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Conclusion: The Moral Responsibility of Firms: Past, Present, and Future

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Abstract

In 2009, my family bought a new Volkswagen Jetta diesel relying on high scores this model received for its environmental characteristics. I don't recall the rating service we used, but the top-rated passenger car along this dimension was the Toyota Prius, and the VW Jetta came in a close second. We preferred the performance and "pick up" in driving the Jetta. In 2015, however, we learned along with millions of other owners of VW automobiles one reason for the difference in performance: VW had lied. Our Jetta did not deserve the high ratings it received for its environmental characteristics because VW had intentionally installed software designed to fool routine government testing. A "defeat device" programmed the engine to run with lower emissions when tested, but then shifted during normal driving conditions to spew into the atmosphere twenty to forty times more harmful nitrogen oxide than permitted under the relevant environmental regulations in the United States and Europe (Davenport and Ewing 2015; Hakim 2016b).[1] Another corporate fraud scandal was born: prosecutors unleashed, product recalls ordered, and class action lawsuits filed. As this book goes to press, the story of VW's large-scale environmental fraud has only begun, but it serves to illustrate the practical relevance of the central question addressed in this book of the moral responsibility of firms—or not.

Disciplines

Applied Ethics | Business Administration, Management, and Operations | Business and Corporate Communications | Business Intelligence | Business Law, Public Responsibility, and Ethics | International Business | Law | Organizational Behavior and Theory | Strategic Management Policy

Conclusion

The Moral Responsibility of Firms: Past, Present, and Future

Eric W. Orts

ENVIRONMENTAL FRAUD AT VOLKSWAGEN

In 2009, my family bought a new Volkswagen Jetta diesel relying on high scores this model received for its environmental characteristics. I don't recall the rating service we used, but the top-rated passenger car along this dimension was the Toyota Prius, and the VW Jetta came in a close second. We preferred the performance and "pick up" in driving the Jetta. In 2015, however, we learned along with millions of other owners of VW automobiles one reason for the difference in performance: VW had lied. Our Jetta did not deserve the high ratings it received for its environmental characteristics because VW had intentionally installed software designed to fool routine government testing. A "defeat device" programmed the engine to run with lower emissions when tested, but then shifted during normal driving conditions to spew into the atmosphere twenty to forty times more harmful nitrogen oxide than permitted under the relevant environmental regulations in the United States and Europe (Davenport and Ewing 2015; Hakim 2016b).[1] Another corporate fraud scandal was born: prosecutors unleashed, product recalls ordered, and class action lawsuits filed. As this book goes to press, the story of VW's large-scale environmental fraud has only begun, but it serves to illustrate the practical relevance of the central question addressed in this book of the moral responsibility of firms—or not.

[1] VW has admitted to fraud in the United States, but has claimed that its practices regarding the emissions software devices were legal in Europe (Hakim 2016a).

Volkswagen has admitted to its deception, and everyone can agree that what it has done was morally wrong. I feel cheated, as do millions of other consumers, as do governments around the world. The key question, though, is *who* exactly committed this wrong? A letter sent to consumers by Michael Horn, President and CEO of VW America (a subsidiary of the larger German parent), illustrates how easy it is to be imprecise and ambiguous about moral responsibility in firms. He writes to offer a "personal and profound apology" and admits that "Volkswagen has violated your trust." He expresses heartfelt empathy: "I understand and fully appreciate your anger and frustration." He owns the problem and makes a promise: "I would like you to know that we take full responsibility and are cooperating with all responsible agencies. I can also assure you that we are committed to making this right for you—and taking steps to prevent something like this from ever happening again" (Horn 2015).

Notice, though, how easily some of these sentences oscillate between the personal and the institutional. Mr. Horn offers a "personal" apology, but as the CEO of VW's US subsidiary, he likely has no direct knowledge of the fraud perpetrated by engineers and other executives at VW. So his "personal" apology is not really personal: it's institutional. He is apologizing as a senior executive of VW who has the job of dealing with American consumers defrauded by his company. As is ubiquitous in business, he speaks as an authorized legal agent of his big firm (see Orts 2015, 53–62). VW, one of the largest automobile companies in the world, employs hundreds of thousands of people. Most probably, only a relatively small number of people were directly responsible for the skullduggery of creating the deceptive software and installing it in millions of VW cars.[2] Most probably also, only a relatively small number more actually knew about or suspected the mass deception. Mr. Horn's ability to offer a "personal and profound apology" to consumers like me, then, makes a few rather large assumptions. First, his apology assumes that some portion of blame for the wrong can affix to the very large and complex firm called "Volkswagen," as well as the individual people who actually perpetrated or knew about the deception. Second, Mr. Horn assumes that he has authority to speak on behalf of the firm in a manner allowing him to apologize to consumers for the wrong in some meaningful sense.

Notice also that Mr. Horn moves immediately from offering a personal apology to admitting that "Volkswagen has violated your trust." But what does this statement mean in the context of this scandal? Again, there are specific employees and executives who were morally responsible for designing and installing the "defeat devices," and there are probably more who either ordered

[2] As of this writing, an internal investigation at VW reported that only nine people have been suspended who are suspected of the participating in the fraud (Ewing 2015). Additional questions concern when and how many executives learned of the problem and may have failed to disclose it (Ewing 2016).

this to be done or knew about and condoned these actions. Moreover, the owners of Volkswagen at the time of the deceptive activity (which occurred approximately from 2009 to 2015) have likely profited from the fraudulent activity. Executive and employee bonuses may well have been paid for hitting performance targets in sales and profits that might not have been reached without the environmental fraud. (On the idea of environmental fraud and the role of citizens in the private enforcement of environmental laws more generally, see Orts 1995, 1324; Thompson 2000.) VW owners who likely profited from the fraud embrace a complex category that describes the capital structure of the modern firm, including not only shareholders, but also bondholders, other creditors, and the company itself in the form of retained earnings. (On the complexity of corporate ownership, see Orts 2015, 71–105).[3]

According to the individualist accounts of moral responsibility offered by many scholars, including several authors of chapters in this book, to say "Volkswagen has violated your trust" is only shorthand for saying "specific participants within the company structure of Volkswagen have violated your trust." Following this line of reasoning, one may conclude that Mr. Horn's statement here is not sensible or coherent. It is not the company as a whole or Mr. Horn in particular who has violated customers' trust but rather the specific people who are employees, executives, and owners of the company who committed the wrong, condoned it, and profited from it. To put the problem more starkly, to accept the personification of Volkswagen as the relevant "entity" that is responsible for the wrong enables agents, such as Mr. Horn, to point to the formal and abstract representation of "the firm" as the source of the wrong rather than to hold particular individual people responsible. Instead, and more precisely, Mr. Horn might have been encouraged instead to say: "Some employees and executives within Volkswagen have violated your trust, and they and some owners of the company have profited from this violation." Then, when Mr. Horn says that "we are committed to making this right for you," he might instead have been encouraged to say: "We promise to find out who within our firm is responsible for this wrongful behavior, and we will cooperate with government authorities in prosecuting them and otherwise bringing them to justice. In addition, we will require any of the firm's owners, executives, and employees who have profited from this wrongful behavior to disgorge their ill-gotten gains—with an appropriate share paid to you as a defrauded customer to compensate you for the harm wrongfully done." In other words, for Mr. Horn to attribute blame vaguely to VW as a formal and abstract firm and to promise consumers that the "royal

[3] VW's somewhat unusual corporate structure involving a significant "co-determination" role for labor unions on its supervisory board as well as a large ownership interest by the government of Lower Saxony may have contributed to laxity in oversight. (Van der Heyden 2015). But the overall problem is generic.

we" of VW will "make this right" allows him to avoid saying anything very specific about the business participants within the firm who are immediately and directly responsible. On this view, Mr. Horn's "personal and profound apology" rings hollow.

OUR CONTRIBUTORS' PERSPECTIVES

Chapters in this book by John Hasnas, Ian Maitland, David Rönnegard and Manuel Velasquez, and Amy Sepinwall track this theme—providing various arguments for what might be called the individualist theory of moral responsibility in firms.

Hasnas argues that recognizing moral responsibility for firms qua firms creates a "responsibility deficit" by which individual wrongdoers can escape accountability for their actions. He is particularly concerned that this avoidance of individual responsibility occurs through punishing "innocent" business participants (including employees, shareholders, and perhaps others who suffer from penalties imposed on a firm as a whole) rather than focusing on the specific individuals who have done or condoned the wrong. (See Chapter 5.)

Maitland reinforces this argument. He maintains that a philosophically careless "anthropomorphization" of firms allows a "responsibility deficit" of great magnitude, often amounting to abuse that enables the equivalent of a real-life game of "grand theft corporation." (See Chapter 6.) He references Judge Jed Rakoff's recent opinions taking US prosecutors to task for allowing large corporate settlements of criminal charges in situations in which no individual person is convicted or held personally responsible. (See also Rakoff 2014, 2015).

In a similar vein, Rönnegard and Velasquez advance a set of arguments making the individualist case against attribution of moral responsibility to organizations, including business firms. They argue that collective organizations such as firms cannot correctly be said to bear moral responsibility for the following reasons.

(1) Firms are not "agents" (in the philosophical sense) that can be conceived as meaningfully separate from the individual people that compose them.

(2) Firms do not have the capacities of knowledge and intention required for moral responsibility.

(3) Firms do not have capacity to feel emotions needed for moral responsibility.

(4) Firms cannot "act" in the world themselves and depend instead on the direct involvement of real individual people.

(5) Attributing moral responsibility to firms often has the unacceptable consequence of "punishing" innocent individuals (rehearsing arguments also made by Hasnas and Maitland).

(6) Firms do not have the "autonomy" required to attribute moral responsibility.

(See Chapter 7.)

Sepinwall elaborates on the argument that corporations and other business firms lack emotions. They are, in her words, "affectless." In particular, firms cannot experience "guilt," and it therefore makes no sense to "blame" them for wrongdoing. Doing so is also ineffective. (See Chapter 8.)

These chapters make a strong case for an individualist approach to moral responsibility in firms. They build on previous contributions that these and other authors have made to advance the argument that attributing moral responsibility to firms is philosophically mistaken. (See Hasnas 2010; Maitland 1994; Rönnegard 2013, 2015; Sepinwall 2012, 2015a; Velasquez 1983, 2003. See also Lewis 1948; Miller and Makela 2005). As noted by the philosopher Roger Scruton, these arguments follow in a long historical tradition. Centuries ago, Samuel von Pufendorf argued that a corporation is a "*persona moralis composita*," and Wilhelm von Humboldt maintained that such a composite person "should be regarded as nothing more than the union of its members at a given time." (See Scruton 1989, 245–6).

Other scholars, who are also represented in the chapters of this book, challenge this individualist theory. They would say that Mr. Horn's attributions of moral responsibility to Volkswagen as a corporation can be justified. The individual actions that caused the fraud affecting millions of vehicles and consumers occurred within the formal legal structure of a corporation, and the organized authority of this structure of the firm is an indissoluble part of the moral wrong that has been committed. VW as an organization is morally responsible because it acts as a rational organization with cognitive attributes and organizationally shared intentions. On this general view, it is impossible to imagine how a fraud on such a massive scale could occur without the assistance—even if a widespread, often innocent, and unknowing assistance—of the thousands of employees and executives who built the offending cars and sold them. The entire enterprise of committing fraud on a massive scale would not have been possible without the complex capital structure that provided the financing to commit the wrong and the internal economic incentives that encouraged and condoned it.[4] It therefore makes sense to say that "VW has violated your trust" and to recognize senior executive agents such as Mr. Horn as having the legal and moral authority to make a public, if not a "personal," apology on behalf of VW as a firm. It makes sense also for consumers like me to feel wronged by the firm itself and to demand a compensatory response.

[4] It has been noted, for example, that the beginning of the environmental fraud in the United States corresponded with a strong commitment and drive of VW's CEO to overtake Toyota as the world's largest automobile company (Ewing 2015).

Versions of this argument for what might be called an organizational or collectivist theory of moral responsibility find support in the chapters collected here by Philip Pettit, Michael Bratman, and Peter French, as well as Waheed Hussain and Joakim Sandberg.

Pettit argues that firms such as business corporations are "conversable agents" that act in the world according to set purposes and objectives. They "speak" as agents in their interactions with other agents in the world through authorized representatives. Business firms organized and operating in this manner therefore have the capacity to hold beliefs, express intentions, and make promises. In this sense, they have "minds of their own." They are "fit to be held responsible" in moral terms when their authorized actions do not meet their expressions of collective purpose, belief, and intention. (See Chapter 1.)

Bratman supports the argument for the collective moral responsibility of firms at least to the extent that his elaboration of a "shared intention" of a group through a sufficient institution of "self-governance" satisfies one important criterion needed for moral responsibility. (He leaves open whether other criteria exist that may or may not be required to attribute moral responsibility to business firms.) Bratman specifies some factors involved in the formation of group intentions, including "shared deliberations" and "shared policies of procedure." His analysis suggests that "shared intentions" created collectively at the firm level may allow for moral responsibility to be attributed correctly to firms qua firms. (See Chapter 2.)

French supplements well-known previous arguments that he has made in favor of finding *how* the moral responsibility of firms can be based on a "functionalist or structuralist account of corporate intentionality and responsibility at the time of an action or event" with new reflections about *when* the moral responsibility of a firm for particular actions or consequences may end. He illustrates what he describes as the "diachronic" dimension of the problem by considering the case of energy firm BP and its responsibility for the massive oil spill in the Gulf of Mexico in 2010. Following a study of the more general philosophical problem by Andrew Khoury (2013), French asserts that even though BP bears moral responsibility as a firm at the time of the oil spill (namely, synchronic responsibility), the firm's responsibility dissipates and even disappears over time (namely, diachronic responsibility). This reduction and eventual vanishing of responsibility occurs when BP goes through various changes in its identity through corporate reorganizations, changes of leadership, and measures expressing atonement taken to address the wrong, such as admitting responsibility, paying damages, and other acts of contrition or compensation. (See Chapter 3.)

Hussain and Sandberg support arguments for the moral responsibility of firms by taking what they call a "functional normative" approach to the problem. They adopt a constructivist pragmatism and note that business firms such as corporations are legal structures. The plasticity of law allows Hussain and Sandberg to appeal to a larger value of social welfare or what is best for society overall. In their words, "there is no one right way to treat an organization or group as a collective agent." Therefore the moral responsibility of firms translates into a pragmatic moral and legal question rather than a "pre-institutional" moral one. The moral responsibility of firms should be found, in other words, when it serves the broader social good to do so. (See Chapter 4.)

These chapters that generally support an organizational or collectivist view of the moral responsibility of firms also build on other major contributions to the literature by these authors, as well as others. (See, for example, Bratman 2007, 2014; List and Pettit 2011; Pettit 2007, 2008; French 1979, 1995, 1996. See also Arnold 2006; Donaldson 1982, 18–35.)

Is it possible to square the circle of this debate between individualists and collectivists? Two of the contributions in the book provide possible options going forward into the future that seem compatible with both individualist and collectivist accounts of moral responsibility in firms. I will suggest one other possible future direction as well, drawing on a legal perspective.

Kendy Hess suggests that a close philosophical analysis of competing positions reveals "an unrecognized consensus" uniting the individualists and collectivists (whom she also calls "holists"). She points out that much of the debate revolves around ontological, metaphysical, meta-ethical, and methodological questions about the nature of firms. Nobody denies, though, that ethics matter in business. In Hess's words, the "debate over the initial claim that there *is* 'a firm,' or that it can bear moral obligations.... is *not* a debate about ethics, about whether there are moral obligations in play" (original emphasis). Everyone agrees, including everyone writing chapters in this book, that "business behavior is subject to ethical norms" in general. Despite the fact that some contemporary observations may suggest the contrary, "business is not a morality-free zone." Hess encourages a "reframing" that allows for progress to be made on examining many practical ethical dilemmas in a manner that "brackets" the individualist-versus-collectivist debate. Ethical answers may correlate, in other words, to specific practical questions in business ethics (and perhaps law too) whether or not one's background view of the grounding of moral responsibility relies on seeing "firms as collections of people" or "firms qua firms." (See Chapter 9.)

For example, if one accepts the argument that insider trading is wrong (see, for example, Lee 2002; Scheppele 1993; Strudler and Orts 1999), then one can also likely agree that steps should be taken within firms—or by individuals acting within the structure of firms—to prevent insider trading from happening. All can agree to sanction violations of insider trading without agreeing on the moral meta-analysis. If the premise that insider trading is wrong is accepted, in other words, then everyone can agree that individuals in firms should prevent insider trading and that individuals who commit insider trading should be punished, even though individualists and collectivists may diverge on whether a firm qua firm can either commit insider trading or be rightly punished for it. (On the problem of corporations themselves committing insider trading, see Loewenstein and Wang 2005.)

Nien-hê Hsieh encourages forward thinking in another direction that both individualists and collectivists may support. He urges a focus on the "positive duties" that firms qua firms or people acting collectively in firms may owe. Much of the long debate about the proper seat of the moral responsibility of firms focuses on ethics as a negative constraint: what one *should not* do. Hsieh calls for attention to positive moral duties: what one *should* do, particularly in cases of urgent human need. He builds on work that he and others have done, for example, in applying an ethical "duty to rescue" to firms (Dunfee 2006; Hsieh 2004, 2006). He extends this view to include positive duties or virtues of "beneficence," drawing on the work of Bowie (1999) and Smith (2012), as well as positive duties to act in the world following principles of "justice," drawing on the work of various theorists including O'Neill (2001), Caney (2013), and Dubbink and Van Liedekerke (2014). Examining these "positive" duties and virtues can fit within both individualist and collectivist theories of the ethical responsibility of firms. (See Chapter 10.)

A LEGAL PERSPECTIVE ON MORAL RESPONSIBILITY IN FIRMS

Finally, I would like to suggest that a closer legal analysis of the nature of business firms may lead to some other agreements among individualists and collectivists going forward. In a book called *Business Persons*, I've argued that the law plays a very large role in the construction and recognition of what we call business firms (Orts 2015). Firms come in many varieties and in different legal forms: corporations, partnerships, limited liability companies, and other complex combinations (such as corporate parent-subsidiary structures and franchises). And firms range widely in terms of size: from sole proprietors to massive multinational enterprises such as VW and BP. In addition, firms may adopt different objectives and value orientations. There is no natural law requiring "shareholder value maximization" or the pursuit of profits over all other values. To be sure, profit-making describes a primary objective of most if not all business firms, but this does not mean that it is the *only* objective. As the American Law Institute recognizes, a business corporation has the "primary" objective of profit and economic gain, but it is "obliged, to the same extent as a natural person, to act within the boundaries set by law," and it may "take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business." Many firms "devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes," a practice which many statutes sanction and many ethical traditions encourage. (American Law Institute 1994, sect. 2.01).

The normative orientations of family-owned enterprises, which are ubiquitous on the world stage (Landes 2006; Morck and Steier 2007), often imbue particular religious or other moral values into a firm's culture and operations. The recent high-profile US Supreme Court case of *Burwell v. Hobby Lobby Stores, Inc.* (2014), which recognized a right of some family-owned firms to resist legal obligations on religious grounds, illustrates this phenomenon. (See also Orts 2016; Sepinwall 2015b, 2015c.) Statutes establishing benefit corporations, community interest companies, and other "hybrid social enterprises" expand the choice of legal forms to include social or environmental ends as an explicit supplement to profit-making (see Orts 2015, 206–22).

An appreciation of the descriptive and normative complexity of different business firms means that attributions of ethical responsibility require digging into the organizational details of specific firms. Others have previously noticed the need to adjust ethical theory to the legal variations in the types and sizes of business firms, as well as differences in national and cultural contexts (for example, Donaldson 1982, 1989). With respect to the ethical responsibility of firms, a legal analysis drills down into the organizational structure of a specific business to understand who has legal authority for particular decisions and who has rights and benefits of ownership. This legal analysis can provide an understanding of particular firms that may help to ground agreements unifying both individualists and collectivists on particular attributions of moral responsibility.

Consider again, for example, the case of VW and its environmental fraud on consumers. Important questions to ask when attributing ethical responsibility including understanding and, through a proper investigation, finding out *who actually made the decisions and engaged in the actions* to design the "defeat devices" that were installed on millions of cars and *who knew about these decisions and actions*. Another important question is *who profited from these decisions and actions*. For example, employees who met productivity targets at least in part by means of the fraudulent behavior arguably had "ill-gotten gains" (cf. Katz 1996). The executives who met internal incentives for profit-making by accelerating sales of falsely promoted vehicles are in the same boat. Morally speaking, the ill-gotten profits should be returned from those who gained to those who were defrauded (or forfeited to the government in recognition of its role to protect the environment). Moreover, the ill-gotten gains from the fraud should be reversed whether or not a particular employee

knew about the fraud, because the profits themselves have been "tainted" by the wrongful activity.[5] Some owners may also have profited from the wrongful behavior. If the economic gains from the fraud were large enough, then the stock price of VW would likely have been affected favorably as a reflection of a greater perceived economic value of the company.[6] If a shareholder sold his or her shares just prior to a market correction following the exposure of the environmental cheating, then a portion of this realized gain is also arguably wrongfully obtained. We may have pragmatic reasons to limit the legal scope of moral responsibility in the context of complex corporate ownership structures, but this is a different matter than a straightforward tracing of moral responsibility to the individuals who are responsible for the fraud, knew about it, and profited from it.

Figure 1 provides a stylized example to illustrate how thinking about a firm's *business participants* in a wrongful action can shed light on how we think about the attributions of moral responsibility to different individual participants and firms qua firms. (For an account of the different business participants in firms and how they are related to each other, see Orts 2015.)

Imagine a firm (perhaps a stylized version of VW) that is making only ethical and legal profits through time T_1. The firm then begins committing massive fraud of some kind at T_1, and at T_2 a wider group of people within the firm becomes aware of the fraud, but it is not discovered and reported to the public until T_3. Revelation of the fraud causes a significant decline in the value of the firm in expectation of the legal and market consequences, which include large legal damages and penalties, as well as reputational harm. T_4 and T_5 indicate times after which the crisis has occurred and begun to fade, as the company stabilizes. The firm may take corrective actions of various kinds at T_4

[5] I thank my colleagues Nico Cornell and Sarah Light for alerting me to the idea of morally "tainted" profits which they formulate in an article on "Wrongful Benefit and Arctic Drilling" (Cornell and Light (forthcoming 2017)). This idea relates to what some philosophers call a "remedial" or "rectificatory" obligation to return benefits gained from wrongful behavior to those who were wrongfully harmed (Butt 2007). Additional support for the intuition that wrongful gain from fraud should be transferred back to those defrauded may refer to moral and legal conceptions of "corrective justice" (see, for example, Coleman 1992; Weinrib 1992).

[6] I omit here a discussion of the large empirical assumption regarding the reliability of stock prices as a measure of the intrinsic economic value of firms and the extent to which stock values may be attributable to general market conditions as well as a specific company's economic value. The accurate measurement of economic value in specific time windows—such as VW's environmental fraud and its discovery—is fraught with similar complications. For example, if a fraud occurs in a company that had the consequence of returning ill-gotten gains to the company, but a different external economic shock occurs at the same time which had greater overall effect, then the stock price value would not provide a correct measure of the damage caused by the fraud. One might instead use other accounting measures of the fraudulent gain such as tracking profits-per-vehicle illegally sold in terms of sales and earnings.

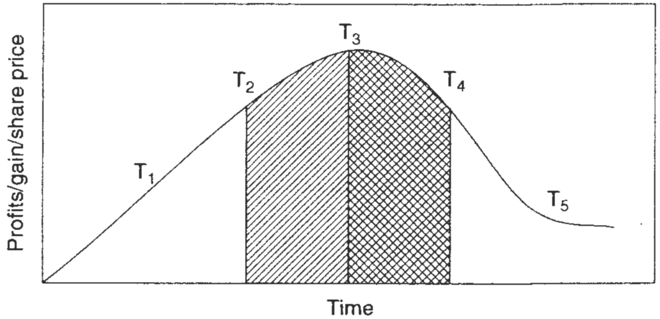

Figure 1. Time and liability in firms

and pay any legally required damages or fines at T_5.[7] The firm may also make efforts to recover its organizational reputation by adopting internal reforms and reaching out to "make things right" with its customers.[8]

It is interesting to note in this example, as moral individualists emphasize, that there are many business participants who may profit from the fraud and yet elude any legal responsibility. In theory at least, those who actually perpetrate the fraud should be brought to justice—including by the criminal law. (In practice, this often doesn't happen for various reasons, as Garrett (2014) has recently documented, and as Craig Smith notes in his introductory chapter in this book with respect to the legal aftermath of the financial crisis of 2008 in the United States.) Many people working within VW who knew about or condoned the fraud may be difficult to prosecute under the criminal law, given high standards of proof (usually "beyond a reasonable doubt") and state of mind requirements (usually actual intent or at least "recklessness"). Also most employees within firms are immunized from being sued individually by outraged consumers or the government. Internal legal principles of firm organization usually protect individual employees. A general shield of "limited liability" covers executives, managers, and employees by operation of agency law principles, indemnification provisions, and insurance (Orts 2015, 146–51; Thompson 1994). A manager or employee who may have known about or suspected fraud will usually escape any legal responsibility, even though we may think that some moral responsibility should attach to this behavior of

[7] As of this writing, VW had hired Kenneth Feinberg, a legal expert who had previously advised compensation for victims of BP's oil spoil and the 9/11 terrorist attacks, for advice (Ivory 2015).

[8] For an examination of possible public relations strategies that VW might adopt, including one proposal for VW to relocate its headquarters to Detroit and adopt hip-hop advertising, and another to crowdsource remedies for environmental damages to consumers, see National Public Radio (2015).

"looking the other way," especially when the manager or employee may benefit from the fraud through increases in compensation by hitting sales targets or other goals that the fraud enabled. Recent "clawback" provisions for executives who commit major frauds may have begun to address this problem to some extent. (See Cherry and Wong 2009; Fried and Shilon 2011.) So far, though, these provisions are rather blunt instruments and usually rely for enforcement on the firm itself, which in turn is represented by its top executives.

As moral individualists emphasize, there is a concern that punishing a firm heavily at the institutional level of the firm itself may visit unjust consequences on business participants who are completely innocent of wrongdoing. A common example given is the criminal indictment of Arthur Anderson for the involvement of some of its partners in the massive Enron fraud and the ensuing bankruptcy of Arthur Anderson and loss of thousands of employees' jobs. (See the chapters in this book by John Hasnas and Ian Maitland; see also Brickey 2003.)[9] By the same token, though, the organizational structures of firms may serve to protect complicit individuals. This legal reality provides a pragmatic argument for visiting moral responsibility somewhere—namely, at the level of the firm as a whole—in some circumstances. Otherwise, as Pettit argues in his chapter, a moral deficit would open in the other direction.

The case of VW illustrates also that legal realities track different moral theories in different parts of the world. Germany, for example, does not recognize corporate criminal liability at the level of the firm (Khanna 1996, 1490). Elsewhere in Europe, France and the Netherlands have amended their laws to allow corporate criminal liability at the firm level (id.). In the United States, corporate criminal liability at the firm level has allowed for financial cases to be settled for very large amounts of money without any individual admitting culpability, which has sparked strong criticism (for example, Garrett 2014). In response to criticism, the US Department of Justice revised its prosecutorial guidelines to focus on the role of individuals in corporate crimes. The new guidelines state a "foundational principle" as follows:

> Prosecutors should focus on wrongdoing by individuals from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers, we accomplish multiple goals. First, we increase our ability to identify the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and the extent of any corporate misconduct. Second, a focus on individuals increases the likelihood that those with knowledge of the corporate misconduct will be identified and

[9] Brickey's account provides important context for an assessment of the Arthur Andersen's "fall from grace," including the fact that the firm had previous serious problems with regulators and prosecutors in major cases and failed to make internal governance changes as a result.

> provide information about the individuals involved, at any level of an organization. Third, we maximize the likelihood that the final resolution will include charges against culpable individuals and not just the corporation. (US Department of Justice 2015, 9–28.010)

It is likely that these standards will increase pressure substantially for prosecutors to focus on individual liability for business participants in the future.

Looking deeply into the "black box" of the firm to see the legal complexity of its internal organization proves both individualists and collectivists to be right. Although attributions of moral responsibility to individuals may be ideal, organizational complexities of legal structure and authority make the case for fixing moral responsibility at the firm level, if only for pragmatic reasons. This legal perspective finds support in the moral pragmatism recommended by Hussain and Sandberg. (See also Dewey 1926.) This pragmatic argument does not fully "square" the competing views, but it provides grounds for individualists to agree in practice to a compromise legally that may allow "the firm" to be designated to carry moral responsibility as a proxy in cases when organizational complexities prevent a practical tracing of moral responsibility to all complicit individuals. Both individualists and collectivists may also support legal reforms that attempt to track moral responsibility more closely to hold specific individuals accountable when acting within and on behalf of their firms. One recent intriguing suggestion, for example, would fix greater legal responsibility for organizational wrongdoing on the top executives based on a theory analogous to the traditional view that the captain of a ship bears moral responsibility for negligence by inferior officers regardless of the captain's own knowledge and behavior (see Sepinwall 2012, 2014).

Consider now another category of business participants who may use the legal structures of firms to escape legal responsibility for ill-gotten gains: its owners. Again referring to the stylized facts represented in Figure 1, imagine that the firm is a corporation, and shareholders who hold an ownership interest at T_1 and T_2 then sell their shares at T_3. On the assumption that the fraud was massive enough and secret enough (that is, no traders had knowledge of the fraud ahead of its actual disclosure or at least did not trade in sufficient quantities to correct the stock price), then the shareholder who sold at T_3 made profits that were at least partly composed of ill-gotten gains from the fraud. The well-established principle of limited liability for shareholders in corporate law, however, would prevent anyone from legally recovering these ill-gotten gains. Note also that for longer term shareholders who hold their shares through T_3 and continue to hold their ownership interests through T_4 and T_5, there is no injustice because the stock price would readjust to account for the negative value of the fraud.

A recognition of this legal structure of responsibility—or, more precisely, the legal "shielding" of responsibility—sheds light on the debate between moral individualists and collectivists. On one hand, a moral individualist may respond with an argument for a reform of the corporate law to allow legal responsibility to better follow moral responsibility (that is, to enable recovery of ill-gotten windfalls to either employees or owners).[10] One might even go so far as to argue for a repeal of limited liability for business corporations and other organizational entities on moral grounds. (For such an argument on economic grounds regarding tort liability, see Hansmann and Kraakman 1991.) At least, some especially compelling moral arguments may make the case for disregarding the corporate entity or "piercing the corporate veil" stronger in certain situations (Bainbridge 2001; Orts 2015, 156–68). On the other hand, moral collectivists may point to these limitations on legal liability as good reason to attribute moral responsibility *somewhere*, and a likely target is the firm itself.

The legal structure of business enterprise supplies a rationale for the moral collectivists' argument in this context. It is true that all of the capital and property committed to a business firm such as a corporation is owned, at least in the final analysis, by a specified set of individual people.[11] The capital structure of modern enterprise consists of an often complex amalgamation of equity and debt ownership interests (Orts 2015, 71–99). In addition, and in part allowing for this complexity of ownership, business firms such as corporations are given the legal authority to "own themselves." A corporation, for example, may purchase real estate or capital equipment in its own name. It keeps separate books and records that delineate the assets of "the firm" as separate from the personal assets of the firm's owners. This "asset partitioning" describes an essential feature of the historical development of business enterprise (Hansmann and Kraakman 2000; Hansmann, Kraakman, and Squire 2006). The corporation, as well as other legal forms of business, has the ability to "retain earnings" rather than to distribute them as profits, and its managers may decide with broad authority to reinvest earnings in the ongoing operations of the firm, including salary raises, or new research and development projects (Orts 2015, 99–104). The legal fact that retained earnings are allocated initially to the structural capital and property of the firm supports the view that some degree of collective responsibility may correctly attach to the firm itself. For moral individualists, the capital and property of the firm is indeed "owned" by specific people (namely, the equity and debt holders of claims on profits of the firm over time). To fix financial responsibility on the

[10] One of my MBA students, Christopher Dahan, accurately points out that taxes on increased earnings paid by a fraud-committing firm to the government should also arguably be recovered by the firm in order to prevent a windfall from accruing to the government. At least in cases of bankruptcy, there is a case to be made that "ill-gotten taxes" should be made available to compensate victims of a large fraud or major accident rather than retained by the government.

[11] There is a possible exception regarding government-owned firms or public-public hybrid structures which I leave outside of consideration here (see Orts 2015, 194–200).

firm in some circumstances on these owners, then, describes a convenience of legal administration that violates no moral boundaries even on an individualist account.

Again to refer to the example of VW's massive environmental fraud, some of the ill-gotten gains are arguably present as "retained earnings" within the complex ownership structure of the firm. Even if some of the ill-gotten profits may somehow trace to other uses or allocations, the fact that the firm served as a nexus of ownership for these distributions of ill-gotten gains would justify using the firm's capital itself as a target for compensation. By the same token, it seems also true that some owners, as well as executives and employees, may unethically profit from the fraud if they "cash out" their winnings between T_1 and T_3. To the extent that these ill-gotten gains are not legally recoverable (perhaps for practical reasons of difficulty of "following the money" in complex cases), there is a "moral deficit" of accountability for wrongful actions that calls for legal redress.

This legal analysis of moral responsibility in firms presented here is by no means complete. It may, however, serve to shed light on some issues that will continue to be debated into the future. Continuing discussion of moral responsibility in firms may help to inform and drive legal reform along the lines envisioned by John Dewey (1926) in his examination of the "personhood" of corporations and, by extension, other business entities. For Dewey, legal forms and conceptions reflect larger scale political, ethical, religious, and economic debates. In this sense, Waheed Hussain and Joakim Sandberg's chapter here also points in a promising future direction. Perhaps moral as well as legal conceptions of moral responsibility in firms should follow a methodology of pragmatism. Alternatively, other moral theories of the responsibility of firms advocated by various authors in the chapters of this book will, to the extent that they are politically and jurisprudentially persuasive, influence how the law of responsibility of firms progresses. In this sense, the debate between individualists and collectivists regarding the moral responsibility of firms—and the search for common ground between them—will no doubt continue.

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