several contexts: in matching attitudes to facts about its environment; in holding attitudes that are consistent with each other; or in acting consistently with its held attitudes. LIST & PETTIT, *supra* note 82, at 24; *see also* Philip Pettit, *Akrasia, Collective and Individual*, in WEAKNESS OF WILL AND PRACTICAL IRRATIONALITY (2003) (canvassing failures of rationality).

¹²³ *E.g.*, McKenna, *supra* note 21, at 26–30 (arguing that the lack of emotional content precludes corporations from moral agency).

¹²⁴ *E.g.*, DARWALL, *supra* note 118, at 198 (incorporating Gilbert); Margaret Gilbert, *Corporate Misbehavior and Collective Values*, 70 BROOK. L. REV. 1369, 1376 (2004) (describing collective belief's performative character).

¹²⁵ Margaret Gilbert, *Who's to Blame? Collective Moral Responsibility and Its Implications for Group Members*, 30 MIDWEST STUDS. PHIL. 94, 100 (2006). Gilbert canvasses a variety of intentional attitudes. *E.g.*, *id.* at 100 (*desires*); Margaret Gilbert, *Shared Intention and Personal Intentions*, 144 PHIL. STUDS. 167 (2009) (*intentions*); Margaret Gilbert, *Collective Belief and Scientific Change*, in SOCIALITY AND RESPONSIBILITY 37 (2000) (*beliefs*).

an INTERNAL STRUCTURE; this structure describes the formal and informal mechanisms through which members interact to coordinate activities and responsibilities as a body.

The internal structure is the most important consideration in my account, which focuses on complex, sophisticated agents.¹²⁶ Participation in the space of legal obligations, in particular, requires a sophisticated structure that allows for flexible, responsive, and dynamic decisionmaking. For these collectives—often characterized by large memberships or multiple, open-ended joint commitments—a developed structure is essential. Modern commercial corporations possess such a sophisticated structure, which Peter French describes as the Corporate Internal Decision (“CID”) Structure. The CID Structure’s “primary function is to draw experience from various levels of the corporation into a decision-making and ratification process.”¹²⁷ Specifically, a CID Structure “accomplishes a subordination and synthesis of the intentions and acts of various biological persons into a corporate decision.”¹²⁸ A corporation’s CID structure allows it to be an effective participant in the space of legal obligations—for example, by participating meaningfully in the obligation-laden practice of contracting.

Finally, I come to the issue of when corporations became legal persons. On the account sketched above, a corporation is eligible for legal personhood if it can participate effectively in the space of legal obligations. In particular, the corporation must possess an internal structure that accomplishes the following: allowing the corporation to act and express attitudes as a single agent; acknowledging its ability to enforce legal claims and have legal claims enforced against it; and identifying failures of the corporation’s ra-

¹²⁶ For methodological reasons, Gilbert focuses on simple plural subjects. *But see, e.g.*, Margaret Gilbert, *Collective Wrongdoing: Moral and Legal Responses*, 30 SOC. THEORY & PRACTICE 167 (2002) (treating nations as plural subjects).

¹²⁷ Peter French, *The Corporation as a Moral Person*, 16 AM. PHIL. QUARTERLY 207, 212 (1979).

¹²⁸ *Id.*

tional processes and improving those processes. When did corporations reliably begin to adopt such complicated internal structures?

The first lesson of Part 3 is that commercial corporations were not always sophisticated collective agents. To recap, corporations in the early 1800s did have members. Moreover, those members were united by a joint commitment—albeit, a narrowly proscribed commitment chosen for them by the legislature who drafted their charter. Corporations started out without much in the way of uniform structures, and courts liberally borrowed from partnership law to fill in gaps in corporate law. Although the legal benefits obtained through the corporate form—independent-entity status, limited liability, and separation of ownership from control—existed in principle at this time, these advantages had not yet been widely exploited.

The second lesson of Part 3 is that the steady liberalization of corporate law over the nineteenth century—driving and in turn being driven by expanding, increasingly national economic opportunities—created the need for sophisticated corporate agency. To track the language of collective agency, the rapid increase in a corporation’s membership, coupled with the expanding scope of a corporation’s joint commitment, necessitated the development of sophisticated internal structures. Development of these structures made corporations, for the first time, legal persons eligible for criminal liability.

Start with joint commitment. Courts and legislatures repeatedly expanded the permissible scope of a corporation’s joint commitment throughout the nineteenth century. First, general incorporation democratized access to the corporate form, thereby allowing entities committed to purely private commercial interests to incorporate; as a result, commercial corporations arose outside of a narrow class of quasi-public industries. Second, judicial liberalization of the *ultra vires* doctrine allowed corporations to push the limits of their chartered purpose. Third, the creation of “any lawful act” statutes made it easier still for corporations to pursue multiple related commitments. Fourth, the removal of caps on a corporation’s lifespan meant

that corporations could pursue open-ended commitments. The cumulative effect of these reforms was to remove legal impediments on corporation action. This allowed corporations to expand beyond single-purpose ventures, to change strategies or industries in response to market demands, and to plan long-term commercial projects.

At the same time, corporations expanded dramatically with respect to membership. In the early 1800s, corporations were small enterprises with a local base of shareholders and strong overlap between ownership and control. However, the ability to separate capital contributions from corporate decision-making made corporations the preferred enterprise vehicle for pursuing large commercial projects. The development of a countrywide infrastructure and financial markets allowed corporations to pursue business, and to attract capital, from a national market. Geographic dispersion accelerated the separation of ownership from control. Increased size in turn allowed for larger ventures, which itself fueled growth and further expanded the geographical base of shareholders. This cycle was exacerbated initially by the use of trusts to aggregate corporate wealth, and later by changes in corporate law allowing corporations to own shares in each other.

How did these changes influence corporate structures? From the State's perspective, the nineteenth century saw a sea change in regulatory attitudes towards corporations, which influenced the development of corporate structures that realized the corporation's status as single legal entity. General-incorporation statutes provided a template structure for corporations. During this period, courts' increasing disregard for the ultra vires rule—in corporate law as well as in tort law—illustrated courts' growing unwillingness to intervene in the internal negotiations of corporate members; instead, the court would deal with a corporation as a single agent for purposes of both legal powers and responsibilities. The creation of the Business Judgment Rule reinforced this judicial commitment to stay out of the process of internal decision-making. Meanwhile, legislative transition towards enabling acts signaled that the State would withdraw from the prac-

tice of regulating a corporation's internal structure. At the same time, the legislative removal of, for example, shareholder-unanimity requirements strengthened the hierarchical nature of corporate decision-making.

From the commercial perspective, particularly in the latter part of the nineteenth century, strong economic incentives pushed corporations to organize themselves in a manner that embraced their legal status as a single entity. Changes in size and national focus created a need for internal structures that were flexible and responsive to increasingly competitive markets. The need to win over from local businesses customers in an increasingly national marketplace meant that developing a single branded identity became a good business practice. Likewise, as corporate employees spread over a wider community, a single corporate identity could substitute for physical presence as a means of inspiring loyalty. In short, corporations faced economic incentives to organize themselves to resemble and respond like they were a single entity.

To summarize, during the latter part of the nineteenth century, it became in the commercial corporation's interest to develop for themselves internal structures that allowed them to act and respond as the single entities corporate law treated them as. At the same time, courts and legislatures increasingly signaled their willingness to interact with corporations as single agents, rather than interfere with a corporation's internal structure. The cumulative effect resulted in sophisticated internal structures, which were capable not only of corporate attitudes and actions, but further of effective participation in the space of legal obligations. In short, economic and corporate-law innovations in the latter part of the nineteenth century created the conditions of corporate eligibility for criminal responsibility.

5 REEVALUATING WHY COURTS BEGAN TO HOLD CORPORATIONS CRIMINALLY RESPONSIBLE

Up to this point, I have demonstrated how corporations became eligible for criminal liability in the latter part of the nineteenth century. Part 5 now explains why liability developed.

5.1 The Insufficiency of Deterrence as an Explanation

Deterrence might seem an odd final target to take on. As I noted in Part 2, some courts appealed to deterrence rationales when expanding criminal liability to corporations. Most notably, the Supreme Court blessed the practice on the rationale that a combination of private civil suits against a corporation and criminal indictments of corporate employees would not adequately deter corporate misconduct.¹²⁹ Moreover, Part 3 demonstrated the shift to criminal law coincided with the abandonment of corporate law as a regulatory strategy. In doing so, I made explicit that criminal law could better serve as a regulatory tool than could corporate law. So why I am criticizing the standard myth that corporate-criminal liability developed in order to deter corporate misconduct?

Appeals to deterrence alone cannot explain the development of corporate-criminal liability. Two problems arise. To begin, the use of criminal law as a means to control corporate activity was not new. As Part 3 demonstrated, a species of strict criminal liability had existed for corporations since at least the early 1800s.¹³⁰ Moreover, these early courts provided an identical rationale as that advanced by the Supreme Court in 1909—namely, that “[a]n indictment and an information are the only remedies to which the public can resort for a redress of their grievances.”¹³¹ Thus, more needs to

¹²⁹ *N.Y. Cent. & Hudson River Ry. v. United States*, 212 U.S. 481, 495 (1909).

¹³⁰ *See supra* note 36–37 and accompanying text.

¹³¹ *People v. Corp. of Albany*, 11 Wend. 539, 542–43 (N.Y. Sup. Ct. 1834) (emphasis omitted).

be said to explain why corporate-criminal liability expanded not just to include crimes, but further to include crimes involving intentional attitudes.

Separately, even if a need to deter corporate misconduct explains the development of *some* method for the State to hold corporations accountable, this fact alone does not suffice to explain the development of corporate-criminal liability. For example, why didn't states rely on civil suits or regulations, rather than criminal statutes, to minimize corporate misconduct? In response, Brickey and Khanna suggest that, at the time, it was not possible for the State to bring a civil suit.¹³² However, under the circumstances, the suggestion that corporate-criminal liability arose because other methods of regulation were not available rings hollow. Lest it be overlooked, centuries of legal precedent affirmed and reaffirmed the impossibility of finding a corporation guilty of a general-intent crime. What led states to abandon one impossibility instead of the other? In short, although deterrence can help to explain the development of corporate-criminal liability, it is at best a partial explanation that stands to be augmented.

5.2 The Cluster of Fairness Norms Driving Corporate-Criminal Liability

Courts developed corporate-criminal liability in the face of longstanding legal and conceptual obstacles. Integral to this development was a commitment to a cluster of fairness norms; courts, in expanding corporate-criminal liability, were not solely or even predominantly concerned with deterring corporations. In particular, courts reiterated the position that the law should not discriminate against individual persons in favor of corporate persons. Implicit, and sometimes explicit, to this rationale is a view that corporate personhood exists to serve the interest of individual within society; failing to hold corporations legally responsible, in a similar manner to the ways that we hold individual persons legally responsible, is unfair to individuals.

¹³² See *supra* Section 2.2.

5.2.1 Fairness as Fittingness

Part 4 furthered the explanation for corporate-criminal liability's development by establishing that corporations became eligible for criminal liability. It is a prerequisite for extending criminal liability to an entity that the entity be capable of satisfying criminal law's requirements. However, though eligibility is necessary, it is not sufficient. We need some further reason to consider why the practice of criminal liability should be extended to corporations. Now I shift attention from a corporation's eligibility for criminal liability to considering the appropriateness of doing so. Courts developing corporate-criminal liability recognized that corporations had become fitting targets of criminal responsibility.

I take fittingness to be subtly, but importantly, different from mere eligibility. In discussing eligibility, the focus was on whether an action or attitude could be attributed to a corporation. Fittingness concerns whether an action or attitude should be attributed to a corporation. Particularly relevant in the corporate context is whether an action or attitude is better attributed to the corporation, or whether instead it should be attributed to an individual within the corporation. Fittingness, in other words, concerns finding the right interpretation. This interpretive practice is not unique to the criminal context. For example, courts had long understood “[w]henever a corporation makes a contract, it is the contract of the legal entity . . . and not the contract of the individual members,” notwithstanding the fact that executing the contract may require a physical act to be performed by one of the individual members.¹³³

The same interpretive challenge arises with respect to criminal responsibility. It became difficult to maintain a prohibition with respect to corporate responsibility on the same sorts of attribution common in contract law. Consider, for example, the Georgia Supreme Court's response to the sug-

¹³³ *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 587 (1839).

gestion that employees operating a corporation's train, rather than the corporation itself, deserved to be the target of criminal liability:

It is well known that freight trains are frequently run on the Sabbath day; the physical operation being the charge of the conduct and engineer and their assistants, but the actual running of the train being ordered and directed by those higher in authority and having the company's business directly in charge. The servants who operate the train might greatly prefer to observe the Sabbath as a day of rest, but to retain their situation and the good will of their employers they have no option but to obey their orders.¹³⁴

Again, the timing of these observations match the history provided in Part 3. When corporations were small organizations similar to general partnerships, the idea that the entity itself might be better suited than any given set of individuals held less sway. However, as corporations grew and became more sophisticated, it became less plausible to reduce an act of misconduct to the contributions of an individual or set of individuals. Meanwhile, the individuals causally involved in misconduct became more removed from the decisionmaking process, making them less apt targets for enforcement.

To say that corporations may be fitting for criminal liability is not to disregard the individual; courts proved willing to hold individual members criminally responsible alongside corporations.¹³⁵ What fittingness seeks to rule out is a categorical prohibition on attributing responsibility to a corporation. Among other things, one court noted, to reduce accountability to individual contributions would be to expose unfairly individuals to the consequences of corporate commands: "The individual today, as a natural person . . . is simply the officer, agent, employé or servant of the corporation; and if the corporation is not amenable and responsible to and punishable by the state and nation for the doing of such mischief, the individual will, in addi-

¹³⁴ *S. Express Co. v. State*, 58 S.E. 67, 69 (Ga. 1907) (crime of furnishing alcohol to minors); *see also* LIST & PETTIT, *supra* note 89, at 161–63 (discussing conditions under which a group agent is fit to be held responsible for the actions of an individual member).

¹³⁵ *E.g.*, *State v. Belle Springs Creamery Co.*, 111 P. 474, 477 (Kan. 1910) (noting that both a corporation and an individual can be held criminally responsible).

tion thereto, become merely the slave of such corporation.”¹³⁶ Melodrama aside, a regime without corporate-criminal liability forced individuals to choose between criminal punishment and unemployment, while simultaneously inoculating the corporation from answering for its role in creating this situation. A categorical prohibition on corporate-criminal liability might well have resulted in criminally punishing individuals for actions that should be properly understood to be those of the corporation.

5.2.2 Fairness as Reciprocity

The second dimension of fairness responded to the growing powers and opportunities available to corporations. Courts explained that a corporation’s exposure to legal liability served to complement the expansion of its legal rights and powers. Reciprocity is on display in the Supreme Court’s early recognition that a corporation could commit libel, which has as an essential component an intentional attitude. In response to the observation that corporations had once been immune to liability, the Court noted that “a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives[] is the recognition of a corporate responsibility for the acts of those representatives.”¹³⁷ Decades later, the Missouri Supreme Court would enforce the same lesson when it recognized that a corporation could commit a tort of malicious prosecution:

That a corporation, in all cases within the scope of its legitimate functions, may act as a natural person may act, and the rule of corporate responsibility has kept even pace with the growth of their powers, and the enlargement of their spheres of action, not only in regard to the enforcement of contracts, but also in making them amenable to personal actions for their torts, and

¹³⁶ *Ohio v. Gen. Fire Extinguisher Co.*, 20 Ohio Dec. 240, 244–45 (Ohio. Ct. Common Pl. 1910) (crime of antitrust).

¹³⁷ *Phila., Wilmington, & Balt. R.R. Co. v. Quigley*, 62 U.S. 202, 210 (1858).

holding them to the same measure of responsibility in these respects to which natural persons are held.¹³⁸

The reciprocal relationship between legal powers and legal responsibilities has long been a feature of corporate law. We saw it articulated, for example, during the special-charter era, where corporate authority to perform quasi-state functions entailed an implied duty to perform said functions.¹³⁹ Admittedly, a commitment to reciprocity will not uniquely predict corporate-criminal liability; there is no one legal power whose reciprocal counterpart is criminal responsibility. Nevertheless, the steady expansion of corporate liability, including the development of corporate-criminal liability, mirrors the steady increase in the corporation's legal powers.

5.2.3 Fairness as Parity

If reciprocity motivated the expansion of corporate responsibility, then parity gave that expansion content. Throughout the nineteenth century, courts repeatedly stated that the treatment of corporate persons should resemble, as nearly as possible, the treatment of individual persons. With respect to corporate liability, that meant exposing corporations whenever possible to the same tort and criminal responsibilities that individuals faced. Indeed, well before the Supreme Court ostensibly extended the Fourteenth Amendment's Equal Protection Clause to corporate persons we see several state supreme courts articulating a norm of parity as reason to expand intentional-tort liability to corporations.¹⁴⁰ The sentiment stretches back to the

¹³⁸ *Boogher v. Life Ass'n of Am.*, 75 Mo. 319, 324–25 (Mo. 1882) (purporting to quote *Cumberland Valley R.R. Co. v. Baab*, 9 Watts 458, but actually quoting *Fenton v. Wilton Sewing Mach. Co.*, (see *Philadelphia Reports*)]; *see also* *Bushel v. Commonwealth Ins. Co.*, 15 Serg. & Rawle 173, 176 (Pa. 1827).

¹³⁹ *E.g.*, *People v. Corp. of Albany*, 11 Wend. 539, 542–43 (N.Y. Sup. Ct. 1834).

¹⁴⁰ *E.g.*, *S. & N. Ala. R.R. Co. v. Chappell*, 61 Ala. 527 (Ala. 1878) (negligence); *Wheless v. Second Nat'l Bank*, 60 Tenn. 469, 473 (Tenn. 1872) (malicious prosecution); *Jefferson R.R. Co. v. Rogers*, 28 Ind. 1, 7 (Ind. 1867) (exemplary damages); *Murfreesboro & Woodbury Turnpike Co. v. Barrett*, 42 Tenn. (2 Cold.) 508, 510

early history of criminal nuisance cases.¹⁴¹ Courts offered the same rhetoric when developing corporate-criminal liability.¹⁴²

Courts enforcing equal treatment of corporate and individual persons—in particular, by expanding corporate liability to be commensurate with individual liability—appealed explicitly to the interests of individuals. For example, the Supreme Court of Indiana refused to exempt corporations from exemplary damages on the basis that “whatever rule of damages would apply in a suit against a natural person, ought to apply in a suit against a corporation. *Any discrimination in that regard would shock the public’s sense of impartial justice.*”¹⁴³ Likewise, the Tennessee Supreme Court specified that holding corporations criminally responsible the same as individuals was necessary to secure the interests of individuals:

By our Code, natural persons and corporations are entitled to like benefits in resorting to the ordinary and extraordinary process provided for the enforcement of their rights. . . . It results from [the exemption of corporations from liability] that the law secures rights and exemptions to corporations which are withheld from natural persons. This is wholly inconsistent with the genius and spirit of our State Constitution, which was intended to secure equal and exact justice to all.¹⁴⁴

(Tenn. 1865) (negligence); Penn. R.R. Co. v. Vandiver, 42 Pa. 365, 370 (Pa. 1862) (trespass to person); Owsley v. Montgomery & W. Point R.R. Co., 37 Ala. 560, 562–63 (Ala. 1861) (false imprisonment); Goodspeed v. E. Haddam Bank, 22 Conn. 530, 538 (Conn. 1853) (malicious prosecution). The Supreme Court first suggested that corporations are persons for purposes of the Fourteenth Amendment’s in 1886. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

¹⁴¹ *E.g.*, Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. 339, 345 (1854) (crime of public nuisance) (“[T]he tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them, as far as possible, in their legal duties and responsibilities, to individuals.”).

¹⁴² *E.g.*, State v. Belle Springs Creamery Co., 111 P. 474, 477 (Kan. 1910) (crime of mislabeling butter); State v. Rowland Lumber Co., 69 S.E. 58, 58–59 (N.C. 1910) (identifying a host of specific-intent crimes).

¹⁴³ Jefferson R.R. Co. v. Rogers, 28 Ind. 1, 7 (Ind. 1867).

¹⁴⁴ Wheless v. Second Nat’l Bank, 60 Tenn. 469, 473 (Tenn. 1872); *accord* Murfreesboro & Woodbury Turnpike Co. v. Barrett, 42 Tenn. (2 Cold.) 508, 510

Again, the timing of corporate-criminal liability's expansion reflected the proliferation and increasing sophistication of the commercial corporation. Thus, explained New Jersey's Supreme Court:

In early days, when corporate bodies were few, it was a matter of comparatively small consequence whether such an action could be maintained. In these days, however, when the great concerns of business are carried on chiefly through these artificial persons, it would be most oppressive to hold that they are not amenable to answer for such wrongs as subject natural persons to prosecution.¹⁴⁵

Of course, it would be a mistake to conclude that courts treated corporate persons as identical to individual persons for purposes of the criminal law. On the one hand, corporate persons did not receive all the same criminal-procedure protections. For example, in *Hale v. Henkel*, the Supreme Court extended limited Fourth Amendment protections, but not Fifth Amendment protections, to corporations.¹⁴⁶ On the other hand, corporations were not exposed to the full gamut of crimes.¹⁴⁷ Similarly, corporations

(Tenn. 1865) (“Corporations are becoming so numerous, it is the policy of the state to attach to them the same liabilities, to which natural persons are subject and liable. This principle must be enforced; *the rights of the citizen require it.*” (emphasis added)); see also *State v. Belle Springs Creamery Co.*, 111 P. 474, 477 (Kan. 1910) (crime of mislabeling butter) (“That the individual who, after the passage of the act . . . should be guilty of a crime, and that a corporation might conduct the practice with impunity, seems revolting to all ideas of justice.”).

¹⁴⁵ *State v. Passaic Cnty. Agric. Soc’y*, 23 A. 680, 681 (N.J. 1892) (crime of private nuisance); cf. *Hussey v. King*, 3 S.E. 923, 926 (N.C. 1887) (internal quotation marks omitted) (malicious prosecution) (“The rights, the powers, and the duties of corporate bodies have been so enlarged in modern times, and these ‘artificial persons’ have become so numerous, and entered so largely into the everyday transactions of life, that it has become the policy of the law to subject them, as far as practicable, to the same civil liability for wrongful acts as attach to natural persons.”).

¹⁴⁶ *Hale v. Henkel*, 201 U.S. 43 (1906). It should be noted that the Court has since abandoned for all persons the Fourth Amendment doctrine it initially declined to extend to corporations. See *Warden v. Hayden*, 387 U.S. 294, 304–06 (1967) (renouncing the mere evidence rule).

¹⁴⁷ See *N.Y. Cent. & Hudson River Ry. v. United States*, 212 U.S. 481, 494 (1909) (noting, without enumeration, “that there are some crimes, which in their nature cannot be committed by corporations”); *United States v. John Kelso Co.*,

were not exposed to all the same punishments as were individual persons—in particular, corporations were not imprisoned—although the unavailability of prison terms did not preclude criminal liability.¹⁴⁸

5.3 Situating Fairness into Our Modern Practice

What are the upshots of this historical analysis? First, deterrence is not the only rationale—perhaps not even the central rationale—motivating the expansion of corporate-criminal liability. Accordingly, even if we were to concede that there now exist other legal forums that better deter corporate misconduct than the criminal law, it may still be the case that there is a principled reason to maintain our current practice.

Specifically, the cluster of fairness norms provides an independent basis for justifying a practice of holding corporations criminally responsible. This does not amount to arguing that corporations are full-fledged moral agents capable of shame and eligible for retribution; my account does not appeal to retributive rationales to defend corporate-criminal liability. But neither is the practice capricious or without normative foundation. I have identified reasons for the State to hold corporations criminally responsible, consistent with principled limits and constraints on the corporate criminal liability. In particular, corporations, like any other criminal defendant, should be held responsible when there exist genuine corporate attitudes sufficient to satisfy a criminal statute’s specific mens rea requirements.

86 F. 304, 306 (N.D. Cal. 1898) (identifying bigamy, rape, and murder); *People v. Rochester Ry. & Light Co.*, 88 N.E. 22, 23 (N.Y. 1909) (recognizing that a corporation can commit a crime involving intent, but suggesting that “there are many crimes so involving personal, malicious intent and acts so ultra vires that a corporation manifestly could not commit them”).

¹⁴⁸ *E.g.*, *State v. Ice & Fuel Co.*, 81 S.E. 737, 738 (N.C. 1914) (“The corporation should not be wholly exempted from punishment because it cannot be imprisoned.”); *accord* *United States v. MacAndrews & Forbes Co.*, 149 F. 823, 836 (C.C.S.D.N.Y. 1906) (discussing corporate imprisonment); *Ohio v. Gen. Fire Extinguisher Co.*, 20 Ohio Dec. 240, 247 (Ohio. Ct. Common Pl. 1910) (same).

What does this mean for our current practice? For starters, we should amend our practice so that corporate-criminal liability applies only where it is fitting to attribute the requisite mens rea to a corporation. This means, in particular, abandoning the practice of federal courts to employ respondeat superior in the criminal context. Ideally, we would adopt instead an interpretive approach similar to that articulated by the Michigan Supreme Court. Indeed, Chapter II argues that such an approach has recently sprung up, informally, in the shadow of *New York Central*'s respondeat superior regime.

Contrary to the myth, the State's motivation for holding corporations criminally responsible is stronger today than ever before. All three fairness considerations—fittingness, reciprocity, and parity—apply today. As to fittingness, the likelihood of tracing a corporate action or attitude back to the causal contribution of its individual participants has become vanishingly small.¹⁴⁹ In our multinational economic environment, corporations have developed exponentially more sophisticated internal structures; for example, today an internal compliance system meant to detect and prevent criminal misconduct is a virtual necessity for any major corporation.¹⁵⁰ With respect to reciprocity, corporate rights have only expanded since the early 1900s—most prominently, in recent years, with respect to protecting a corporation's rights of participation in non-commercial spheres.¹⁵¹ Finally, improved methods of investigation and punishment improve the feasibility of holding corporations criminally responsible in a manner suggesting parity

¹⁴⁹ LIST & PETTIT, *supra* note 82, at 76–78 (identifying reasons why an “easy reduction,” if possible even in theory, could not be executed in practice).

¹⁵⁰ U.S.S.G §§ 8B2.1, 8D1.4(b) (establishing as a requirement of probation the establishment of an internal compliance program). The presence (or absence) of an effective compliance program also affects the magnitude of a convicted corporation's fine. *See* U.S.S.G. § 8C2.5(f).

¹⁵¹ *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, — U.S. —, 82 U.S.L.W. 4636, *15 (2014) (“Any suggestion that for-profit corporations are incapable of exercising religion because their purpose is simply to make money flies in the face of modern corporate law.”); *Citizens United v. FEC*, — U.S. —, 130 S. Ct. 876 (2010) (striking down restrictions on political expenditures by corporations).

with individuals. In short, there is no reason to think that the same overriding commitment to fairness at the core of corporate-criminal liability's development has lost its applicability today. If anything, debunking the myth of corporate-criminal liability's development has opened the door to new reasons—or at least resurrected old reasons—for why the State ought to hold corporations criminally responsible.

6 CONCLUSION

There is a prevailing story about how and why corporations came to be held criminally responsible. This just-so story is mostly wrong, or at least seriously incomplete. The purpose of overturning this myth is not historical accuracy for its own sake. By reconsidering how and why corporate-criminal liability developed, we can improve the conceptual and normative foundations of our modern practice of holding corporations criminally responsible.

Courts expanding corporate-criminal liability did so along principled lines and out of a commitment to a cluster of fairness norms—one that refuses to favor corporate persons over individual persons. Whereas modern regulatory strategies may challenge corporate-criminal liability's usefulness for deterring wrongdoing, commitment to these fairness norms is as relevant in our modern experience with corporations as it was at the turn of the twentieth century. At the very least, we should resist the myth behind the development of corporate-criminal liability, and appreciate both the theoretical coherence and continued desirability of a practice of holding corporations criminally responsible.

CHAPTER II

WE CAN, SHOULD, AND (VERY NEARLY) DO HOLD CORPORATIONS CRIMINALLY RESPONSIBLE

1 PREFACE

The State can hold commercial corporations criminally responsible, and it should. Nevertheless, there is a sense that the State has failed in this duty notwithstanding the longstanding existence of a federal doctrine that permits holding corporations criminally responsible separate from their members.¹ Meanwhile, the mere possibility of corporate-criminal liability continually faces robust criticism. Federal doctrine specifically is derided as bereft of any rational foundation, but this complaint reflects a larger critique that

¹ I use the term MEMBER generically to identify a participant in a collective. I do not use MEMBER as it is understood in enterprise law to describe participants in a limited liability company (but not a corporation). Thus, on my account, corporate shareholders, directors, and managers all constitute members—albeit, members who play a clearly defined role in a peculiar class of organizational structures.

the very idea of extending criminal law to corporations is conceptually confused and morally pernicious.

The foundational criticisms are wrong. First, corporations can sensibly be held criminal responsible. In particular, corporations are eligible candidates for legal personhood as that concept is understood by the criminal law. Second, the State has a variety of reasons for holding corporations criminally responsible, all of which trace to the State's duty to use criminal law to protect individuals within society: victims of the corporation, citizens expecting the State to uphold the rule of law, and even individuals inside the corporation who would otherwise unfairly bear the consequences of corporate misconduct.

Although critics are wrong about the theory—corporate-criminal liability is both fundamentally sound and socially desirable—they are right that the federal doctrine is seriously deficient. Under the status quo, the federal government rarely holds corporations responsible for their misconduct. Worse, it has recently embraced civil alternatives to criminal liability that allow corporations, but not individuals, to evade criminal responsibility. Meanwhile, when it does prosecute corporations, it does so under the guise of a doctrine that is entirely unmoored from any conceptual anchor.

It might seem that the only solution is to sink a federal doctrine that has floated adrift for over a century. Thankfully, there is another option, one that has largely gone unnoticed by critics of corporate-criminal liability. In the shadow of this unsatisfying doctrine, prosecutors and sentencing courts have pieced together an alternative model for holding corporations criminally responsible. This practice diverges wildly from the doctrine. More to the point, courts and prosecutors have created an approach to corporate-criminal liability that comes close to a morally and conceptually justifiable framework for the practice—one that approximates the account developed here. Accordingly, the State could achieve meaningful reform merely by adjusting the liability conditions currently enshrined in doctrine to reflect considerations already employed by federal prosecutors and sentencing courts.

2 THE STATE CAN HOLD CORPORATIONS CRIMINALLY RESPONSIBLE

Begin with a corporation's eligibility for criminal liability. The typical criminal statute attaches liability to a person—specifically, a person who performs a proscribed act (*actus reus*) concurrently with a proscribed attitude (*mens rea*).² Thus, the question of eligibility can be understood as asking whether a corporation can qualify as a person as the concept is understood in the context of criminal law. In particular, I focus for now on whether we can coherently attribute to a corporation the actions and attitudes necessary to satisfy the ordinary criminal statute's *actus reus* and *mens rea* requirements.

2.1 Pragmatic Approaches to Agency

Attempts to define personhood traditionally approach the topic from one of two directions. The first direction assesses personhood “in terms of an essential and universal inhering nature,” which derives from the possession of some natural or intrinsic feature.³ The other direction, frequently associated with legal personhood, assesses personhood pragmatically. On this latter view, what it is to be a person is to manifest “the capacity to perform as a person.”⁴ I focus attention on what is necessary to demonstrate the capacity to perform as a person for purposes of criminal liability. As I explain later, this approach is consonant with our ordinary legal practice.⁵

² WAYNE R. LAFAYE, 1 SUBST. CRIM. L. § 1.2 (2d ed. 2014).

³ See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 660 (1925).

⁴ CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* 173 (2011); see generally Daniel C. Dennett, *Conditions of Personhood*, in *THE IDENTITIES OF PERSONS* (Amélie O. Rorty ed. 1976).

⁵ Moreover, pragmatic accounts of personhood have a long pedigree, both in and outside of the law. Dewey traces pragmatic theories of legal personhood back to a pronouncement by Pope Innocent IV in 1246 CE, Dewey, *supra* note 3, at 665,

Demonstrating the capacity to perform as a person requires at least the ability to possess intentional states and a capacity for action. Intentional states consist of an attitude and a proposition towards which that attitude is held.⁶ An attitude might describe the way the world is—for example, I believe that the proposition ‘The water glass is full’ is false. Alternatively, an attitude might describe the way an agent wants its environment to be—so, I might desire that ‘The water glass is full’ be true. Meanwhile, a capacity for action refers specifically to an agent’s ability first to identify a divergence between the environment as it is and the environment as the agent wants it to be, and second to take suitable steps to reconcile this divergence. To wrap up the example, I am able to notice that ‘The water glass is full’ is false; that I desire ‘The water glass is full’ to be true; and that, by walking to the kitchen and turning on the tap, I can reconcile my diverging attitudes.

I have described merely the simplest of agents. And although the constituent elements necessary for criminal liability are beginning to emerge—intentional states correspond to *mens rea*, capacity for action corresponds to *actus reus*—simple agency is insufficient to satisfy legal personhood. As Tim Scanlon puts the point, it is not enough to expect merely that a competent agent can respond to stimuli; we need an “expectation grounded in a supposed responsiveness to certain reasons.”⁷ What is needed is an agent that can conform to the requirements of criminal law, and further can take the fact of criminality as a reason to conform its practice. More generally, a legal person must be able to “perform effectively in the space of [legal] obli-

while List and Pettit identify similar strains in the philosophies of Thomas Hobbes and John Locke. LIST & PETTIT, *supra* note 4, at 170–73.

⁶ LIST & PETTIT, *supra* note 4, at 20–21.

⁷ T.M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, AND BLAME* 161 (2008); *accord* LIST & PETTIT, *supra* note 67, at 178. The sort of responsiveness in mind here tracks what Scanlon elsewhere refers to as judgment-sensitive attitudes. T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (2000).

gations,”⁸ which amounts to demonstrating what Stephen Darwall refers to as “second-personal competence.”⁹ A legal person must be capable of making, and following through on, commitments to other persons.¹⁰ Effective performance in particular requires recognizing that the existence of an obligation constitutes a reason to act, and that failing to satisfy an obligation constitutes grounds for criticism. Such recognition means the agent is sensitive to criticism; it is capable of both of recognizing failures of rationality,¹¹ and learning from past mistakes by taking action designed to avoid repeating irrational missteps in the future.¹² This assumes both a capacity for second-order attitudes—that is, attitudes *about* the simple attitudes already described—and specifically some motivation to improve to reform one’s conduct by imposing checks on one’s processing.

2.2 Collective Agency

Thus far, I have said nothing to preclude the possibility of a collective or group qualifying as a person; eligibility for legal personhood turns on whether an agent can reliably demonstrate it is appropriately “responsive to

⁸ *Id.* at 173.

⁹ STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* 23 (2006) (observing that “genuine obligations can result only from an address that presupposes an addressee’s second-personal competence”).

¹⁰ *Id.* at 59; *accord* LIST & PETTIT, *supra* note 4, at 178.

¹¹ List and Pettit note that “if a reasoning agent fails to be rational, then the fact that it self-corrects, recognizing its failure in a manner open only to a reasoning agent, will provide a ground for continuing to view it as an agent.” *Id.* at 31; *see also* Darwall, *supra* note 9, at 21; Philip Pettit, *Akrasia, Collective and Individual, in WEAKNESS OF WILL AND PRACTICAL IRRATIONALITY* (2003) (discussing failures of rationality).

¹² LIST & PETTIT, *supra* note 4, at 31 (“The sensitivity to the demands of rationality displayed in the acknowledgement of criticism is appropriate may be evidence of agency.”).

reasons,” not on whether it has a single or organic body.¹³ Accordingly, collective agents, the same as individual agents, are eligible in principle to count as legal persons for the purposes of criminal liability. That said, qualifying for legal personhood poses special challenges for collective agents.

I largely follow the approach to collective agency articulated by Margaret Gilbert, whose work on plural subjects is broadly consonant with the pragmatic approach to personhood articulated here.¹⁴ For Gilbert, a plural subject consists of some “population of persons who are jointly committed in a certain way.”¹⁵ Individual members of a collective enter into a joint commitment to act as a single body. What it would mean for a plural subject to intend to X is for its members to act “together to constitute, as far as is possible, a single body that intends” to X.¹⁶

Acting as a single body does not require that each member further *personally* intend to X. Instead, what matters is that a member’s “behavior generally should be expressive of the [intention], in the appropriate contexts.”¹⁷ For a non-corporate example, consider the U.S. Senate. The Senate acts and expresses attitudes through legislation and resolutions. Successful legislation ordinarily requires that a majority of senators communicate their support directly to the Senate clerk during a voting session. A Senator’s per-

¹³ SCANLON, *MORAL DIMENSIONS*, *supra* note 7, at 162 (defending an account according to which it is possible to hold collective agents responsible); *accord* DARWALL, *supra* note 9, at 35; LIST & PETTIT, *supra* note 4, at 178.

¹⁴ *See generally* MARGARET GILBERT, *JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD* (2014). Indeed, Darwall argues that Gilbert’s account is a second-personal one. DARWALL, *supra* note 9, at 198.

¹⁵ Margaret Gilbert, *Who’s to Blame? Collective Moral Responsibility and Its Implications for Group Members*, 30 *MIDWEST STUDS. PHIL.* 94, 99 (2006) [hereinafter *Who’s to Blame*].

¹⁶ *Id.* at 100. Gilbert’s schema applies to all intentional attitudes. *See, e.g., id.* at 100 (desires); Margaret Gilbert, *Shared Intention and Personal Intentions*, 144 *PHIL. STUDS.* 167 (2009) (intentions); Margaret Gilbert, *Collective Belief and Scientific Change*, in *SOCIALITY AND RESPONSIBILITY* 37 (2000) (beliefs).

¹⁷ Margaret Gilbert, *Corporate Misbehavior and Collective Values*, 70 *BROOK. L. REV.* 1369, 1376 (2004) (emphasis omitted).

sonal attitudes about legislation, to the extent that they differ from the support she expresses to the clerk during a voting session, are irrelevant in determining the Senate's attitude towards legislation. At an extreme, we could imagine that no Senator privately holds an attitude that is nevertheless appropriately attributed to the Senate. Conversely, a Senator's expressing an attitude outside of a voting session is not attributable to the Senate.

Although Gilbert's work canvasses all plural subjects, I restrict my attention to what is required for a sophisticated plural subject—one with a large membership, or a series of open-ended joint commitments—to act and hold attitudes to satisfy the requirements of legal personhood. Coordinating members in such a plural subject requires a complex internal structure, constituted by interlocking rules, norms, and customs.¹⁸ Through this structure individual members are able to produce collective attitudes derived from, but independent of or autonomous from, the personal attitudes of any particular member.¹⁹ Likewise, a plural subject's structure designates the contexts in which actions by a member should be attributed to the plural subject, as opposed to contexts where a member's actions are attributable only to the individual.

A plural subject's internal structure may take a variety of shapes. The structure may be broadly egalitarian; more likely, it consists of interlocking hierarchies, delegations of authority, etc.²⁰ To get a sense of this complexity, return to the Senate. The Senate's majority voting rules create the impression of an egalitarian, deliberative internal structure. That impression is mistaken. The Senate limits members' access to voting sessions through supermajority cloture requirements—sixty Senators must vote to open and

¹⁸ See SCANLON, *MORAL DIMENSIONS*, *supra* note 7, at 162–64 (discussing “procedures through which [a collective agent] can make institutional decisions”).

¹⁹ Phillip Pettit, *Responsibility Incorporated*, 117 *ETHICS* 171, 184 (2007).

²⁰ See, e.g., Gilbert, *Who's to Blame*, *supra* note 15, at 103–04 (discussing hierarchies); LIST & PETTIT, *supra* note 4, at 72–77 (discussing groups with heterogeneous decisionmaking structures).

close debate on proposed legislation—alongside an evolving practice about when members will contest cloture.²¹ Hierarchies exist in rules (e.g., legislation ordinarily cannot reach the Senate floor without being approved by a committee), norms (e.g., the Senate Judiciary Committee will not approve a judicial nominee before receiving a “blue slip” from both home-state senators), and culture (e.g., party members usually defer to their respective leader). Indeed, because a variety of ordinary procedures require the unanimous consent of the Senate to proceed, each Senator has preemptory authority to effectively close down the Senate—this power usually remains largely in check because of norms of decorum.²² Proper appreciation of the structure informs the attitudes expressed by the Senate. For example, Senate norms establish that the Senate adopts specific intentional attitudes towards legislative acts—namely, those identified by the markup committee and, to a weaker extent, the sponsoring member of the legislation.²³

2.3 Corporations as Legal Persons

The discussion thus far should make clear that qualifying for legal personhood is no easy task—particularly for collective agents. Nevertheless, modern commercial corporations are able to clear this high bar. Corpora-

²¹ E.g., E.g., Paul Kane, *Reid, Democrats Trigger ‘Nuclear’ Option; Eliminate Most Filibusters on Nominees*, WASH. POST, Nov. 21, 2013, http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html; see generally THOMAS E. MANN & NORMAN J. ORSTEIN, *IT’S EVEN WORSE THAN IT LOOKS* 31–81 (2013) (describing the drastic increase in cloture motions).

²² See Norm Ornstein, *Why the Senate Can’t Resist Dysfunctional Obstruction*, THE ATLANTIC, July 18, 2013, <http://www.theatlantic.com/politics/archive/2013/07/why-the-senate-cant-resist-dysfunctional-obstruction/277912/>.

²³ Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 PENN. L. REV., 1503, 1522–23 (2000); Stephen Breyer, *On The Uses Of Legislative History In Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863–64 (1992).

tions are group agents that, by virtue of the nature of their sophisticated internal structures, are capable of satisfying the requirements of legal personhood. To be sure, this was not always the case. Chapter I details the confluence of regulatory and economic pressures that developed corporations into agents capable of satisfying the requirements of criminal law. For now, I focus on the role of corporate law in producing an internal structure that empowers corporations to qualify as legal persons.

The corporation is organized around a sophisticated internal structure, which derives its foundation from corporate law. For example, corporate law creates classes of members within a corporation,²⁴ divvies up decisionmaking authority amongst classes,²⁵ and specifies the scope and breadth of each class's powers and obligations.²⁶ Although, strictly speaking, corporate law consists largely of jurisdiction-specific default rules, the effect of these corporate default rules is to produce a broadly similar type of commercial entity.²⁷

Specifically, corporate law encourages the adoption of a hierarchical structure—what Peter French refers to as the Corporate Internal Decision (“CID”) structure²⁸—whose “primary function is to draw experience from various levels of the corporation into a decision-making and ratification pro-

²⁴ *E.g.*, DEL. CODE ANN. tit. 8, § 141(a) (broad default powers of directors); MODEL BUS. CORP. ACT § 8.01(b) (same); DEL. CODE ANN. tit. 8, § 142(a) (creation of officers); MODEL BUS. CORP. ACT § 8.40(a) (same).

²⁵ *E.g.*, DEL. CODE ANN. tit. 8, § 141(k) (allowing removal of directors via shareholder majority); MODEL BUS. CORP. ACT § 8.08 (same); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (articulating business-judgment rule).

²⁶ *E.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (limiting directors' personal liability resulting from a breach of their duty of care).

²⁷ See generally Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L. REV. 439 (2001).

²⁸ Bill Laufer has developed perhaps a more sophisticated, albeit more unwieldy, model of corporate agency. WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS* (2006). With respect to corporate structures, the two accounts are sufficiently interchangeable for my purposes. Accordingly, for simplicity's sake, I refer to French's characterization unless otherwise specified.

cess.”²⁹ The CID structure consolidates much of the intra-member deliberations within a corporation. Meanwhile, a corporation’s hierarchical CID structure creates both the fact and the perception of what social psychologists refer to as a “highly entitative group agent,” which is a “unified and coherent whole in which the members are tightly bound together.”³⁰ This is bolstered by the fact that the corporation independently faces commercial incentives to foster its perception as a highly entitative group and a single entity—among other things, to develop brand loyalty with consumers and to engender employee loyalty to the enterprise.³¹

A corporation’s hierarchical CID structure allows it to be an effective participant in the space of legal obligations. Corporations are sufficiently well organized to hold intentional attitudes and to take actions separate from their members. For example, corporations are capable of participating in the obligation-laden practice of contracting; corporations routinely manifest consent to enter into complicated contracts. And moreover, a corporation can take the fact of an obligation as reason to conform its conduct, and can work to improve its rational processes. Indeed, List and Pettit identify conditions under which corporation decisionmaking may be more rational, in the sense of improving its ability to track the truth and learn from error, than individual decisionmaking.³² To continue the example, corporations recognize that the existence of a contract constitutes a reason to conform corporate conduct to the contract’s terms; moreover, they can understand the violation of a contractual obligation as grounds for legal reproach. Similarly, corporations are capable of holding attitudes sufficient to satisfy mens rea,

²⁹ Peter French, *The Corporation as a Moral Person*, 16 AM. PHIL. QUARTERLY 207, 212 (1979).

³⁰ Steven J. Sherman & Elise J. Percy, *The Psychology Of Collective Responsibility: When And Why Collective Entities Are Likely To Be Held Responsible For The Misdeeds of Individual Members*, 19 J.L. & POL. 137, 149 (2010).

³¹ Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. REV. 785, 798, 810 (2013).

³² LIST & Pettit, *supra* note 4, at 81–103.

are capable of conforming their conduct to the terms of criminal statutes, and capable of recognizing that misconduct's status as criminally prohibited presents a reason to constrain corporate activity.

2.4 Legal Personhood is Sufficient to License Criminal Liability

Some critics argue that legal personhood by itself is insufficient to license criminal responsibility and punishment—some further element, not accessible by group agents, is required.³³ Implicit to this position is an intuition that some notion of moral responsibility is a necessary component of criminal responsibility, and that personhood by itself does not give rise to moral responsibility.

The moral status and capacity of corporate agents is by itself a contentious and somewhat unfocused topic. If all that critics have in mind is that corporations must be responsive to the sorts of normative considerations that arise in the criminal law, then I see no problem for my account.³⁴ Nothing I have described thus far constrains the sorts of attitudes attributable to a corporation. I have already noted that, through contract law, corporations routinely participate in a normative practice akin to promising. Practically speaking, insofar as corporate attitudes derive from the contributions of individuals who themselves are uncontroversially moral agents, it would be surprising that every emergent, autonomous corporate attitude would be stripped of normative content.

³³ E.g., Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTING L.J. 411, 428–30 (2012) (articulating the importance of emotional capacity to moral agency); Michael McKenna, *Collective Responsibility and an Agent Meaning Theory*, 30 MIDWEST STUDS. PHIL. 16, 23 (2006).

³⁴ At the other extreme, some require far less to qualify for moral personhood. E.g., Tracy Isaacs, *Collective Moral Responsibility and Collective Intention*, 30 MIDWEST STUD. PHIL. 59, 61 (2006) (“To the extent that they have the capacity to act on the basis of intentions, corporations and other similarly structured organizations are moral persons.”).

However, if critics expect something more robust—Michael Moore and Amy Sepinwall suggest that personhood requires an emotional capacity akin to reactive attitudes³⁵; Michael McKenna suggests that robust moral agency requires a free will in some deep Kantian sense³⁶—then claims of corporate moral agency are more complicated. That is not to say that the possibility of robust moral agency is beyond reach. David Silver, as well as Gunnar Björnsson and Kendy Hess, argue that corporations are Strawsonian agents capable of reactive attitudes sufficient to give rise to moral agency.³⁷ Margaret Gilbert has extended her schema for collective attitudes to collective emotions.³⁸ Bryce Hubener, relying on an account broadly similar to Gilbert's, has offered a detailed account of what it would look like for a collective to experience fear.³⁹ Peter French has done something of the same for corporate shame.⁴⁰ For my part, I am inclined towards the position that corporations are able to participate in at least broad swaths of our normative practices, but that they are not object of moral concern in and of themselves.⁴¹

³⁵ MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 614–17 (1997); Sepinwall, *supra* note 33, at 428–30.

³⁶ McKenna, *supra* note 33, at 23–29.

³⁷ David Silver, *A Strawsonian Defense of Corporate Moral Responsibility*, 42 *AM. PHIL. QUARTERLY* 279 (2005); Gunnar Björnsson & Kendy M. Hess, *Corporate Crocodile Tears? On The Reactive Attitudes of Corporate Agents* (work in progress).

³⁸ Gilbert, *Who's to Blame?*, *supra* note 15.

³⁹ Bryce Hubener, *Genuinely Collective Emotions*, 1 *EURO J. PHIL. SCI.* 89 (2011).

⁴⁰ Peter French, *The Hester Prynne Sanction*, 4 *BUS. & PROF. ETHICS J.* 19, 19–22 (1985).

⁴¹ On this I agree with Dietmar Pfordten's statement of normative individualism, according to which "[o]nly individuals can be the ultimate point of reference of moral obligations and hence the justificatory source of morals and ethics. Collective entities such as nations, peoples, societies, communities, clans, families, or eco-systems, etc. cannot fulfill this function. Dietmar Pfordten, *Five Elements of Normative Ethics - A General Theory of Normative Individualism*, 15 *ETHICAL THEORY MORAL PRAC.* 449, 452 (2011) (emphasis omitted). A future project on this point will seek to disconnect personhood from moral agency.

What does the controversy over corporations' moral agency portend for criminal law? After all, criminal law is not co-extensive with morality, even if the latter ideally provides some loose grounding relationship for the former. Sepinwall takes the mere fact of admittedly deep-seated controversy over the corporation's moral status as reason to reject the sort of account of corporate personhood I have been developing.⁴² I concede the controversy, but not the solution. Discussions of moral agency blur the line between eligibility and aptness—between whether the state can hold corporations criminally responsible and whether it should. The next Section enumerates a variety of reasons why the State should hold corporations criminally responsible. As to whether robust moral agency is a requirement of eligibility for criminal liability, I am skeptical that criminal law enshrines such a requirement. At most, it may be the case that retributive justifications of punishment fall short in their application to corporations. Yet this alone would not put corporations outside the bounds of our criminal practice. To that point, the law mitigates its treatment of minors and the mentally impaired on the basis of suspicion that these individuals lack the robust moral agency necessary to license retributivist justifications.⁴³ However, neither of these classes is immune from the criminal law; it would be surprising then to grant corporations such a luxury.

More fundamentally, I disagree that legal personhood is insufficient to give rise to criminal liability and punishment. What it means to be a legal person is to be able to participate in the space of legal rights and obligations, which includes being held responsible for violating those legal obligations. One paradigmatic feature of that space is criminal law and punishment.

⁴² Sepinwall, *supra* note 33, at 430.

⁴³ *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (concluding that certain mental disabilities render an individual less morally culpable, such that retributive rationales apply less strongly with respect to the death penalty); *see also* *Roper v. Simmons*, 543 U.S. 551 (2005) (extending *Atkins*'s rationale to children); *accord* *Miller v. Alabama*, — U.S. —, 132 S. Ct. 2455, 2464–66 (2012) (discussing children's moral development).

Corporations are capable of effectively participating in the space of legal obligations. In particular, the pragmatic account provided here demonstrates that they are capable of satisfying the criminal law's essential features of mens rea and actus reus. They can and do commit most, if not every, crime: corporations produce serious harm that in ways that society deems criminal.⁴⁴ Nothing further should be necessary to establish a corporation's standing to accept criminal liability and punishment.

In short, corporations are legal persons sufficient to recognize and respond to the demands and consequences of the criminal law. Accordingly, they are eligible to qualify as persons for purposes of criminal liability. Whether they should in fact be deemed persons for purposes of the criminal law is the subject of the next section.

3 THE STATE SHOULD HOLD CORPORATIONS CRIMINALLY RESPONSIBLE

From here out I take it to be the case that, if the State were to extend the institution to them, modern commercial corporations would be capable of satisfying the requirements of criminal law. This observation is far from toothless. Eligibility constrains (or at least should constrain) state action; the State cannot sensibly extend personhood by fiat just to any entity or object.⁴⁵ On the other hand, although eligibility is necessary to justify corporate-criminal liability, it is not sufficient. Given that corporations are capable of satisfying the requirements of criminal law, it is a further question whether the State should extend the institution.

This Section explores disparate reasons why the State should hold corporations criminally responsible. That said, all of these reasons are rooted in the State's obligation to protect the interests of individuals within society—

⁴⁴ See BRANDON GARRETT, *TO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 14 (2014).

⁴⁵ See Dewey, *supra* note 3, at 661-62 (claiming that trees could not qualify as legal persons, judicial pronouncements notwithstanding).

both those outside of the corporation who may otherwise be forced to bear the cost of criminal misconduct, and also many individuals inside the corporation who would suffer in the absence of corporate-criminal liability.

3.1 Corporate-Criminal Liability Protects Individuals Outside of the Corporation

3.1.1 The Historical Purpose Served by Corporate Personhood

Consider first the role served by extending personhood to corporations in other legal contexts. Both historically and today, personhood exists to protect individuals from losing legal protections by virtue of incorporating. Thus, for example, economic historians agree that extending personhood to corporations served to ensure equal property protections for “‘owners of property held in the name of a corporation . . . [and] owners of property held in their own name.’”⁴⁶ More recently, the Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.* that corporations qualify as persons under the auspices of the Religious Freedom Restoration Act.⁴⁷ In discussing the purpose of corporate personhood, the Court explained that “[w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of” individuals within the corporation.⁴⁸ This sentiment is reflected in Brandon Garrett’s review of the personhood jurisprudence. Garrett concludes that corporate personhood has served to vindicate the

⁴⁶ Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1609 (1988); accord Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 793–95 (2005); Blair, *supra* note 31, at 797–98; Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 176–78 (1985).

⁴⁷ *Burwell v. Hobby Lobby Stores, Inc.*, -- U.S. --, 134 S. Ct. 2751, 2768 (2014) (citing The Dictionary Act, 1 U.S.C. 1 (2012)).

⁴⁸ *Id.*; see also *Citizens United v. FEC*, 558 U.S. 310, 351 (2010) (noting that the State may not condition the special advantages of the corporate form on the forfeiture of constitutional protections).

rights of individuals; courts extend personhood to corporations when the corporation is best suited to protect the rights of the shareholders.⁴⁹

Yet personhood protects against exploitation the interests of more than just corporate insiders; personhood just as importantly serves those outside the corporation. Granting corporate personhood for the purposes of federal diversity jurisdiction increased access to impartial courts for out-of-state citizens.⁵⁰ Personhood in contract law allows corporations to enter into agreements, but also provides those on the other side of the transaction an identifiable counterpart against whom to seek remedies.⁵¹ And tort liability ensures remedies for victims, irrespective of whether the harm done came from a corporation or an individual.

3.1.2 Corporate Personhood as a Check on Criminal Misconduct

Consistent with this historical role, extending corporate personhood to the criminal law ensures the State's ability to seek redress for victims and to uphold respect for the rule of law. Put simply, criminal liability for corporations ensures that individuals do not suddenly become free to commit crimes with impunity simply because they pursue their crimes through a corporation.

More generally, corporations reap the benefits of personhood; they should take the burdens as well. There is a flavor of reciprocity here: corporations have had extended to them (with increasing frequency) the benefits

⁴⁹ Brandon Garrett, *The Constitutional Standing of Corporations*, 163 PENN. L. REV. 95 (2014).

⁵⁰ Initially, a corporation would escape federal jurisdiction if any one shareholder of the corporation shared was a citizen of the same state as the opposing party. *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), *overturned by* *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844) (mentioning that Chief Justice John Marshall came to hold his opinion in *Deveaux* as one of his greatest regrets while on the bench).

⁵¹ See Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1633–39 (2011) (collecting authorities).

of legal personhood, and so should face the burdens of legal personhood. Or, as Sherman and Percy put the point, “if corporations are to benefit from perceptions of entitativity, they must also accept the downside of being perceived as entitative—collective responsibility.”⁵² To fail to extend personhood status for purposes of criminal liability is to abandon the State’s role of protecting individuals: it allows individuals to use corporations as a tool for securing the benefits of legal personhood without being subject to legal personhood’s attendant responsibilities.

It is vital to secure protection against individuals’ ability to use the corporation to carry out criminal misconduct with impunity. This is especially true because incorporation enables, or at least facilitates, misconduct that would have been either less likely or less harmful if left to the devices of unincorporated individuals. Incorporation brings with it a variety of well-rehearsed dangers: diffusion of responsibility, adoption of a group identity, in-group/out-group bias, bureaucratic myopia, and cognitive dissonance all conspire to make more likely criminal misconduct by a corporation than by individuals acting alone.⁵³ Small wonder then that harm that can be wrought by corporations outstrips that done by individuals.⁵⁴ These concerns are not new; they inform Lord Coke’s infamous aside that “corporations have no souls” and arise repeatedly throughout the historical expansion of corporate liability.⁵⁵ Moreover, they offer an explanation to observations by social psy-

⁵² See Sherman & Percy, *supra* note 30, at 169.

⁵³ *E.g.*, Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 10–11 (2012); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1122–45 (1991); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 493–97 (2006).

⁵⁴ GARRETT, *supra* note 44, at 117–46.

⁵⁵ Sutton’s Hop. Case, 77 Eng. Rep. 960, 973 (K.B. 1612). Coke’s statement is often presented as a bald (and legally irrelevant) metaphysical proposition. But a better interpretation comes from the Tennessee Supreme Court. *Murfreesboro & Woodbury Turnpike Co. v. Barrett*, 42 Tenn. (2 Cold.) 508, 510–11 (Tenn. 1865) (suggesting that corporations are “soulless” in that “[m]en, when associated to-

chologists that “high-entitativity groups are perceived to be more capable of engaging in negative behaviors . . . than low-entitativity groups.”⁵⁶

3.1.3 The Case of Google Street View

For illustration, consider Google’s surreptitious collecting of data from private wireless networks. In 2010 German investigators discovered that Google’s Street View project—in which Google launched a worldwide fleet of vehicles to photograph every public street—was secretly being used to download packets of information from any unsecured wireless network in range of one of Google’s vehicles.⁵⁷ The intentional interception of third-party electronic communications, such as those conveyed over a wireless network, violates criminal provisions of the Wiretap Act (among other criminal statutes).⁵⁸

There are several senses in which the misconduct at issue—what at the time was described as the “biggest wiretap case in U.S. history”⁵⁹—was distinctly corporate. First, no individual could accomplish the same amount of harm as Google; this project required the global coordination of thousands of employees united in service of, and organized around, a shared goal.

gether in a corporate capacity, frequently lose that regard for individual rights, they have as private persons” such that their “direct responsibility is . . . removed.”).

⁵⁶ Anna Kaisa Newheiser et al., *Why Do We Punish Groups? High Entitativity Promotes Moral Suspicion*, 48 J. EXP. SOC. PSYCHOL. 931, 92 (2012).

⁵⁷ Google gathered MAC addresses and network IDs—effectively, information about the network—from all wireless networks. However, Google also collected payload data—that is, content being transmitted over the network—from unsecured wireless networks. The latter conduct is the source of the controversy.

⁵⁸ The Wiretap Act, 18 U.S.C. § 2511(1)(a), (d) (2012); *see also* 18 U.S.C. § 1030(A)(2) (2012) (computer fraud); The Pen/Trap Act, 18 U.S.C. § 1327 (2012); The Federal Communications Act of 1934, 47 U.S.C. § 605(a) (2012).

⁵⁹ Karen Gullo, *Google Wi-Fi Roundup Has Lawyers Chasing Landmark Jackpot*, BLOOMBERG, Sept. 24, 2014, <http://www.bloomberg.com/news/articles/2014-09-24/google-wi-fi-roundup-mistake-has-lawyers-eyeing-jackpot>.

Second, no individual would have an incentive to carry out such a crime; the value of the misconduct increases exponentially with the breadth of data collected. Google has suggested that the event amounts to a series of incidental trespasses—technical wrongs, perhaps, but not harms—with no real gain for Google.⁶⁰ This is because, according to Google, a vehicle would have been in range of a given wireless network for no more than several seconds.⁶¹ True, information gathered over a few seconds would, in isolation, likely be innocuous. However, snippets of data become potentially valuable when collected on a large scale. Google knows this better than anyone—presentations given to Google executives gave this exact reason to justify collecting data from wireless networks in the first place.⁶²

Third, there is a sense in which Google’s misconduct is distinctly criminal; civil remedies are not a supplement to a criminal conviction.⁶³ The Wiretap Act allows for private civil remedies⁶⁴; however, those remedies are deficient in two respects. First, as a practical matter, it will be next to impossible for any given plaintiff to prove she was wronged; to win her claim an individual would have to sift through terabytes of data on the off chance that a Street View vehicle captured personally identifiable information. That assumes a plaintiff could get access to the data. Now that international investigators have discovered login credentials, passwords, medical records, and bank records contained in the payload data, it may well be illegal for Google to turn the information over to private litigants.

⁶⁰ This is a moot point for the criminal law, as the Wiretap Act criminalizes separately the interception and use of third-party communications.

⁶¹ Alan Eustace, *Wifi Data Collection: An Update*, GOOGLE OFFICIAL BLOG (last updated June 9, 2010), <http://googleblog.blogspot.com/2010/05/wifi-data-collection-update.html>.

⁶² FCC, Notice of Apparent Liability, at 17.

⁶³ Although in this case they will likely have to be. The Justice Department announced that it would not prosecute, largely on the basis of Google’s own reporting to the FCC, well in advance of most other jurisdiction’s completing their investigations, from which many of Google’s previous explanations were proven false.

⁶⁴ 18 U.S.C. § 2520 (2012).

But more fundamentally, the wrong here is not captured by the snippets of data that would serve as the basis for a civil suit. Google intentionally engaged in a systematic conspiracy to capture information it knew to be private.⁶⁵ The wrong being accomplished here is the circumvention of other people's privacy for commercial gain. This seems precisely the goal of the Wiretap Act to censure. More to the point, personhood exists precisely to combat a situation where such misconduct might otherwise go unpunished.

3.2 The Expressive Concern: Why Tort Liability is Insufficient

The last point—tort law's insufficiency as a substitute for criminal liability in Google's case—raises a broader argument for the need for corporate-criminal liability. Corporate crime likely harms more individuals than is first suspected; indeed, several studies suggest that corporate crime does more harm overall domestically than does all street crime combined.⁶⁶ Regardless, the absence of corporate-criminal liability would wrong even individuals outside of the direct victims of corporate misconduct.

Thus far I have described personhood as a sort of anti-exploitation tool, which I have suggested should apply to criminal law the same as it applies to contract law, property law, federal jurisdiction, etc. Separate from this, the State should extend personhood to corporations for the purpose of criminal liability because, given the way our corporate practice developed, it would be unfair for the State not to do so.

⁶⁵ Ironically, Google unsuccessfully argued in ongoing litigation that payload data transmitted over an unsecured wireless network is equivalent to radio communications (which are excluded from the Wiretap Act). *Joffe v. Google, Inc.*, 746 F.3d 920 (9th Cir.), *cert. denied*, — U.S. —, 134 S. Ct. 2877 (2013). In other words, sending email from your home or Starbucks is the same as publishing that information for public consumption. No surprise this characterization is at odds with Google's view of privacy when it comes to Gmail. Google Privacy Policy, (last modified June 15, 2015), <https://www.google.com/intl/en/policies/privacy>.

⁶⁶ RICHARD D. HARTLEY, *CORPORATE CRIME* 27 (2008) (collecting cites).

It is not just victims who suffer when the State fails to hold corporations criminally responsible. Law expresses the values of the State—more specifically, of the citizens the State represents.⁶⁷ With respect to criminal law in particular, “we communicate far more about our condemnation of wrongdoing when we call conduct criminal, whether the defendant is a corporation or an individual.”⁶⁸ And while the State expresses itself in part through legislation, it “continues to express the social meaning of a community through the manner of its enforcement.”⁶⁹ Just as importantly, the State expresses itself through the decision to systematically not prosecute misconduct.⁷⁰

The systematic non-prosecution of a class of persons—in this case, corporations established to be eligible for personhood under the criminal law—“undermines the legitimacy of the criminal justice system” in several

⁶⁷ Anderson & Pildes, *supra* note 23, at 1514–30; *see also* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 420 (1999) (“The expressive theory of punishment says we can’t identify criminal wrongdoing and punishment independently of their social meanings. Economic competition may impoverish a merchant every bit as much as theft. The reason that theft but not competition is viewed as wrongful, on this account, is that against the background of social norms theft expresses disrespect for the injured party’s moral worth whereas competition (at least ordinarily) does not.”).

⁶⁸ David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1333, 1343 (2013); *accord* Peter J. Henning, *Corporate Criminal Liability and the Potential For Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1427 (2009) (“As an expression of the community’s moral judgment, there is a significant value to applying the criminal law to organizations that act through their agents, apart from any instrumental benefits from having a coercive means available to deter certain conduct.”).

⁶⁹ Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 916 (2013) [hereinafter *Criminal Affirmance*]; *accord* Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858 (2014).

⁷⁰ Obviously, the decision not to prosecute any given person might not send one clear message to the public; there are myriad factors that go into whether to bring a specific prosecution.

respects.⁷¹ It implies that those corporate persons immune to criminal liability are somehow favored to individual persons.⁷² Relatedly, it suggests that corporations get special treatment; they are persons when it serves their economic, political, and now religious interests, but they avoid personhood when such a classification would expose the corporation to harmful liability.⁷³ As Gilchrist puts the point:

The failure to impose criminal liability on corporations—where people morally condemn corporations *qua* corporations for criminal conduct—would expose the criminal justice system to accusations of favoritism and undermine its appearance of equal application of laws. It risks sending the signal that criminal conduct will be punished—except where it is committed by a corporation.⁷⁴

This discussion should not be read to endorse a substantive principle of equality, according to which corporate persons and individual persons are (and must be treated) equally. Corporate persons are not equal to individual persons for a host of reasons.⁷⁵ Rather, the suggestion is that corporations are not differently situated with respect to individuals when it comes to committing criminal harm to victims; accordingly, the mere fact that the offender is a corporation is not sufficient to leaves victims and society underserved.⁷⁶ Finally, and tying into the next section, excluding corporations from criminal liability overlooks the State’s capacity to acknowledge, and warn against, the corrupting influence of corporate participation on mem-

⁷¹ Gilchrist, *supra* note 53, at 48 (“[T]he failure to express condemnation through the imposition of criminal liability, where such condemnation is widespread, undermines the legitimacy of the criminal justice system.”)

⁷² Ramirez, *Criminal Affirmance*, *supra* note 69, at 917 (“Discretionary enforcement of law that conveys a negative message of inequality that some law-abiding citizens are less valued concurrently conveys the message that some citizens are more valued.”)

⁷³ See Sherman & Percy, *supra* note 30, at 169 (worrying about reciprocity).

⁷⁴ Gilchrist, *supra* note 53, at 51.

⁷⁵ See *supra* note 41 and accompanying text.

⁷⁶ My thanks to Scott Hershovitz for pressing me to develop this point.

bers themselves, which needs to be countered by sound corporate governance.⁷⁷

3.3 Corporate-Criminal Liability Protects Individuals within the Corporation

Thus far, I have focused largely on why a society that recognizes corporate-criminal liability is preferable to a society without it. Disregarding criminal misconduct merely because it is attributable to a corporation is a non-starter; such an approach does a disservice to both victims and other individuals outside the corporation. Nor is tort law an adequate substitute for criminal liability.

However, there is an obvious third option not yet discussed: holding individuals inside the corporation, rather than the corporation itself, criminally responsible. To be clear, I do not believe these options are mutually exclusive; the State should pursue both avenues.⁷⁸ Nevertheless, exclusive reliance on individual prosecutions is an insufficient response to the fact of corporate misconduct.

3.4 Corporate Misconduct Should Not Be Reduced to Individual Misconduct

Limiting criminal liability to individuals is insufficient because collective responsibility is not reducible to individual responsibility. The claim here is not that it is merely conceivable to attribute criminal liability to a

⁷⁷ Buell, *supra* note 50, at 522 (arguing that an expressive defense of corporate-criminal liability must connect the “social practice of blaming institutions for individuals’ wrongdoing and the reality of institutional influence on individuals”).

⁷⁸ Although the Justice Department agrees, United States Attorneys’ Manual § 9-28.100 cmt. b (2009), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm (“Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation.”), it privileges individual prosecutions over corporate ones.

corporation, but that further in some cases it is preferable to do so. Consider the following examples.

3.4.1 Further Examples of Corporate Criminality

We have already seen the example of Google. Initially, Google blamed the collection of payload data on a software tweak included by a “rouge engineer.”⁷⁹ That story quickly proved false. An FCC investigation found, among other things, that the idea to capture payload data was actively discussed and promoted as a benefit to improve the Street View project, that multiple engineers reviewed and modified the software code in question, and that managers overseeing the Street View project approved the idea.⁸⁰ Moreover, the project fits into the core ethos of Google’s larger commercial aims—namely, to gather detailed information about consumers in order to prove them with tailored services.

Or consider the case of the Deepwater Horizon spill, for which British Petroleum (“BP”) was largely responsible. BP has predominantly blamed a small cadre of middle managers for causing the error that released 5 million barrels of oil into the Gulf of Mexico and onto the shores of the southeastern United States. But as Garrett has catalogued at length, BP before the spill had a well-earned reputation for sacrificing safety in favor of expediency. In the five years before the spill, BP received from the Occupational Safety and Health Administration (“OSHA”) 760 “egregious, willful” violations—the worst violation issued by the regulator.⁸¹ Nor do these numbers reflect an

⁷⁹ Chris Davies, *Google’s “Rogue Engineer” Street View Explanation Blown Apart*, SLASHGEAR, April 20, 2012, <http://www.slashgear.com/googles-rogue-engineer-street-view-excuse-blown-apart-30225200/>.

⁸⁰ Federal Communications Commission, Notice of Apparent Liability for Forfeiture, April 13, 2012, at 10–18, *available at* <https://epic.org/privacy/google/FCC%20Google%20SV%20Enforcement%20UNREDACTED.pdf> [hereinafter Notice of Apparent Liability].

⁸¹ Pierre Thomas et al., *BP’s Dismal Safety Record*, ABC NEWS, May 27, 2010, <http://abcnews.go.com/WN/bps-dismal-safetyrecord/story?id=10763042>.

industry epidemic. BP received 97% of all violations; Exxon-Mobil, for comparison, received only one such violation. In 2005, a separate refinery explosion cost the lives of fifteen BP employees and caused hundreds of injuries; years later, BP received the largest OSHA fine in history for failing entirely to put into place safety measures that would prevent a similar accident—safety measures BP had acknowledged knowing before 2005 were lacking.⁸² Thus, with respect to the Deepwater Horizon spill, even if the specific error were traceable to a handful of employees, the case is an apt candidate for corporate-criminal liability. There is overwhelming evidence to suggest that a culture of negligence, reckless risk-taking, and disregard for safety regulations would inevitably produce harm in the way it tragically did.

Finally, consider the mortgage-lending crisis. Linda Green committed fraud on a massive scale, signing affidavits attesting to her personal knowledge of the soundness of various mortgage documents, all while posing as a high-ranking executive at a coterie of prestigious financial institutions.⁸³ Linda Green is not a proper target for criminal responsibility—she doesn't exist. Rather, her persona was created by DocX, which executed more than one million mortgage documents across the country.⁸⁴ To keep pace with demand, DocX employees routinely forged or created out of whole cloth documents used in foreclosure proceedings; employees signed thousands of documents per day.⁸⁵ An uncovered “Document Recovery Solution” list provides prices for which DocX would “recreate” missing

⁸² *Id.*

⁸³ Ariana Eunjung Cha & Brady Dennis, *Under Piles Of Paperwork, A Foreclosure System in Chaos*, WASH. POST, Sep. 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/story/2010/09/23/ST2010092300076.html>.

⁸⁴ Andrew M. Harris, *Ex-DocX President Pleads Guilty in Florida in Robo-Sign Case*, BLOOMBERG BUS., Nov. 20, 2012, <http://www.bloomberg.com/news/articles/2012-11-20/ex-docx-president-pleads-guilty-in-florida-in-robo-sign-case>.

⁸⁵ Drew Harwell, *Former Florida Mortgage Executive Pleads Guilty To Widespread Robo-Signing*, TAMPA BAY TIMES, Nov. 20, 2012, <http://www.tampabay.com/news/business/realestate/former-florida-mortgage-executive-pleads-guilty-to-widespread-robo-signing/1262550>.

mortgages, securitization agreements—even a complete “collateral file” providing everything necessary for foreclosure.⁸⁶ Often DocX’s papers served as the primary, or even exclusive, documentation entitling the holder to foreclose. Beyond the irreparable harm done to individual homeowners, the resultant, massive influx of litigation in state and federal courts have prompted several states to respond in the worst possible way—by repealing statutory remedies designed to ensure homeowners fair process during foreclosure proceedings.⁸⁷

Holding DocX employees criminally responsible seems unsuitable; most were temporary, sometimes unauthorized, employees who were frequently fired if they did not meet onerous quotas.⁸⁸ The same cannot be said for Lorraine Brown, DocX’s president, who among other things taped to employees’ desks forged signatures for them to copy. Indeed, Lorraine Brown was convicted—first fraud by Missouri, then mail fraud by the federal government, then racketeering by Michigan (curiously, Michigan convicted only Brown of racketeering).⁸⁹

Yet convicting Brown seems insufficient to capture the criminal misconduct at issue. DocX was valuable because it produced foreclosure-related documents at a (literally) incredible pace. Here we have a criminal enterprise—one whose facially benign business model can be maintained only

⁸⁶ Ryan Chittum, *Criminal Charges in the Foreclosure Scandal*, COLUM. J. REV., Feb. 7, 2012, http://www.cjr.org/the_audit/nyt_criminal_charges_in_the_fo.php (citing DocX’s “‘Document Recovery Solution’ pricing list”).

⁸⁷ See, e.g., Pub. Act 2014, No. 124, § 1 (repealing sections of M.C.L. § 600.2167 (governing foreclosure proceedings in Michigan)).

⁸⁸ Harwell, *supra* note 85, at 2.

⁸⁹ Dep’t of Justice, Former Executive at Florida-Based Lender Processing Services Inc. Admits Role in Mortgage-Related Document Fraud Scheme, Nov. 12, 2012, *available at* <http://www.justice.gov/opa/pr/former-executive-florida-based-lender-processing-services-inc-admits-role-mortgage-related>; State of Mich. Atty. Gen., Schuette Announces Former Mortgage Processor President to Serve 40 Months to Twenty Years in Prison for Role in Robo-Signing Fraud, May 3, 2013, *available at* <http://www.michigan.gov/ag/0,4534,7-164-46849-301868--,00.html>.

through rampant law breaking. Yet DocX as a corporation was not prosecuted. Moreover, DocX was a wholly owned subsidiary of its largest client, Lending Processing Services (“LPS”), whose primary business depended on DocX’s document services; LPS purchased DocX precisely to meet the massive demand LPS faced for foreclosure services. Although Missouri also indicted LPS, these were dropped in exchange for assisting in the Brown’s prosecution.⁹⁰ Later, LPS received a non-prosecution agreement from the federal government.⁹¹

3.4.2 Causal Reducibility is Distinct from Criminal Responsibility

To be clear, in arguing that corporate responsibility should not be reduced to individual responsibility, I am not making an ontological or metaphysical claim about corporations existing separately as irreducibly collective agents. Corporate personhood does not require any “ontologically suspect kind of ‘social spirit’ or ‘group mind’”⁹²; on my view a collective agent consists all and only of its constitutive members and the structure through

⁹⁰ LPS claimed ignorance of the rampant fraud at its subsidiary, pointing to Brown’s statement that DocX had “robust quality control” measures in place. Harwell, *supra* note 85, at 2. LPS found nothing suspicious about DocX producing daily thousands of documents that previously had been missing, spread across the country, and thought lost or in the hands of homeowners. Why would they? After all, in 2006 LPS touted that its tiny internal document execution team (one separate from DocX) could routinely process over one thousand documents daily. Davidy Dayen, *The Recession was Her Fault*, SALON, Feb. 24, 2013, http://www.salon.com/2013/02/24/shes_paying_for_wall_streets_sins/.

⁹¹ *LPS Reaches Non-Prosecution Agreement with Justice Department on Robo-Signing Charges*, NAT’L MORTG. PROF., Feb. 18, 2013, <http://nationalmortgageprofessional.com/news/24844/lps-reaches-non-prosecution-agreement-justice-department-robo-signing-charges>.

⁹² GILBERT, *supra* note 14, at 3.

which they interact.⁹³ In theory, all of this could be spelled out in terms of the contributions by individuals.⁹⁴

Nevertheless, the fact that corporate attitudes and actions might be reducible to contributions from individuals says nothing about whether it is appropriate for the State to hold these individuals responsible.⁹⁵ That is, the fact of *causal* reducibility does not negate the possibility of irreducibly collective responsibility.⁹⁶ This distinction should not be surprising when considered from the individual context. For example, some event—say, my shooting another in cold blood—is reducible in principle to a set to a basic set of physical descriptions (e.g. electrical currents, positional shifts by various atomic elements, etc.) for which there is no need to appeal to my agency in the situation. Yet even if we could provide a brute physical description from which any notion of my agency is entirely absent, the fact of this description should not undermine a judgment that I be held responsible for murder.⁹⁷ Put starkly, if the mere fact of causal reducibility were sufficient to obviate the appropriateness of moral and legal judgments, criminal law (for starters) would cease to function.⁹⁸

⁹³ LIST & PETTIT, *supra* note 4, at 4 (“[T]he agency of group agents depends wholly on the organization and behavior of individual members.”); LARRY MAY, *THE MORALITY OF GROUPS* 14 (1987) (stating that a collective is “not merely people but the structures and relationships among those people as well”).

⁹⁴ *But see* LIST & PETTIT, *supra* note 4, at 76–78 (identifying challenges with reducing collective activity to individuals’ contributions).

⁹⁵ I am not denying that individuals could bear personal responsibility for the actions or attitudes of a corporation, or that an individual’s responsibility could not rise to the level of criminal liability. Rather, I am observing that an individual’s responsibility is logically independent from a corporation’s responsibility.

⁹⁶ GILBERT, *supra* note 14, at 3 (“[J]oint commitment . . . cannot be analyzed in terms of a sum or aggregate of personal commitments.”).

⁹⁷ LIST & PETTIT, *supra* note 4, at 76–78; *accord* CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 71 (2000).

⁹⁸ *Cf.* Peter Frederick Strawson, *Freedom and Resentment*, 48 *PROC. BRIT. ACAD.* 1, 9 (1962) (“A sustained objectivity of inter-personal attitude, and the human isolation which that would entail, does not seem to be something of which

Thus, it is not a response to point out that instances of corporate misconduct can be reduced down to a complicated set of interactions amongst individuals. The mere fact of causal reducibility does not render infelicitous our responsibility judgments. This is clear in the individual context: We do not take causal reductions that explain events without appeal to agency to obviate individual judgments. There is no reason to privilege judgments at the individual level. For one, doing so sacrifices information about the social world.⁹⁹ For another, it is perfectly coherent to attribute to a corporation or collective an attitude not held by any member.¹⁰⁰ Accordingly, causal reducibility proves too much.

3.4.3 Corporate Crime Does is Not about Deficits or Surpluses

My defense of corporate responsibility differs slightly from common descriptions of the role served by corporate liability. Pettit has claimed that holding only individuals responsible produces a “deficit of responsibility,” and that the corporation is an apt target to bear the weight of that residual responsibility.¹⁰¹ Sepinwall has described the same situation as leaving a “surplus [of] blame” for which the corporation is a potential target.¹⁰²

I think using accounting as a metaphor for corporate responsibility confuses more than it elucidate. First, it asserts without justification an additive quality to responsibility judgments.¹⁰³ Second, this would have the effect of making collective responsibility judgments vary in response to individual responsibility. This seems wrong. As Gilbert summarizes the point general-

human beings would be capable, even if some general truth were a theoretical ground for it.”).

⁹⁹ KUTZ, *supra* note 97, at 70–71; LIST & PETTIT, *supra* note 4, at 76–78.

¹⁰⁰ LIST & PETTIT, *supra* note 4, at 64–72; Gilbert, *Corporate Misbehavior*, *supra* note 17, at 1376.

¹⁰¹ Pettit, *supra* note 19, at 194.

¹⁰² Sepinwall, *supra* note 33, at 433.

¹⁰³ Cf. SCANLON, MORAL DIMENSIONS, *supra* note 7, at 146 (noting that moral responsibility judgments are not about assigning “pointless grad[es]”).

ly: “What does the blameworthiness of the collective’s act imply about the personal blameworthiness of any one member of that collective? From a logical point of view, the short answer is: *nothing*.”¹⁰⁴

In particular, there is no reason to expect that a collective agent’s degree of responsibility will exactly match, or even track, the concatenation of members’ individual responsibilities. Consider the following experiment:

CORNER-CUTTING CORPORATIONS: Several corporations face the opportunity to build a factory, which would provide a lucrative opportunity if completed by a certain date. The project can be completed on time only by disregarding safety and environmental regulations, risking severe damage to employees, community members, and the environment. Approval of the project requires the majority support of the board of directors.

In each of the following cases, the board of directors approves the project, and serious physical and environmental injuries occur:

CORPORATION A. The directors all know the risks attendant to the building schedule, and vote unanimously to begin construction.

CORPORATION B. None of the directors know the attendant risks because none reviewed the project details available to them; not wanting to look foolish in front of their peers for rejecting a profitable investment, each member votes in favor of construction.

CORPORATION C: While all board members knew of the risk, only a majority voted in favor of construction; the remaining board members voted against the project.

To my mind, the corporation’s responsibility for ensuing injury remains constant across all three cases. Each board of directors approved the project, which the corporation thereby undertook. It does not matter, for the purposes of ascertaining the corporation’s responsibility, the private beliefs of any given directors; what matters is that, at the time a vote was called, a majority of directors voted in favor of the project.¹⁰⁵ Indeed, the fact that cor-

¹⁰⁴ Gilbert, *Who’s to Blame*, *supra* note 15, at 109.

¹⁰⁵ See Gilbert, *Corporate Misbehavior*, *supra* note 17, at 1376 (explaining that a group agent’s belief that *p* does not require that group members privately believe *p*, provided that “[t]heir behavior generally should be *expressive of the belief that p*, in the appropriate contexts”).

porate attitudes, although derived from individual contributions, are not co-extensive with those individuals' personal attitudes is essential for creating the sort of sophisticated collective agency that is a prerequisite for eligibility for criminal liability.

Yet clearly the personal responsibility of any given director varies with the actions she took and the reasons she for which she took those actions. Intuitively, a director at Corporation A is more to blame than is a director at Corporation B than is a dissenter at Corporation C. Thinking of corporate responsibility as the leftover of individual responsibility leads to a mistaken understanding of the nature of corporate responsibility.

3.5 The State's Complicity for Irreducible Corporate Misconduct

Suppose I am wrong that collective responsibility is irreducible. Imagine that, in principle, an act of collective misconduct could be traced to the contributions of every involved individual. Moreover, suppose we could identify the degree to which each individual should be held responsible, hold him or her responsible, and guarantee ourselves that no residual or deficit of responsible remained. Even still, I submit, the State has an obligation to hold corporations responsible. This is because our world does not look like the world described above, even allowing for the contestable metaphysics of responsibility the idealized account above assumes.

To start, society is plagued by epistemic obstacles that make "an easy reduction" from collective activity to individual contributions effectively impossible.¹⁰⁶ Moreover, epistemic difficulties in the corporate context are not run-of-the-mill challenges present for ordinary responsibility ascriptions. Rather, an easy reduction is made practically impossible precisely because the internal structure necessary for sophisticated collective agency obscures the contributions of individual members. In other words, the same structure that helps to make corporations the kind of agents eligible for

¹⁰⁶ LIST & PETTIT, *supra* note 4, at 76–78.

criminal liability simultaneously prevents the State from reducing corporate misconduct back down to the level of individuals.¹⁰⁷ Worse, it is especially difficult to isolate the individual contribution of those high up in a hierarchical corporate structure—a phenomenon invoked to explain the lack of senior officials prosecuted in prominent cases of corporate misconduct.¹⁰⁸

Were we to depend exclusively on a practice of individual criminal responsibility, many culpable individuals would go unpunished. Individuals avoiding punishment would do so precisely because of the collective structure, and the collection of individuals avoiding punishment would skew towards those who already exercise the most control and who most benefit from participation in collective activity.¹⁰⁹ The set of culpable individuals most likely to avoid being held responsible would also be the set of individuals most likely to benefit from the permission of sophisticated collective activity in the first place.

To recall, the structure of the modern commercial corporation is built upon a foundation provided by corporate law. Given the State's role in facilitating through corporate law institutions that obscure our ability to reduce collective responsibility to individual responsibility, the State has a duty to counteract this problem. Of course, one solution would be to prohibit the creation of such corporate structures altogether. This solution throws the baby, and the rest of the family, out with the bathwater. A better approach for satisfying the State's obligation is to hold the corporation responsible. A

¹⁰⁷ KUTZ, *supra* note 97, at 200 (“The judgment of [corporate] fault does entail a claim about individuals, namely that some individuals should have made sure the plant's procedures were up to snuff. But this claim about individuals cannot be further localized—the culpable ‘individuals’ are simply placeholders for whoever would have, counterfactually, operated the plant safely.”).

¹⁰⁸ *E.g.*, David M. Uhlmann, *Crimes on the Gulf*, 53 LAW QUAD. NOTES 31, 32 (2010) (discussing the difficulty of finding “individuals with enough supervisory responsibility and personal involvement” in cases of corporate misconduct).

¹⁰⁹ *Cf.* Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 349 (2003) (considering whether collective sanctions delegate deterrence decisions to better-situated group members).

practice of collective punishment would be a valuable corrective to the peculiar epistemic obstacle attendant to sophisticated collective activity.

4 THE STATE DOES NOT HOLD CORPORATIONS CRIMINALLY RESPONSIBLE

For all intents and purpose, and notwithstanding all the reasons provided for why it should, the federal government does not hold corporations criminally responsible. I mean this claim in two distinct senses. First, corporations are rarely prosecuted; corporate crime represents a vanishingly small portion of the federal government's docket. Second, in the rare case where corporations are subjected to criminal liability, it occurs under a doctrine that is sharply at odds with the normative and conceptual justifications for corporate-criminal liability sketched in the previous two sections.

4.1 The Rarity of Corporate-Criminal Convictions

Corporate crime is infrequently prosecuted both in absolute terms and when compared to individual convictions. Since 1999, on average 200 organizations are convicted annually of a federal crime; the number of organizational convictions has actually *decreased* by approximately 25% since the late nineties—this amidst a decade racked by corporate scandals from Enron and WorldCom to BP to the financial and mortgage-lending crises.¹¹⁰ Worse, during the same period the overall number of federal convictions *increased* by over 50% to more than 70,000 annual convictions.¹¹¹ Moreover, these figures overestimate the number of paradigmatic corporate convictions. Data from the Sentencing Commission includes all organizations, not just corporations. Additionally, “the overwhelming majority of corporations prose-

¹¹⁰ Data compiled by author using information provided by the United States Sentencing Commission, *available at* http://www.usc.gov/Research_and_Statistics/index.cfm [hereinafter Sentencing Data].

¹¹¹ *Id.*

cuted are small firms that may be alter egos of individuals participating in a criminal enterprise.”¹¹²

While I cannot speak to the natural rate of corporate crime, these data strongly suggest that the federal government does not prosecute corporations as vigorously as it prosecutes individuals.¹¹³ The scarcity of corporate convictions reflects in part the fact that corporate crime remains difficult to prosecute. Corporate crime can be hard to detect; often, victims of crimes committed by corporations do not realize that they have been victimized.¹¹⁴ Meanwhile, corporate prosecutions require “a substantial investment due to their complexity, the organizations’ greater ability to conceal information, attorney-client privilege issues, access to very highly paid defense counsel, and the factual complexity of such cases.”¹¹⁵ Likely only a handful of U.S. Attorney’s offices—the Southern District of New York most prominent among them—have the resources necessary to prosecute complicated cases of corporate criminality.¹¹⁶ Accordingly, prosecutors may opt to focus their efforts on convicting individuals involved in corporate misconduct.¹¹⁷ Relatedly, prosecutors increasingly rely on corporate assistance in identifying and prosecuting corporate employees, which discourages prosecutors from simultaneously prosecuting the corporation.¹¹⁸

¹¹² Brandon Garrett, *Collaborative Organizational Prosecution*, in PROSECUTORS IN THE BOARDROOM 156 (2011).

¹¹³ GARRETT, *supra* note 44, at 14.

¹¹⁴ *Id.* at 20; *see also* John. C. Coffee Jr., “No Soul to Damn: No Body to Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 390–91 (1981).

¹¹⁵ Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 880–81 (2007); *accord* Ramirez, *Criminal Affirmance*, *supra* note 69, at 888.

¹¹⁶ *See* Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM 192 (2011).

¹¹⁷ USAM § 9-28.100 cmt. b.

¹¹⁸ *Cf.* Lisa Kern Griffin, *Inside-Out Enforcement*, in PROSECUTORS IN THE BOARDROOM 113 (2011).

Regardless of the explanation, it seems overwhelmingly plausible that corporations are not being prosecuted with anything like the regularity of individuals. This constitutes prima facie evidence that the State is failing to meet its obligation to hold corporations criminally responsible.

4.2 The Disconcerting Rise of the Corporate Prosecution Agreement

The past ten years have seen the rise of prosecution agreements as an alternative to corporate-criminal liability.¹¹⁹ A PROSECUTION AGREEMENT is a civil agreement between a prosecutor and would-be defendant, according to which the prosecutor agrees to delay indefinitely filing an indictment against a defendant (in the case of a deferred prosecution agreement) or to not file an indictment at all (in the case of a non-prosecution agreement). The same prosecution agreement also often resolves the government's pending and prospective civil suits brought for the same misconduct.¹²⁰ In exchange, the corporation accepts a host of sanctions; prosecutors frequently obtain through a prosecution agreement most everything they would obtain through a conviction. As Ramirez puts the point, a "prosecution agreement permits a corporation to civilly resolve a criminal investigation by agreeing to similar terms that might be included in a corporate criminal sentence."¹²¹ Meanwhile, corporations avoid indictment, conviction, and any consequences that follow.

I believe that prosecution agreements are an unwelcome innovation for a host of reasons that go beyond the scope of this project. For these purpos-

¹¹⁹ Uhlmann, *supra* note 68, at 1307-08 (noting the virtual non-existence of prosecution agreements prior to 2001).

¹²⁰ *Hudson v. United States*, 522 U.S. 93, 98-97 (1997) (holding that the imposition of administrative and criminal penalties against the same firm do not implicate the Double Jeopardy Clause).

¹²¹ Mary Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 952 (2005).

es, note simply that prosecution agreements allow corporations to avoid the criminal-justice system in its entirety. This is because, with a single exception,¹²² prosecution agreements have been offered only to corporations. This has the effect of feeding the expressive worry detailed above regarding discrimination in favor of corporate persons against individual persons. If the harm from discriminating among individual and corporate persons with respect to frequency of prosecution is great, then surely the expressive harm from exempting corporations from prosecution altogether is greater still.¹²³

4.3 The Federal Doctrine of Corporate-Criminal Liability

I mentioned a second sense in which the federal government does not hold corporations criminally responsible. In the unlikely case of a corporate-criminal prosecution, federal doctrine fails to take seriously the corporation as a single person separate from its membership. As such, federal doctrine disregards the eligibility conditions that make corporations apt targets for criminal liability.

Consider the doctrine for attributing criminal attitudes to a corporation, which remains effectively unchanged since first introduced in 1909. In *New York Central & Hudson River Railway v. United States*, the Supreme Court affirmed Congress's power to create a general-intent criminal statute that applies to corporations.¹²⁴ In doing so, the Supreme Court expressly extended the tort doctrine of *respondeat superior* to the criminal context; this meant

¹²² SEC prosecutors recently accepted its first deferred prosecution agreement with an individual. *SEC Negotiates First Individual Deferred Prosecution Agreement*, CORPORATE CRIME REPORTER (Nov. 12, 2013), <http://www.corporatecrimereporter.com/news/200/sec-negotiates-first-individual-deferred-prosecution/>.

¹²³ Uhlmann, *supra* note 68, at 1335–36; *see also* Gilchrist, *supra* note 53, at 56 (“[Civil agreements] carry the expressive downsides of criminal immunity (corporate crime is priced; corporations are treated differently than persons in a way not clearly justified) and the additional expressive cost of appearing unprincipled (corporations are compelled to pay fines under threat of indictment).”).

¹²⁴ *N.Y. Cent. & Hudson River Ry. v. United States*, 212 U.S. 481 (1909).

that a corporation would be “charged with the knowledge and purpose of their agents.”¹²⁵ Following *Hudson River*, it became standard practice for federal courts to hold corporations “guilty of ‘knowing’ or ‘willful’ violations of regulatory statutes through the doctrine of respondent superior.”¹²⁶ Today, a court applying the criminalized version of the doctrine of *respondeat superior* may impute to a corporation the attitudes of *any* employee, provided only that the employee was acting on behalf of the corporation. Worse, courts in fact pay little attention to whether the “on behalf of” requirement is satisfied.¹²⁷

Using *respondeat superior* to attribute attitudes to a corporation disregards the corporation’s ability to act and hold attitudes as a legal person. As has already been explained, it is possible—and in fact perfectly ordinary—to ascribe intentional attitudes to a group agent, although doing so correctly requires some appreciation of how the group agent is structured. However, the federal doctrine makes no effort to employ a conceptually well-founded method of attribution. Instead, the federal doctrine attributes to a corporation the criminality of any single member.¹²⁸ This doctrine is over-inclusive because it implies that any member’s personal attitudes can be attributed to the corporation.¹²⁹ To return to a previous example, this would be like saying that any single Senator’s comments are always attributable to the Senate itself. Yet relying on *respondeat superior* is also *under*-inclusive. For one, it requires that at least one employee have the relevant attitude in order for

¹²⁵ *Id.* at 495.

¹²⁶ *United States v. A & P Trucking Co.*, 358 U.S. 121, 125 (1958).

¹²⁷ Buell, *supra* note 53, at 531.

¹²⁸ The Model Penal Code fares little better as a conceptual matter; it limits the imputation of mens rea to attitudes held by “high managerial agents.” MODEL PENAL CODE § 2.07(4)(c) (1962).

¹²⁹ Jennifer Arlen, *Removing Prosecutors from the Boardroom*, in PROSECUTORS IN THE BOARDROOM 62, 65 (2011).

corporate attitudinal attribution to occur.¹³⁰ However, as has been demonstrated, a corporation can hold an attitude not held by any member. More likely, there is no reason to expect that the corporation's attitudes be instantiated by the same member carrying out the corporate act.¹³¹

In short, the federal doctrine of corporate-criminal liability effectively displaces the eligibility conditions for exposure to criminal liability. In doing so, the federal doctrine disregards the corporation as a single agent that should be held responsible separate from its members.

5 THE STATE COULD (AND SOMETIMES, SORT OF DOES) HOLD CORPORATIONS CRIMINALLY RESPONSIBLE

How do we improve the practice of corporate-criminal liability so that it aligns with the sort of institution that I have argued the State has an obligation to maintain? As a starting point, federal courts should reform the doctrine of corporate-criminal responsibility. This is because the point of criminal judgments is not “pointless grading.”¹³² A criminal judgment alone damages a person's reputation—be they an individual or corporation. More importantly, criminal responsibility licenses and begets punishment.

The case for punishing a corporation stands on its best footing when the eligibility conditions are satisfied—that is, when the court can meaningfully attribute to the corporation the actions and attitudes necessary to satisfy a criminal statute's actus reus and mens rea requirements. Particularly be-

¹³⁰ Scholars have suggested that *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987), establishes a court's ability to let juries stitch together the partial knowledge of individual employees to satisfy statutory requirements. However, this interpretation is inconsistent with the opinion itself, as well as with subsequent case law interpreting it. Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. W. L. REV. 210, 227 (1997). Perhaps for this reason, mention of the so-called Collective Knowledge Doctrine by courts is exceedingly rare.

¹³¹ See Uhlmann, *supra* note 108, at 32.

¹³² SCANLON, MORAL DIMENSIONS, *supra* note 7, at 146.

cause a corporate-criminal punishment will result in harm not just to the corporation but also to innocent parties, we should want the argument for holding a corporation responsible in any given instance to stand on the best foundation possible. Accordingly, federal courts should replace the current *respondeat-superior* approach to corporate-criminal liability with liability conditions that capture genuine corporate attitudes. As it turns out, this is easier than it sounds.

5.1 The Shadow Practice of Corporate-Criminal Liability

I have complained that prosecutors do not prosecute corporations frequently enough. That said, in one respect prosecutorial practice represents a bright spot in our current federal practice, which may provide a template for improving the status quo's liability conditions consistent with our pragmatic account of genuine corporate attitudes. This is because, although the federal *doctrine* of corporate criminal liability remains unchanged since *New York Central*, two modern revisions to the criminal-justice system have drastically altered federal *practice*—to the point that, arguably, “the administration of justice is no longer ruled by existing principles of vicarious liability” when it comes to corporate-criminal responsibility.¹³³

First, although federal prosecutors exercise broad discretion in deciding which cases to charge, in 1999 the Department of Justice (“DOJ”) adopted formal policies regarding when to prosecute a corporation. Then-Deputy Attorney General Holder first articulated principles for corporate prosecutions; in doing so, the DOJ unilaterally disclaimed much of its authority to prosecute corporations based on *respondeat superior* theories of liability.¹³⁴

¹³³ William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, 44 AM. CRIM. L. REV. 1307, 1311 (2007).

¹³⁴ See Memorandum from Deputy Attorney General Eric H. Holder on Bringing Criminal Charges Against Corporations to All Component Heads and United States Attorneys (June 16, 1999).

William Laufer describes the Holder Memo as “an explicit renunciation of vicarious liability by the U.S. Department of Justice.”¹³⁵

The Justice Department continues to refine its position towards corporate prosecutions through a series of memos and through revisions to the United States Attorneys’ Manual.¹³⁶ That said, the general tenor of DOJ’s approach to corporate crime is to prosecute cases that reflect a sense of “institutional responsibility.”¹³⁷ For example, prosecutors are instructed to consider whether the corporation had embedded in its structure an effective compliance program that could have prevented the alleged misconduct, or whether instead corporate compliance was ineffective or non-existent.¹³⁸ Prosecutors weigh the corporation’s prior offenses as evidence of institutional responsibility.¹³⁹ They assess the “pervasiveness of wrongdoing within the corporation.”¹⁴⁰ And they evaluate whether the prosecution of individuals would be adequate to address the misconduct.¹⁴¹

Even when DOJ decides to prosecute a corporation, the manner in which it does so can evince an effort to establish robust institutional fault not captured by vicarious liability. For example, the federal government’s prosecution of Arthur Andersen should have proved a relatively simple one given the facts of the case and the flexibility afforded by the doctrine of corporate crime to impute most acts and intentions of any employee to the corporation.¹⁴² Nevertheless, both sides spent considerable efforts prosecuting and defending the notion that Andersen’s misconduct actually reflected in-

¹³⁵ LAUFER, *supra* note 28, at 37.

¹³⁶ Following the Holder Memo, three additional memos have modified the treatment of the prosecution of corporations: the McNulty Memo, the Thompson Memo, and the Filip Memo.

¹³⁷ Buell, *supra* note 53, at 485.

¹³⁸ USAM § 9-28.800.

¹³⁹ USAM § 9-28.600.

¹⁴⁰ USAM § 9-28.500.

¹⁴¹ USAM § 9-28.200.

¹⁴² GARRETT, *supra* note 44, at 30–36. Technically, Arthur Andersen was a partnership. For these purposes, the lesson remains the same.

stitutional fault, as opposed to misconduct by a few individual bad apples working at the firm.¹⁴³

Second, Congress created the United States Sentencing Commission, which then provided federal courts with a framework for considering how to sentence a convicted corporation.¹⁴⁴ The sentencing considerations for organizations are contained in Chapter Eight of the U.S. Sentencing Guidelines. Many considerations listed in Chapter Eight—especially those concerning the magnitude of the corporate fine to impose—mirror prosecutorial considerations about whether to indict a corporation. For example, both investigate whether criminal misconduct occurred in spite of, or in the absence of, a compliance program designed to detect individual misconduct.¹⁴⁵ Both consider the corporation’s prior offenses as circumstantial evidence of institutional fault.¹⁴⁶ And both consider the “pervasiveness” of criminal activity within the corporation.¹⁴⁷ In the sentencing context, these considerations provide grounds for increasing the sentence that would otherwise be imposed against a corporation.

These two innovations—factors to prosecute, and sentencing considerations—have created “[a] richer version of entity liability . . . in the shadow of *respondeat superior*.”¹⁴⁸ Through such an approach, the criminal-justice system recognizes that an institution’s structure produces collective intentional attitudes autonomous from its members. Both prosecutorial and sentencing guidelines seek to isolate corporate intentions by looking to the corporate structure to rule out interpretations of corporate illegality that would be more aptly attributed only to individuals. In doing so, the modern prac-

¹⁴³ Buell, *supra* note 53, at 484–86.

¹⁴⁴ While the Guidelines have been rendered advisory, *United States v. Booker*, 542 U.S. 220 (2005), they continue to carry significant weight at sentencing.

¹⁴⁵ U.S. SENTENCING GUIDELINES MANUAL §§ 8D1.4(b), 8C2.5(f) (2012) [hereinafter U.S.S.G.]; USAM § 9-28.800.

¹⁴⁶ U.S.S.G. § 8C2.5(c); USAM § 9-28.600.

¹⁴⁷ U.S.S.G. § 8C2.5(b); USAM § 9-28.500.

¹⁴⁸ Buell, *supra* note 53, at 487.

tice of corporate criminal-liability embraces a meaningful sense of collective attitudes like intention while recognizing that collective intentions can sometimes be difficult to identify insofar as they overlap with the attitudes of individual members.

5.2 Federal Practice as a Template for Improving Federal Doctrine

The same considerations developed by courts and prosecutors can and should be put before a jury. In short, the jury should be presented with the same sorts of considerations to inform whether to attribute the requisite mens rea to a corporation. The idea of attributing attitudes to an organization would not place an unreasonable demand on jurors. Sherman and Percy conclude that, with respect to high-entitative groups like corporations, “the inference of group-level intentionality, and thus causality, ought to be similar to such inferences for an individual actor.”¹⁴⁹ There is no reason to suspect that this activity is beyond a jury’s capacity. Indeed, the Andersen trial suggests that juries may be surreptitiously considering the factors of their own accord.¹⁵⁰ The sorts of considerations currently considered by sentencing courts and prosecutors—whether the misconduct is better attributed to identifiable individuals, the corporation’s past misconduct, and the corporation’s efforts to prevent misconduct—should guide a jury’s deliberations.

To be clear, the current shadow approach to corporate-criminal liability by itself does not redeem the federal doctrine. With respect to sentencing, courts are dealing with corporations that have already been sentenced; at best judicial consideration ameliorates the excesses of an already unsound approach to liability. With respect to prosecutorial discretion, voluntary renunciation is no substitute for genuine corporate attitudes. For one thing, a

¹⁴⁹ Sherman & Perry, *supra* note 30, at 156; accord Thomas F. Denson et al., *The Roles of Entitativity and Essentiality in Judgments of Collective Responsibility*, 9 GRP. PROCESSES & INTERGROUP REL. 43 (2006).

¹⁵⁰ See Buell, *supra* note 50, at 488.

prosecutor's discretion does not alter the burden of proof. For another thing, a prudent corporation must take into account that a prosecutor may push his or her doctrinal advantage in any particular case. Finally, recall that a *respondeat-superior* approach to corporate-criminal liability is under-inclusive as well as over-inclusive. Modern innovations cannot expand the scope of liability to account for these missed cases of genuine corporate attitudes; prosecutors have discretion to shrink, but not expand, the space of eligible cases beyond that allowed by the doctrine. Accordingly, complete reform would require not just giving juries the power to determine corporate mens rea, but further replacing the current *respondeat-superior* doctrine with those considerations.

In short, reforming the current doctrine of corporate-criminal liability would place the practice on solid footing. Put another way, it would focus corporate-criminal liability on cases where genuine corporate attitudes existed to satisfy the applicable eligibility requirements. A template for this reform exists in current practice. The considerations already being considered by prosecutors and sentencing courts operating in the shadows of an indefensible *respondeat-superior* doctrine should be passed to juries. Doing so would support a practice of holding corporations criminally responsible that is required by our existing corporate- and criminal-law practices.

6 CONCLUSION

The State can and should hold corporations criminally responsible for their misconduct, even though it rarely does. More specifically, the federal government should hold corporations criminally responsible only in cases of genuine corporate misconduct—that is, when criminal prosecution and conviction would be consistent with the normative and conceptual foundations that undergird the practice. Nevertheless, these reforms serve merely to put current federal practice on better footing. The larger takeaway of this Essay is that the practice has footing upon which to stand.

INTERLUDE

AN INTRODUCTION TO COMPETING VIEWS OF THE CORPORATION AND A TRANSITION TO PUNISHMENT

1 TWO VIEWS OF THE CORPORATION

Corporate law and criminal law see the corporation in very different ways. Corporate law treats the corporation as a system to be designed, reworked, and tinkered with in service of some further end—say, creating the most efficient vehicle for economic growth. Call this view the **SYSTEMS VIEW OF CORPORATIONS**. Chapter I illustrated that states took an active approach to systems design during the nineteenth century; courts and legislatures used corporate design to regulate and second-guess all sorts of corporate decisions. The State controlled the structural makeup of the corporation, limited what specific corporations could and couldn't do, arbitrarily denied them access to markets, and second-guessed the corporation's day-to-day managerial decisions and internal organization. Put another way, the State looked past the corporate person and tinkered with the corporation's internal workings.

Criminal law, by contrast, is committed to seeing corporations as persons. Call this the PERSONS VIEW OF CORPORATIONS. By this I mean that the criminal law, in bringing a corporation into the criminal process, takes the corporation as a single object of concern distinct or autonomous from its constituent members. Criminal law might look into the corporation—to inform its determination of whether an action or attitude is appropriately attributed to the corporation, as opposed to an individual within the corporation—but it does not look past the corporation.

To this point in the dissertation, I have tried to establish several claims. First, the Persons View of Corporations implicit to corporate-criminal liability is not wrong. Second, regulating corporations as persons, rather than as systems, has enabled a more successful society. This is because the treatment of corporations as persons, rather than as systems that the State can freely poke around in, was integral in creating the modern corporation. And for all the criticism of corporations, I am ultimately a huge fan of them. Nicholas Murray remarked in 1912 that “[t]he limited liability corporation is the greatest single discovery of modern times.”¹ A century later, I believe that claim has been largely vindicated. Put another way, the development of corporate-criminal liability has enabled a more successful society by serving as a substitute for the use of corporate law as the primary means of corporate regulation.

However, neither view of the corporation is correct in some absolute sense. I think that the State has independent reasons to hold corporations criminally responsible, which commits the State (in that setting) to conceiving of the corporation in a certain way. But the State is not required to see corporations this way; corporations do not have some sort of freestanding moral claim to be seen as single persons. If there were reason to think that the corporate-law regulation of old, with its clunky corporations operating

¹ NICHOLAS MURRAY BUTLER, WHY SHOULD WE CHANGE OUR FORM OF GOVERNMENT?: STUDIES IN PRACTICAL POLITICS 82 (1st. ed. 1912).

under the uncertainty of State meddling in day-to-day affairs, was actually a preferably regulatory regime—that is, it benefitted society more than the regime that begat and rose to prominence under the modern commercial corporation—then I would have no problem giving up my defense of protecting a corporation’s treatment as a single agent.

Related to this point, there is nothing obviously problematic with the State operating institutions that express, or are committed to different views of the corporation. This is Dewey’s point (and likely Dennett’s). Criminal law and corporate law serve different roles; there is nothing inappropriate with them operating according to different views of the corporation.

2 TRANSITIONING TO PUNISHMENT

Having spent the first part of the dissertation establishing that corporations can and should be considered legal persons for the purposes of criminal responsibility, I now pivot to consider the consequences of that decisions. The reason for this interlude is to flag these distinct views of the corporation as the dissertation transitions from corporate-criminal responsibility to corporate punishment. In particular, Chapter III tackles corporate fines—the traditional form of corporate punishment—whereas Chapter IV addresses alternative punishments that have arisen in the last few decades.

More to the point, my approach to corporate punishment is largely concerned with exploring the relationship between corporate law and criminal law. Corporate law is not a dead letter, even if it has largely abandoned its role as an activist regulatory model. Corporate law still profoundly influences the structure of the modern corporation. Meanwhile, corporate law complicates criminal law when it creates corporations that are hard to punish effectively. One way to understand the second half of this dissertation is an effort is to reinvigorate corporate law not as an alternative method of regulation, but rather as a means of improving criminal punishment.

This puts us in a delicate position. As I said, neither perspective on the corporation is correct in some absolute sense. But neither does it follow that the perspective is up for grabs at any time. In particular, criminal law presupposes that the corporation is a person; this commitment is vital to the foundation of corporate-criminal liability. Yet introducing corporate law into the mix has the potential to upend a pivotal precondition of criminal responsibility. At the extreme, corporate law could improve corporate punishment while simultaneously cracking the conceptual foundation upon which corporate-criminal liability stands. So we have to tread carefully.

Chapters III and IV both use corporate law to improve criminal punishments, but they take very different tacks. Chapter III recognizes that corporate law is not a dead letter. Even though corporate law is not the regulatory tool of its heyday, it still profoundly influences the structure of corporations. Indeed, corporate law is inescapable; it will affect corporate structure no matter what. The insight of Chapter III is that we can leverage the background influence of corporate law to enact reforms that will ultimately improve criminal punishment. Crucially, this approach does not require the criminal law to abandon or compromise the Persons View of Corporations.

Chapter IV presents a more challenging case. Rather than use background corporate-law reforms to improve criminal punishments, Chapter IV advocates corporate reform as punishment in and of itself. This presents a trickier case: the criminal law is committed to a view of the corporation as a single agent, but I will be proposing punishments that restructure that corporate person. This is okay because I will not be looking past the corporate agent, but it is a fine line that I walk at the end of Chapter IV.

CHAPTER III

THE ABILITY AND RESPONSIBILITY OF CORPORATE LAW TO IMPROVE CRIMINAL FINES

1 PREFACE

Corporate fines are a paradigmatic, ubiquitous, and yet deeply flawed form of criminal punishment. Their imposition reliably distributes harm to innocent individuals—worse, the brunt of the harm falls on individuals who neither participated in nor were in a position to anticipate or prevent the corporation’s misconduct. To add insult to injury, all the harm experienced by innocent parties looks to be mostly pointless; as punishments go, fines serve little, if any penological value.

It is not difficult to imagine a better corporate-criminal fine. Fines whose harm fell instead on corporate members responsible for or able to prevent misconduct would improve the status quo: they would be normatively more defensible and penologically more effective. The challenge, then, is to secure such a proportional distribution of harm. This Chapter fo-

cuses on the factors that confound attempts to implement a better fine. In doing so, I resurrect the deep, but often disregarded, connection between corporate law and criminal punishment, and demonstrate that this seemingly criminal-law problem requires a corporate-law solution.

Attempts to improve criminal fines are flawed to the extent that they overlook the role corporate law plays in influencing the distribution of harm resulting from criminal punishment. A common approach for improving corporate-criminal fines involves devising methods for the State to target individuals within the corporation who are “really” responsible for the corporation’s crime. This strategy puts the institution of criminal law at war with itself. Within the span of a single prosecution, the State must presuppose the corporation’s single-agent status in order to assign liability, only to deny that same single-agent status when punishing. Put simply, reforms that focus on targeting individuals for their contributions improve the distribution of corporate-criminal fines only by undermining the conceptual foundation upon which corporate-criminal liability stands.

A better approach starts by noticing corporate law’s responsibility for producing problematic distributions of corporate fines. Corporate-criminal fines have characteristics unusual to other forms of punishment: they are one of few punishments whose distributed harm can be controlled, and the power to control has been surrendered by the State to the private negotiations of corporate members. Thus, the problem of corporate-criminal fines starts well before the moment of punishment: through corporate law, the State enables profoundly lopsided corporate structures that render as a foregone conclusion any “negotiation” amongst members about how to distribute the harm of punishment.

The State has chosen to punish corporations with fines, and it permits the harm of that punishment to be distributed according to the private negotiations of members. But, at the same time, the State has enabled and encouraged a corporate structure that makes any pretense of actual negotiations amongst corporate members a farce. Corporate law is complicit for

permitting these structures to exist; on the flipside, corporate law is also well situated to encourage new structures that will achieve desirable distributions. As proof of concept, I advocate the use and expansion of provisions that empower the corporation to recoup officer's compensation—in particular, I sketch what I call a CORPORATE-CRIME CLAWBACK PROVISION—as a remedy for the problem of corporate-criminal fines.

2 IDENTIFYING AND DIAGNOSING THE PROBLEM OF CORPORATE-CRIMINAL FINES

The PROBLEM OF CORPORATE-CRIMINAL FINES is frequently mischaracterized. The problem is often framed as one where corporate-criminal fines cause innocent third parties to suffer harm. However, this fact alone cannot be the whole problem; punishment, be it individual or corporate, reliably distributes harm to innocent third parties. Rather, the problem is that corporate fines distribute harm to innocent parties *and also* effectively fail to serve any penological purpose for the State.

2.1.1 Corporate-Criminal Fines Distribute Harm to Innocent Parties

Start with the obvious: Corporate fines distribute harm to individuals. Although the State imposes a fine against the corporation, “[a]s in any other sanction or taxation scheme, the impact point is not necessarily the final resting point, or incidence, of the burden.”¹ In the case of corporate fines particularly, the distribution of harm falls heavily on innocent parties.

A word on terminology. I use notions of guilt and innocence formally—an INNOCENT person in this context is any person not criminally convicted of substantially the same crime, arising out of substantially the same conduct, as gave rise to the corporation's conviction. I use CULPABLE to pick out individuals who, irrespective of a legal adjudication of guilt or inno-

¹ Daryl J. Levinson, *Collective Sanctions*, 56 STANFORD L. REV. 345, 377 (2003).

cence, bear some responsibility for the corporation's misconduct.² A culpable person either personally contributed to the sanctionable misconduct—for example, by carrying out the misconduct, authorizing it, or creating conditions that cannot be satisfied without resort to criminality—or stood in a position of responsibility to prevent it. Thus, many members of a guilty corporation are culpable but personally innocent; either they were not prosecuted, or their personal conduct did not rise to the level of individual criminality. Many shareholders, consumers, and low-level employees are both innocent of and not culpable for a corporation's misconduct.

Corporate fines distribute harm in a reliable pattern, which overwhelmingly burdens innocent, non-culpable individuals. On the standard picture, “the [most] widely used form of corporate punishment, a fine, will cause economic detriment to innocent shareholders” in the form of diminished equity value.³ Albert Alschluer describes the effect a bit more broadly: “Innocent shareholders pay the fines, and innocent employees, creditors, cus-

² For these purposes, I am excluding notions of membership responsibility, according to which every member of a group bears personal responsibility for the group's misconduct merely by virtue of his or her membership in the group. See CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A DIGITAL AGE* 162 (2000); Phillip Pettit, *Responsibility Incorporated*, 117 *ETHICS* 171, 193–94 (2007). Even assuming that individuals are responsible in some sense for the corporation's misconduct, it would be surprising if this thin notion of responsibility by itself were sufficient to justify any and all imposition of harm.

³ Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 *U. PITT. L. REV.* 21, 47 (1957); accord PETER FRENCH, *Punishing the Criminal Corporation*, in *COLLECTIVE AND CORPORATE RESPONSIBILITY* 190 (1987). The standard story could afford some complication. Recently we have seen circumstantial evidence of shareholder value *increasing* after a criminal fine is announced. *E.g.*, Kevin McCoy & Kevin Johnson, *5 Banks Guilty of Rate-Rigging, Pay More than \$5B*, *USA TODAY*, May 20, 2015, <http://www.usatoday.com/story/money/2015/05/20/billions-in-bank-fx-settlements/27638443/> (noting that three of five banks saw their stock value rise by 2% upon the announcement of their guilty pleas.). At any rate, I will stay with the standard story.

tomers, and communities sometimes feel the pinch too.”⁴ Scholars focus frequently on shareholders who, though legally owners of the corporation and contributors of capital, nevertheless are far removed from the corporation’s management. For the purposes of this Chapter, I discuss the harm distributed to shareholders and low-level employees.⁵ Largely, we can expect that most members of these two classes are innocent and non-culpable.

There is no clear, reliable mechanism to impose harm on culpable, or even guilty, parties (assuming for now that such a distribution would be desirable) within the corporation. At best, shareholders can pressure the board of directors to sanction or remove the corporation’s executives, at least some of whom, by virtue of their position of authority, are likely to be amongst the set of culpable members. As will become clear when discussing the realities of corporate law, even this circuitous mechanism exists only on paper; shareholders effectively have no power to push the harm of a corporate-criminal fine onto more suitable parties.

2.2 The Distribution of Harm to Innocent Individuals is Not Unique to Corporate Punishment

So, corporate-criminal fines unquestionably distribute harm to innocent (and non-culpable) individuals. However, in this respect, corporate punishment is no different from individual punishment. Punishment always has this messy quality to it. The imposition of punishment reliably—indeed, barring highly contrived examples, invariably—results in harm being spilling over to innocent parties.⁶ Consider who else suffers when a convicted per-

⁴ Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1367 (2009).

⁵ The lessons here could be extended to include harm distributed to other stakeholders: consumers, creditors, local communities, etc. I limit my discussion for purposes of simplicity and brevity.

⁶ Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 522–23 (2006); FRENCH, *supra* note 3, at 188; Peter French, *The Hester Prynne Sanction*, 4 BUS. & PROF. ETHICS J. 19, 21 (1985).

son goes to prison: family and friends lose access to a loved one, employers lose an employee, and society members pay for an inmate's care.⁷ The Department of Justice endorses this characterization, reassuring its prosecutors that “[v]irtually every conviction of a corporation, *like virtually every conviction of an individual*, will have an impact on innocent third parties.”⁸ Indeed, Sanford Levinson argues that this spillover effect makes individual punishments effectively collective.⁹ On his view, “many sanctioning regimes that are de jure individual should be understood as de facto collective.”¹⁰

The State does not ordinarily take the fact of harm being distributed to innocent parties as a reason to avoid punishment. At best, considerations of innocent third parties can mitigate the punishment imposed. Even then, the Sentencing Guidelines broadly discourage courts from taking the harm experienced by innocent third parties as a reason to mitigate punishment.¹¹ Thus, if the problem of corporate-criminal fines were merely that they distributed harm to innocent parties, I would say it is no problem at all—or, at least, not one unique to corporate punishment.

Granted, we might nevertheless want to pay attention to whether corporate punishment were causing outsized suffering to innocent individuals as compared to other punishment. For example, it seems plausible that any given corporate fine distributes harm to more innocent parties than does,

⁷ The social cost of prison informs Judge Posner's suggestion that white-collar criminals receive a fine instead of imprisonment. See Richard Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 415 (1980). *But cf.* Brennan Center for Justice, *Is Charging Inmates to Stay in Prison Smart Policy?*, <https://www.brennancenter.org/states-pay-stay-charges> (last visited June 1, 2015) (identifying states that require inmates to repay the costs of their incarceration).

⁸ USAM § 9-28.100 cmt. b (emphasis added).

⁹ Levinson, *supra* note 1, at 378.

¹⁰ *Id.*

¹¹ U.S.S.G. § 5H1.6 (“[F]amily ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.”).

say the punishment of an ordinary street crime.¹² But ultimately this is an empirical question reflecting a difference in degree, not a difference in kind, of the harm distributed by different punishments and different crimes. Nor does the empirical question clearly cut in one direction. Sara Sun Beale, for one, argues that although, “white collar and corporate offenses also impose serious hardships on third parties,” equivalent “secondary impacts of federal drug policies dwarf the effect of policies regarding corporate and white collar offenses.”¹³

2.3 Addressing Objections

There are critics who disagree that harm distributed through corporate punishment is equivalent in kind to harm distributed through individual punishment. Stephen Bainbridge pithily captures the sentiment: “When you punish an entity, you’re really punishing the entity’s shareholders.”¹⁴ In this, he echoes Glanville Williams’ assertion that “a fine imposed on the corporation is in reality aimed against shareholders who are not . . . respon-

¹² Of course, this may reflect the fact that corporate crimes are themselves more damaging to society. See RICHARD D. HARTLEY, *CORPORATE CRIME* 27 (2008) (collecting citations for the proposition that “loss of life and injuries that result from corporate wrongdoing far outweighs those from street crime”).

¹³ Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1522 (2007). Behind the empirical question is a theoretical one about how to go about comparing harms. Does the breadth of harm distributed matter? The depth of the suffering experienced by innocent parties? Compare David Lewis, *The Punishment That Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 53 (1989) (rejecting punishments that are calibrated to the subjected suffering of individuals), with Posner, *supra* note 7, at 415 (defending punishments calibrated according to personal suffering).

¹⁴ Stephen Bainbridge, *What the NY Times Doesn’t Understand About Organizational Wrongdoing*, ProfessorBainbridge.com, May 14, 2015, <http://www.professorbainbridge.com/professorbainbridge.com/2015/05/what-the-ny-times-doesnt-understand-about-organizational-wrongdoing.html>.

sible for the crime, i.e., is aimed against innocent persons.”¹⁵ Albert Alschuler distinguishes the problem of corporate third-party harm as follows: “The penalties imposed on innocent shareholders and employees when corporations are convicted are not incidental, collateral, or secondary. They are what the punishment of a collective entity is all about.”¹⁶

Notably, the Supreme Court rejected this line of criticism. In *New York Central & Hudson River Railroad v. United States*, the Court dismissed petitioners’ characterization that “to thus punish the corporation is in reality to punish the innocent stockholders.”¹⁷ Nevertheless, the same critique of corporate fines, and corporate punishment generally, evidently recurs. Accordingly, it is worth ventilating and rejecting afresh the critics’ objection.

There are two interpretations for assertions that the harm distributed via corporate punishment is different in kind from, and categorically worse than, the harm distributed via individual punishment. Both challenge the conceptions of agency underpinning a well-founded practice of corporate-criminal liability; I will not relitigate aspects to the extent that they are addressed in Chapter II. At any rate, neither interpretation is compelling.

2.3.1 Intentional vs. Foreseeable Harm

One interpretation assigns a morally significant difference between intending and foreseeing, which is a strategy prominently associated with the Doctrine of Double Effect.¹⁸ This interpretation especially matches Alschuler’s comments, which assert that the point of corporate punishment

¹⁵ GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 863 (2d ed. 1961).

¹⁶ Alschuler, *supra* note 4, at 1369.

¹⁷ *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 492 (1909).

¹⁸ The first articulation of the Doctrine of Double Effect is often attributed to Thomas Aquinas. THOMAS AQUINAS, *Of Murder*, in *THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS* pt. II-II q. 64, art. 7 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911).

is to harm the corporate members—in particular, the shareholders. The philosophical literature is littered with thought experiments that purport to capture the intuition that a wrong done intentionally for its own sake is worse than the same action taken under circumstances where the wrong was salient, but not intended, by the agent. Roughly, according to the Doctrine of Double Effect, what grounds the divergence in intuitions is the subjective attitudes of the wrongdoer; what might be permissible (or less morally problematic) if merely foreseeable but unintended becomes impermissible (or morally worse) by virtue of being intended.

I am skeptical that the conceptual distinction between intending and foreseeing, to the extent there is one, can bear the normative weight that Alschuler and others seem to think it does. Elsewhere I have argued against the coherence of the Doctrine of Double Effect as it would apply to the criminal law.¹⁹ Briefly, endorsing the view that intending and merely foreseeing delineate the severity of moral and legal judgments has the consequence of elevating obviously irrelevant factual considerations to the status of decisive determinants of moral and legal permissibility.²⁰

That concern aside, there is a separate challenge facing those who seek to render corporate punishment normatively indefensible. This is the so-called Closeness Problem that has plagued accounts of the Doctrine of Double Effect for decades.²¹ In essence, many so-labeled intending cases can be redescribed as foreseeing cases (and vice versa). Troublingly, there are frequently no independent standards for determining which description is “correct,” assuming a correct description exists as a coherent notion. The worry, then, is that an individual privileges a description only because it

¹⁹ W. Robert Thomas, *On Strict Liability Crimes: Preserving a Moral Framework for Criminal Intent in an Intent-Free Moral World*, 110 MICH. L. REV. 647 (2012).

²⁰ *Id.* at 664–65 (collecting examples and citations).

²¹ See, e.g., H.L.A. HART, *Intention and Punishment*, in PUNISHMENT AND RESPONSIBILITY 113 (2d ed. 2008); see generally EZIO DI NUCCI, *ETHICS WITHOUT INTENTION* 103–32 (2014) (cataloguing failed efforts to circumvent the closeness problem).

supports her pre-theoretic moral judgment, which the appeal to intending/foreseeing was meant to elicit and ground. In other words, appeals to the Doctrine of Double Effect risk begging the question.

Alschuler's claim acutely suffers from the Closeness Problem. He asserts that the goal of corporate punishment is to harm shareholders—that is, the State intends to harm innocent individuals. (Presumably, the harm experienced by innocent individuals is merely foreseeable in the individual context). However, there is no independent reason to accept Alschuler's characterization of the State's conduct. (The State does not claim this motivation as its own.) For one, it is not clear why the State would want to harm innocent shareholders, particularly as it has long been the case that shareholders have few, weak levers to reform a corporation. For another, the State already has an institution of individual liability and punishment. As Chapter II demonstrates, the State has ample reasons to hold corporations criminally responsible separate from their members. Chief among them is that conduct not reducible to individuals nevertheless remains criminal; the State has a duty to its citizens to hold criminally responsible perpetrators, be they individual or corporate. It just so happens the State uses punishment to express condemnation, even though individuals suffer as a result.²²

It seems, in essence, that Alschuler is attempting to use corporate punishment to revisit whether corporations are eligible and apt targets for criminal liability. Appeals to punishment certainly give stakes to that debate—punishment is one area where the rubber of responsibility judgments meets the road. They do not, however, change the terms of the debate that was already addressed in Chapter II.

²² It is a broad topic—one well beyond the scope of this Chapter—the limits to which the State can punish as a means of enforcing its criminal judgments. On the flip side, it is a live question whether there could exist a public institution of criminal responsibility that did not enforce its judgments through the imposition of harm. See Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 400 (1965). Regardless, it suffices for my purposes to observe that, irrespective of whether we *could* have such an institution, manifestly we do not.

2.3.2 Corporate vs. Individual Experiences of Harm

Consider a separate, albeit related interpretation of the characterizations given by critics like Bainbridge, Williams, and Alschuler—viz., that the harm distributed from corporate punishment is categorically worse. This second interpretation leverages the fact that a corporation’s experiences inputs, harm among them, differently than do individuals. In ordinary cases of individual punishment, the convicted individual experiences harm directly from his punishment; innocent parties experience harm derivatively from the convict’s suffering. For example, “[w]hen an offender with children is sent to prison, his children may suffer, yet criminal justice officials may have no way to punish the offender appropriately without hurting other people.”²³ On this view, the family’s harm is dependent on the convict’s harm (i.e., his incarceration); innocent parties suffer harm alongside of or because of the convict’s need to suffer harm. By contrast, suggests the critic, a corporation cannot experience harm on its own.²⁴ Accordingly, the harm of punishment passes entirely through to innocent shareholders; their suffering is not derivative of or arising alongside the corporation’s suffering of harm. Rather, the harm experienced by individuals is a substitute for the corporation experiencing harm.

First, it is not clear punishment requires that innocents’ suffering must derive from the suffering of the guilty. The occurrence is reliable, but it is not obvious how the suffering of a guilty person grounds the permissible suffering of innocents.²⁵ It seems more likely that State’s fulfilling its penological obligations grounds the excusable distribution of harm to innocents.

Second, there is an equivocation driving the force of the critic’s argument. The critic makes an uncontroversial observation: corporations do not

²³ Alschuler, *supra* note 4, at 1368–69.

²⁴ *Id.* at 1367–69, 1392.

²⁵ See Joel Feinberg, *Collective Responsibility*, 65, J. PHIL. 674, 680 (1968) (partially defending historical regimes that relied on collective-criminal responsibility).

experience harm like individuals do. Now, if the complaint were that corporations cannot experience harm like individuals experience harm, then it would be irrelevant. This harkens back to, or merely restates, the Individual Person Premise that has not survived Chapters I and II. Just because a corporation does not have the single body and sense organs of an individual person, it does not follow that the corporation cannot experience harm.

Yet the critics' argument requires this stronger claim—viz., corporations do not experience harm *at all* (or do not experience harm except through the suffering their members). But these stronger claims do not follow from the former, and themselves seem false. Corporations can obviously experience harm: they can have their charters to exist revoked, their property seized, their internal structures forcibly reworked in ways that severely impair the corporation from pursuing its goals. Moreover, analogous to the fact that a corporation can hold attitudes not held by any of its constituent members, corporations can conceivably experience without harm being experienced by the membership. For one, there is weak evidence of this possibility when shareholders recently saw the value of their equity increase upon the announcement of a guilty plea against domestic banks.²⁶ For another, recall that a corporation has an internal structure that arranges interactions between individuals. Harm imposed on a corporation's structure need not harm any given member of the corporation—indeed, they might benefit from the change—but it would still be fair to characterize forced restructuring as harm to the corporation *qua* corporation.

2.3.3 Neither is the Distribution of Harm Categorically Less Bad in the Case of Corporate Punishment

It should be noted there are theorists at the other end of the spectrum. That is, some claim that the distributive consequence of corporate fines merit less attention than does the similar phenomenon in the individual con-

²⁶ See McCoy and Johnson, *supra* note 3.

text. French, for one, argues that shareholders voluntarily enter into the corporation knowing the risk of criminal misconduct, and so should not be an object of concern in the same way that a convict's family members are.²⁷ Says French: "If [stockholders] suffer from corporate punishment, that is a risk they undertook when entering the market."²⁸ Brent Fisse makes a similar claim, suggesting "[d]istribution of retributive punishment to innocent shareholders, personnel, and consumers, is warranted" because members acquiesced to or assumed the risk of loss by joining the corporation.²⁹

But it is not clear why voluntariness matters in the collective context any more than it does in the individual context. After all, we choose our spouses in the same sense—and hopefully more scrupulously—than we choose our investments. Moreover, both French and Fisse confuse the familiar with the necessary. Even if in fact shareholders are willing to accept the risk of bearing harm from a criminal fine as a cost of doing business, it is a further question whether the State should maintain a legal regime that permits or endorses such acceptance. It is worth interrogating whether the State should avoid endorsing a message that the chance of corporate criminality is the kind of gamble it expects investors to make.

2.4 Corporate-Criminal Fines are Broadly Ineffective as Punishment

The State can impose harm in service of its obligation to hold persons criminally responsible; our system of individual punishment is proof of this. So why worry about corporate-criminal fines if not because they reliably distribute harm to innocent parties? I submit that the real problem of corporate-criminal fines is that they are a broadly ineffective form of punishment. The harm being distributed to innocent parties serves little, if any purpose.

²⁷ FRENCH, *supra* note 3, at 188.

²⁸ French, *supra* note 6, at 20.

²⁹ Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1175 (1983).

Consider several common rationales justifying criminal punishment articulated by criminal law theorists and by the Sentencing Guidelines. Punishment can provide retribution, or what the Guidelines refer to as “just punishment for the offense.”³⁰ Punishment can deter the specific offender from reoffending or deter other would-be offenders. Punishment also expresses the State’s condemnation: it is imposed “to reflect the seriousness of the offense” and “to promote respect for the law.”³¹ The State uses different punishments to express different rationales; no one punishment need necessarily convey all rationales.³² For example, federal law is clear that rehabilitation, a once-prominent rationale for punishment that “eventually fell into disfavor,”³³ cannot determine whether or for how long to incarcerate.³⁴

In any event, corporate-criminal fines do not seem to serve *any* rationale—or, at least, they do not serve any well.

2.4.1 Fines as Deterrence

The received wisdom, for better or worse, is that corporate punishment exists almost exclusively to deter prospective misconduct. Regina Robson, in cataloguing discussions of corporate punishment, concludes that there has occurred a “virtual elimination of retribution as an acknowledged goal of [corporate-]criminal sanctioning,” with only deterrence offered to explain

³⁰ 18 U.S.C. § 3553(a)(2) (2012).

³¹ 18 U.S.C. § 3553(a)(2)(A).

³² *See, e.g.*, *United States v. Johnson*, 529 U.S. 53, 59 (2000) (“Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.”).

³³ *Tapia v. United States*, — U.S. —, 131 S. Ct. 2382, 2386 (2011); *see* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1 (2003).

³⁴ 18 U.S.C. § 3582(a) (“[I]mprisonment is not an appropriate means of promoting correction and rehabilitation.”); *Tapia*, 131 S. Ct. at 2388 (“[A] court making [decisions about whether to incarcerate] should consider the specified rationales of punishment *except for* rehabilitation.” (emphasis in original)).

why the State should hold corporations criminally responsible.³⁵ Pity then that fines are a famously poor deterrent of corporate crime.

To be fair, part of the poor deterrent value of fines is that corporate crime is infrequently prosecuted and that convicted corporations historically receive modest fines. Although the average fine from 1999–2012 is approximately \$7.4 million, the median fine is less than \$120,000.³⁶ Meanwhile, the Guidelines instruct courts to decrease the fine calculated under the Guidelines if a corporation cannot afford it.³⁷ That said, recently there have been signs of larger financial penalties for convicted corporations. In 2014, several financial firms received criminal penalties well in excess of \$1 billion each,³⁸ although a large portion of these penalties consist in restitution payments to victims.³⁹ This trend has continued in 2015; five domestic banks have recently pleaded guilty to a criminal conspiracy involving currency manipula-

³⁵ Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 121 (2010); accord V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1494 & n.91 (1995) (collecting citations for the proposition that “deterrence, not retribution, is the aim of . . . corporate criminal liability”).

³⁶ Data compiled by author using information provided by the United States Sentencing Commission, *available at* http://www.usc.gov/Research_and_Statistics/index.cfm [hereinafter Sentencing Data].

³⁷ An equivalent rule applies for individuals. 18 U.S.C. § 3572(a). However, individuals are subject to imprisonment as their primary form of punishment (from which there is no such similar relief); by contrast, a fine is the primary form of punishment of punishment for a corporation.

³⁸ Credit Suisse (\$2.6B in criminal penalties), BNP Paribas (\$8.9B in criminal penalties), and JP Morgan Chase (\$2.6B in criminal and civil penalties).

³⁹ Sensibly, the Guidelines acknowledge that restitution is not punishment. U.S.S.G. ch. 8, pt. B, introductory cmt. Still, there is a long tradition of corporations paying out only a tiny fraction of their restitution payments, paying restitution “in kind,” or using restitution to write down debts that, while already worthless, had been kept on the balance sheet precisely in anticipation of a monetary sanction.

tion, for which they too received penalties well in excess of \$1 billion.⁴⁰ It remains to be seen whether this trend will continue.

And yet, there is reason for skepticism that even large fines will meaningfully deter corporations. For one thing, it is likely impossible to set fines at the appropriate price to deter misconduct. Even assuming reasonable rates of enforcement, John Coffee demonstrates that the optimal fine for deterring even minor criminal activity would far outstrip the value of most corporations, leading to a mismatched calculus that he refers to as the Deterrence Trap.⁴¹ Vince Buccola's research on corporate insolvency implies that the Deterrence Trap, when considered dynamically, is even more of a problem than Coffee suspected.⁴² According to Buccola, the closer a corporation moves towards insolvency, the more mismatched becomes the Deterrence Trap—in particular, the less a large fine acts as a deterrent. Accordingly, at a time of looming insolvency, when a corporation might be most inclined to stave off collapse by engaging in criminal activity, criminal fines offer the least value as a deterrent.

Meanwhile, the magnitude of a fine cannot be calculated independently of enforcement rates. It is well documented that large punishments can actually discourage enforcement.⁴³ The chance of bankrupting a corporation discourages many prosecutors away from seeking a corporate conviction. According to Brandon Garrett, “[t]he DOJ suffered great criticism following [Arthur] Andersen's collapse and has since moderated its approach to

⁴⁰ David McLaughlin et al., *Six Banks Pay \$5.8 Billion, Five Guilty of Market Rigging*, BLOOMBERG, Mar. 20, 2015 <http://www.bloomberg.com/news/articles/2015-05-20/six-banks-pay-5-8-billion-five-plead-guilty-to-market-rigging>.

⁴¹ John C. Coffee Jr., “*No Soul to Damn: No Body to Kick*”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 389, 390 (1981). Essentially, to get the expected cost calculation right (fine * likelihood of conviction), the fines would have to be astronomical in order to outweigh the countervailing expected value from breaking the law.

⁴² Vincent S.J. Buccola, *Beyond Insolvency*, 62 KANSAS L. REV. 1 (2013).

⁴³ Ehud Guttel & Doren Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 596 (2011) (collecting examples).

explicitly take into account collateral consequences in organizational cases.”⁴⁴

Finally, the corporate fine’s deterrence value is undermined by one of several agent/principle problems at the core of corporate law. As Larry Summers recently put the point, “[m]anagers do not find it personally costly to part with even billions of dollars of their shareholders’ money Paying with shareholders’ money as the price of protecting themselves is a very attractive trade-off.”⁴⁵ This worry bears out empirically and anecdotally. It is the central rationale offered by Professors Alexander and Cohen’s economic research into corporate crime, which concludes that “[t]here is little evidence that increasing the magnitude of monetary sanctions has a deterrent effect.”⁴⁶ Anecdotally, consider the recent conduct of JP Morgan after pleading guilty to manipulating currency markets.⁴⁷ JP Morgan acknowledged its wrongdoing both in a guilty plea and in a disclosure notice that, as a condition of its probation, it was required to circulate to its investors. Yet, in a second client letter—which was sent attached to the disclosure notice!—the bank informed investors that it would continue to engage in potentially criminal conduct specifically identified in the guilty plea but that was not itself the basis for the instant antitrust conviction.⁴⁸

⁴⁴ Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 880 (2007).

⁴⁵ Larry Summers, *Companies on Trial: Are They ‘Too Big to Jail’?*, FIN. TIMES, Nov. 21, 2104, <http://www.ft.com/cms/s/0/e3bf9954-7009-11e490af-00144feabdc0.html>.

⁴⁶ Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, in PROSECUTORS IN THE BOARDROOM 24 (2011).

⁴⁷ Michael Corkery & Ben Protess, *Rigging of Foreign Exchange Market Makes Felons of Top Banks*, N.Y. TIMES: DEALBOOK, May 20, 2015, <http://www.nytimes.com/2015/05/21/business/dealbook/5-big-banks-to-pay-billions-and-plead-guilty-in-currency-and-interest-rate-cases.html>.

⁴⁸ Matt Levine, *Banks Will Keep Doing FX Stuff that Got Them in Trouble*, BLOOMBERG VIEW, May 21, 2015, <http://www.bloombergvew.com/articles/2015-05-21/banks-will-keep-doing-fx-stuff-that-got-them-in-trouble>.

2.4.2 Fines as Retribution

There is a widespread view that “corporate criminal liability cannot be justified retributively,”⁴⁹ and as a result retribution has been virtually eliminated from corporate-criminal law.⁵⁰ Underlying this is anxiety about whether corporations, even if they can be subjected to criminal liability, are the kinds of agents for which retribution is applicable. For example, even while conceding the possibility of corporate personhood, McKenna nevertheless notes that personhood alone is insufficient for robust moral agency.⁵¹

As Chapter II notes, the status of corporate moral agency is heavily contested; a full treatment of the topic is beyond the scope of this project. I am inclined to believe that corporations are capable of responding to reasons in a way that makes them capable of experiencing the sort of reactive attitudes that are essential to moral agency. Likewise, I think they have free will in a weak sense; they can act separate from outside pressures.⁵² In this respect, I am optimistic about the possibility of corporate retribution. I am also not sure how much this sort of analysis matters.⁵³

I realize that I am in the minority on this position, at least for now. Ultimately however, it may not matter for these purposes. It would not be out-

⁴⁹ Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 *HASTINGS L.J.* 1, 8 (2012).

⁵⁰ Robson, *supra* note 35, at 121.

⁵¹ McKenna does not believe corporations are incapable in principle of robust moral agency, but rather that the creation of a sufficiently well-structured entity that could meet all the requisite demands is practically impossible.

⁵² See Margaret Gilbert, *Who's to Blame? Collective Moral Responsibility and Its Implications for Group Members*, 30 *MIDWEST STUDS. PHIL.* 94, 99 (2006); see generally MARION SMILEY, *MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY* (1992) (ideal, practice-independent notion of moral blameworthiness the dessert of which has its source in agent's free will).

⁵³ See BRENT FISSE & JOHN BRAITHWAITE, *CORPORATIONS, CRIME AND ACCOUNTABILITY* 24 (1993) (“[T]he issue is more a matter of what we consider moral responsibility to be, rather than what sort of metaphysical entities corporations may turn out to be.” (internal quotation marks omitted)).

side the bounds of our criminal practice to impose punishment on corporations notwithstanding reservations about their retributive capacities. Fines, and corporate punishment generally, are still justifiable even if corporations are not the kind of fully formed moral agents for which retribution is a prerequisite. Recall that not all punishments embody all rationales for punishment. With respect to retribution specifically, the law mitigates its punishment of minors and the mentally disabled largely because these individuals have yet to establish robust moral agency. However, mitigation is not exemption; these classes are nevertheless susceptible to criminal liability and punishment. Moreover, current ineligibility for retributive-style rationales would not preclude arguments that the State should treat corporations as though they are capable of retribution.⁵⁴ Indeed, List and Pettit note that value of such a practice: by treating corporations as though they are capable of moral agents, we may educate them to actually become moral agents.⁵⁵

The more mundane, but probably more pressing problem is that fines—at least in the corporate context, and perhaps in all cases—are a poor vehicle to express retribution. The reasons for this are tied into the next section.

2.4.3 Fines as Promoting Respect for Law

Perhaps the most common lay criticism of corporate liability and punishment,⁵⁶ one echoed just as frequently by criminal-law scholars,⁵⁷ is that

⁵⁴ See generally Robson, *supra* note 35.

⁵⁵ CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* (2011); see Feinberg, *supra* note 25, at 677 (“Collective responsibility not only expresses the solidarity, it also strengthens it, and thus is a good thing to whatever extent the preexistent solidarity was a good thing.”); Levinson, *supra* note 1, at 386–90 (weighing the cost and benefits of using collective punishment to “build group solidarity”).

⁵⁶ See, e.g., Daniel Kurtzleben, *Bank of America’s \$17B Penalty is Arguable Too Little, Definitely Too Late*, VOX, Aug. 20, 2014, <http://www.vox.com/2014/8/8/5979563/bank-of-americas-17-billion-penalty-is-arguably-too-little-definitely>; Katie Thomas & Michael Schmidt, *Glaxo Agrees to Pay \$3 Billion in Fraud Settle-*

corporations treat fines simply as “the cost of doing business.” By this, I take critics to mean that a corporation commits crimes after calculating criminality to be in the corporation’s best interest.⁵⁸ Paying a fine may well be worth the benefits of criminality; fines, from this perspective, act as licenses retroactively permitting the corporation’s misconduct.⁵⁹

I take the root of the problem here to be the fact that corporate fines are treated like any other business cost. This is true prospectively in weighing the decision to commit a crime, but it is also true after the fact. That is, a corporation absorbs the cost of a criminal fine in exactly the same way that it absorbs any other business cost—a civil fine,⁶⁰ for example, or even just an exogenous shock from a bad investment or a disappointing quarterly performance. In all of these instances, the costs hit the corporation, and immediately distribute down (primarily) to the shareholders.

ment, N.Y. TIMES, July 2, 2012, <http://www.nytimes.com/2012/07/03/business/glaxosmithkline-agrees-to-pay-3-billion-in-fraud-settlement.html>.

⁵⁷ See, e.g., Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 278 (2008); Dan Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEG. STUDS. 609, 619 (1998); French, *supra* note 6, at 20; Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1426–27 (2009).

⁵⁸ Buell, *supra* note 6, at 495–96 (“An obvious point (but one that bears repeating, given that questions of how to prevent self-interested agent misconduct tend to dominate discussions of enterprise liability) is that agent crimes often *benefit* organizations and are committed for that reason.”)

⁵⁹ This sort of calculation tracks Gary Becker’s economic analysis of corporate crime. Gary S. Becker, *Crime and Punishment: An Economic Approach*, in ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 1 (1974). Put briefly, Becker predicts that a person’s decision to commit a crime is a function of the benefit to be gained by the crime, weighed against the likelihood of detection (enforcement) and the severity of the sanction (punishment).

⁶⁰ The major difference seems to concern tax implications. See Lynneely Browning, *Too Big to Tax: Settlements Are Tax Write-Offs for Banks*, NEWSWEEK Oct. 27, 2014, <http://www.newsweek.com/2014/11/07/giant-penalties-are-giant-tax-write-offs-wall-street-279993.html>.

Why does this matter for promoting respect for the rule of law? As Hart famously put the point: “What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition.”⁶¹ But it would be a mistake to conclude that a criminal judgment’s condemnatory force—not the imposition of punishment—distinguishes it from civil or regulatory judgments. That is, we cannot isolate condemnation from punishment. Doing so gives short shrift to the fact that the State expresses condemnation through action.⁶²

While it is true that criminal judgments are understood to express condemnation more severe than civil judgments, the State conveys, and buoys, this convention by accompanying criminal judgments with uniquely harsh punishments.⁶³ Conversely, where criminal and civil sanctions are indistinguishable, the State’s expression of uniquely *criminal* condemnation is blunted.⁶⁴ Such is precisely the case with corporate-criminal fines, which as a form of sanction appears to be no different from civil fines. In a slogan, the problem of corporate-criminal fines is that there is nothing uniquely criminal about corporate fines.

3 CRIMINAL LAW’S SHORTCOMINGS AS A TOOL TO FIX THE PROBLEM OF CORPORATE-CRIMINAL FINES

Thus far, I have diagnosed the real problem of corporate-criminal fines. The problem is that corporate-criminal fines reliably impose harm on classes

⁶¹ Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404 (1958).

⁶² See Feinberg, *supra* note 22, at 400; accord Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *PENN. L. REV.*, 1503, 1508 (2000) (“To communicate a mental state requires that one express it with the intent that others recognize that state by recognizing that very communicative intention.”)

⁶³ DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 12 (2008).

⁶⁴ See Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability, in PROSECUTORS IN THE BOARDROOM* 93–96 (2011).

of individuals—namely, stockholders and employees—whose members are quite likely to be innocent of, and not culpable for, the corporation’s misconduct. This is a problem because the State is causing innocents to experience harm without the countervailing excuse of penological benefit.

Identifying a solution to this problem is simple: a fine whose harm fell on culpable individuals within the corporation would be a vast improvement, morally and penologically speaking, over the status quo. However, *obtaining* such a preferable distribution is remarkably difficult. While a better distribution of harm is conceivable, the institution of criminal law is fundamentally ill equipped to solve the problem of corporate fines.

3.1 A Solution: Impose the Harm of Punishment on Culpable Parties

As a starting point, consider the sorts of distributions of harm that might result from a corporate punishment. Eva Pasternak, one of the few scholars who has focused exclusively on the distributive questions of collective punishment, provides a useful framework for discussion.⁶⁵ Pasternak identifies three options for distributing the harm of collective punishment: randomly amongst the membership, equally across the membership,⁶⁶ or “in proportion to members’ differing levels of personal association with the collective harm.”⁶⁷ Pasternak argues that a proportional distribution is most “compatible with our basic intuitions about fairness.”⁶⁸ By contrast, equal distributions are more objectionable insofar as non-culpable members expe-

⁶⁵ Avia Pasternak, *The Distributive Effect of Collective Punishment*, in *ACCOUNTABILITY FOR COLLECTIVE WRONGDOING* 201 (Tracy Isaacs ed., 2011).

⁶⁶ The distinction between equal and random distributions is slippery. A punishment that applies randomly on one description—for example, the harm imposed is incarceration—applies equally when the harm is redescribed as the chance of incarceration. *See* Lewis, *supra* note 13, at 53; Posner, *supra* note 7, at 415.

⁶⁷ Pasternak, *supra* note 65, at 220.

⁶⁸ *Id.* at 224.

rience harm alongside and equal to culpable members⁶⁹; random distributions are most objectionable because they expose non-culpable members to severe harm while allowing culpable members to evade harm. To the extent that it places the harm on those culpable for its occurrence, a proportional distribution is the most normatively attractive distribution available.

As it stands now, fines are nowhere on Pasternak's taxonomy. The fine is not equally distributed; managers and directors do not experience the harm. Nor is the fine randomly distributed; it falls reliably on shareholders. Nor is it proportional, as shareholders likely have at best limited culpability, even when they experience the brunt of the imposed harm. Moreover, a fine's distribution could not even be categorized as a hybrid of Pasternak's categories. True, a fine falls equally on a set of members (the shareholders); however, selection of this set is neither random nor proportional.

I am inclined to support Pasternak's suggestion that a proportional distribution of extra-penal harm is normatively attractive, as are several others.⁷⁰ Certainly the impulse to push extra-penal harm onto those corporate members who are culpable for collective misconduct is common both in popular culture and in academic scholarship. At least proportional distributions of harm are among the set of outcomes that are all superior to the status quo. What makes them superior? One, all things being equal, it is preferable to distribute harm to culpable individuals than to non-culpable ones.⁷¹

⁶⁹ *But see* MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 297 (1992) (defending equal distributions). I am inclined to support equal distributions with respect to restitution, but not with respect to punishment. *See* KUTZ, *supra* note 2, at 201 (“[C]laims of victims to compensation have lexical priority over the claims of . . . members to fairness.”).

⁷⁰ *See, e.g.,* KUTZ, *supra* note 2, at 159–62 (distinguishing the culpability of those at the core of an enterprise compared to those at the periphery).

⁷¹ Buell, *supra* note 6, at 524 (“Tolerance for injury to individuals should lessen as we consider persons within the institution further removed from the crime and thus less responsible for it even in a diffused sense.”).

Second, by imposing harm on those responsible, we improve the penological status of fines. Harm that falls on officers and directors is more likely to deter misconduct than ratcheting up fines on the shareholders. It might solve the problem of doing business by treating corporate fines as a distinct form of financial sanction, one recognizably different from other costs.

What would a proportional distribution look like in the context of a fine? Roughly, the harm of the fine would distribute to those individuals who are culpable in proportion to their responsibility for the underlying misconduct. Realistically, we should expect that some or all officers will receive a distribution of harm—perhaps a sizeable portion of the harm. This would especially be true were the State to reform the liability conditions for corporate crime as suggested in Chapter II—that is, away from *respondeat superior* and towards genuine corporate attitudes. Insofar as officers exercise outsized authority within a corporate structure, we can expect that some or all of them will be involved in creating the conditions for misconduct by authorizing, failing to stop or investigate, or creating employee requirements that cannot be satisfied without breaking the law. At the other end of the spectrum, we can expect that shareholders would receive virtually no portion of the distribution; the same goes for the vast majority of low-level employees.

It is important to note that the distribution sketched above is a generalization based on common ways that individuals within a corporation contribute to the occurrence of misconduct. To be clear, in imagining an ideal proportional distribution, every case will have its own unique distribution. Sometimes mid-level employees, more than the officers overseeing them, are most culpable. An activist institutional investor might be culpable.

3.2 Two Unattractive Strategies: Abandon Corporate Crime or Abandon Corporate Fines

Identifying a solution to the problem of corporate-criminal fines is easy; implementing criminal-law reforms that embrace this solution is hard. Consider two strategies, and why each will ultimately be unsuccessful.

3.2.1 Abandon Corporate Crime

We could abandon corporate-criminal liability altogether, focusing instead on prosecuting, convicting, and punishing culpable individuals for their involvements in criminal misconduct. Certainly this is the strategy favored by a host of critics of corporate-criminal liability, many of whom ground their criticism precisely on the problem of corporate-criminal fines. And there is something superficially, if speciously, attractive about the strategy. After all, if the hope is create punishments that fall on culpable individuals, why not cut out the conceptual middleman that is corporate liability and go straight after those individuals really responsible?

Nevertheless, this strategy is ultimately doomed to fail. I have already demonstrated in Chapter II the need for corporate-criminal liability as part of our modern practice, and I will not repeat the full breadth of the apology here. That said, two points bear recapping quickly in this context.

First, the State has reason to hold the corporation criminally responsible separate from its membership; corporate responsibility does not reduce to individual responsibility. In the language of this Chapter, being culpable does not make someone guilty. At least under the status quo, an individual may well be responsible for bringing about corporate misconduct in a manner that does not give rise to individual criminal liability. Amy Sepinwall's recent work on the responsible officer doctrine reveals just how drastically the State would have to reform its conception of individual responsibility in

order to reach these individuals.⁷² Sepinwall defends the view that corporate officers are guilty of all corporate misconduct based on a drastically expanded conception of fiduciary obligation.⁷³ This approach requires a massive revision of criminal responsibility, one where criminal vicarious liability takes a prominent role. Given the robust criticism reserved for vicarious criminal liability in the corporate context, I imagine it is cold comfort to shift the practice out of the corporate context and into the individual context.

Second, epistemic obstacles plague any strategy that relies solely on individual prosecutions. The State is simply not in a position to identify those individuals within a corporation who are culpable for misconduct. The upshot is that prosecutors can, at best, identify and prosecute only the lowest-level culpable employees—those who carried out the misconduct, as opposed to those who ordered, created the conditions for, or were in a position to stop corporate misconduct. To improve prosecutorial investigations requires close cooperation with the corporation itself. Put starkly, prosecutors must ask high-ranking officers of the corporation to implicate . . . high-ranking officers of the corporation.⁷⁴ Little wonder that this strategy has been ineffective at producing convictions.

3.2.2 Abandon Corporate-Criminal Fines

Instead of abandoning corporate-criminal liability altogether, an alternative strategy would be to abandon corporate fines as a method of criminal punishment. Alternative corporate punishments exist: corporations can be placed on probation, they can have their corporate charters revoked (thus

⁷² Amy Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371 (2014).

⁷³ *Id.*

⁷⁴ See Lisa Kearn Griffin, *Inside-Out Enforcement*, in PROSECUTORS IN THE BOARDROOM 113 (2011) (“Without the assistance of corporate insiders, prosecutors would find it difficult if not impossible to identify which individuals within a firm are involved in criminal activity”).

effectively terminating the corporation), and they can be suspended by regulators from participating in specific industries. One benefit of these alternative punishments is that they more clearly satisfy the State's penological objectives, and so are better situated to avoid the problem of corporate-criminal fines in the first place.⁷⁵

On the one hand, alternative corporate punishments should play an expanded role in our corporate-criminal practices, notwithstanding a recent trend to use them less often.⁷⁶ Chapter IV deals entirely with this issue. On the other hand, I am reticent to abandon corporate-criminal fines in their entirety. Fines are a ubiquitous form of corporate punishment.⁷⁷ For decades, they were the *only* permissible form of corporate punishment.⁷⁸ Moreover, fines offer clear advantages worth preserving: they are easy to administer, and they provide a social benefit in the form of state revenues.⁷⁹

Finally, despite the fact that alternative corporations are underused and under-theorized, neither are they a panacea. The forced termination or suspension of a corporation will have outsized consequences; very likely these punishment will distribute harm to innocent persons on an order of magnitude greater than that from fines. Arthur Andersen remains the paradigmatic example of this possibility. At the least, we should consider limiting the use of existential punishments to serious cases involving pervasive or ongoing criminal misconduct. Separately, reforming a corporation through probation sounds appealing, but it can be difficult to determine the nature of

⁷⁵ I hold off defending this claim until Chapter IV.

⁷⁶ For example, those major banks that pleaded guilty of conspiring to manipulate currency prices first secured waivers from the SEC suspensions that otherwise would have occurred upon conviction. McLaughlin, *supra* note 40.

⁷⁷ Eighty-eight percent of organizations convicted between 1999–2012 received a fine. Sentencing Data.

⁷⁸ *United States v. A&P Trucking Co.*, 358 U.S. 121, 127 (1958) (“As in the case of corporations, the conviction of [a partnership] can lead *only* to a fine levied on the firm’s assets.”) (emphasis added).

⁷⁹ Posner, *supra* note 7, at 409–10.

the structural defect that led to corporate misconduct—to say nothing of designing, implementing, and monitoring a solution.

3.3 A Third Strategy and a New Constraint: Targeted Punishments

Proponents of corporate-criminal liability gravitate towards a third strategy: design corporate fines that, while imposed on the corporation, thereafter target culpable individuals to receive the distribution of harm. These proposals self-consciously attempt to produce Pasternak’s proportional distribution. This strategy is part of a larger effort to hold corporations criminally responsible and then separately apply carefully crafted punishments that target those individuals “really” responsible. Call this practice TARGETING (and the punishments it imposes TARGETED PUNISHMENTS) because it involves the State targeting individuals within the corporation to bear the harm associated with corporate punishment based on those individuals’ culpability. For example, Mary Kreiner Ramirez argues that corporations should be punished by “remov[ing] the directors and officers of the corporation” without displacing “the innocent shareholders.”⁸⁰ Sepinwall enumerates several corporate punishments “whose sting is directed towards corporate officials,” who she believes are culpable on her aforementioned expanded conception of fiduciary duty.⁸¹ Larry May too advocates targeting directors with the harm of corporate punishment, provided the individual in question contributed to the corporation’s misconduct.⁸²

⁸⁰ Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 975 (2005).

⁸¹ Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 449 (2012)

⁸² Larry May, *Negligence and Corporate Criminality*, in SHAME, RESPONSIBILITY AND THE CORPORATION 137, 146–49 (Hugh Curtler ed., 1986)

Nevertheless, targeted punishments are ill suited to fix the problem of corporate-criminal fines. More importantly, targeting reveals that the institution of criminal law generally is poorly situated to fix the problem.

3.3.1 Targeting and the Corporations as Persons View

As a practical matter, there is no reason to expect that targeted punishments will avoid the epistemic obstacles raised above and in Chapter II; targeting merely pushes the problem from the moment of criminal responsibility to the moment of criminal punishment. If the State knew who was really responsible for misconduct, it would go after them directly. Accordingly, relying on targeted distributions of corporate punishment is no more likely to succeed than is relying exclusively on individual prosecutions to solve the problem of corporate-criminal fines.

Epistemic obstacles aside, there are deeper problems underpinning the turn to targeted punishments. Recall from the Interlude that the Corporations as Persons view takes corporations as single persons separate from their members. Targeting stands in tension with the Corporations as Persons view. This tension is problematic for at least three reasons.

First, targeting undermines the conceptual foundation establishing corporation's eligibility for criminal liability. Recall that corporate-criminal liability presupposes that the corporation is a person for purposes of the criminal law—that is, corporate-criminal liability is committed to the Corporations as Persons view. The idea that a corporation can be prosecuted separately from its members presupposes that a corporation is an object of concern all on its own. Thus, corporate-criminal liability is about holding the corporation, separate from its members, responsible for misconduct better attributed to the corporation than to any individual (or set of individual) member(s). Accordingly, corporate-criminal liability does not look past the

corporation as a single person.⁸³ Yet looking past the corporation to those “really” responsible is precisely what targeting does. At the moment of liability the criminal law asserts the corporation’s status as a single agent; at the moment of punishment, the criminal law rejects and looks past that very same status. Targeting, in other words, threatens the conceptual framework establishing corporation’s eligibility for criminal liability in the first place.

Second, conceptual tensions aside, targeting is a problematic way to spread harm among culpable individuals because it hybridizes individual and corporate liability in a manner that skirts individual protections. The State already has an institution for reaching individuals; *corporate*-criminal liability operates alongside the well-established practice of *individual*-criminal liability. However, targeting enable the State to use corporate-criminal liability as a means of punishing individuals on the cheap. Targeting subjects the corporation to criminal liability. But corporations and individuals have different criminal-procedure protections. Moreover, the individual who will eventually be targeted is not on trial, and so cannot press her constitutional protections. More generally, the corporation and the individual likely have different incentives; the former is not a stand-in for the latter. Targeting thus gets individual liability on the cheap. After all, though the State is formally holding the corporation criminally responsible, it is bypassing the corporation to impose harm directly on those “really” responsible. Recall that the State expresses its condemnation through criminal conviction and punishment.⁸⁴ This scenario is not that, but it is so close as to blur the message. Although

⁸³ This is not to suggest that the State cannot look *into* the corporation—inspect its structure, determine actions/attitudes of individual—when prosecuting a corporation. But the purpose for doing so is to establish evidence of the corporation’s attitudes and actions (as opposed to, say attitudes of corporate members not attributable to the corporation). It remains the case that the corporation is the proper object of concern under these circumstances.

⁸⁴ Feinberg, *supra* note 22, at 400 and accompanying text; Hart, Jr., *supra* note 61, at 404 (“What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition.”).

the targeted individual has not been found guilty, directing harm directly on to her sends an unearned message of individual criminal responsibility.

Third, and relatedly, targeting does a disservice to the State's effort to hold the corporation criminally responsible. As Chapter II demonstrates, the argument for corporate-criminal liability stands on its best footing when the case concerns structural misconduct, the reduction of which fails to adequately describe our judgments of responsibility. Among other things, the conviction of a corporation expresses the State's judgment that the corporation, above and beyond some of its members, bears responsibility for the misconduct that occurred. To quote Buell:

A message of institutional fault says something different than a message of individual fault: not just that somebody pursued faulty preferences, but that the group arranged itself badly. Such a message is apt to lead to reevaluation of group arrangements, not just the rethinking of individual choice that might follow imposition of criminal liability on a person.⁸⁵

Directing harm onto those "really" responsible blurs the State's message. Worse, directing harm might actually undo the State's message. Corporations may understandably seek to avoid being judged responsible.⁸⁶ The literature is clear that a corporation's best way to avoid judgments of responsibility is to identify and hold out a scapegoat.⁸⁷ By calling out through targeting individuals within the corporation "really" responsible for the ostensible corporate misconduct, the State is doing for it the corporation's work of distancing itself from the condemnation of criminal responsibility.

⁸⁵ Buell, *supra* note 6, at 502.

⁸⁶ French, *The Hester Prynne Sanction*, *supra* note 6, at 21.

⁸⁷ Steven J. Sherman & Elise J. Percy, *The Psychology Of Collective Responsibility: When And Why Collective Entities Are Likely To Be Held Responsible For The Misdeeds Of Individual Members*, 19 J.L. & POL. 137, 163 (2010).

3.3.2 Targeting vs. Veil Piercing

Perhaps it seems I am overly concerned about maintaining criminal law's commitment to the Corporations as Persons view. But to see why its abandonment is so troubling, consider the circumstances under which the State looks past the corporation in a similar institution—piercing the corporate veil for the purposes of contract or tort liability.

A court may permit victims to pierce the corporate veil—that is, to look past the corporation as the ostensible tortfeasor and reach the shareholders behind the corporation. However, veil piercing is rarely permitted under famously opaque circumstances.⁸⁸ That said, permissible instances of veil piercing generally involve the use of a corporation as a “sham” or “alter ego” for the intended purpose of immunizing an individual from expected liability. For example, a classic use of veil piercing is to see past an undercapitalized corporation—that is, the creation of a corporation that manifestly, from inception, cannot in good faith expect to cover its liabilities.⁸⁹ Other representative cases involve incorporating solely to evade responsibility for committing fraud or illegal acts.⁹⁰

There is a superficial resemblance between targeting and veil piercing: both look past the corporation to sanction directly individuals inside the corporation. However, the comparison does not flatter targeting. For one, whatever the factors are that license piercing the corporate veil, courts across the country are unanimous in their resolution to use the power “only in the rarest of circumstances.”⁹¹ By contrast, targeting seeks to reform cor-

⁸⁸ *E.g.*, *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 155 N.E. 58 (1926) (Cardozo, J.) (describing discussions of veil-piercing as “enveloped in the mists of metaphor”).

⁸⁹ *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 *CORNELL L. REV.* 1036, 1065–67 (1991) (discussing the frequency of undercapitalization as a reason given to pierce a corporate veil in tort and contract).

⁹⁰ *E.g.*, *Kutty v. U.S. Dep’t of Labor*, 764 F.3d 540, 552–53 (6th Cir. 2014) *cert. denied*, — U.S. —, 135 S. Ct. 1162 (2015).

⁹¹ *Schultz v. Gen. Elec. Healthcare Fin. Servs. Inc.*, 360 S.W.3d 171, 174 (Ky. 2012); *accord* *Dep’t of Transp. v. McMeans*, 754 S.E.2d 61, 63 (Ga. 2014); *AIG*

porate punishment in all instances. Yet there is no reason to suspect that every case, even most cases, of corporate crime involve the abuse of the corporate form.⁹² For the reasons described above, and given the longstanding reluctance to look past the corporation in nearly every other area of law—and even then only in rare cases—we should be very wary of a strategy that abandons the Corporations as Persons view for all corporate punishments.

3.4 Looking to Corporate Law to Fix Criminal Punishments

If corporate-criminal punishments are to be reformed, criminal law seems the wrong place to look for a solution. Neither abandoning criminal liability entirely, avoiding criminal fines, nor using fines to target culpable members solve the problem of corporate criminal fines.

This is not to say that the State is entirely unable to influence the distribution of harm. It is here that corporate law has a role to play. However, that role is an indirect one, the explanation of which requires understanding both the peculiar characteristics of fines and the role that corporate law already plays in influencing the distribution of harm from criminal fines. Accordingly, I next explore the pervasive—and in this case, perverse—role that corporate law plays in creating the problem of corporate-criminal fines.

Domestic Claims, Inc. v. Hess Oil Co., 751 S.E.2d 31, 38 (W. Va. 2013); *Green v. Freeman*, 749 S.E.2d 262, 270 (N.C. 2013); *Lipsitt v. Plaud*, 994 N.E.2d 777, 788 (Mass. 2013); *Canadian Nat. Ry. Co. v. Waltman*, 94 So. 3d 1111, 1116 (Miss. 2012); *Comm’r of Env’tl. Prot. v. State Five Indus. Park, Inc.*, 37 A.3d 724, 732 (Conn. 2012); *Jones & Trevor Mktg., Inc. v. Lowry*, 284 P.3d 630, 636 (Utah 2012); *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 215 (Tenn. 2012); *see also* *Se. Texas Inns, Inc. v. Prime Hospitality Corp.*, 462 F.3d 666, 675 (6th Cir. 2006) (applying Delaware law).

⁹² Indeed, to suggest as much echoes back to the old, ridiculed (even then) argument that a corporation cannot be charged with a crime because criminality is *ultra vires*, and so the corporation’s owners by definition are abusing the corporate form. *See, e.g.*, *Wheless v. Second Nat’l Bank*, 60 Tenn. 469, 475 (Tenn. 1872).

4 CORPORATE LAW AS THE CAUSE OF, AND A SOLUTION TO, CRIMINAL LAW'S SHORTCOMINGS

At the start of this Chapter I asserted that corporate law can solve the problem of corporate-criminal fines. That was a slightly odd way to frame the discussion: corporate law *causes*, or at least contributes substantially to, the problem of corporate-criminal fines. The promise is that diagnosing *how* corporate law undermines corporate punishment will reveal how to undo the problem. Looking ahead, the key insight is that corporate law as it exists today is not some fixed feature of the landscape around which we must operate. Corporate law can be reformed, and corporate-law reform can approximate the preferred distribution of corporate fines while avoiding the shortcomings of the criminal-law strategies discredited in Part 3.

4.1 Diagnosing Corporate Law's Role in Undermining Corporate-Criminal Fines: Fines as Negotiable Punishments

Thus far I have specified ways that corporate-criminal fines are similar to other punishments. Yet, as compared to most other individual and collective punishments, corporate-criminal fines are unusual with respect to two features. The interplay between these features leads me to describe corporate fines as **NEGOTIABLE PUNISHMENTS**.

4.1.1 The Fine-Grained Characteristic of Fines

Fines—as with any monetary exchange—are fungible and divisible. As a result, they are amenable to fine-grained, directed distributions amongst members. Fines are one of only a few punishments with this characteristic: for example, a term of community service meets this description. Under a different regime than the one we have, so could a term of imprisonment.

This fine-grained characteristic matters more in the corporate context, because corporate punishments can separate the distribution of harm from the imposition of punishment to a degree rarely achievable with individual

punishments. By comparison to paradigmatic forms of individual punishment, the particular distribution of harm that obtains is mostly intertwined with the punishment imposed. As an illustration, the State does not impose a term of imprisonment on an individual and then subsequently ask which individual (or individuals) will serve the time. Moreover, although the State can take limited steps to control the distribution of harm,⁹³ it cannot control whether and which family members bear the harm. Corporate fines are different. Indeed, this feature is implicit to the idea of targeted punishment; to say that the State should assign portions of corporate punishment to individuals commensurate to their culpability entails that the State has the ability to carry out fine-grained apportionments.

So too in the collective context: Many collective punishments come prepackaged with an uncontrollable distribution of harm. Punishments that target ineliminably collective features of the group—say, the license to practice in an industry, which is held by the corporation and not any of its members—are not subject to easy division. These punishments distribute harm like any other punishment. Where they resemble individual punishments and differ from corporate-criminal fines is that the harm distributes haphazardly and is not subject to control. By contrast, it is conceivable that after imposing a fine on a collective agent, there is a further question to answer—namely, which individuals will provide the funds.

4.1.2 Who Controls the Fine-Grained Distribution?

Insofar as a fine's distribution is subject to fine-grained control, there is a further question not just of *how* to distribute the harm but also of *who* will decide the distribution. The importance of this point cannot be overstated. Who decides the distribution strongly influences which distribution will be adopted; it is the vote-counters, not the voters, who decide the election.

⁹³ See *supra* note 7 (discussing “pay to stay” laws). This is not the occasion to detail the myriad problems associated with these laws.

The State could reserve for itself the power to decide a fine's distribution. This is the strategy implicitly assumed by advocates of targeted punishment. Of course, I have already argued that the State should not impose a proportional distribution of corporate-criminal fines, but it is perfectly consonant with (and implicit in) this position that the State *could* impose a distribution. And while my comments focused on the State targeting culpable members to produce a proportional distribution, the State could insist on other distributions. For example, the State could insist that harm be distributed randomly—the ancient practice of decimation being a classic case. On one description, the State “decides” the distribution of harm by imposing punishments whose distribution is haphazard and beyond anyone's control; in other words, the State could be said to decide the distribution by taking away the ability to decide the distribution.

Alternatively, the State could hand the power to decide a fine's distribution over to the corporate agent being punished.⁹⁴ The State would impose the punishment of its choice—provided that the chosen punishment were divisible and subject to fine-grained control—and then leave to corporate members the task of distributing the harm. Taking a formal description of this situation, the determination of how to distribute harm would be left to the private negotiations of members constituting the corporation. Hence the reason I describe this as a **NEGOTIABLE PUNISHMENT**.

Fines are a paradigmatic example of a negotiable punishment. Rather than insist upon any particular distribution at the time of punishment, the State allows corporate members to negotiate amongst themselves how to distribute harm. The members could, for example, distribute the cost evenly across all members or randomly amongst members. The membership could organize an investigation and quasi-trial to determine which members were culpable and proportion the cost among these members. Alternatively, the

⁹⁴ See Levinson, *supra* note 1 (arguing that in many cases of collective sanctions, the “sanctioner effectively delegates the deterrence function to this group.”).

collective could prospectively designate members who will bear the harm resulting from criminal conduct. It would not matter to the State how the harm is divvied up, provided the distribution is completely satisfied.

The implication is that the distribution that reliably occurs—harm distributes to shareholders and employees—is “negotiated” amongst corporate members. But plainly, any sense that such negotiations occur in the real world is a farce. In reality, nothing like a negotiation occurs to decide which members will bear the harm of a corporate fine. The distribution of a corporate fine is not negotiated amongst members; it is *announced* to those who will bear the harm. Even that characterization overstates the sense in which there is any deliberation afoot. It might be better said that there exists a settled, default distribution of corporate-criminal fines, and nothing ever (or rarely) occurs to disrupt the default distribution.

The mismatch between formalism—corporate fines as negotiable punishments—and the reality of corporate fines is the fault of corporate law.

4.2 Corporate Law Creates the Problem of Corporate-Criminal Fines

Negotiations do not occur in a vacuum. How corporate members decide to distribute harm is inseparable from—indeed, is all but determined by—the deliberative structure through which members interact. The outcome agreed upon by members within a broadly egalitarian structure—Senators on the Senate floor, for example, or partners in a partnership—are likely to be quite different from the outcome “negotiated” within a rigidly hierarchical structure in which large swaths of decisionmaking authority are concentrated in a small class of individuals. Per Chapter II, commercial corporations have just such hierarchical structures.

The State plays a pivotal role in producing corporations that consolidate and compartmentalize decisionmaking. The State is ultimately responsible for creating, or at least permitting and endorsing entities with hierarchical structures. To begin, corporations are partially a creation of state law;

founders must receive official recognition in order to take advantage of the corporate form. Meanwhile, exactly the role of corporate law is to facilitate individuals' ambitions to pursue (predominantly commercial) collective activity and to provide a structure through which to pursue those ends.

There is no natural corporate law. Corporate law could arrange or encourage myriad different structures. As Chapter I details, states used corporate law in the mid-1800s to control the corporation's size, purpose, duration, geographic limitations, ownership rights, degree of shareholder liability, and even day-to-day decisionmaking. The 20th century ushered in a different vision for corporate law, one that emphasized "giving the greatest freedom and vigor to central management."⁹⁵ Although corporate law consists largely of jurisdiction-specific default rules, this has not prevented a near-worldwide adoption of a universal corporate foundational structure.⁹⁶

Relevant for our purposes, corporate law establishes shareholders as owners of the corporation. Yet since at least the turn of the 20th century, the practical value of those ownership rights has steadily eroded. That power passed first to directors—those charged with running the corporation—and then to officers, who are appointed by directors to manage the day-to-day affairs. Today, the balance of power within a corporation rests somewhere between the officers and directors.⁹⁷ As for shareholders, so little power does the average shareholder wield that, when Facebook went public, it sold only a special class of equity—one stripped of any voting rights.⁹⁸ Given the practical value of shareholder voting rights, investors were nonplussed to forgo these formal rights.

⁹⁵ JAMES W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* at 57 (1970).

⁹⁶ See generally Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 *GEO. L.J.* 439 (2001).

⁹⁷ This is a permeable barrier. Most corporations have inside directors—that is, directors who are also officers.

⁹⁸ James Surowiecki, *Unequal Shares*, *NEW YORKER*, May 28, 2012, <http://www.newyorker.com/magazine/2012/05/28/unequal-shares>.

Corporate law provides innocent shareholders precious little ability to negotiate the distribution of harm with officers and directors. It provides employees even less recourse, a point Chapter IV discusses at length. Instead, and as a result, corporate punishments are distributed through and out of a corporation as if they are any other cost borne by the corporation. Although members *could* agree to adopt a different distribution—the State would not turn down a payment of a fine if, for example, officers had agreed to forgo their salaries to cover the cost—the status quo of corporate law virtually guarantees that deviations from the current setup will not occur. Indeed, plausibly the only negotiations that actually occur surrounding the distribution of corporate-criminal fines are among the founders in trying to decide whether to incorporate or to adopt instead a different commercial vehicle. The mere decision to incorporate by itself all but guarantees the outcome of future distributions.

Thus, we see the crux of the problem. The State entrusts the distribution of harm to the private negotiations of corporate members, but only after creating corporate structures that virtually guarantee those negotiations will result in harm being pushed away from culpable members and onto innocent, non-culpable shareholders and employees. In doing so, the State's blind eye towards the influence of corporate law means that it sabotages its own attempt to punish corporations with criminal fines.

4.3 Why Reform Corporate Law to Save Criminal Fines?

I want to defend first in the abstract the claim that corporate-law reforms are better than criminal-law options, including targeting. Put another way, I argue that the State should do indirectly what I have already suggested it should not do directly. Part V uses executive-compensation clawback provisions to illustrate how to address negotiating imbalances through corporate-law reform, while simultaneously providing a template for reform.

4.3.1 Reforming Corporate Law is Preferable to Targeting

Corporate-law reform has the potential to approximate a proportional distribution of harm while avoiding each problem identified with targeting.

First, both targeted punishment and corporate-law reforms would at best approximate an ideal, proportional distribution; it is not clear if either would produce a close approximation. On the one hand, insofar as corporate-law reforms occur antecedently to any particular crime being committed,⁹⁹ the best we should probably expect is that corporate-law reforms inculcate from receiving distributions of harm classes of reliably innocent, non-culpable individuals—shareholders and employees—while leaving those in charge to negotiate amongst themselves the ultimate distribution. On the other hand, targeted punishments must grapple with the same messy reality. Even if an idealized targeted fine would distribute harm more exactly in line with the proportional distribution, well-rehearsed epistemic realities make obtaining this idealized outcome implausible. Using corporate law to push harm away from innocent, non-culpable classes will likely fare no worse than targeting in approximating an ideal proportional distribution.

Second, corporate-law reforms are less likely to invite questionable circumventions of individual rights or undermine the State's effort to condemn the corporation separate from its members. Recall that one problem with targeting was that the State's distributing the harm from corporate punishment called individuals for being "really" responsible for purportedly corporate misconduct. This created the impression of punishing individuals without affording them constitutionally due criminal-procedure protections. Meanwhile, it undermined the State's own message of corporate condemnation by creating and highlighting a State-endorsed scapegoat.

This problem does not recur with corporate-law reforms. The goal of corporate-law reform is to influence intra-corporate negotiations in such a

⁹⁹ I mean lexical priority, not necessarily temporal priority.

manner as to encourage and empower members to agree upon distributions of harm that fall proportionately on culpable individuals. For its part, the State is shifting how the harm of a prospectively criminal corporation's punishment will distribute amongst individuals. That is, the State is altering default positions for hypothetical cases of wrongdoing; it is not identifying actually culpable individuals.

Third, corporate-law reforms are not in tension with the Corporations as Persons view. One problem with targeting is that it preempts or second-guesses the internal deliberations of corporate members; targeting looks past the corporate person to reach culpable individuals directly. The reason this was a problem for targeting is that criminal law is premised on the idea that the corporation is a single person eligible for, and deserving of, criminal liability separate from its members. Thus, targeting presupposes a conception of corporations that is inconsistent with the vision of corporate personhood criminal law must maintain in order to provide a sound moral and conceptual foundation of corporate-criminal liability.

Corporate law carries no such burden. Quite the opposite: corporate law is in the business of creating the default rules and procedures that help give rise to the possibility of corporations that can qualify as persons in the criminal, and other legal, contexts. This is embodied in corporate law's embrace of the Corporations as Structure view. To suggest that corporate law looks past the corporate person gets the relationship entirely backwards—corporate law *creates* the conditions for the corporate person to exist.

How does this play out in the context of corporate-criminal fines? Under the status quo, fines distribute harm primarily to shareholders by virtue of structures, created and influenced by corporate law, that render intra-corporate negotiations utterly predictable. If the State were to use targeted fines while leaving corporate law undisturbed, then it would preempt the (predictable) outcome of corporate negotiations and substitute in its own judgment for how the harm of a corporate-criminal fine should be distributed. This normatively preferable distribution imposed by the State would

come at the cost of the view of corporate personhood that licenses corporate-criminal responsibility in the first place.

By contrast, corporate-law reforms can alter the background internal structure against which corporate negotiations occur. This sort of reform is entirely within the prerogative of corporate law (whether it is advisable to exercise this prerogative is a question I take up shortly). Done well, it would have the effect of producing intra-corporate negotiations that approximate proportional distributions. In other words, the criminal law would be able to fine a corporation, leave to the private negotiations of members how to distribute the harm, and trust that culpable members would endure most of the harm—all without invading intra-corporate negotiations in a manner that puts the foundations of corporate-criminal liability in jeopardy.

The key insight is that the critique of targeting from the vantage of the Corporations as Persons view gets its purchase by smuggling in a corporate structure that makes shareholder harm a reliable outcome of intra-corporate negotiations. Unburdening the criminal law of this corporate arrangement is the key to solving the problem of corporate-criminal fines.

4.3.2 Solving the Problem of Corporate-Criminal Fines is Worth Reforming Corporate Law

Assume I am correct that corporate-law reform promises a better option than criminal-law strategies to fix the problem of corporate-criminal fines: it avoids blurring the State's message, it does not circumvent individual rights, and it shows the right amount of respect for corporate decisionmaking. Even if all this were true, why should the State be interested in attempting this sort of reform? Put another way, does the problem of corporate-criminal fines merit a corporate-law solution?

I believe it does. First, we need to be realistic about corporate law's role in the world. Corporate law is not some immutable property of the universe. I do not worry about interfering with some natural state of corporate struc-

tures, because no such mythical state exists. Corporate law can and does change—Chapter I demonstrates how drastic those changes have been. Moreover, corporate law is still in flux today, even with respect to questions about the proper distribution of harm amongst members. For example, in the mid-1980s Delaware permitted a corporation, through its bylaws, to limit or eliminate entirely directors’ personal liability for violations of their duty of care.¹⁰⁰ Currently, the Delaware legislature is debating whether to permit “loser-pay” provisions, which would make shareholders who bring a derivative suit, not the corporation, pay the litigation costs of a failed suit.¹⁰¹

To be sure, the fact that corporate law can change does not mean that we should consider the entire enterprise up for grabs. For one, the current state of corporate law reflects centuries of incremental reform developed across state, federal, and international jurisdictions. For another, altering a doctrine that controls the foundational structures of hugely sophisticated entities can have profound consequences. The background rules of corporate law, and enterprise law generally, should not be tinkered with lightly.

Nevertheless, there are three reasons not to shy away from the prospect of using corporate law to fix the problem of corporate-criminal fines. First, corporate law inescapably impacts a corporation’s structure in ways that, at least as far as criminal law is concerned, are deeply problematic. It is important to realize that I am not advocating using corporate law to solve just any problem. Rather, I am advocating reforming corporate law to solve a problem *created by corporate law*. Put another way, I am trying to get corporate law out of the way of the State’s objective to hold corporations crimi-

¹⁰⁰ Del. Code § 102(b)(7); *see generally* Thomas C. Lee, *Limiting Corporate Directors’ Liability: Delaware’s Section 102(b)(7) and The Erosion of The Directors’ Duty Of Care*, 136 PENN. L. REV. 239 (1987).

¹⁰¹ C. Steven Bradford, *The Death of Loser-Pays in Delaware*, BUS. L. PROF BLOG (June 15, 2015), http://lawprofessors.typepad.com/business_law/2015/06/the-death-of-loser-pays-in-delaware.html (discussing the continued viability of *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 553 (Del. 2014)).

nally responsible. This is particularly important because, at a fundamental level, the State has chosen to use a tort/crime model of regulation rather than a corporate-law model of regulation. We should endeavor to protect corporate law from sabotaging its regulatory replacement.

Second, I expect we can cabin the consequences of corporate-law reform insofar as we are working in the narrow context of corporate crime. Granted, any reform has the potential to produce spillover consequences. That said, my reforms are tied to a corporate conviction; I don't intend to alter anything about the corporate structure except how it is to respond to the distribution of harm associated with criminal punishment.

Finally, the State currently accepts a status quo that permits, and sometimes encourages, corporations to treat criminality as a business plan. Meanwhile, the State endorses a world where investors should be willing to gamble on the prospect of criminal activity the same as they would a bad PR strategy or poor product rollout. I agree with Mueller that the State should not “add a [criminal law] gamble to the economic gamble which already inheres in most, if not all, stock market ventures.”¹⁰² Fundamentally, this tolerance is a mockery of what the criminal law is supposed to represent. It also betrays the absolute minimum limitation on corporations—the only remnant of the nineteenth century's belief that incorporation should serve a public goal—which today exists in nearly all corporation's articles of incorporation: the corporation must confine its activities to “any *lawful* act.”¹⁰³ If corporate law contributes significantly to this dysfunction, it behooves us at least to explore reform. I turn now to what such a reform might look like.

¹⁰² Mueller, *supra* note 3, at 40.

¹⁰³ DEL. CODE ANN. tit. 8, § 102(a)(3).

5 PUTTING THEORY TO PRACTICE: CLAWBACK PROVISIONS AS A MODEL FOR REFORM

Here I sketch the broad parameters of a policy reform consistent with the account I have developed. My intention is to demonstrate how we might start thinking of using corporate law to ameliorate the problem of corporate-criminal fines without (A) abandoning corporate-criminality, (B) abandoning corporate-criminal fines, and (C) altering fundamentally the nature of fines as a form of negotiable punishment. A centerpiece of my proposal is a new clawback provision—what I call the **CORPORATE-CRIME CLAWBACK**—that applies when the State imposes a corporate-criminal fine.

5.1 Clawback Provisions: An Overview

Before getting into the proposal, it is worth discussing clawback provisions in general: what they are, how they fit into corporate law, and why those that exist today are fail to solve the problem of corporate crime.

5.1.1 Clawback Provisions Initiated by Corporations

In its basic form, a clawback provision is a term, included either in an employment contract or in the corporation's compensation policies, that allows the employer to recoup previously paid out incentive compensation—bonuses, stock options etc., *but not* earned income—under pre-negotiated circumstances. One paradigmatic circumstance: an employee commits fraud against or on behalf of the corporation.¹⁰⁴ Incentive payments awarded for this period could be recouped; in essence, the corporation is

¹⁰⁴ Clawback provisions are also beginning to be used as a form of non-compete clause. *See, e.g.*, American Express Co., Definitive Proxy Statement in Connection with Contested Solicitations (Form DEFC14A) 37–38 (Mar. 22, 2011), *available at* <http://www.sec.gov/Archives/edgar/data/4962/000119312512121814/d302637ddefc14a.htm> (identifying “working for certain competitors” as an instance of “detrimental conduct” triggering the clawing back of compensation).

recovering funds that were paid out under the false pretense of job performance, which itself may have exposed the corporation to liability as a result.

A corporation may adopt a clawback provision policy voluntarily.¹⁰⁵ However, clawback provisions have recently exploded in popularity; whereas fewer than 20% of Fortune 100 companies had such provisions in 2006, today that number is close to 90%.¹⁰⁶ A major driving force is that corporations are responding to the federal government's attempt to use clawback provisions as a tool of corporate governance.

5.1.2 Clawback Provisions Initiated by the Federal Government

To date, there have been three federal legislative attempts to develop clawback provisions applicable to corporations. First came the Sarbanes-Oxley Act of 2002 (“SOX”).¹⁰⁷ SOX empowers the SEC,¹⁰⁸ rather than corporate directors, to claw back incentive payments to the CEO and CFO of a publically traded company after an “accounting restatement due to the material noncompliance of the issuer, as a result of misconduct.”¹⁰⁹ Notably, the misconduct at issue need not have actually been carried out by the

¹⁰⁵ *Id.*; see also Sam Sharp, Note, *Whose Money is It Anyway? Why Dodd-Frank Mandatory Compensation Clawbacks Are Bad Public Policy*, 10 GEO. J.L. & PUB. POL'Y 321, 337–39 (2021) (collecting examples).

¹⁰⁶ Equilar, Inc., *2013 Clawback Policy Report* at 5 (2013), available at <http://info.equilar.com/rs/equilar/images/equilar-2013-clawbacks-policy-report>. [hereinafter 2013 Equilar Report].

¹⁰⁷ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat 745 (codified in scattered sections of 15 U.S.C.).

¹⁰⁸ The SEC has been slow to exercise its authority. Gretchen Morgenson, *Clawbacks? They're Still a Rare Breed*, N.Y. TIMES, Dec. 28, 2013, <http://www.nytimes.com/2013/12/29/business/clawbacks-theyre-still-a-rare-breed.html>.

¹⁰⁹ 15 U.S.C. § 7243(A) (2012).

CEO or the CFO; misconduct by *any* employee suffices to ground an action by the SEC provided the misconduct led to material noncompliance.¹¹⁰

Next came the Trouble Asset Relief Program (“TARP”) as part of the Emergency Economic Stabilization Act of 2008.¹¹¹ TARP’s clawback provisions differ substantially from those in SOX. Among other things, the provisions apply beyond the CEO and CFO.¹¹² Further, TARP mandated that directors adopt their own clawback provisions, but further required that those provisions be enforced under triggering circumstances. That said, those triggering conditions never occurred; no institution receiving TARP funds ever executed one of its clawback provisions.

Most recently, and of most interest for my purposes, Congress in 2010 passed the Dodd–Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).¹¹³ Dodd-Frank’s rules concerning clawback provisions have not yet been set by regulators¹¹⁴; nevertheless, the broad parameters bring together elements of past federal interventions with elements from clawback-provision policies that corporations have voluntarily adopted. Like SOX, Dodd-Frank allows for recovery because of an “accounting restatement due to the material noncompliance of the issuer”; however, Dodd-

¹¹⁰ S.E.C. v. Jenkins, 718 F. Supp. 2d 1070, 1075–76 (D. Ariz. 2010); *accord* S.E.C. v. Microtune, Inc., 783 F. Supp. 2d 867, 886 (N.D. Tex. 2011) *aff’d sub nom.* S.E.C. v. Bartek, 484 F. App’x 949 (5th Cir. 2012) (“[15 U.S.C. § 7243(A)] contains no *personal* wrongdoing element . . . that would require scienter or misconduct on behalf of the officers in order to trigger reimbursement.”).

¹¹¹ Emergency Economic Stabilization Act of 2008, P.L. 110-343 § 111, 122 Stat. 3765 (codified as amended at 12 U.S.C. § 5221).

¹¹² 12 U.S.C. § 5221(a)(3) (2012) (covering “senior executive officer[s] and any of the next 20 most highly-compensated employees”).

¹¹³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5301).

¹¹⁴ Indeed, regulations governing clawback provisions may be (merely) proposed this year. Joshua Miller & Andrea Rattner, *SEC Announces Open Meeting on Proposed Clawback Requirements under Dodd-Frank Act*, JDSUPRA BUS. ADVISOR, June 29, 2015, <http://www.jdsupra.com/legalnews/sec-announces-open-meeting-on-proposed-95808/>.

Frank does not require that the misreporting be the result of misconduct.¹¹⁵ Like TARP, Dodd-Frank covers individuals beyond the CEO and CFO.¹¹⁶ Where Dodd-Frank diverges from SOX and TARP's approach is that it incentivizes, but does not require, corporations to create their own clawback policies implementing the goals outlined in § 78j-4(b) and subsequent regulations.¹¹⁷ Thus, Dodd-Frank influences the corporate structure, creating a clawback provision that directors may(?) enforce to recoup incentive payments.

5.1.3 The Benefits and Problems of Clawback Provisions

As someone interested in the distribution of harm amongst members in a corporation, clawback provisions are an enticing mechanism. An executed clawback provision straightforwardly redistributes costs away from shareholders and towards officers. Equally promising, clawback provisions have the potential to distribute harm proportionate to culpability.

Nevertheless, there are several features that make the recent spate of clawback provisions unsuitable for my project of repairing the problem of corporate-criminal fines. First, clawback provisions under SOX, TARP, and Dodd-Frank are limited in scope with respect to the industries affected, the types of activities that trigger recoupment, and the individuals who are subject to clawback provisions. In particular, these clawback provisions only tangentially relate to the broader issues of corporate crime. In one respect, corporate crime is broader than extant federal regulation. Corporate crime is neither industry-specific nor limited to accounting and securities fraud. As illustration, clawback provisions under SOX, TARP, and Dodd-Frank would

¹¹⁵ See 15 U.S.C.A. § 78j-4 (2012).

¹¹⁶ 15 U.S.C. § 78j-4(b)(2) (allowing recovery from “any current or former executive officer of the issuer who received incentive-based compensation”).

¹¹⁷ It does so by prohibiting non-complying corporations access to national securities exchanges. So, “incentivize” might understate it. 15 U.S.C. § 78j-4(a).

not apply to any cases of corporate crime discussed in Chapter II.¹¹⁸ In a different respect, corporate crime is *narrower* than federal regulations. That is, neither “material noncompliance” nor “misconduct” by an employee will necessarily rise to the level of criminality, particularly if evaluated through the lens of the reforms articulated in Chapter II. Insofar as I am interested in approximating proportional distributions of harm—that is, distributions that are responsive to culpability—these brands of clawback are unappealing.

Third, and most fundamentally, the execution of clawback provisions is mired by profound incentive problems. Indeed, federal interventions can be seen as an effort to create clawback provisions that will actually be enforced. SOX left enforcement to the SEC. TARP made enforcement mandatory upon directors. The largest regulatory fight currently surrounding Dodd-Frank is whether the SEC should make the enforcing of clawback provisions mandatory.¹¹⁹ Irrespective of whether making clawbacks mandatory is good policy, it reflects the fact that clawback provisions are rarely exercised.

To understand the incentives problem, consider first why clawback provisions were uncommon when their adoption was an issue of private initiative—viz., in the absence of federal regulations pressuring their adoption. Directors have several reasons to resist having their powers “expanded” to allow them to hunt down disbursed payments. Directors work closely with a corporation’s executives. It is common practice for one or more members of the executive team to serve simultaneously as directors of the corporation. Inasmuch as officers have an outsized role in influencing who will be a direc-

¹¹⁸ Indeed, corporate-criminal liability may be less important in industries that have pervasive administrative oversight and regulation. See Vikramaditya Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L. Q. 95 (2004) (identifying conditions under which a corporate conviction is preferable to civil or regulatory alternatives). That said, a preference for corporate-criminal liability presumes systematic enforcement by civil regulators. In reality, as Buell notes, prosecutors today often use corporate-criminal liability as a quasi-substitute to compensate for regulatory laxity. Buell, *supra* note 67, at 93–96.

¹¹⁹ See Sharp, *supra* 106, at 336–41.

tor in the future, directors are often beholden to officers in ways that the legal regime does not capture. Directors might understandably (if cravenly) want to simply avoid a situation where they could be called upon to upset their relationship. Less cynically, even directors in support of clawback provisions likely recognized the first-mover dangers inherent in adopting them. In the competitive landscape of executive recruitment, shepherding through provisions to claw back executive compensation might diminish the corporation's prospects when it comes to recruiting top executive talent.¹²⁰

Meanwhile, shareholders have virtually no ability to create clawback provisions, or to ensure their enforcement. Absent a specific provision in either the certificate of incorporation or the corporation's bylaws, compensation policies fall within the exclusive purview of the board of directors.¹²¹ Amending the certificate of incorporation to include a clawback-provision policy is a non-starter for shareholders; any amendment must be proposed by the board of directors.¹²² Shareholders are able to amend the corporation's bylaws,¹²³ but the process is arduous. Moreover, shareholders have effectively no recourse if directors decline to enforce a clawback provision.¹²⁴ Removal of a director is possible, but challenging; removing multiple directors—enough to make a difference—can be exponentially harder.¹²⁵ And even if shareholders convinced a court that the directors' duties to the corporation required they exercise clawback provisions, by now most corporations have adopted Delaware's § 102(b)(7) or its jurisdictionally relevant

¹²⁰ *But see* 2013 Equilar Report, *supra* note 106, at 4 (finding limited evidence that “[t]he lack of a clawback does not lead to higher pay”).

¹²¹ DEL. CODE ANN. tit. 8, § 141(h) (2013) (“Unless otherwise restricted by the certificate of incorporation or bylaws, the board of directors shall have the authority to fix the compensation of directors.”).

¹²² DEL. CODE ANN. tit. 8, § 242 (2013).

¹²³ DEL. CODE ANN. tit. 8, § 109(a) (2013).

¹²⁴ Enforcement almost certainly could not be mandated in a bylaw, as it would likely interfere with the director's judgment to run the “business affairs of the corporation,” DEL. CODE ANN. tit. 8, § 141(a) (2013), which courts guard carefully.

¹²⁵ *See* DEL. CODE ANN. tit. 8, § 141(k).

counterpart, which immunizes directors from damages for breaching precisely the duty of care. In short, directors have little more incentives to exercise clawback provisions than they did to adopt them in the first place.

5.2 The Corporate-Crime Clawback

With an understanding of clawback provision on the table, turn now to my proposal to use corporate law to influence proportional distributions of harm resulting from a corporate-criminal fine.

The proposal has two key components. First, the State should hold directors jointly and severally personally liable for a fine imposed as a result of a corporate conviction. This means that the set of directors will be personally responsible for the entire fine.¹²⁶ Because liability would be joint and several, directors may negotiate amongst themselves how to divvy up the fine.

Second, the State should provide a series of model bylaws, which corporations may adopt at their discretion, that allow directors to distribute the costs of a criminal fine to other members of the corporation. Chief among them, a model bylaw will outline the conditions for adopting a **CORPORATE-CRIME CLAWBACK**—one that allow directors to shrink their liability with funds recouped through the corporate-crime clawback.

5.2.1 Joint and Several Liability for Directors

Consider each component in more detail. First, the State should hold directors joint and severally liable for corporate-criminal fines. The motivation here is not that directors are culpable per se, thereby deserving to pay the harm of a corporate fine.¹²⁷ Admittedly, it is antecedently more likely that the set of culpable members within a corporation will include directors than that it will include shareholders; distributing harm to directors makes it

¹²⁶ I consider tweaks to this requirement in the Objections section.

¹²⁷ *Contra* Sepinwall, *supra* note 81, at 435–44.

more likely than the status quo that some culpable parties will bear the harm of corporate punishment.

Regardless, the motivation behind holding directors personally liable is that directors are in the best position to negotiate a proportional distribution amongst corporate members. After all, recall that “the impact point is not necessary the final resting point, or incidence, of the burden.”¹²⁸ In this respect, this component of my proposal might be best described as creating a type of vicarious director liability. Under the status quo, unfortunately, directors lack both incentives and a clear pathway within the corporate structure to negotiate a proportional distribution. Making directors personally liable addresses the lack of incentives by establishing a new baseline distribution, one different from the default distribution that applies to all other corporate costs. Whereas in the status quo director inaction results in shareholders bearing the cost of a corporate fine, under my proposal director inaction means directors will be paying out of pocket.

5.2.2 Model Bylaws

The central innovation of my proposal is to provide directors, now having been incentivized to avoid the harm of corporate-criminal fines, with clear mechanisms through which they can distribute harm in a manner that approximates a proportional distribution. To that end, I advocate a model bylaw that allows the corporation to recoup incentive payments made to individuals who are culpable for the corporation’s misconduct.

This sort of clawback provision—the CORPORATE-CRIME CLAWBACK—should have the following features. First, the corporate-crime clawback applies to any member of the corporation, past or present, found to be culpable for the misconduct that produced a corporate conviction. This mirrors TARP and Dodd-Frank in one respect—it reaches beyond the CEO and CFO—but differs in that it grounds the basis for eligibility upon one’s

¹²⁸ Levinson, *supra* note 1, at 377.

culpability for corporate misconduct. Second, director liability is diminished in proportion to funds recouped from culpable members. Third, a model bylaw should specify procedures for investing and adjudicating culpability in a manner that protects against director exploitation. Key procedural protections should include: an opportunity for a hearing, clear standards of proof, third-party adjudication and/or review of culpability determinations, etc.¹²⁹

5.3 Evaluating the Proposal and Anticipating Objections

No policy proposal survives contact with the real world. That said, on the account provided here, I can venture answers to a few key questions and respond to a few probable objections.

5.3.1 Answering the Problem of Corporate Fines

First, does my proposal solve, or at least ameliorate, the problem of corporate-criminal fines? Absolutely. Consider first the penological benefits. My proposal would improve the deterrent effect of corporate-criminal fines. Recall that fines, even large fines, were unlikely to deter corporate misconduct. This is in large part because those running the firm are, to a large extent, personally unaffected by a corporate fine. My proposal creates a mechanism to impose those costs on directors, officers, and other high-level employees. In doing so, it disrupts the status quo dynamic that unites the interests of officers and directors against those of shareholders. Moreover, as members inside the corporation—and especially members with broad powers to monitor and direct corporate internal deliberations—directors may be both well-positioned and, thanks to my reforms, well incentivized to circumvent the epistemic obstacles that plague state enforcement.¹³⁰

¹²⁹ One could do worse than to look at the factors articulate by Judge Friendly. Henry J. Friendly, *Some Kind of Hearing*, 123 PENN. L. REV. 1267 (1975).

¹³⁰ See Levinson, *supra* note 1, at 379 (“Collective sanctions thus have the potential to leverage group solidarity by substituting more efficient intra-group moni-

A further virtue of the corporate-crime clawback is that it can improve deterrence even for corporate crimes where officers are not the obvious target for the brunt of a proportional distribution. I consider this an improvement on similar attempts to improve deterrence, and consistent with the fact that the personal culpability for corporate misconduct is idiosyncratic to the particular corporation and particular misconduct. Thus, my account is not committed to the view that officers are the only individuals culpable for misconduct, even if they are likely candidates.¹³¹

Separately, my proposal would ameliorate the cost-of-doing-business problem. Recall that the root of the problem is that corporate-criminal fines are indistinguishable from any other financial imposition on a corporation. That would not be true under my proposal. By creating an incentive structure that inoculates, or at least pushes the harm away from, shareholders and onto officers, corporate-criminal fines are readily distinguishable from civil monetary penalties. Accordingly, corporate-criminal fines would be unique from other financial sanctions to the extent they approximated a proportional distribution.

toring and control mechanisms for less efficient externally imposed sanctions aimed at individual wrongdoers.”).

¹³¹ Buell, *supra* note 6, at 529 (“It is easy to imagine serious harm produced by lower-level employees (such as telemarketing salespeople who defraud) without the knowledge of high managers, but explainable by institutional norms.”). *But see* Cindy R. Alexander & Mark A. Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1, 52 (1999) (“[O]ur evidence is consistent with the view that efforts of top management can and do affect corporate crime’s occurrence. Even where the culprits are lower-level employees, corporate crime does not appear to be a random event beyond top management’s control. The evidence is that incentives of top management affect conduct at all levels of the corporate hierarchy.”).

5.3.2 Distinguishing from Targeted Punishment

One could imagine a complaint that I have created a targeted punishment—one that targets directors—which I spent so long decrying. However, such a complaint misunderstands the nature of my proposal. There are several reasons why my proposal avoids the pitfalls of targeted punishment.

First, as previously explained, the directors are not facing harm because they are culpable *per se*. The harm of a corporate-criminal fine defaults to them because they are best in a position to institute a proportional distribution. Second, my proposal leaves ample room to decide the ultimate distribution of the harm according to the private negotiations of members. By virtue of joint and several liability, directors are in a position to negotiate amongst themselves who should bear the burden of the harm. Directors stand in relatively egalitarian relations to one another; *qua* director, no one director has any more power than another. Accordingly, we can feel confident that decisions about how to divvy up their personal liability—equally, according to an assessment of culpability, according to personal wealth, etc.—will be negotiated in a meaningful sense. Likewise, officers and high-ranking employees have powerful *de facto* authority within a corporation; they are well positioned to negotiate with directors the issue of personal culpability. Crucially, the class of shareholders and low-level employees—who are institutionally unable to effectively defend their interests, and whose number of culpable members is vanishingly small—are protected from bearing the harm of fines.¹³²

¹³² As an aside, I could imagine circumstances arising under which it might be desirable for shareholders to bear the cost of a fine. Accordingly, I would take seriously a bylaw that passes the cost from directors onto shareholders, provided that the decision met with majority approval of shareholders *after* conviction (i.e., there could be no bylaw giving directors blanket authority to pass on costs).

5.3.3 Other Objections

The magnitude of corporate-criminal fines makes my proposal infeasible. It is the rare board of directors that can personally afford \$1 billion in fines. However, recall that most fines are significantly more modest: the median fine over the past 15 years is \$125,000, while the average fine is \$7 million.¹³³ More to the point, we may not need gigantic fines, which we have seen are an unsuccessful solution to a problem of deterrence that my policy solves in a different way. On my proposal, smaller fines could nevertheless accomplish the desired effect. Indeed, per Guttel and Teichman, smaller fines may have the benefit of increasing the number of prosecutions.

If the State were to continue imposing large fines, a similar effect could be achieved by holding the directorship personally responsible for a portion of the fine. A sentencing court could calculate the board's responsibility according to a variety of factors. It could limit personal liability to earnings received as a director (or some multiplier thereof). It could hold directors responsible for a portion—either a percentage or an absolute amount—of the total fine. I am not in a position to announce the best implementation strategy, but I trust that sentencing courts could develop best practices.

Executives will neuter the policy by insisting on higher salaries instead of incentive-based payments. Likely they will try; there is some evidence to suggest that they are already doing so in response to federal regulations.¹³⁴

However, it is important to remember why employment contracts have incentive payments in the first place—to align employee's personal interests with the corporation's interests. That is, incentive-based payments already are not in the interests of employees when the same value could come in the

¹³³ For comparison, each clawback executed by the SEC, to the limited extent the SEC actually exercises its authority under SOX, often brings in over \$1 million.

¹³⁴ Claudia H. Deutsch, *A Brighter Spotlight, Yet the Pay Rises*, N.Y. TIMES, Apr. 6, 2008, <http://www.nytimes.com/2008/04/06/business/06comp.html> (noting that executives are insisting on compensation not tied to performance).

form of a salary. Directors are not likely to abandon entirely this well-settled mechanism merely because officers now dislike them more.

Indeed, my proposal has an advantage over other clawback provisions. In the ordinary case, directors insisting on incentive-based payment are acting in the best interest of the corporation. Under my proposal, directors now further have a personal financial interest to include incentive payments in contracts, particularly for the sorts of employees positioned to participate in, or otherwise produce corporate misconduct. Accordingly, I expect that officer pushback will be met with stiffer resistance under my proposal than under the evolving status quo.

Directors will avoid harm by scapegoating hapless employees. This I expect to be the thorniest aspect that a model bylaw would have to face. I cannot address the issue in every permutation, but I can say a few things.

Ideally, under my proposal directors would pursue in good faith two goals: to identify culpable individuals (and, if possible, some measure of their culpability), and to protect non-culpable individuals. However, insofar as directors benefit personally each time they find a culpable individual, they may be tempted to pay short shrift to the latter goal.

Any model bylaw should prioritize creating a fair process through which directors may exercise their powers to use the corporate-crime clawback. We can look to administrative law for guidance on what constitutes fair process; modifying *Matthews v. Eldridge* to the current setting would mean balancing the weight of the interest of the corporation in identifying culpable individuals, the weight of the interest in individuals not being wrongly found culpable, and the marginal benefit gained from additional process.¹³⁵ I favor strong procedural rights—in particular, the use of third-party investigations

¹³⁵ *Matthews v. Eldridge*, 424 U.S. 319 (1976). *Matthews* establishes the three-part modern doctrine for assessing how much process is due.

and neutral tribunals¹³⁶—for several reasons. First, individuals have much to lose from a corporate-crime clawback. Analogizing to SOX, the few SEC enforcement cases frequently claw back millions of dollars in incentive compensation—one case clawed back a staggering *\$468 million from a single individual*.¹³⁷ Second, as explained, directors have conflicting interests. Accordingly, while some processes may be too onerous to make corporate-crime clawbacks feasible, the burden should fall to directors to make this case.

More importantly, and process aside, I want to note two things in defense of my proposal with respect to scapegoating. First, although we should worry about scapegoating, it would be naïve to pretend that this problem is not already ongoing. The discussion of DocX in Chapter II tells a familiar story; a corporation avoids conviction in exchange for building the government’s case against an individual within the corporation. Or, consider Siemens—a corporation responsible for paying out \$1 billion in a global bribery scheme the existence of which insiders described as “common knowledge” inside the firm.¹³⁸ Although Siemens pleaded guilty, its punishment was greatly reduced for its “outstanding” help in developing cases against middle managers at the corporation. Garrett summarizes the outcome of these individual prosecutions as follows: “The Banker’s fears were thus realized. He was right that individual low-level employees like him would get prosecuted as scapegoats while those at the top would go free.”¹³⁹ At least under

¹³⁶ Among the conditions of an adequate hearing, according to Judge Friendly: an unbiased tribunal; notice of the accusation and its grounds; an opportunity for defense, including evidence, witnesses, and cross-examination; and a decision based exclusively on the evidence presented. *See generally* Friendly, *supra* note 129.

¹³⁷ SEC, *Former UnitedHealth Group CEO/Chairman Settles Stock Options Backdating Case for \$468 Million*, Dec. 6, 2007, available at <http://www.sec.gov/news/press/2007/2007-255.htm>.

¹³⁸ BRANDON GARRETT, *TO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 2* (2014).

¹³⁹ *Id.* at 9.

my proposal, the scapegoating might lead to financial disgorgement rather than imprisonment—a small consolation, but a consolation nonetheless.

But my proposal might offer greater consolation than this. Notice who is unlikely to experience the corporate-crime clawback: shareholders and low-level employees. Shareholders cannot have costs passed to them because they are not compensated by incentives (they are owners). And moreover, low-level employees are effectively immune from scapegoating: either they do not receive incentives, or any incentives they do receive are small enough to not be worth the effort to recover. In short, there is cautious room for optimism that adequate process could help to produce proportional distributions, bolstered by the low bar set by the status quo.

My proposal outsources the State's duty to carry out justice and punishment to private corporations. Yes and no. The State is still responsible for convicting the corporation and deciding the appropriate punishment; it then deputizes the corporation to carry out the punishment.

But justice is *already* being outsourced—that is the central insight to be gleaned from recognizing corporate fines as negotiable punishments. I am not advocating handing over penal authority to corporations; I am advocating that the State take seriously the decision it has already made to hand over this authority. If the State is going to hold corporations criminally responsible, it further has reason to insist on distributions of harm that work to the benefit both of the State and of non-culpable individuals. Put another way, my proposal aims to create space for better “private governments”¹⁴⁰—that is, an internal structure that protects non-culpable members who experience harm under the status quo in a manner that undermines the State’s penological interests. As Elizabeth Anderson has detailed,

¹⁴⁰ Elizabeth Anderson, Keynote Address as the Princeton Univ. Tanner Lectures on Human Values: Private Government 5 (Mar. 15, 2015). (“Private government is government that has arbitrary, unaccountable power over those it governs”); *id.* at 1–3 (identifying corporations as private governments).

corporations themselves are private governments—and particularly dictatorial ones at that.¹⁴¹ Introducing some semblance of quasi-judicial process, combined with protection for the most vulnerable corporate members, should provide something of a step away from corporate dictatorships.

6 CONCLUSION

Corporate-criminal fines are a ubiquitous form of punishment, yet they neither secure penological benefit to the State nor serve the interests of those innocent individuals who suffer harm in response. Although this problem of corporate-criminal fines is perceived as a failing of criminal law, there corporate law is the real culprit. By leaving the distribution of harm to the private negotiations of members, all the while creating corporate structure that silence most members' ability to participate in any such negotiations, corporate law undermines the very institution of criminal law that arose as its regulatory replacement. Only by restructuring the relationship of corporate and criminal law—say, through the corporate-clawback provisions described here—can we expect to make traction on the problem of corporate-criminal fines.

¹⁴¹ *See id.* at 1–3.

CHAPTER IV

PUNISHING CORPORATIONS WITH CORPORATE REFORM: THE UNFULFILLED AMBITION OF CORPORATE PROBATION

1 PREFACE

Plenty of ink has been spilled on the idea of corporate-governance reform—that is, reforming corporate law to fix any number of perceived fundamental problems with the corporation. To my knowledge, no has proposed leveraging the corporate-governance literature in a different way: to punish recidivist corporations.

Essentially, my proposal amounts to gathering together different reforms proposed in the corporate-governance literatures, sorting them according to the broad structural problem they aim to fix, and offering them as a sort of menu for sentencing courts to employ through probation against recidivist or pervasively criminal corporations. I refer to this coterie of off-the-rack corporate reforms, and thus my new proposed corporate punishments, as **FORCED RESTRUCTURING** or simply **RESTRUCTURING**. Using a particular corporate-governance reform as an illustration, I demonstrate one major value to restructuring: standard objections to corporate re-

form fall apart when the conversation switches from the ordinary commercial context to the domain of criminal law.

Restructuring is more than just a good idea—it fills a valuable gap in our practices of corporate punishments. To make this point, I scrutinize Chapter Eight of the Sentencing Guidelines, which covers the punishment of organizations. The adoption of Chapter Eight reflects an effort to broaden the array of punishments applicable to corporations; Chapter Eight creates a spectrum of corporate punishments that had not previously existed. At one extreme Chapter Eight makes possible existential punishment more severe than any fine; at the other extreme, the Guidelines created a probation system as a less severe form of punishment. However, I demonstrate that the Guidelines also planted the seeds for a new potential punishment. Restructuring is perfectly situated to fill this space, and thus to realize the full potential of the Sentencing Guidelines.

To support this claim, I look beyond the Guidelines to the broader justifications, and methods of implementation, for criminal punishment generally. Restructuring falls into the spectrum of corporate punishment in approximately the same place as do imprisonment and supervised release in the comparable spectrum of individual punishment. I discuss imprisonment and supervised release together because the two punishments are tightly intertwined with respect to method, function, and contribution to the State's pluralistic approach to justifying punishment. As it turns out, restructuring operates according to similar methods and serves the same penological interests to imprisonment and supervised release—methods and interest currently unrepresented by the panoply of corporate punishment.

Restructuring is not imprisonment for corporations; analogizing corporate and individual punishments requires taking seriously real differences between corporate and individual persons. That recognized, restructuring can and should serve as a spiritual successor of sorts, one that combines aspects of imprisonment and supervised release into a punishment specially suited for corporations.

Situating restructuring in our practices of punishment—both as a needed contribution to the spectrum of corporate punishments, and as a corporate counterpart to the methods and penological justifications served by imprisonment and supervised release—vindicates the idea of restructuring. Restructuring is not just an interesting idea, not just technically possible under current law, but in fact a necessary innovation that realizes the unmet potential of our current approach to corporate punishment.

2 USING CORPORATE RESTRUCTURING AS PUNISHMENT

2.1 The Contested Ground of Corporate Reform

There is an active literature on corporate reform, sometimes operating under the title of corporate-governance reform. Over the years, plenty of reforms have been developed in responses to myriad shortcomings in the corporate status quo.¹ These reforms have met with sustained resistance from the defenders of the status quo, arguing in essence that (A) commercial corporations are fine just the way they are,² or (B) reforming corporations to be something other than they are would only make matters worse.³

For the sake of simplifying discussion, I will limit my attention to one corporate reform in particular: adopting the GERMAN MODEL of director-

¹ See generally KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2007) (cataloguing proposed reforms); LAWRENCE E. MITCHELL, *PROGRESSIVE CORPORATE LAW: NEW PERSPECTIVES ON LAW, CULTURE, AND SOCIETY* (1995) (same); Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431 (2006) (providing a framework for evaluating proposal related to corporate social responsibility).

² The most famous articulation of this position comes in Milton Friedman's rejection of corporate social responsibility. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES. MAG., Sep. 13, 1970.

³ E.g., D. Gordon Smith, *Response: The Dystopian Potential of Corporate Law*, 57 EMORY L.J. 985 (2008) (responding to Kent Greenfield, *Debate: Saving the World with Corporate Law?*, 57 EMORY L.J. 947 (2007)).

ship composition, which I explain below. Although any particular proposal will have its unique benefits and criticisms—the German model has an ample literature surrounding it⁴—the dialectic between reformers and apologists is broadly similar across proposals. I am confident that most everything I say about the German model will apply to any other proposal to reform corporations or corporate governance.

What is the German model? Start with the particular problem motivating the call for this reform. Our current corporate framework overlooks the importance of the employee as a stakeholder in the success of a corporation. Under the AMERICAN MODEL,⁵ the legal structure of a corporation—that is, the background rules of corporate law that govern and shape a corporation and the interrelationships of its members—focuses nearly exclusively on three classes: shareholders, directors, and officers. Employees (other than officers) are virtually absent from the legal framework; they have “have no role, or almost no role, in the dominant contemporary narrative of corporate law.”⁶ Yet, of course, employees are a vital constituency within a corporation.⁷ The complaint is not just about a lack of representation for its

⁴ E.g., Florian Stamm, *A Comparative Study of Monitoring of Management in German and U.S. Corporations After Sarbanes-Oxley: Where Are the German Enrons, Worldcoms, and Tycoos?*, 32 GA. J. INT’L & COMP. L. 813 (2004); Marleen A. O’Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 936-65 (1993); Theodor Baums & Kenneth E. Scott, *Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany*, 53 AM. J. COMP. L. 31, 36 (2005); Thomas J. Andre, Jr., *Some Reflections on German Corporate Governance: A Glimpse at German Supervisory Boards*, 70 TUL. L. REV. 1819 (1996); Timothy L. Fort & Cindy A. Schipani (FNaa1), *Corporate Governance in A Global Environment: The Search for the Best of All Worlds*, 33 VAND. J. TRANSNAT’L L. 829 (2000).

⁵ I use as a proxy for the American model corporate law enacted by Delaware or recommended by the Model Business Corporate Act, which together form the primary contours of corporate law as it exists today in America.

⁶ Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 283 (1998).

⁷ Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250 (1999).

own sake.⁸ Critics have catalogued ways those running the corporation brutalize, humiliate, and otherwise denigrate employee's dignity.⁹ More generally, employees are ever subject to the potential of brutality¹⁰; the modern corporation leaves employees without representation and without recourse.

The German model incorporates employees into the legal framework and decisionmaking structure of a corporation by guaranteeing employees representation on a corporation's board of directors.¹¹ The German model gets its name from German corporate law, which requires, among other things, a very different directorship structure as compared to Anglo-American corporations. German corporations have two boards: a management board, consisting of executives responsible for managing the corporation's day-to-day affairs; and a supervisory board, which oversees and appoints members to the management board.¹² The supervisory board is com-

⁸ Cf. Eric W. Orts & Alan Strudler, *Putting a Stake in Stakeholder Theory*, 88 J. BUS. ETHICS 605 (2009) (noting confusion in the corporate-governance literature over whether stakeholder theories say more than that stakeholders should be recognized as having interests).

⁹ See, e.g., Elizabeth Anderson, *Recharting the Map of Social and Political Theory: Where is Government? Where is Conservatism?*, BleedingHeartLiberatians.com (June 12, 2012), available at <http://bleedingheartlibertarians.com/2012/06/recharting-the-map-of-social-and-political-theory-where-is-government-where-is-conservatism> (listing examples of employee abuse, and noting that "25% of American workers say their workplace is a dictatorship" (internal citations omitted)).

¹⁰ As List and Petit note, "the imbalances of power between corporate entities" creates a situation of "power at its most perfect: power that does not need to be actively exercised to have an effect." CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* 184 (2011).

¹¹ There are other reforms meant to address this problem. E.g., ROBERT A. DAHL, *A PREFACE TO ECONOMIC DEMOCRACY* (1986) (arguing for the moral necessity of workplace democracy as a means of, inter alia, protecting the interests of employees). Historically the United States has relied on a system of voluntary employee unions to counterbalance corporate power. It is beyond the scope of this project to discuss the various explanations for the decline in employee unions, and the subsequent effect on worker protections.

¹² Andre Jr., *supra* note 4, at 1283–85.

posed partially of shareholder representatives and partially of employee/labor representatives; members of the management board are prohibited from serving on the supervisory board.¹³ By comparison, formally under the American model the board of directors consists exclusively of shareholder representatives. Meanwhile, senior executives routinely serve simultaneously as directors. Absent a dramatic departure from corporate law's default rules, a corporation under the American model denies employees an avenue for electing directors.

2.2 Standard Objections to Reform

Again, there are a host of arguments for and against adopting the German model of corporate directorship that are specific to the problem diagnosed and the efficacy and rightness of the proposed solution. I want to abstract from the minutiae to introduce, without comment, what I take to be four standard objections to corporate reform, which I frame in terms of the German model but can be extended to most corporate reforms.

2.2.1 The Status Quo is the Best Possible Arrangement

Overwhelmingly, corporations have voted with their feet to adopt the American model over the German model. It may be possible for corporations to succeed under the German model—after all, there are prominent, successful German corporations. However, neither has the German model spread far past Germany.¹⁴ Instead, the American model has spread around the world.¹⁵

¹³ *Id.* at 1286.

¹⁴ David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325, 1392 (1998) (noting that there are “powerful constraints on opting out” of the German model for German corporations). In part German corporations are constrained by legal requirements surrounding board composition. *See, e.g.*, Act Concerning Co-Determination of Employees of May 4, 1976, Mitbestimmungsgesetz, 1976 BGB1. I 1153 (mandating equal representation

The widespread adoption of the American model, both by corporations and by countries developing their own corporate law, is strong circumstantial evidence that the American model is the best method available for arranging intra-corporate relationships. Inasmuch as commercial corporations overwhelmingly drive economic growth, we should encourage adoption of the most successful model of corporate activity. The State should not preclude the adoption of what we have good reasons to think are best practices with respect to corporate management.

2.2.2 Abandoning “Good Enough” is Risky and Costly

Suppose that the German model were better than the American model in the abstract. It does not follow that shifting from a “good enough” system to a questionably better one would be worth the costs.

The American model was not created overnight. It has evolved, across two centuries and across multiple jurisdictions, into its current form. Indeed, it still evolves to address new challenges in an ever-changing economy.¹⁶ The claim above is that the evolution of corporate law through “laboratories of democracy” likely produced the best possible corporate law, but it may be that this common-law style development produced only a “good enough” corporate law. Even still, this incremental, piecemeal testing and revising represents the best way to identify necessary reforms and implement them. Abandoning a centuries-old approach to testing and refining

between shareholders and employees for all corporations with more than 2000 employees).

¹⁵ See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

¹⁶ See, e.g., Phillip S. Crain et al., *Fee-Shifting and Forum Selection Clauses: Delaware Passes New Legislation*, NAT’L L. REV. (July 1, 2015), <http://www.natlawreview.com/article/fee-shifting-and-forum-selection-clauses-delaware-passes-new-legislation>.

corporate law guarantees massive transition costs while offering uncertain benefits at the risk of unpredictable consequences.

2.2.3 Corporate Reform Cannot Avoid the Race to the Bottom

Corporate reform, even if laudable, is fundamentally unenforceable. New Jersey's rise and fall as the locus of corporate activity is an elegant example of what happens when the State tries to reorganize corporations in a manner that does not serve the interests of those currently running the corporation. At the end of the nineteenth century, New Jersey became the center of the corporate universe by adopting reforms sought by corporations of the day. Approximately 95% of major corporations reincorporated in New Jersey within fifteen years after New Jersey began its reform movement.¹⁷ Yet today Delaware, not New Jersey, is the locus of corporate activity. Two reasons explain the change. First, Delaware mimicked New Jersey by adopting its corporate-law reforms.¹⁸ Second, and more importantly, New Jersey's then-governor Woodrow Wilson enacted several progressive reforms intended to rein in the power of corporations within his state.¹⁹ The corporations left New Jersey and never returned.

As corporations have gone international, so too has corporate law. As a result, the number of available jurisdictions too has grown—any number of which would love to become the next Delaware. Corporations facing an unattractive enough reform will simply relocate to a more hospitable jurisdiction. Indeed, we have already seen recently several examples of American firms expatriating to avoid taxes through “corporate inversion,” whereby a

¹⁷ Daniel Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 13 (2008) (citing Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 AM. J. LEGAL HIST. 160, 164 (1982)).

¹⁸ Smith, *supra* note 3, at 1006.

¹⁹ E. Merrick Dodd, Jr., *Statutory Developments in Business Corporation Law, 1888–1936*, 50 HARV. L. REV., 27, 43 & n.67 (1936).

corporation re-incorporates in another jurisdiction by having its assets purchased by another corporation.²⁰

2.2.4 Autonomy

The State should not be engaged in the practice of regulating how individuals choose to associate.²¹ Corporations, after all, are merely associations of individuals bound together through a complicated nexus of contracts.²² Regulate commercial activity through external rules and regulations—with respect to the German model, a bevy of laws and regulations already protect employees. But leave to individuals the freedom to organize the manner in which they pursue their commercial ends consistent with external rules.

This approach has been the hallmark of corporate regulation since its transition from the Corporations as Systems view to the Corporations as Persons view around the turn of the twentieth century—a transition that proved tremendously beneficial to society writ large. To that end, corporate law gives corporations freedom to organize as they see fit; most of corporate law consist of default rules that can be supplanted by corporate members as they wish. On this point, the American model does not *prevent* a corporation from putting employees (or their representatives) on the board. By the same token, neither should the State mandate the composition of corporate

²⁰ *E.g.*, Liz Hoffman, *The Tax Inversion Wave Keeps Rolling*, WALL ST. J., July 7, 2015, <http://www.wsj.com/articles/horizon-pharma-at-the-nexus-of-taxes-and-deals-1436296946>; Zachary Mider, *The Greatest Tax Story Ever Told*, BLOOMBERG, Dec. 18, 2014, <http://www.bloomberg.com/news/features/2014-12-18/i-hear-america-singing-never-pay-taxes-the-inversion-operetta> (describing the first-ever corporate inversion); *see generally* Hale E. Sheppard, *Fight or Flight of U.S.-Based Multinational Businesses: Analyzing the Causes for, Effects of, and Solutions to the Corporate Inversion Trend*, 23 NW. J. INT’L BUS. 551 (2003).

²¹ U.S. CONST. amend. I (“right to peaceably assemble”).

²² Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (coining the phrase that a corporation is merely a “nexus of contracts”).

boards. To force corporate to give employees representation deprives shareholders of their property interests, and more generally deprives corporate members their freedom to contract and arrange their private activity.

Some of these arguments are more compelling than others are; that said, for my part, the standard objections taken together pose a meaningful response to corporate reformers. I am not going to wade into the substantive debate over the German model—or any other corporate-law reform, for that matter. Rather, what I intend to demonstrate is that the force of the standard objections is drastically diminished when we shift the debate from the ordinary commercial context and into the rarefied world of corporate-criminal punishment.

2.3 Restructuring: Using Corporate Reforms as Punishment

Start with my proposal to use restructuring as punishment: Sentencing courts should impose, as a condition of corporate probation, structural reforms on a criminal corporation. In particular, courts should take corporate reforms developed by reformers, intended to be applied to the corporate community writ large, and force criminal corporations to adopt those reforms.

Sticking with the German model as an example, I will illustrate restructuring using British Petroleum (“BP”) as a test case. BP is a serial corporate offender. From 2005–10, BP garnered 97% of its industry’s worst violations available under OSHA regulations.²³ An overwhelming portion of these violations was for “plain indifference to employee safety and health,” while the rest were for “intentional disregard” of regulatory requirements and federal

²³ Pierre Thomas et al., *BP’s Dismal Safety Record*, ABC NEWS, May 27, 2010, <http://abcnews.go.com/WN/bps-dismal-safetyrecord/story?id=10763042>.

law.²⁴ The Deepwater Horizon spill was the second fatal disaster for the corporation in ten years; each incident claimed several lives and injured hundreds more.²⁵ A vast majority of the victims were employees or contractors of either BP or its subsidiaries.

It is no stretch to conclude from this data that BP's corporate structure and associated culture systematically disregards the safety of the environment and others—especially its own employees. Indeed, a federal commission said as much, stating the cause of the spill “can be traced to a series of identifiable mistakes made by BP [and its partners] that reveal such systematic failures in risk management that they place in doubt the safety culture of” all those involved.²⁶

Using restructuring as punishment, a court that found BP guilty of manslaughter after the Deepwater Horizon spill could have imposed the German model upon BP as a condition of its probation.²⁷ BP would have to guarantee that representatives of the corporation's employees constituted a meaningful portion of the board of directors, while removing insider directors from the board. This seems a fitting response not just to the conditions that gave rise to the specific crime itself, but further to the systemic corporate failing likely to cause similar tragedies in the future—viz., the fact that

²⁴ See OSHA, Federal Employer Rights and Responsibilities Following an OSHA Inspection, <https://www.osha.gov/Publications/fedrites.html> (discussing the spectrum of violations under 29 CFR § 1960).

²⁵ BRANDON GARRETT, *TO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 150 (2014).

²⁶ National Commission on the BP Deepwater Horizon Oil Spill & Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling* at vii (2001), available at <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>.

²⁷ See Dep't. of Justice, BP Exploration and Production Inc. Pleads Guilty, Is Sentenced to Pay Record \$4 Billion for Crimes Surrounding Deepwater Horizon Incident (Jan. 29, 2013), available at <http://www.justice.gov/opa/pr/bp-exploration-and-production-inc-pleads-guilty-sentenced-pay-record-4-billion-crimes> (confirming BP's guilty plea to eleven counts of felony manslaughter).

BP routinely fails to give adequate consideration to the wellbeing and safety of its employees. BP's German model restructuring promises to remedy this problem by giving employees a meaningful voice within the corporation.

The German model is an example of how restructuring should be applied to BP. In general, the German model is well-suited for corporations whose criminal misconduct reflects, or derives from, inadequate attention to employee's interests.

That said, my proposal more broadly is to provide courts with a range of corporate reforms suitable for addressing different sorts of systematic shortcomings in criminal corporations. Providing such a menu of corporate reforms would allow sentencing courts to assign pre-designed conditions of reform based on the nature of the offender's misconduct.

2.4 Standard Objections to Corporate Reform Fall Away in the Context of Criminal Punishment

The standard objections to corporate reform, to the extent they have traction in the ordinary commercial context, slip away in the face of my restructuring proposal. This is because the standard objections are broadly motivated by concerns that are inapplicable to criminal punishment. Indeed, some arguments that previously militated against reform in the broader commercial context plausibly support using restructuring as punishment.

2.4.1 The Status Quo is the Best Possible Arrangement

The American model may well be the most efficient method for organizing corporate activity towards productive ends. However, efficiency and productivity concerns are simply not germane when discussing punishment.²⁸ The consideration of whether and how to punish is not constrained

²⁸ Of course, some have argued for making efficiency a central virtue of our criminal practice. See Richard Posner, *Optimal Sentences for White-Collar Criminals*,

by efficiency; as Chapter III demonstrates, punishment spills over harm in ways that can be tremendously inefficient. Moreover, corporate punishment especially should not embrace efficiency as a relevant consideration. As we saw, this sort of pricing out the costs of criminal activity contributes to the sentiment that criminal punishment is an ordinary cost of doing business. So to point out that a shift towards the German model would render the punished corporation less efficient or productive is not an argument against using the forced adoption of the German model as punishment.

Indeed, forced reforms that decrease a corporation's profitability may actually be desirable insofar as they constitute one way in which the corporation experiences punishment. Far from productivity arguments being a strike against restructuring, in the context of criminal punishment they count as a potential argument in favor of forced reform—or, at least, a confirmation that restructuring constitutes corporate punishment.

2.4.2 Transition Costs of Abandoning “Good Enough”

This criticism fails to attach to the extent that it focuses on the wrong scope. In the ordinary reform context, we are worried about the effect of systemic changes to corporate law. By contrast, in the criminal context, reforms are being imposed only against a single corporation.

Worries about transition costs and unintended consequences are less salient when talking about one corporation rather than the entire economy.²⁹ Moreover, courts would not be restructuring just any corporation. At issue is a corporation whose pervasive, systematic, or repetitive misconduct indicates an internal structure so corrupted as to, essentially, be either unable or

17 AM. CRIM. L. REV. 409, 415 (1980). Regardless, that is decidedly not our practice, nor is it obviously a desirable change.

²⁹ Indeed, this approach may have the incidental benefit of creating pilot cases from which to observe the effect of alternative corporate governance structures.

unwilling to prevent criminality. Criminality counsels in favor of punishment; systematic criminality counsels in favor of drastic punishment.

Finally, as explained above, concerns about harm to the corporation are misplaced to the extent we are interested in criminal punishment. Harm to the defendant is an essential component to criminal punishment; pointing out that a corrupted corporation will experience harm under restructuring is just a way of restating that the corporation is being punished.

2.4.3 Race to the Bottom

As Chapter I noticed, one benefit to regulating corporations through criminal law is that criminal regulation is immune to race-to-the-bottom concerns in a way that corporate law is not. Whereas a corporation can reincorporate in a new jurisdiction in order to avoid changes to corporate-law reform, relocation is unlikely to help a convicted corporation escape criminal punishment.

Indeed, in this respect the globalization of corporate commercial activity has actually made it harder for corporations to escape criminal penalties.³⁰ Major federal convictions over the past decade go beyond American corporations to include South Korean technology companies, European banks, and Japanese pharmaceutical companies. Where globalization undermines the State's ability to enforce the law through corporate reform, globalization actually aids the State in enforcing regulation through criminal law.

2.4.4 Autonomy

Arguments for corporate autonomy might actually be stronger in the criminal context than in the ordinary commercial context, for reasons I hint-

³⁰ See Rashna Bhojwani, *Deterring Global Bribery: Where Public And Private Enforcement Collide*, 112 COLUM. L. REV. 66, 68 (2012) (describing the impact of the Foreign Corrupt Practices Act); accord GARRETT, *supra* note 25, at 239–40.

ed at in Chapter III. Ordinarily, corporate autonomy is not sacrosanct; individuals may have broad rights of association, but that does not mean that they get the benefits of the corporate form no matter the form they take. Moreover, corporations are not merely a nexus of contracts; they are a nexus of contracts registered with the State in order to secure benefits—limited liability, freestanding constitutional protections, etc.—that cannot be generated out of thin air through private agreement.³¹

All that said, the institution of criminal law is premised on a view that a corporation is a single agent. Piercing that conception at least creates a tension that I sought to avoid in the context of criminal fines. Concerns about corporate autonomy are surmountable. However, I think it best to delay the discussion until the Coda.

In summary, whatever the arguments against corporate reform, they are made significantly weaker when conversation switches from the ordinary commercial context to the context of criminal punishment. Indeed, many arguments that would count against corporate reform in the ordinary context actually count in favor of using forced corporate reform as punishment.

In the next section I argue that courts could impose restructuring, right now, under the guise of corporate probation. In other words, there already exists a legal basis for courts to impose restructuring. The subsequent section takes a broader view of our practices of punishment to argue that restructuring is more than just a good idea with a plausible legal basis; it is a necessary complement to our extant practices of corporate punishment whose adoption would realize the full potential of the Guidelines.

³¹ Stefen J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327 (2014) (“[L]imited liability is the biggest obstacle in the way of nexus-of-contracts theory gaining unquestioned dominance.” (citing Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 82, 83 (1991))).

3 THE EXISTING LEGAL BASIS FOR RESTRUCTURING

Corporate probation as it is enumerated in the U.S. Sentencing Guidelines provides an adequate legal hook for courts to begin imposing restructuring today. Strictly speaking, there is no need for a pre-existing legal basis to consider such a policy. Nevertheless, I show that such a basis already exists because I think it helps to see that this sort of punishment is anticipated, and because it lays the groundwork for thinking about the role that restructuring plays as punishment. In particular, a robust system of restructuring fulfills the potential of corporate probation as it exists in the Guidelines.

3.1 A History of the Expansion of Methods of Corporate Punishment

For most of the time that corporations have been eligible for criminal liability, the only available punishment was a criminal fine.³² This changed in 1991 when the United States Sentencing Commission promulgated Chapter Eight of the Sentencing Guidelines, which governs the sentencing of organizations.³³ Although today the Guidelines are merely advisory,³⁴ they nevertheless still carry great weight in providing the basis for most punishments imposed against corporations.³⁵

³² *E.g.*, *United States v. A&P Trucking Co.*, 358 U.S. 121, 127 (1958) (“As in the case of corporations, the conviction of [a partnership] can lead *only* to a fine levied on the firm’s assets.”) (emphasis added); *see also* *N.Y. Cent. & Hudson River Ry. v. United States*, 212 U.S. 481, 495 (1909) (“We see no valid objection in law, and every reason in public policy, why the corporation . . . shall be held *punishable by fine* because of the knowledge and intent of its agents to whom it has entrusted authority to act...”) (emphasis added); *cf.* *State v. Ice & Fuel Co.*, 81 S.E. 737, 738 (N.C. 1914) (It is true that, when the statute imposes a penalty of a fine or imprisonment, only the fine can be placed upon a corporation.”).

³³ *See* U.S. Sentencing Guidelines Manual app. C, amd. 421 (U.S. Sentencing Comm’n 2003) (adopting “Chapter Eight (Sentencing of Organizations)” effective Nov. 1, 1991) [hereinafter U.S.S.G.].

³⁴ *See* *United States v. Booker*, 542 U.S. 220 (2005).

³⁵ Most, but not all. For example, the Guidelines do not apply to environmental crimes with respect to fines, but do apply with respect to restitution. U.S.S.G.

To be sure, the Guidelines still encourage using fines as punishment. The vast majority of Chapter Eight is dedicated to calculating the appropriate fine to impose based on a broad array of considerations.³⁶ However, and more importantly for my purposes, Chapter Eight also expanded the spectrum of punishments applicable to corporations and other organizations.³⁷

3.2 Forced Termination: An Extreme, Absentee Punishment

At one extreme, the Guidelines empowered a court to terminate a corporation. Although technically accomplished through a specially calculated fine, the Guidelines permit a sentencing court to “to divest [an] organization of all its net assets.”³⁸ This punishment is severe, and as such the Guidelines reserves its usage to only an organization that “operated primarily for a criminal purpose or primarily by criminal means.”³⁹ Courts are extremely wary to impose this existential fine; to my knowledge, forced termination under the terms of Chapter Eight has been used only once.⁴⁰

Worth noting is an analogue to forced termination, which exists just outside of the criminal-justice system—namely, within regulatory agencies under the guise of “collateral consequences” to conviction. Calling these sanctions collateral consequences should not change the fact that they are

§§ 8C2.1 cmt. n.2 (fines); 8A1.1 (restitution); *see generally* U.S.S.G. app. B (collecting sentencing statutes, some of which supersede the Guidelines).

³⁶ U.S.S.G. §§ 8C1.1–8C4.11.

³⁷ Chapter Eight also establishes a requirement that a conviction organization pay restitution or otherwise make amends (which may include community service). U.S.S.G. §§ 8B1.1–4. However, the Guidelines makes explicit that “[t]he resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.” U.S.S.G. ch. 8, pt. B, introductory cmt. This accords with common sense: a thief is not punished by being forced to return that which he stole.

³⁸ U.S.S.G. § 8C1.1.

³⁹ *Id.*

⁴⁰ *See* United States v. Najjar, 300 F.3d 466, 486 (4th Cir. 2002).

clearly punishment, and should be considered as such.⁴¹ At issue are sanctions imposed by the federal government directly in response to a federal criminal conviction. In particular, regulators in various industries have the discretion—and in some cases are required—to disbar or suspend the organization’s license to do business in the regulated industry or with the federal government.⁴² For example, organizations convicted of any of a broad range of felonies are automatically prohibited from participating in any federal healthcare program for a minimum of three years.⁴³ The EPA takes a similar approach to mandatory debarment, as do other statutes.⁴⁴ Mandatory-suspension regulations exist in the accounting, securities, and banking sectors; meanwhile, regulators have authority to impose a much broader array of similar sanctions.⁴⁵ Likewise, the federal government automatically

⁴¹ See Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 670–80 (2008) (noting that distinctions between direct consequences—i.e., punishments—and collateral consequences are often arbitrary and more a matter of historical convention than logic).

⁴² For my part, I think these sanctions should be expressly treated as punishment by putting them under the auspices of a sentencing court for a host of reasons concerning institutional competence, agency capture, and expressive clarity.

⁴³ 42 U.S.C. §1320a-7(a) (2012) (mandatory-exclusion provision); 42 C.F.R. § 1001.101 (identifying scope of mandatory-exclusion provision).

⁴⁴ See, e.g., U.S. Gov. Accountability Office, *SUSPENSION AND DEBARMENT: SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED*, Aug. 2011, *available at* <http://www.gao.gov/assets/590/585277.pdf> (collecting statutes); Project on Gov. Oversight, *FEDERAL CONTRACTOR MISCONDUCT: FAILURES OF THE SUSPENSION AND DEBARMENT SYSTEM*, May 10, 2002, *available at* <http://www.pogo.org/our-work/reports/2002/co-fcm-20020510.html> (same).

⁴⁵ Securities Act of 1933, 15 U.S.C. § 77t(b) (2000); Securities Exchange Act of 1934, 15 U.S.C. § 78o(b) (2000); Federal Deposit Insurance Act, 12 U.S.C. § 1818(a)(2) (2000); 17 C.F.R. § 201.102(e)(2) (2008) (prohibiting convicted accounting firms from advising publicly traded companies).

excludes from participating as a federal contractor nearly any corporation convicted of a crime.⁴⁶

At least on paper, regulatory suspension is a less severe sanction than termination: the corporation could enter a new business, or wait out the period of suspension. In reality, it is widely understood to be functionally equivalent to forced termination—so much so that regulatory suspension is often referred to colloquially as a “corporate death penalty.”⁴⁷ Why this is the case plays an important role in explaining the impossibility of corporate imprisonment, which I defer discussing until Section 4.4.

Like forced termination, regulatory suspension is rarely implemented. Indeed, notwithstanding its ostensibly mandatory character, regulators have recently found ways to circumvent its application. For example, a spate of guilty pleas secured against major banks in 2015 came only after the SEC prearranged to grant the banks waivers from regulatory suspension.⁴⁸ Nevertheless, the combination of the Guidelines and a raft of federal regulations create at least a (faint) specter of existential punishment for corporations.

3.3 Corporate Probation: A Curious Punishment

Chapter Eight did more than create an existential alternative to fines. It also created corporate probation, which can be less severe than a fine. Whether there is more to corporate probation is the focus of this section.

⁴⁶ 48 C.F.R. § 9.406-2(a) (debarment); 48 C.F.R. § 9.406-1(a) (identifying conditions under which to grant excusal from debarment); *see also* 33 U.S.C. § 1368(a) (mandating debarment upon a conviction under § 1319(c)).

⁴⁷ *E.g.*, Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in *PROSECUTORS IN THE BOARDROOM* 179 (2011); Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine through the Corporate Death Penalty*, 47 *ARIZ. L. REV.* 933, 949–50 (2005).

⁴⁸ Michael Corkery & Ben Protess, *Rigging of Foreign Exchange Market Makes Felons of Top Banks*, *N.Y. TIMES: DEALBOOK*, May 20, 2015, <http://www.nytimes.com/2015/05/21/business/dealbook/5-big-banks-to-pay-billions-and-plead-guilty-in-currency-and-interest-rate-cases.html>.

Corporate probation is an odd and underexplored punishment. If it were indistinguishable in character from the federal probation applicable to individuals,⁴⁹ then I would have scant ground to defend my claim that forced restructuring is already within the power of courts. However, that is not the case. Although corporate probation superficially resembles probation applicable to individuals, upon closer inspection it draws inspiration from two separate punishments. To appreciate this oddity requires detouring slightly to discuss two forms of punishment applicable to individuals: (ordinary) probation and supervised release.

3.3.1 Ordinary Probation vs. Supervised Release

The federal system has a system of probation that applies to individuals (and, ostensibly, organizations),⁵⁰ which allows for the imposition of probation, in lieu of imprisonment, on offenders who commit either a misdemeanor or a low-level felony.⁵¹ For the sake of clarity, I will refer to this punishment as either **PROBATION** or **ORDINARY PROBATION**; this is in distinction to **CORPORATE PROBATION**, which I use to refer to the specific punishment detailed in Chapter Eight of the Guidelines. Ordinary probation represents a kinder alternative to the harsh punishment of imprisonment, albeit one that operates under the threat of imprisonment.⁵²

Separately, the federal system has a system of supervised release, which is an analogue to the system of parole once used by the federal government and still used by many states.⁵³ “Supervised release, in contrast to proba-

⁴⁹ See 18 U.S.C. § 3561 (2012).

⁵⁰ 18 U.S.C. § 3561.

⁵¹ 18 U.S.C. § 3561(a).

⁵² See 18 U.S.C. §§ 3565(a)(2), (b) (identifying conditions under which a court may or must resentence an individual who violates the terms of probation).

⁵³ 18 U.S.C. § 3583. Supervised release is not parole; there is no such thing as federal parole (at least not applicable to crimes committed after Nov. 1, 1987). The regimes are not-coextensive, but the differences are not germane to this project.

tion, is not a punishment in lieu of incarceration.”⁵⁴ Rather, supervised release is imposed at sentencing to be served immediately upon completion of a term of imprisonment.⁵⁵ Thus, supervised release is not a standalone punishment; it is derivative of imprisonment. By that I mean that a court cannot impose only a term of supervised release—supervised release must follow some period of imprisonment.⁵⁶

Although it can impose many of the same conditions as probation imposes, supervised release is a much harsher and more invasive punishment. First, the imposition of supervised release presupposes an individual’s former incarceration, thus signaling a more serious degree of criminality. Second, whereas violations of probation can trigger resentencing—i.e., imprisonment—those on supervised release have already served their term of imprisonment. Nevertheless, §3583 allows courts to sentence violators to serve the rest of their term either in prison or under house arrest—*up to five years*, depending on the nature of the original crime (not the nature of the violation of supervised release).⁵⁷

Third, supervised release is more expansive in its invasion into individual autonomy. Probation under federal law consists of an enumerated set of conditions, some of which a court must impose and others that a court has

⁵⁴ United States v. Granderson, 511 U.S. 39, 50 (1994).

⁵⁵ 18 U.S.C. § 3583. While supervised release is not mandatory—judges have discretion not to impose a term of supervised release—“more than 95 percent of people in the federal system sentenced to a term of imprisonment were also sentenced to a term of supervised release.” Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Supervised Release*, 18 BERKLEY J. CRIM. L. 180, 182 (2013) (citing U.S. SENTENCING COMM’N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 50 (2010), *available at* http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2012/2_Federal_Offenders_Sentenced_to_Supervised_Release.pdf).

⁵⁶ 18 U.S.C. § 3583(a); United States v. Johnson, 529 U.S. 53, 56–58 (2000) (discussing the relationship between imprisonment and supervised release).

⁵⁷ 18 U.S.C. § 3583(e)(3)–(4).

limited discretion to impose.⁵⁸ By contrast, 18 U.S.C. § 3583 lists mandatory and recommended conditions of supervised release. However, it further empowers courts to fashion their own conditions of supervised release, provided only that a bespoke condition is “reasonably related” to the penological objectives and “involves no greater deprivation of liberty than is reasonably necessary.”⁵⁹ Fueled partially by a lenient standard of review, courts have interpreted this power extremely capaciously. In fact, in light of examples discussed in Section 4.2.1, I would argue that courts effectively disregard the “deprivation of liberty” requirement.

Put simply, although superficially similar, probation and supervised release are drastically different forms of criminal punishment that occupy starkly different spaces in our practices of punishment.

3.3.2 Corporate Probation as an Amalgamation of Ordinary Probation and Supervised Release

Corporate probation is an odd amalgam of probation and supervised release, able to act as either depending on the circumstances. For example, corporate probation must be imposed in cases where no fine is employed.⁶⁰ In this respect, corporate probation mirrors ordinary probation under § 3561—that is, it is a milder punishment issued in lieu of the harsher punishment (a fine for corporations, imprisonment for individuals). And corporate probation includes most of the same mandatory and voluntary conditions of probation as does ordinary probation—chiefly, prohibiting further criminal activity during probation, notifying victims of criminality, and performing community service or other remedial actions.⁶¹

⁵⁸ 18 U.S.C. §§ 3563(a) (mandatory conditions); (b) (discretionary conditions).

⁵⁹ 18 U.S.C. § 3583(d)(1)–(2).

⁶⁰ U.S.S.G. 8D1.1(a)(7).

⁶¹ Compare U.S.S.G. §8D1.3(1)–(2) (conditions of corporate probation), *with* 18 U.S.C. § 3563(a) (conditions of ordinary probation).

On the other hand, corporate probation can be used in a manner similar to supervised release. For one, corporate probation can be imposed in addition to, instead of merely in lieu of, harsher punishment. Of particular interest to this project, the Guidelines require that corporate probation be imposed if it “is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct.”⁶²

Also like supervised release, a court has authority to impose any conditions of corporate probation “that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing.”⁶³ In practice, and again similar to supervised release, this power has been interpreted capaciously. As a result, a court’s “opportunity to remedy corporate misbehavior through [conditions] of probation is almost endless.”⁶⁴

3.4 Why a Legal Basis for Restructuring under the Guidelines is Insufficient to Establish the Practice

To the extent that corporate probation provides a legal hook for massive corporate reform, my policy of restructuring could fit soundly here. However, although courts frequently impose corporate probation,⁶⁵ vanishingly few courts take advantage of the broad license the Guidelines afford them. But if courts already have the power to restructure recidivist or otherwise structurally corrupted corporations, then why aren’t they doing so? After all, the Guidelines themselves identify as an overarching priority of

⁶² U.S.S.G. 8D1.1(a)(6).

⁶³ U.S.S.G. 8D1.3(c).

⁶⁴ Pamela H. Bucy, *Corporate Criminal Liability: When Does It Make Sense?*, 46 AM. CRIM. L. REV. 1437, 1439 (2009).

⁶⁵ Sixty-eight percent of organizations sentenced from 1999–2012 received probation. Data compiled by author using information provided by the United States Sentencing Commission, *available at* http://www.ussc.gov/Research_and_Statistics/index.cfm.

organizational sentencing “to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct.”⁶⁶

Three reasons explain this reticence. First, courts lack guidance. The Guidelines are not entirely silent; they encourage courts to impose a condition of probation requiring the corporation to adopt an “effective compliance program.”⁶⁷ The Guidelines even provide some detail as to what compliance programs should consist of.⁶⁸ Beyond this, however, courts are on their own should they feel that some other form of restructuring is appropriate. To be clear, internal compliance programs may well be valuable. However, internal compliance programs are neither necessary nor sufficient to address structural inadequacies within every corporation. There is no one-size-fits-all solution to reform a corrupted institution, which is the point behind introducing a menu of reforms.

Second, and related to the first point, courts lack the competence to design structural reforms on their own. Judges have many skills, but managerial expertise in the commercial sector is not one of them.⁶⁹ In fairness, it can be difficult in its own right to identify the nature of the structural obstruction that is producing criminality. Designing a bespoke solution to the correct problem identified would likely be exponentially more complicated.

⁶⁶ U.S.S.G. ch. 8, introductory cmt.

⁶⁷ U.S.S.G. § 8D1.4. Additionally, the existence of a compliance program can serve as grounds to decrease the fine levied against a U.S.S.G. § 8C2.5(f).

⁶⁸ *See* U.S.S.G. § 8B2.1.

⁶⁹ The same holds for prosecutors, yet this has not stopped them from implementing reforms on the fly for corporations and even whole industries. *See generally* PROSECUTORS IN THE BOARD ROOM (Barkow & Barkow eds., 2011). While I applaud the initiative, I agree with most critiques that prosecutors are ill suited to the task. The reforms articulated here could just as easily be appropriated by prosecutors should they continue to use prosecution agreements. *Cf.* Ramirez, *supra* note 47, at 975 (noting that prosecution agreements tend to include “similar terms that might be included in a corporate criminal sentence”).

These challenges cry out for restructuring as I have described it. A menu of corporate-governance reforms would address both problems. First, it would assist courts in identifying the broad sort of structural problem at issue, and would identify a reform most fitting to address said problem. Second, it would provide guidance to courts as to how to implement a forced restructuring of a corporation.

However, there is a third reason why courts might decline the invitation I suggest the Guidelines extend to them. Likely there is skepticism that the Guidelines really intend for corporate probation to be used in the aggressive manner that I am suggesting. To be sure, elements of supervised release appear in corporate probation. But other evidence points against a broad reading of the Guidelines. For example, although the Guidelines empower courts to use corporate probation as a means of “providing a structural foundation from which an organization may self-police its own conduct,”⁷⁰ the Guidelines seem to expect that an effect compliance program alone is sufficient to meet the challenge. Court thus might understandably worry that I am using fragments to justify the equivalent of severe conditions of supervised release. And, to be sure, restructuring a corporation will usually cause a severe intrusion. By contrast, while supervised release *can* be severe, it need not be and often is not.

4 RESTRUCTURING IS A NECESSARY COMPONENT OF CORPORATE-CRIMINAL PUNISHMENT

4.1 Locating Restructuring among Corporate Punishments

Whereas the first objections to restructuring under the Guidelines concerned matters of feasibility and implementation, this final objection narrows in on the suitability of restructuring. Addressing it requires shifting our gaze from the legal framework of the Guidelines themselves and towards our

⁷⁰ U.S.S.G. ch. 8, introductory cmt.

broader practices of punishment. I turn now to consider where restructuring falls within the spectrum of other corporate punishments, and, by analogizing to individual punishments, how restructuring serves as a necessary component in our pluralistic approach to justifying criminal punishment.

4.1.1 Restructuring as Punishment

What makes restructuring punishment? After all, reformers evidently don't think of themselves as punishing corporations. That said, many actions not considered punishment in the ordinary course of things become punishment when saddled with the appropriate social meaning.⁷¹ Certainly the forced restructuring of a single corporation by a court in response to a corporate conviction connotes a different message than does the adoption of global reforms applicable to all corporations in the ordinary commercial context. What we are really asking is whether restructuring can constitute hard treatment, the kind that reflects criminal condemnation.⁷²

Restructuring has all the hallmarks of the kind of hard treatment that could serve as the basis for the State's expression of criminal condemnation. Restructuring aims to reform a corporation. In doing so, the State may—in fact, likely will—frustrate the corporation's interests. For example, a BP that is more protective of its employees may well be a significantly less profitable BP. Forced restructuring of the corporation will cause it to experience harm in the form of compliance costs, lost lines of business, new initiatives enacted by previously voiceless stakeholders, etc. Meanwhile, the nature of the hard treatment is distinctly corporate. That is, to the extent that restructuring aims to reform a corrupted structure, the message being conveyed is

⁷¹ See Dan M. Kahan, *The Secret Ambition of Deterrence*, 133 HARV. L. REV. 413, 420 (1999).

⁷² Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965).

that the misconduct is not reducible to any individual; there is something separate from the members causing the problem.

4.1.2 A Spectrum of Corporate Punishments

Where does restructuring fit on the spectrum of corporate punishment? Consider first such a spectrum as it exists without restructuring. At one end is ordinary probation—or more accurately, corporate probation used in a manner tantamount to ordinary probation. Like probation for individuals, ordinary corporate probation is a mild sanction, one given in lieu of more severe punishment. The impositions can be relatively minor: the primary purpose for using corporate probation as ordinary probation is to ensure a convicted corporation makes outstanding restitution payments and satisfies other remedial obligations.⁷³

At the other end of the spectrum is termination, either by court order or (effectively) by regulatory suspension. Like the death penalty to which it is analogized, forced termination is the ultimate sanction for corporations: it is irreversible and uniquely harsh in its effects. To be sure, we should not take the metaphor too seriously: the execution of an individual person is unquestionably a more serious affair than is the termination of a corporation. Among other things, those individuals previously constituting a terminated corporation are still around and free to join another enterprise; in theory, they could even attempt to recreate the corporation just terminated.⁷⁴ But forced termination need not reach the level of capital punishment to count as especially severe punishment. Arthur Anderson is the paradigmatic example: the firm's termination—not because of its overturned conviction,

⁷³ See U.S.S.G. § 8D1.3(2); § 8D1.1(a)(1) (requiring probation if “necessary to secure payment of restitution, enforce a remedial order, or ensure completion of community service” (internal citations omitted)).

⁷⁴ I suspect that this is more difficult than it sounds, and even the formation of a doppelgänger would still come at a cost great enough to consider forced termination an extreme sanction.

but rather because of its SEC debarment⁷⁵—cost 85,000 jobs, cancelled a broad swath of contracts and business relationships with a host of third parties, and reorganized the collection of major domestic accounting firms.⁷⁶ The severity of forced termination is reflected in the strict conditions for its application,⁷⁷ under which courts have found only one corporation to terminate under the Guidelines in the past 25 years.⁷⁸

In between ordinary probation and forced termination are criminal fines, the traditional and still paradigmatic form of corporate punishment. By definition, any fine less than the amount calculated to terminate a corporation will be less severe. On the other hand, fines are worse punishment than ordinary corporate probation as signaled, among other things, by the fact that corporate probation must be imposed in the absence of a fine, but not vice versa.⁷⁹

Where would restructuring fit on this spectrum? I consider restructuring to be more severe a punishment than a fine but less severe than termination. First, restructuring is a more invasive punishment than a fine; it reworks a corporate structure that ordinary and historically is predominantly within the purview of members to design. By contrast, as Chapter III articulates at length, a fine takes a corporation as a single agent, leaving preserved the underlying structure voluntarily entered into by the members. Second,

⁷⁵ GARRETT, *supra* note 25, at 150.

⁷⁶ The aftermath of Arthur Andersen’s prosecution also probably influenced the government decision to enter into a massive deferred-prosecution agreement with KPMG, one of the remaining major accounting firms, in 2005.

⁷⁷ U.S.S.G. 8C1.1 (applying to organizations “operated primarily for a criminal purpose or primarily by criminal means”). This is not to endorse the Guideline’s standard. For my part, I think it is too restrictive; the State should be more willing to terminate corporations for the same reasons that termination, if an analogue to capital punishment, is incomparably less severe. That point aside, the absence of corporation terminations reinforces the argument in Chapter II that corporations receive preferential treatment under the criminal law as compared to individuals.

⁷⁸ *United States v. Najjar*, 300 F.3d 466, 486 (4th Cir. 2002).

⁷⁹ U.S.S.G. § 8D1.1(a)(7).

the misconduct towards which restructuring should be responding is worse than that associated with a fine. Consider that an act of criminality by a corporation—even one that could be called genuinely corporate under the account developed in Chapter II—nevertheless does not establish an endemic problem; corporate crime, like individual crime, can be an isolated event. By comparison, restructuring responds to structural, repetitive misconduct.

This proposed spectrum of corporate punishments mirrors the spectrum of standard, individual punishments.⁸⁰ With respect to individuals, probation is less severe than a fine, which is less severe than imprisonment,⁸¹ which is less severe than capital punishment. That restructuring occupies the same relative position as imprisonment on its respective spectrum is not an accident. This is because restructuring is the spiritual successor, or at least the corporate counterpart, to imprisonment and its derivative supervised release.

4.2 Establishing the Analogy between Individual and Corporate Punishments: The Tight Connection between Imprisonment and Supervised Release

To analogize between individual and corporate punishments, I need to establish both the role imprisonment and supervised release play as punishment, and how they function to fulfill that role. Imprisonment and supervised release are practically inseparable. Legally, supervised release must follow imprisonment—the imposition of the former presupposes and re-

⁸⁰ See 18 U.S.C. § 3551(b) (identifying, in ascending order, punishments available to individuals as follows: probation, a fine, or imprisonment).

⁸¹ This should be evident from the fact that the price of going to prison is virtually inelastic. Even Posner, who argues that a fine and a term of imprisonment are interchangeable in theory, acknowledges that the exchange rate between the two could only be paid by the very wealthy when faced with only a short term of imprisonment. Posner, *supra* note 28, at 415.

quires the imposition of the latter.⁸² Factually, imprisonment virtually ensures supervised release: supervised release is imposed in over 95% of cases where a term of imprisonment is imposed.⁸³

More fundamentally, imprisonment and supervised release are broadly similar punishments in ways that can easily go overlooked. Both operate through physical coercion: they impose severe constraints on an individual's ability to act freely either by constraining an individual's liberty to act or by forcing an individual to take action he or she might otherwise not have taken. Further, they do so in service of the same aspects of the State's pluralistic approach to penological justification. Recall from Chapter III that our practices of punishment respond to a host of justifications: retribution, specific and general deterrence, respect for the law, incapacitation, and rehabilitation.⁸⁴ At issue here are the latter two justifications: to incapacitate an offender, and to rehabilitate an offender. Imprisonment and supervised release are the primary,⁸⁵ if not exclusive, methods through which the State pursues these two penological objectives.

4.2.1 Incapacitation

Consider first the role of imprisonment and supervised release in satisfying the State's effort to incapacitate offenders. I understand the goal of incapacitation to be the protection of society from the prospect of future

⁸² Arguably, the relationship is tighter between imprisonment and parole at the state level—the connection is more conceptual than it is legal. This is because, in many states, parolees are still considered to be in the custody of the State, albeit outside a prison. To that point, one federal circuit has held that to be on parole just is to be serving a term of imprisonment. *United States v. French*, 46 F.3d 710, 717 (8th Cir. 1995). *But see* *United States v. Pray*, 373 F.3d 358, 361 (3d Cir. 2004) (“[T]he term ‘imprisonment’ in U.S.S.G. § 5G1.3 . . . does not include parole.”).

⁸³ Scott-Hayward, *supra* note 55, at 182.

⁸⁴ *See* 18 U.S.C. § 3553(a)(2) (enumerating justifications for punishment).

⁸⁵ Ordinary probation too plays a rehabilitative function, but for a very different class of criminals.

criminality by a current offender; to that end, incapacitation is often cited as a primary response to recidivism.⁸⁶ Incapacitation operates either by removing entirely an offender from society or by rigorously limiting and controlling the offender’s ability to freely interact with society.

Incarceration—that is, placement in a jail or prison⁸⁷—represents the paradigmatic form of incapacitation. Through incarceration, the State physically removes an individual from society, restricts them to a prison for a period of time, and controls nearly every aspect of the defendant’s daily existence. The State prohibits prisoners from most activities on the one hand, and on the other hand forces them to perform basic activities—working, sleeping, eating, exercising, etc.—according to the jailor’s schedule and discretion. Incarceration is the purest expression of the State’s effort to punish through incapacitation.

Nevertheless, the extent to which supervised release can incapacitate an individual is hard to understate; to the extent it differs from incarceration, that difference is one only of degree. To be fair, what I describe below are extreme, albeit perfectly legal, conditions of supervised release; many defendants receive only the mandatory conditions of supervised release, and one or two discretionary conditions.⁸⁸ With that caveat aside, and putting aside for now a court’s ability to invent its own conditions of supervised release, the enumerated terms of supervised release can severely incapacitate a defendant. A court can restrict a defendant’s physical movement.⁸⁹ It can exercise fine-grained control over a defendant’s professional life: requiring the defendant to work, but prohibiting a defendant from pursuing certain

⁸⁶ See *Ewing v. California*, 538 U.S. 11, 24 (2003) (defending the view that recidivists “must be isolated from society in order to protect the public safety”).

⁸⁷ The Guidelines define “term ‘sentence of imprisonment’ [to] mean[] a sentence of incarceration.” U.S.S.G. § 4A1.2(b). That said, the concepts need not be coextensive. See *infra* notes 124–128 and accompanying text.

⁸⁸ See Scott-Hayward, *supra* note 55, at 211–12 (identifying common conditions imposed from a survey of cases out of the Eastern District of New York).

⁸⁹ U.S.S.G. § 5D1.3(c)(1) (geographic limitations); § 5D1.3(e)(5) (curfew).

jobs and industries.⁹⁰ It can limit a defendant's freedom of association.⁹¹ It can mandate participation in substance-abuse and mental-health programs, even if that means forced confinement in a community center.⁹² It can empower probation officers to conduct random drug tests, to search an offender and his home at any time without notice, and to seize contraband (which includes property legal for ordinary citizens to possess) without process.⁹³

And this list only covers *enumerated* conditions of probation. Courts of appeal have granted district courts broad discretion to invent "reasonably related" conditions of supervised release. For example, one defendant was foolish enough to express a "desire to overcome his criminal history and to secure a stable life."⁹⁴ Almost exclusively on this basis, and notwithstanding that "[n]othing about [his crime] suggests a need to monitor Gaynor's finances,"⁹⁵ the district court granted a probation officer unfettered, ongoing access to all of the defendant's financial information, and further required the defendant to file tax returns even though he was not required to do so under federal law.⁹⁶ Conditions of supervised release for sex offenders are especially severe. Courts have prohibited offenders from ever accessing the Internet,⁹⁷ and even possessing Internet-accessible smart phones.⁹⁸ Courts

⁹⁰ U.S.S.G. § 5D1.3(c)(5) ("[D]efendant shall work regularly at a lawful occupation."); § 5D1.3(e) ("Occupational restrictions may be imposed as a condition of supervised release.").

⁹¹ U.S.S.G. § 5D1.3(c)(9) (prohibiting "associat[ing] with any person convicted of a felony").

⁹² U.S.S.G. § 5D1.3(e)(1).

⁹³ U.S.S.G. § 5D1.3(c)(10) ("[D]efendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed."); U.S.S.G. § 5D1.3(a)(4) (mandating periodic drug testing for all defendants on supervised release).

⁹⁴ *United States v. Gaynor*, 530 F. App'x 536, 541 (6th Cir. 2013) (unpublished opinion)

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *United States v. Rearden*, 349 F.3d 608, 620 (9th Cir. 2003) (collecting citations).

even require offenders to submit to repeated plethysmographic testing, whereby offenders are forced to observe images of child pornography while wearing medical equipment that measures genital bloodflow to serve as a means of detecting arousal.⁹⁹

The line between supervised release and imprisonment is especially blurry with respect to conditions like house arrest. The Guidelines specify that a term of home detention must be imposed through supervised release rather than imprisonment¹⁰⁰; a term of imprisonment is reserved for incarceration in a prison.¹⁰¹ However, courts and regulators do not always share the Guideline’s perspective; outside the criminal law they have held repeatedly “that imprisonment does not mean incarceration in a jail.”¹⁰² For example, the Third Circuit recently concluded, on the basis of an immigration “statute’s disjunctive phrasing—’imprisonment ... include[s] the period of incarceration *or* confinement’— . . . that Congress intended for ‘imprisonment’ to cover more than just time spent in jail.”¹⁰³ Accordingly, the Circuit joined others in holding that house arrest is a form of imprisonment.¹⁰⁴

⁹⁸ See *United States v. Mizwa*, 574 F. App’x 220, 222 (3d Cir. 2014) (upholding a 15-month sentence against a defendant for violating his conditions of supervised release by, inter alia, obtaining “a cellular phone with internet access”); accord *United States v. Wood*, No. 1:11-CR-0210-SEB-TAB, 2014 WL 4053925, at *1 (S.D. Ind. Aug. 15, 2014).

⁹⁹ *United States v. Music*, 49 F. App’x 393, 395 (4th Cir. 2002) (unpublished opinion). I have no idea how any court finds this process to be constitutional. See *United States v. McLaurin*, 731 F.3d 258, 261 (2d Cir. 2013) (detailing why such a condition of supervised release violates substantive due process).

¹⁰⁰ U.S.S.G. § 5F1.2; see also § 5F1.1 (community confinement).

¹⁰¹ U.S.S.G. § 5C1.1(c)(3), (d)(c).

¹⁰² *United States v. Allegheny Bottling Co.*, 695 F. Supp. 856, 860–61 (E.D. Va. 1988); see 28 C.F.R. § 2.52(c)(2) (“[I]f a parolee has been convicted of a new offense committed subsequent to his release on parole, which is punishable by any term of imprisonment, detention, *or* incarceration in any penal facility...”) (emphasis added); accord 5 C.F.R. § 890.1003.

¹⁰³ *Ilchuk v. Attorney Gen. of U.S.*, 434 F.3d 618, 623 (3d Cir. 2006).

¹⁰⁴ *Id.*; accord *Rodriguez v. Lamer*, 60 F.3d 745, 749 (11th Cir.1995); see also *Mills v. Taylor*, 967 F.2d 1397, 1400 (9th Cir. 1992) (permitting instances of deten-

Both imprisonment and supervised release serve to incapacitate a defendant. The incapacitation executed through incarceration is almost certainly more severe than any single alternative through supervised release. That said, the difference between the two punishments is one of degree—in theory, that difference can be quite slight. Supervised release can approach the breadth and scope of incapacitation exemplified by incarceration.

4.2.2 Rehabilitation

What about the second penological justification served by imprisonment and supervised release—viz., the rehabilitation of defendants? Again, both imprisonment and supervised release operate to rehabilitate offenders; the difference between each punishment’s commitment to this justification is merely one of degree.

Whereas imprisonment is oriented more towards incapacitation, supervised release is oriented more towards rehabilitation. According to the Supreme Court, “Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.”¹⁰⁵ For example, the Guidelines explicitly permit courts to impose conditions of supervised release designed “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”¹⁰⁶

Nonetheless, imprisonment continues to play an important role in instantiating the State’s justification of rehabilitation. Although rehabilitation has decreased in prominence relative to its heyday in the mid-twentieth cen-

tion that “approach those of incarceration” to count towards the calculation of a term of imprisonment (interpreting 28 U.S.C. § 3585 (2012))).

¹⁰⁵ United States v. Johnson, 529 U.S. 53, 59 (2000).

¹⁰⁶ U.S.S.G. § 5D1.3(b)(1)(D).

tury,¹⁰⁷ rumors of its demise are greatly exaggerated. Although rehabilitation cannot serve as the basis for *imposing* a term of imprisonment,¹⁰⁸ once a term of imprisonment has been imposed, rehabilitation may be considered.¹⁰⁹ Indeed, the Supreme Court has reaffirmed that “opportunities for rehabilitation within prison” are “important matters” to discuss with a defendant during sentencing.¹¹⁰ Meanwhile, the Bureau of Prisons (“BOP”) operates more than a dozen rehabilitative programs for inmates focused on education, vocational training, psychological services, and religious services.¹¹¹ Indeed, one such program—the Residential Drug Abuse Treatment Program¹¹²—constitutes one of the only ways to obtain early release within the federal system.¹¹³ With respect to vocational training, each federal prison tailors the jobs it creates for convicts according to jobs available in the local market; federal prisons provide opportunities intended to maximize their employment prospects upon release.¹¹⁴

In summary, imprisonment and supervised release are intertwined methods of punishment through which the State primarily achieves its pe-

¹⁰⁷ See *Tapia v. United States*, — U.S. —, 131 S. Ct. 2382, 2386 (2011) (describing how the pre-Guidelines era “system was premised on a faith in rehabilitation” that “eventually fell into disfavor”); see generally Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1 (2003).

¹⁰⁸ 18 U.S.C. § 3582(a).

¹⁰⁹ See *Tapia*, 131 S. Ct. at 2392.

¹¹⁰ *Id.*

¹¹¹ BUREAU OF PRISONS, DIRECTORY OF BUREAUS OF PRISONS’ NATIONAL PROGRAMS (2015), available at http://www.bop.gov/inmates/custody_and_care/docs/BOPNationalProgramCatalog.pdf (listing programs).

¹¹² 28 C.F.R. § 550.53.

¹¹³ See 28 C.F.R. § 550.55 (implementing 18 U.S.C. § 3621(e)(2)).

¹¹⁴ See BUREAU OF PRISONS, INMATE OCCUPATIONAL TRAINING DIRECTORY (2014), available at http://www.bop.gov/inmates/custody_and_care/docs/inmate_occupational_training_directory.pdf. As an example both of this and the pervasive problem of collateral consequences to conviction, the federal prison in Mansfield, OH does not train prisoners in barbering because Ohio prohibits former convicts from obtaining a license to cut hair.

nological goals of incapacitation and rehabilitation. Both punishments are far along a spectrum of state intrusion, with imprisonment more directly serving incapacitation and supervised release serving rehabilitation. Still, each punishment goes a long way towards expressing both goals of punishment.

4.3 Comparing Restructuring to Imprisonment

When I say that restructuring is the corporate counterpart to imprisonment and supervised release, what I have in mind is that restructuring satisfies, through similar methods of state coercion, the same penological objectives uniquely or primarily satisfied by these individual punishments. Restructuring functions similarly: by reworking the corporation's structure, it forces the corporation to refrain from actions the corporation might want to take and forces the corporation to take actions it might otherwise have avoided. Of course, the analogy between restructuring and imprisonment runs square into a clear obstacle: corporate imprisonment is impossible.

The impossibility of corporate imprisonment is by now a truism in scholarship on corporate crime—an assertion so obvious that it neither needs neither (and thus receives neither) an explanation nor a defense.¹¹⁵

¹¹⁵ Here is a mere smattering of citations to that effect: Melrose Distillers, Inc. v. United States, 359 U.S. 271, 274 (1959); Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH U. L.Q. 393, 396 (1982); Pamela H. Bucy *supra* note 64, at 1439; V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1478 (1996); Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PENN. J. BUS. L. 797 (2013); Michael B. Metzger & Dan R. Dalton, *Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency*, 33 AM. BUS. L.J. 489, 499 (1996); Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501, 502 (1980); Peter C. Kostant, *Meaningful Good Faith: Managerial Motives and the Duty to Obey the Law*, 55 N.Y.L. SCH. L. REV. 421, 430 (2011); Ramirez, *supra* note 47, at 938 (2005); David M. Uhlmann, *Deferred Prosecution And Non-Prosecution Agreements And The Erosion Of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1333 (2013); Kyle Noonan, Note, *The*

And, to be clear, I agree that corporate imprisonment is impossible—or, at the very least, possible only by creating institutions so foreign to our ordinary criminal practice as not to be worth taking seriously.

Nevertheless, I can think of two reasons why it is worth arguing for a claim that no one seems to contest. First, a bit of conceptual housekeeping: many assertions of the impossibility of corporate imprisonment presuppose an anachronistic conception of personhood whose rejection played an essential role in developing the modern corporation. Those who implicitly invoke the individual-person premise to dismiss corporate imprisonment would not like us to take seriously the consequences of their assertions. Second, developing a sympathetic account of corporate imprisonment, even if it fails, highlights which differences between corporations and individuals make a *legal* difference; accordingly, the exercise informs the limits of analogizing between individual and corporate punishments.

That said, an in-depth discussion of corporate imprisonment is mostly tangential to the current project. Ultimately, the impossibility of corporate imprisonment is less an obstacle than it might first appear; supervised release can accomplish most everything that imprisonment would. The upshot is that restructuring resembles a particularly aggressive, freestanding form of supervised release, one whose aggressiveness comes as a counterweight to the impossibility of corporate imprisonment. Nevertheless, I include a discussion of corporate imprisonment for the sake of completeness, and because little has been done to explain the impossibility of corporate imprisonment. Those who do not need convincing, or who are uninterested in the details of the discussion, can skip to Section 4.4.

Case for a Federal Corporate Charter Revocation Penalty, 80 GEO. WASH. L. REV. 602, 612 (2011).

4.3.1 Dispensing with the Body Argument

First, I pause for a bit of conceptual housekeeping consistent with the broader project. A naïve, and specious, explanation of the impossibility of corporate imprisonment would be to point a syllogism of the following sort:

- P1. In order to experience imprisonment, an entity e must have its own single body to be put into prison.
- P2. A corporate entity e_c does not have its own single body to be put into prison.

- C1. Therefore, e_c cannot experience imprisonment.

In other words, corporate imprisonment is impossible because corporations have no bodies to throw into jail. The observation is an old one: First Baron Edmund Thurlow quipped that “Corporations have neither bodies to be punished, nor souls to be condemned.”¹¹⁶ A bastardized version—one that credits Thurlow with saying that a corporation “has no soul to be damned, and no body to be kicked”—continues to be a favorite among scholars in the modern day.¹¹⁷ Meanwhile, impossibility arguments of this form have been popular throughout the history of corporations. Consider that fifty years ago, the Supreme Court noted that it was impossible for a corporation to experience any form of punishment except for a criminal fine.¹¹⁸ Until fifty years before that, courts routinely held that it was impossible to attribute to a corporation a specific or general criminal intention. And fifty years before that, courts declared it impossible to attribute attitudes to a corporation in any context, civil or criminal. Throughout early corporate

¹¹⁶ See JOHN POYNER, *LITERARY EXTRACTS VOL. 1* at 268 (1844).

¹¹⁷ A Westlaw search confirms that this particular misquotation has been included in more than fifty law review articles during the past ten years alone.

¹¹⁸ *United States v. A&P Trucking Co.*, 358 U.S. 121, 127 (1958) (“As in the case of corporations, the conviction of [a partnership] can lead *only* to a fine levied on the firm’s assets.”) (emphasis added).

history, courts took seriously the legal relevance of a corporation's missing tongue,¹¹⁹ hand,¹²⁰ body,¹²¹ mind,¹²² and soul.¹²³

We have seen this sort of argument before: it is a variant of the Individual-Person Premise considered in Chapters I and II. Yet, as established there, the individual-person premise is anachronistic to our modern conception of the corporation. Specifically, Chapter I established that arguments from impossibility get their purchase from this outdated conception of personhood whose abandonment was essential to developing modern corporations of sophisticated-enough organization to satisfy the demands of legal personhood. Meanwhile, Chapter II recognized that that the individual-person premise is inconsistent with our larger framework for making sense of corporate personhood. Giving up this framework would come at the expense of much of what makes corporations an invaluable means of sophisticated collective activity. Accordingly, the naïve argument against corporate imprisonment is specious grounds for maintaining that a corporation cannot experience imprisonment.

4.3.2 Developing a Pragmatic Account of Corporate Imprisonment

As should come as no surprise, corporate persons are not similarly situated to human persons in all respects. In particular, corporations are differently situated with respect to how they experience imprisonment. However, making sense of this difference is not aided by, and is probably impaired by, appealing to the presence or absence of a single body. We can make sense of

¹¹⁹ *Bank of U.S. v. Dandridge*, 25 U.S. (12 Wheat.) 64, 92 (1827) (Marshall, C.J. dissenting); *Childs v. Bank of Mo.*, 17 Mo. 213, 215 (Mo. 1852).

¹²⁰ *See Copey v. Grover & Baker Sewing-Mach. Co.*, 6 F. Cas. 517, 519 (C.C.S.D. Ala. 1875), *cited with approval in City of Salt Lake City v. Hollister*, 118 U.S. 256, 262 (1886).

¹²¹ *See United States v. John Kelso Co.*, 86 F. 304 (N.D. Cal. 1898); *Bank of Ithaca v. King*, 12 Wend. 390, 390 (N.Y. Sup. Ct. 1834).

¹²² *McDermott v. Evening Journal Ass'n*, 43 N.J.L. 488, 490 (N.J. 1881)

¹²³ *Sutton's Hop. Case*, 77 Eng. Rep. 960, 973 (K.B. 1612) (Coke, J.).

imprisonment as punishment irrespective of whether the person has a single, physical body to incarcerate.

Suppose we were to construct the most sympathetic account of corporate imprisonment we could: one consistent with the pragmatic conception of personhood rather than anachronistic, legally irrelevant assertions. Doing so would require, as starting point, a broad view of the concept of imprisonment.

Imprisonment need not be understood so narrowly as to refer only to putting a single body into prison. I have already suggested some basis in the law for distinguishing imprisonment from incarceration. Some courts of appeal treat house arrest as imprisonment.¹²⁴ Others have held that state parole—the portion of a sentence during which an individual is released from prison back into society subject to onerous restrictions, activity monitoring, and reporting requirements—constitutes imprisonment.¹²⁵ The tort of false imprisonment applies in settings other than a prison.¹²⁶ The Guidelines implicitly acknowledge the distinction by clarifying that, for purpose of the Guidelines, “[t]he term ‘sentence of imprisonment’ means a sentence of incarceration.”¹²⁷ There is even some support in ordinary usage, where imprisonment, but not incarceration is used to describe non-physical confinement—that is, where “the object confined, or the nature of the confinement, or both, are other than physical.”¹²⁸

¹²⁴ See *supra* notes 100–104 and accompanying text.

¹²⁵ *United States v. French*, 46 F.3d 710, 717 (8th Cir. 1995). *But see* *United States v. Pray*, 373 F.3d 358, 361 (3d Cir. 2004) (“We hold that the term “imprisonment” in U.S.S.G. § 5G1.3 (2001) and Application Note 2 does not include parole.”).

¹²⁶ RESTATEMENT (SECOND), TORTS §§ 35–36.

¹²⁷ U.S.S.G. § 4A1.2(b).

¹²⁸ Compare, e.g., *Imprison*, Oxford English Dictionary (2d. ed. 1996) (second definition) (“To confine, shut up: in various [connections], in which either the confining agent or cause, or the object confined, or the nature of the confinement, or both, are other than physical, or in which the object is inanimate.”), with *Incarcerate*, Oxford English Dictionary (2d. ed. 1996) (“To shut up in prison; to put in con-

Leveraging this distinction, I use the term *IMPRISONMENT* to describe the State's imposition of an extreme restraint, suggestive of confinement, on a person's liberty to act. By extreme, I mean that the restraint operates across a broad swath of domains in which a person would otherwise be free to act, and within those domains severely limits or controls the person's ability to act. By contrast, I use the term *INCARCERATION* to refer to the State's physically imprisoning a person within a prison or jail. Incarceration, in other words, is a means of operationalizing imprisonment—just not the only means of operationalizing imprisonment.

Even with a broad conception of imprisonment, it is a challenge to see how to operationalize corporate imprisonment. We could not do so by incarcerating corporate members. Although there is an argument that incarcerating individuals on behalf of a corporation could count as corporate *punishment*,¹²⁹ it still would not count as corporate *imprisonment*. Even our expansive notion of imprisonment still requires a broad restriction of liberty to act. Locking away individual group members would work an extreme, wide-scoping restraint on the liberty of *those individual members*. However, doing so would not obviously restrain in extreme the corporation. The corporation could still go about its day-to-day business, could replace (best it could) the incarcerated members, etc. In short, individual incarceration is an inapt method for imprisoning a corporation.

A promising approach for operationalizing corporate imprisonment would be to aim instead at the other essential characteristics of a sophisti-

finement; to imprison.”); *see generally* Keally McBride, *Incarceration and Imprisonment*, 6 L., CULTURE, & HUM. 341, 343 (2010).

¹²⁹ The argument for incarnation as corporate punishment leverages Chapter III's discussion of negotiable punishment. Terms of imprisonment are not currently treated as divisible and fungible, but they could be. Accordingly, as it does with fines, the State could impose a term of years on a corporation and leave it to the corporation to distribute the term amongst its members. To be clear, I think this would be a terrible policy. I also think that putting minors in prison is a terrible policy, but that fact does not make the policy something other than punishment.

cated collective agent: either its structure or its ability to use that structure to pursue a collective goal. The idea here would be to prevent individuals from participating through a corporate form to pursue their shared goal. In effect, the State would incapacitate a corporation by suspending access either to the corporate form itself or to the collective goal motivating the corporation's existence in the first place. With respect to the latter, many states require that founders identify a collective goal in order to incorporate; a collective goal is frequently an essential component of a corporate charter.¹³⁰ As a matter of practice, a membership's collective goal will be both more focused than the boilerplate "any lawful act" offered as a collective goal in the standard corporate charter. Such a collective goal may be memorialized in a mission statement or prospectus to investors, or it could be implicit in the corporation's participation in a certain industry. Regardless, the government could imprison a corporation by prohibiting the corporation from pursuing its chartered or actual collective goal. Indeed, one district court actually tried *sua sponte* to imprison a corporation by suspending its charter. Unsurprisingly, the Fourth Circuit summarily reversed.¹³¹

All the same, this lone district court opinion may have been vindicated by the subsequent development of regulatory suspension.¹³² As explained earlier, federal regulators can, and sometimes must, suspend temporarily corporate participation in a variety of commercial enterprises in response to a corporate conviction. Regulatory suspension approximates corporate im-

¹³⁰ See, e.g., DEL. CODE ANN., tit 8, § 284(a) (West 2010). Many states reserve the right to revoke a corporate charter for "serious criminal violations," that power is effectively a dead letter. See Noonan, *supra* note 115, at 616 (noting that Delaware has not invoked this power in over sixty years).

¹³¹ *United States v. Allegheny Bottling Co.*, 695 F. Supp. 856, 860–61 (E.D. Va. 1988), *rev'd sub nom.*, *United States v. Harford*, 870 F.2d 655 (4th Cir. 1989) (unpublished table case).

¹³² Cf. David Debold, *Sentencing of Organizations*, PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES §17.01 n.3 (2012) (describing the district court's vindication after the adoption of the Guidelines).

prisonment insofar as it imposes upon a corporation an extreme wide-scoping restriction on the corporation's ability to pursue its actual collective goal. On this view, there is at least one perfectly ordinary sense in which a corporation could be imprisoned.

Arguments from impossibility seem to overstate the conceptual challenge. Contra the standard argument, corporate imprisonment is possible. More to the point, practices approximating corporate imprisonment already exist either outside of the corporate setting, or within the corporate setting but technically just outside our system of corporate-criminal punishment.

4.3.3 Even a Pragmatic Account of Corporate Imprisonment Fails

And yet, our initial discussion of regulatory suspension foreshadowed the real problem of corporate imprisonment. Even the most sympathetic, pragmatic account of corporate imprisonment suffers from a fundamental defect: completely incapacitating a corporation for any meaningful period will reliably result in its termination. To reiterate a slogan, corporate imprisonment of the kind described above is a *de facto* corporate death penalty.

The real problem with trying to imprison corporation is that corporate personhood is voluntary in a way that individual personhood is not. A corporation necessarily consists of its members. Unlike members of some other types of groups,¹³³ corporate members are formally free to leave the collective enterprise at any time. Indeed, the formal preservation of so-called exit rights is a foundational feature of the modern corporation; as Chapter I explained, exit rights are essential to the modern corporation's success as a commercial vehicle.¹³⁴ Voluntariness is written into the foundation of the corporation as a vehicle for successful, collective commercial activity. Indi-

¹³³ Cf. PETER FRENCH, *Types of Collectives*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY* 33 (2d. ed., 1998) (taxonomy of collectives).

¹³⁴ See Margaret Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers During the Nineteenth Century*, 51 U.C.L.A. L. REV. 387 (2003).

vidual persons are not similarly situated; they cannot abandon their humanity in the way that corporate members can abandon a corporation.

Thus, the issue is not that it is conceptually impossible to imprison a corporation. We could imagine ways to remove a corporation temporarily from society, which in fact approximates the practice of regulatory suspension that we already have. Rather, the issue is that it is effectively impossible to *just* imprison a corporation—that is, to imprison a corporation in a way that does not invariably lead to its termination.

4.4 Comparing Restructuring to Supervised Release

We should not take the wrong less from the impossibility of corporate imprisonment. In particular, it would be a mistake to conclude from the fact that corporations cannot experience incapacitation in its most extreme manifestation that corporations are immune to any sort of incapacitation. Rather, the impossibility of corporate imprisonment is merely a recognition that a corporation cannot be entirely removed from society with any expectation that it will return.

That corporations cannot experience the most extreme form of incapacitation is not actually much cause for concern. After all, the ambition is not to recreate corporate versions of individual punishments for its own sake. Rather, the enterprise is to demonstrate that restructuring fulfills a similar purpose, and in a similar way, as imprisonment and supervised release. Just as imprisonment and supervised release are a necessary part of our criminal practice—necessary in the sense that they uniquely (or at least primarily) accomplish penological objectives not reached by other punishments—so too do I want to establish by analogy that restructuring is necessary to satisfy these objectives.

The practical impossibility of corporate imprisonment is reason to shift attention back to supervised release. Supervised release is capable of achieving most everything that imprisonment can accomplish. In particular, alt-

though supervised release is tilted towards rehabilitation, it nevertheless is capable of severely incapacitating an individual.

Indeed, from what we have seen, restructuring resembles a freestanding, aggressive supervised release. I say freestanding because restructuring, but not supervised release, can be imposed without a term of imprisonment. Of course, being freestanding makes sense if the counterpart prerequisite—total incapacitation from incarceration—is impossible. I say aggressive because the sense of supervised release applicable to corporations has to compensate for the impossibility of corporate imprisonment. In particular, the fact that the State is unable to achieve to the same degree its aims of incapacitation through a corporate counterpart to imprisonment suggests that supervised release, the State's other tool for incapacitation, should pick up the slack. Put another way, an aggressive form of supervised release is justified for corporations by the impossibility of corporate imprisonment.

4.5 Summarizing the Dialectic

Restructuring is a good idea as policy goes; among other things, standard objections to the sorts of corporate-governance reforms at issue fall away when we begin to think of using reform as punishment. The legal seeds for restructuring are already present in the Guidelines' creation of corporate probation, which combines elements of ordinary probation with the more invasive, severe potential of supervised release.

Beyond a legal basis restructuring promises to fill a gap in our practices of punishment—viz., a severe punishment, reserved for recidivist or especially pervasive corporate offenders, that uniquely achieves the State's stated goals of rehabilitation and incapacitation. In this respect, restructuring accomplishes the same purposes, and in similar ways as imprisonment and supervised release for individuals. Although imprisoning a corporation is impossible, we can use supervised release to accomplish the same objectives. Indeed, supervised release is a fitting analogue to restructuring: both

allow for massive incapacitation of an offender in the service of rehabilitative ends. Indeed, as the Coda will suggest there are even reasons to think that restructuring is less controversial than supervised release itself in light of the absence of concerns over paternalistic invasions of autonomy.

Regardless, restructuring is a natural corporate counterpart to supervised release, and the spiritual successor to the type of punishment occupied in individual context by imprisonment and supervised release. Accordingly, we need restructuring as a complement to our pluralistic penology. There is more than a legal basis tucked in the Guidelines permitting restructuring as a form of corporate punishment. Forced restructuring fulfills the potential of the Guidelines to deliver a full spectrum of corporate punishments.

5 CONCLUSION

Restructuring offers a new way to leverage developments in corporate-governance reform in a way that skirts standard objections to reform. However, it does much more than that. Restructuring realizes the full potential of the Sentencing Guidelines as they exist today by filling a gap in our current practices of corporate punishment. It serves as a spiritual successor to imprisonment and supervised release for individuals—a sort of freestanding, aggressive version of supervised release applicable to corporations—in that it expresses justifications of incapacitation and rehabilitation currently missing from our panoply of corporate punishments. Restructuring is thus not just a good idea; it realizes the unmet potential of our current practices of corporate punishment.

CODA

RESTRUCTURING VS. TARGETING: FINAL WORDS ON HOW THE CRIMINAL LAW VIEWS A CORPORATION

1 RESTRUCTURING AVOIDS THE SINS OF TARGETING

Both Chapters III and IV have leveraged corporate reforms to improve corporate-criminal punishment. Arguably, restructuring goes a step beyond the proposal in Chapter III. Chapter III advocates using corporate-law reform to improve the efficacy of preexisting, paradigmatic corporate punishment; corporate-law reform served to facilitate corporate punishment. By comparison, Chapter IV advocates the use of corporate reform as punishment itself. Specifically, I am advocating using a pre-existing punishment—corporate probation—as a vehicle for forcibly restructuring criminal corporations consistent with already developed corporate reforms.

The Corporations as Persons view introduced in the Interlude—by which the criminal law takes the corporation as a single person, and declines to look past to the corporate members—operated as a major constraint in Chapter III. In particular, I took the Corporations as Persons view to pre-

clude the State from interfering directly with the negotiations of corporate members over how to distribute the harm of punishment. Yet Chapter IV advocates restructuring a corporation without regard for the preferences of the corporation's members. At least at first blush, Chapter IV seems to do precisely what I decried in Chapter III. Is restructuring inconsistent with the constraints I placed on myself in Chapter III?

Restructuring does not fall into the same trap that targeting does, because restructuring takes the corporation as the object of its concern in a way that targeting does not. Recall the problem with targeting: it exploits the Corporation as Persons view in order to secure a conviction, but then immediately looks past the corporation as the object of concern to go after individuals deemed "really" responsible. In particular, targeting switches mid-prosecution its object of concern in ways that undermine the conceptual framework underlying corporate-criminal liability, short-circuit the State's efforts at corporation regulation, and skirt the rights of individuals.

Restructuring and targeting look superficially similar in one respect: they both embrace the Corporations as Persons view at the moment of conviction, but shift perspectives at the moment of punishment. However, with respect to restructuring, the shift in perspective does not look past the corporation as the State's objective of concern; both the Corporations as Persons view and the Corporations as Systems view take the corporation as the proper object of concern. In other words, restructuring does not exploit the institution of corporate-criminal liability for purposes other than holding criminally responsible the corporation separate from its members. The State still takes the corporation as its object of concern, even if that means thinking about the corporation as a system rather than a person.

2 COMBINING TWO VIEWS OF CORPORATIONS WITHIN THE CRIMINAL LAW

Still, restructuring interferes with the corporation's structure. Presumably, there will be cases—indeed, perhaps the vast majority of cases—where restructuring forces changes upon the corporation that do not reflect the preferences of members; after all, if members wanted their corporation to look that way, corporate law almost certainly gives them the tools to make it so. Doesn't restructuring interfere with members' freedom to design a corporation as they see fit? Moreover, necessarily the State must look inside the corporation to diagnose what reforms to impose. In doing so, isn't the criminal law abandoning the Corporations as Persons view for the Corporations as Systems view—that is, the criminal law stops thinking of a corporation as a single person and starts thinking about it as a system to redesign?

On the first point, the reason to impose restructuring is to reform a corporation whose structure is corrupted. Although the corporation is reducible to individual inputs—even its structure could be redescribed in terms of contributions of individuals—it would be a mistake to think that restructuring disregards the corporation as the object of the law's concern. Indeed, a punishment aimed at a corporation's structure seems a paradigmatic case of treating the corporation as the criminal law's object of concern. Restructuring permissibly looks inside the corporation, but not past it. In a slogan, looking inside the corporation does not necessarily violate corporate autonomy, but looking past the corporation does.

On the second point, I take it as a virtue of restructuring that it unites two views of the corporation at the moment of punishment. Recall that the Corporations as Systems still underwrites our corporate-law practice. Thus, the State already expresses both views of corporations simultaneously; restructuring brings those views within the auspices of a single institution. There is no reason to think that the two views cannot exist side by side, or that in judging responsibility we cannot retreat from one view temporarily to

the other. In particular, the State is temporarily adopting the Corporations as Systems view in service of the criminal law's commitment to treating corporations as persons. This is an extreme remedy, appropriate for recidivist corporations for whom it is demonstrably impossible to conform their conduct to the bounds of the criminal law—which, recall all the way back to Chapter II, was a prerequisite of legal personhood for the purposes of criminal responsibility. Restructuring temporarily appeals to the Corporations as Systems view for the purpose of restoring a corporation's eligibility for legal personhood. Thus, restructuring leverages Corporations as Systems view for the purposes of vindicating the Corporations as Persons view.

Indeed, the idea of suspending temporarily the conception of an entity's perception as person echoes P.F. Strawson's observation that we retreat to an objective (systems) stance towards other individuals in limited circumstances.¹ Rehabilitation—a penological justification primarily served for corporations by restructuring—seems like a potential situation under which we modify our views of personhood. To that point, the objective stance serves as a basis of criticism of rehabilitation in non-exceptional cases: the State denies individuals the dignity and autonomy of being seen as free and equal persons when it instead treats them as things to be molded into the State's conception of a model citizen.²

But notice that such paternalistic concerns about rehabilitation, to the extent they are to be taken seriously, do not attach to corporations. As the Interlude explained, corporations have no freestanding moral right to be

¹ See Peter Frederick Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 1, 9 (1962) (“To adopt the objective attitude to another human being is to see him, perhaps, as an object of social policy; as a subject for what, in a wide range of sense, might be called treatment.”).

² See, e.g., VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATION OF CRIMINAL LAW* 355 (2011) (“Paternalist theories of [rehabilitation] have long been criticized on the grounds that aiming at the moral improvement of offenders by making them suffer involves a failure to respect ... the person's moral autonomy.”)

seen as persons rather than as systems. The advocacy for the Corporations as Persons view over the Corporations as Systems view was purely prudential; the Corporations as Persons view was essential to maintaining a regulatory regime that was preferable to one underwritten by the Corporations as Systems view. We thought of corporations as systems for a long time, and while this made for bad regulatory policy, it was not moral error.

Restructuring identifies a narrow context in which the criminal law can and should adjust its view of corporations as single persons. That is, restructuring provides the opportunity to adopt temporarily the Corporations as Systems view in the service of criminal law, and in a manner that preserves the conceptual framework for corporate-criminal liability. In doing so, restructuring revitalizes corporate law as a means of regulating corporations. However, rather than retreat to a nineteenth-century conception of corporate law as a freestanding method of regulation, instead restructuring makes space for corporate law as a tool for improving criminal punishment.

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