




2012

## Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime

Amy J. Sepinwall

University of Pennsylvania, [sepin@wharton.upenn.edu](mailto:sepin@wharton.upenn.edu)

Follow this and additional works at: [https://repository.upenn.edu/lgst\\_papers](https://repository.upenn.edu/lgst_papers)

 Part of the [Accounting Law Commons](#), [Banking and Finance Law Commons](#), [Business and Corporate Communications Commons](#), [Business Law, Public Responsibility, and Ethics Commons](#), [Business Organizations Law Commons](#), [Corporate Finance Commons](#), and the [Criminal Law Commons](#)

---

### Recommended Citation

Sepinwall, A. J. (2012). Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime. *Hastings Law Journal*, 63 (2), 411-454. Retrieved from [https://repository.upenn.edu/lgst\\_papers/69](https://repository.upenn.edu/lgst_papers/69)

This paper is posted at ScholarlyCommons. [https://repository.upenn.edu/lgst\\_papers/69](https://repository.upenn.edu/lgst_papers/69)  
For more information, please contact [repository@pobox.upenn.edu](mailto:repository@pobox.upenn.edu).

---

## Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime

### Abstract

The BP oil spill and financial crisis share in common more than just profound tragedy and massive clean-up costs. In both cases, governmental commissions have revealed widespread wrongdoing by individuals and the entities for which they work. The public has demanded justice, yet the law enforcement response in both cases has been underwhelming. In particular, no criminal indictments have been sought for any of the corporations responsible for the Macondo oil-rig explosion or for the Wall Street banks involved in the financial meltdown.

This governmental restraint reflects a deep-seated ambivalence about corporate criminal liability. Though scholars have been debating the justifiability of prosecuting and punishing corporations since the doctrine's inception just over 100 years ago, virtually no progress has been made by either side. Thus, we have devastating instances of corporate crime and no good justification for prosecuting and punishing corporations.

The Article seeks to diagnose the reason for the widespread consternation about the doctrine of corporate criminal liability. It then advances a new theoretical foundation for the doctrine.

More specifically, the Article seeks to justify corporate criminal liability by arguing not that the corporation deserves to be punished for its wrongdoing but instead that its members do. Thus the Article conceives of corporate criminal liability as a way of targeting the corporation's officials, who are blameworthy just in virtue of their role within the corporation. The Article ends by identifying a series of corporate sanctions that reflect the rationale for corporate criminal liability advanced here.

### Disciplines

Accounting Law | Banking and Finance Law | Business and Corporate Communications | Business Law, Public Responsibility, and Ethics | Business Organizations Law | Corporate Finance | Criminal Law | Law

# Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime

AMY J. SEPINWALL\*

*The BP oil spill and financial crisis share in common more than just profound tragedy and massive clean-up costs. In both cases, governmental commissions have revealed widespread wrongdoing by individuals and the entities for which they work. The public has demanded justice, yet the law enforcement response in both cases has been underwhelming. In particular, no criminal indictments have been sought for any of the corporations responsible for the Macondo oil-rig explosion or for the Wall Street banks involved in the financial meltdown.*

*This governmental restraint reflects a deep-seated ambivalence about corporate criminal liability. Though scholars have been debating the justifiability of prosecuting and punishing corporations since the doctrine's inception just over 100 years ago, virtually no progress has been made by either side. Thus, we have devastating instances of corporate crime and no good justification for prosecuting and punishing corporations.*

*The Article seeks to diagnose the reason for the widespread consternation about the doctrine of corporate criminal liability. It then advances a new theoretical foundation for the doctrine.*

*More specifically, the Article seeks to justify corporate criminal liability by arguing not that the corporation deserves to be punished for its wrongdoing but instead that its members do. Thus the Article conceives of corporate criminal liability as a way of targeting the corporation's officials, who are blameworthy just in virtue of their role within the corporation. The Article ends by identifying a series of corporate sanctions that reflect the rationale for corporate criminal liability advanced here.*

---

\* Assistant Professor, Department of Legal Studies and Business Ethics, Wharton, University of Pennsylvania. Ph.D., Philosophy, Georgetown University, 2010; J.D., Yale Law School, 2004; M.A., McGill University, 1999; B.A., McGill University, 1997. For very helpful comments, I am grateful to Albert Alschuler, Ian Ayres, Bill Bratton, Pamela Bucy, Jill Fisch, Tamar Frankel, Bill Laufer, David Luban, Jonathan Macey, Eric Orts, Gregg Polsky, Ed Rock, Andy Siegel, Alan Strudler, and Robin West, as well as audiences at Georgetown, University of North Carolina School of Law, Wharton, and the 2011 Northeast Regional Scholarship and Teaching Development Workshop. This Article was selected for the Academy of Legal Studies in Business 2010 Invited Scholars Colloquium and benefited greatly from feedback received there. Joyce Shin provided excellent research assistance. All errors that remain are my own.

## TABLE OF CONTENTS

INTRODUCTION: A CENTURY-LONG MISTAKE? .....	412
I. THE DOGMA OF CORPORATE CRIMINAL LIABILITY .....	420
A. CORPORATE ONTOLOGY AS DESTINY .....	421
1. <i>Practice-Based Accounts of Corporate Criminal</i> <i>Responsibility</i> .....	423
2. <i>Organizational-Based Defenses of Corporate Criminal</i> <i>Liability</i> .....	424
3. <i>Capacity-Based Defenses of Corporate Criminal</i> <i>Liability</i> .....	427
4. <i>Summary</i> .....	430
B. DEBUNKING THE DOGMA .....	431
II. CORPORATE OFFICIALS' MORAL RESPONSIBILITY.....	435
A. THE CORPORATION AS A TEAM .....	436
B. FIDUCIARY DUTIES AND THE GROUND OF THE CORPORATE OFFICIAL'S RESPONSIBILITY.....	438
III. THE RATIONALE, AND APPROPRIATE PUNISHMENT, FOR SHARED RESPONSIBILITY IN CORPORATE CRIME.....	445
A. THE JUSTIFICATION FOR CORPORATE CRIMINAL LIABILITY .....	446
B. CORPORATE OFFICIALS' RESPONSIBILITY AND CORPORATE CRIMINAL LAW SANCTIONS.....	448
1. <i>Corporate Felony Disenfranchisement</i> .....	449
2. <i>The Corporate Criminal Law Sermon</i> .....	451
3. <i>The "Icon" Proceeding for Corporate Officials</i> .....	452
4. <i>Adverse-Publicity Sanctions for Nonparticipating</i> <i>Corporate Officials</i> .....	453
CONCLUSION .....	454

INTRODUCTION: A CENTURY-LONG MISTAKE?<sup>1</sup>

Between the financial meltdown, unsafe manufacturing practices that have led to unprecedented numbers of product recalls,<sup>2</sup> and an oil

---

1. Cf. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1359 (2009) (comparing corporate criminal punishment with the ancient legal practices of deodand and Frankpledge); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1329 (2009) (arguing there exists no theoretical justification for corporate criminal liability).

2. See, e.g., *FDA May Prosecute Executives over Violations*, CHI. TRIBUNE, Aug. 25, 2010, (News), at 43; Parija Kavilanz, *Drug Recalls Surge*, CNNMONEY.COM (Aug. 16, 2010), [http://money.cnn.com/2010/08/16/news/companies/drug\\_recall\\_surge/index.htm](http://money.cnn.com/2010/08/16/news/companies/drug_recall_surge/index.htm) (describing the skyrocketing number of drug recalls over the last year, including a four-fold increase in recalls relative

spill that constituted the worst environmental disaster in U.S. history,<sup>3</sup> we appear to have marked the centennial of corporate criminal liability with a spate of corporate wrongdoing that by itself seems to serve as sufficient justification for the doctrine's existence.<sup>4</sup> Yet commentators continue to revile the doctrine of corporate criminal liability, deeming it "ridiculous,"<sup>5</sup> a violation of a "basic premise of criminal justice that crime requires personal fault,"<sup>6</sup> and a "weed."<sup>7</sup> Punishing the corporation has been deemed worse than the institution of Frankpledge, whereby all members of a group were held responsible for the crime of one of them.<sup>8</sup> Furthermore, the moral theory underpinning corporate criminal liability has been termed "tribal,"<sup>9</sup> "fundamentally incoherent,"<sup>10</sup> and "destructive."<sup>11</sup> Where corporate crime occurs, these critics conclude, it is only the individuals responsible for the crime's commission who deserve prosecution and punishment.

Yet if corporate criminal liability really does warrant the vituperative reactions that scholars evince, those outside the academy appear not to have noticed. For example, in the wake of the BP oil-rig explosion, which led to the deaths of eleven rig workers as well as untold damage to the Gulf of Mexico, the public has demanded not just that BP executives be prosecuted for involuntary manslaughter but also that the corporation itself receive a "death sentence."<sup>12</sup> And when, in May 2010,

to the previous year).

3. See, e.g., Shadi Bushra, *America's Worst Environmental Disaster in History: A Reason to Sink Climate-Change Legislation?*, STANFORD PROGRESSIVE, June 2010.

4. The case affirming corporate criminal liability for specific-intent crimes was decided in 1909. See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493–94 (1909). Prior to that case, U.S. courts had permitted corporate convictions only for crimes of nonfeasance and misfeasance. See, e.g., *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. (2 Gray) 339, 339 (1854).

5. Alschuler, *supra* note 1, at 1359.

6. *State v. Casey's Gen. Stores*, 587 N.W.2d 599, 601 (Iowa 1998). See generally Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674 (1968) (noting that collective responsibility appears to violate the fault principle, according to which one may be held responsible for an injury only if one proximately caused the injury by acting in a faulty manner).

7. Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 21 (1957) ("Nobody bred it, nobody cultivated it, nobody planted it. It just grew.").

8. Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 312 (1991). Alschuler goes on to argue that, at least with Frankpledge, "the group could avoid punishment by capturing the flesh-and-blood wrongdoer and delivering him or her to the authorities." *Id.*

9. DANIEL WARNER, *AN ETHIC OF RESPONSIBILITY IN INTERNATIONAL RELATIONS* 65–66 (1991); cf. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 25–28 (1961) (referring to the tribalist assignment of collective responsibility as primitive).

10. Hasnas, *supra* note 1, at 1333.

11. Jeffrey S. Parker, *Doctrine for Destruction: The Case of Corporate Criminal Liability*, 17 *MANAGERIAL & DECISION ECON.* 381, 381 (1996).

12. Thom Hartmann, *Halliburton & BP—Is It Time for the Corporate Death Penalty?*, HUFFINGTON POST (May 3, 2010), [http://www.huffingtonpost.com/thom-hartmann/halliburton-bp---is-it-ti\\_b\\_560955.html](http://www.huffingtonpost.com/thom-hartmann/halliburton-bp---is-it-ti_b_560955.html).

Johnson & Johnson recalled 136 million bottles of children's medicines—its fourth recall in less than a year—government officials threatened criminal action against the company itself, citing “systemic” failures and a “culture of mediocrity.”<sup>13</sup>

In short, societal responses to corporate crime suggest that the sum of the wrongdoing in a corporate offense may be greater than its parts: We are keen to see the individual perpetrators of the crime brought to justice, but our outrage frequently extends beyond them.<sup>14</sup> It is this surplus outrage—this *remainder*—that likely prompts calls for criminal action against the corporation itself.<sup>15</sup>

But is the public thirst for corporate punishment no more rational than the Ancients' raising their fists against the volcano?<sup>16</sup> Scholars who have sought to account for public sentiment on this score argue that the corporation is an entity that can bear criminal responsibility in its own right.<sup>17</sup> For them, the corporation itself *deserves* to be prosecuted and punished where it has transgressed.

In this way, supporters of corporate criminal liability respond to the doctrine's critics by engaging them not on the merits of the doctrine but instead on a prior question: whether the corporation is a moral agent or, equivalently, whether the corporation is the kind of being that can bear moral, and hence criminal, responsibility. Yet, as we shall see, there is deep disagreement over just which capacities it takes to be a moral agent in the first place, to say nothing of the controversy over whether the

---

13. See, e.g., Susan Heavey, *Storm over J&J's Child Drug Recall Only Grows*, REUTERS.COM (May 27, 2010), <http://www.reuters.com/article/idUSTRE64P3UD20100527>.

14. Cf. Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955, 967 (2008) (citing a study reporting cases in which juries convicted corporations while acquitting each of the individual defendants, and speculating that “[s]uch verdicts suggest a theory of liability in which the whole is greater than the sum of its parts”).

15. The notion of a moral remainder, first introduced by Bernard Williams, typically arises in cases where an agent confronts two simultaneous and conflicting moral demands and, though she chooses the more pressing one, the one she has had to forsake does not thereby get cancelled out; instead, it persists as a kind of residue or remainder. BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980*, at 61 (1981). As should be clear, here I employ the term to signify cases in which what is left over is not some unfulfilled obligation but instead some undistributed responsibility.

16. Cf. Susan Wolf, *The Legal and Moral Responsibility of Organizations*, in CRIMINAL JUSTICE: NOMOS XXVII 267, 268 (J. Roland Pennock & John W. Chapman eds., 1985) (analyzing the rationale behind characterizing corporations as “full-fledged, irreducible moral agents”). The Supreme Court apparently has decided that public outrage can be irrational not only in criminal cases but also in civil cases where juries award punitive damages “grossly” in excess of compensatory damages. See Ryan J. Strasser, Note, *Punitive Damages Caps: A Proposed Middle Ground After Exxon Shipping Co. v. Baker*, 19 CORNELL J.L. & PUB. POL'Y 773, 778, 783 (2010). For example, in a challenge to the punitive damages award imposed upon Exxon for the Exxon Valdez oil spill, the Supreme Court held that punitive damages could not exceed a one-to-one ratio with compensatory damages, and it reduced the punitive damages award from \$5 billion to \$287 million, the amount that the jury had awarded in compensatory damages. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008).

17. See *infra* Part I.

corporation possesses the requisite capacities.<sup>18</sup> It is no surprise, then, that the critics and supporters of corporate criminal liability have been going around in circles for the hundred years since the doctrine's inception.<sup>19</sup>

There is, however, a way out of this mire. I shall argue that we do not need to decide questions of the corporation's moral status in order to defend corporate criminal liability. Instead, when the corporation commits a crime, its senior officers and directors are necessarily blameworthy, *whether or not they participated in the crime, recklessly tolerated it,*<sup>20</sup> *or negligently allowed it to occur.*<sup>21</sup> And I shall contend that we can best make sense of the societal reaction to corporate crime in light of the blameworthiness of these corporate officers and directors: We rage against the corporation that commits a crime because we intuit that its officials deserve blame, in addition to whatever culpability the crime's individual perpetrators bear. It is in giving voice to this response that the doctrine of corporate criminal liability finds it most compelling justification.<sup>22</sup>

In short, the Article advances a retributivist defense of corporate criminal liability—one that seeks to justify prosecuting and punishing the corporation as a way of targeting the senior officials whose very position within the corporation legitimately subjects them to blame. Correspondingly, the Article proposes sanctions against the corporation that can orient the criminal law's sting to these officials.

Importantly, the account of responsibility advanced here holds whether corporate criminal liability is understood along the federal doctrine of respondeat superior or the Model Penal Code (MPC) standard. Briefly, under federal criminal law, a corporation can be found criminally liable for any criminal act undertaken by an employee, so long

---

18. See *infra* Part I.A.3.

19. See, e.g., V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1477–78 (1996); Andrew Weissman & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 418 (2007) (“[N]early every scholarly article on this topic . . . makes a concession to the effect that ‘the doctrine of corporate criminal liability has developed . . . without any theoretical justification.’”). See generally Edward B. Diskant, Note, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Corporate Criminal Procedure*, 118 YALE L.J. 126 (2008).

20. See MODEL PENAL CODE § 2.07(1)(c) (1985) (making a high managerial authority's reckless toleration of a criminal offense one among several alternative predicates for a finding of corporate criminal liability).

21. In this way, the justification for corporate criminal liability to be advanced here is distinct from the responsible-corporate-officer doctrine, which seeks to prosecute individual corporate officials when their negligent oversight contributed to the corporation's crime. I discuss the responsible-corporate-officer doctrine in greater detail below. See *infra* note 33.

22. As Lawrence Friedman notes, “[O]nly criminal liability is understood against the background of social norms, codified by the criminal law, as conveying the particular moral condemnation that expressive retribution contemplates.” Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 854 (2000).

as the act was (a) within the scope of the employee's agency and (b) to the benefit of the corporation.<sup>23</sup> The MPC, by contrast, requires a corporate official's involvement in the crime before the crime can be attributed to the corporation. More specifically, a corporation will be held criminally liable for an act of its employee only if "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."<sup>24</sup>

These two doctrines specify the conditions under which it is appropriate to impute the criminal act of some employee (or employees) to the corporation. I begin not from the question of whether the corporation has committed a crime—again, a question that these two doctrines variously answer—but instead from the question of *who bears responsibility when the corporation has committed a crime*.<sup>25</sup> The Article

23. Thus, for example, in *New York Central & Hudson River R.R. Co. v. United States*, the case inaugurating corporate criminal liability for malfeasance, the Supreme Court held that corporations could be held criminally liable "not . . . because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal." 212 U.S. 481, 493 (1909); *see also* *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 309–10 (2d Cir. 2009) (affirming corporate conviction for a criminal offense committed by a low-level employee in direct contravention of corporate policy).

24. MODEL PENAL CODE § 2.07(1)(c) (1985). Elsewhere, the MPC allows for corporate criminal liability where

the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment.

*Id.* § 2.07(1)(a). The MPC further allows for corporate criminal liability where "the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law."

*Id.* § 2.07(1)(b). The MPC also allows a "defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission." *Id.* § 2.07(5). In the text accompanying this footnote, I focus on the provision requiring culpability on the part of an officer or director of the corporation because that provision functions as the counterpart to the federal criminal liability standard.

25. There is a widespread conflation of these two questions among commentators, who frequently assume that once they can find a basis upon which to ascribe some employee's criminal act to the corporation, then the corporation can rightly be said to deserve punishment. *See, e.g.*, Justice Ian Binnie, *Legal Redress for Corporate Participation in International Human Rights Abuses*, 38 BRIEF 44, 46 (2009) (discussing corporate complicity in international human rights abuses); *see also* Yedidia Z. Stern, *Corporate Criminal Personal Liability—Who Is the Corporation?*, 13 J. CORP. L. 125, 142 (1987) (arguing that corporate liability could be based on corporate personal actions). But this confuses two senses of desert. First, one deserves punishment only for those crimes to which one bears a culpable connection. But second, and more globally, one deserves punishment only if one is the kind of being that qualifies for moral agency in the first place. By way of analogy, children and those who are psychologically impaired can commit crimes, but we often—rightly—think that they do not deserve punishment, in virtue of their moral immaturity or incapacity. By the same token, the commentator who succeeds in convincing us that a corporation has committed a crime has won only half the battle; she must still convince us that the corporation is a suitable object of retribution. For reasons I go on to



answers the latter question by arguing that, in addition to the individual perpetrators, the corporation's officers and directors bear responsibility whenever the corporation has committed a crime. And the Article seeks to justify corporate criminal liability as an appropriate response to the responsibility borne by these officers and directors, to whom I refer collectively as "corporate officials."<sup>26</sup>

A handful of other scholars also have sought to defend corporate criminal liability as an effective way of targeting the corporation's members. Yet these scholars focus on the deterrent value of corporate criminal liability. They propose that, *ex ante*, the doctrine can enhance internal monitoring within the corporation;<sup>27</sup> *ex post*, an indictment or conviction against the corporation will be used by corporate officials to ferret out and, where appropriate, transmit sanctions to the individual wrongdoers.<sup>28</sup> These scholars do not argue that the doctrine might be justified on retributive grounds, as a means of casting blame upon the corporation's officials, as this Article does.<sup>29</sup>

articulate in Part I, I do not believe that any commentator has yet succeeded on this front. I offer my own efforts to this end in Part II.

26. *See, e.g.*, *Blackstone v. Cashman*, 860 N.E.2d 7, 18 (Mass. 2007) ("[A] corporate director, whatever the frequency of his involvement in day-to-day operations, has an important interest in and responsibility for the conduct of business by the company's corporate officers."). On the account I shall go on to advance, the corporate official's responsibility is grounded in her fiduciary relationship to the corporation, and both officers and directors stand in a fiduciary relationship. *See, e.g.*, Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, in *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* 55, 56 (John W. Pratt & Richard J. Zeckhauser eds., 1985) ("[B]oth officers and directors are 'fiduciaries' with respect to the corporation and its stockholders."); A. Gilchrist Sparks, III & Lawrence A. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 *BUS. LAW.* 215, 217 (1992) ("[M]ost authorities suggest that, as a general proposition, corporate officers owe the corporation the same fiduciary duties as do directors.").

27. *See, e.g.*, Alschuler, *supra* note 1, at 1390 (describing the ways in which instrumental proponents of corporate criminal liability support the doctrine in light of its (purported) ability to monitor the corporation *ex ante*).

28. *See, e.g.*, BRENT FISSE & JOHN BRAITHWAITE, *CORPORATIONS, CRIME AND ACCOUNTABILITY* 20–22 (1993) [hereinafter *FISSE & BRAITHWAITE, CORPORATIONS*] (arguing that prosecution and conviction of the corporation can provide an impetus for the corporation to discipline its culpable members, and that the corporation is better placed to ferret out these individual wrongdoers than is the state); 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, 412 (1981) ("[T]o deter corporate crime more effectively, one might sensibly begin by exploring the principal fears and interests of the manager, and then match the consequences of a criminal conviction to them."); Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 *SYDNEY L. REV.* 468, 482–88, 510–12 (1988) [hereinafter *Fisse & Braithwaite, Allocation*] (arguing both that the corporation deserves punishment in its own right, and that punishing the corporation can be an effective response "to the problem of non-prosecution of corporate managers," where the corporation is prompted, or even ordered, to transfer the sanctions imposed upon it to the individual offenders).

29. Larry May comes closest to mounting a retributivist defense of corporate criminal liability on the basis of the corporate executive's culpability, but his account applies only where the corporate executive has engaged in a culpable act or omission. Larry May, *Negligence and Corporate Criminality*, in *SHAME, RESPONSIBILITY AND THE CORPORATION* 137, 146–49 (Hugh Curtler ed., 1986). In this way, his

The account advanced here is not intended to serve as an apology for corporate criminal punishment as it is currently imposed. Critics are right to note the ways in which corporate punishments frequently befall the most innocent and least powerful members of the corporation.<sup>30</sup> They are also right to note the ways in which the threat of corporate criminal prosecutions has been inappropriately leveraged as a tool to sniff out individual perpetrators,<sup>31</sup> and how that threat in fact prompts the corporation to sacrifice expendable, and possibly innocent, employees in an effort to mitigate, or escape, its own liability.<sup>32</sup> But improperly targeted sanctions and undue prosecutorial pressure are not features endemic to corporate criminal liability. In any case, to the extent that the account advanced here justifies corporate criminal liability as a means of targeting the corporation's officials, it shifts the focus of blame, and the corresponding sanctions, from lower-level employees to directors and officers. At the same time, although the account aims to draw out the ways in which corporate officials are blameworthy, it does not seek to argue that they warrant individual prosecution, as the responsible-corporate-officer doctrine does.<sup>33</sup>

---

account, as he recognizes, functions as a philosophical defense of the MPC formulation for corporate criminal liability, or the responsible-corporate-officer doctrine. *Id.* at 148–49, 138–39. In any event, May favors individual over corporate prosecutions. *Id.* at 154–55. For all of these reasons, his project is significantly different from mine.

30. See, e.g., Coffee, *supra* note 28, at 401; John Hasnas, *Foreword to Corporate Criminality: Legal, Ethical and Managerial Implications*, 44 AM. CRIM. L. REV. 1269, 1269 (2007) (suggesting that enhanced prosecution for white-collar crime “risks causing harm to innocent parties”). For a case-specific reaction of this kind, consider the response of Arthur Andersen’s senior management to the Department of Justice’s decision to prosecute the entire firm, rather than just the Houston office: they saw it as unjustly “imposing a death penalty on the whole organization.” Jenifer K. Nii, *Andersen’s S.L. Workers Loyal*, DESERET NEWS, Mar. 23, 2002, at D12.

31. See, e.g., Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295, 295, 306 (2008); see also Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 96 (2007). *But cf.* Julie R. O’Sullivan, *Does DOJ’s Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary “No,”* 45 AM. CRIM. L. REV. 1237, 1238–39 (2008).

32. See, e.g., Coffee, *supra* note 28, at 412.

33. The responsible-corporate-officer doctrine allows for individual prosecutions of high-ranking officers where they have failed adequately to supervise or control subordinates who commit crimes as a result of the oversight failure. As the Supreme Court explained in *United States v. Park*, the doctrine “hold[s] criminally accountable the persons whose failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of.” 421 U.S. 658, 670–71 (1975); see Michael Willats, Comment, *Death by Reckless Design: The Need for Stricter Criminal Statutes for Engineering-Related Homicides*, 58 CATH. U. L. REV. 567, 581–82 & nn.99, 102 (2009) (reviewing the circumstances under which case law and statutes will allow for prosecution of corporate officers). Thus, the predicate for conviction is a finding that these officers are personally at fault in virtue of their own delinquency. In this way, the doctrine represents no departure from an individualist conception of responsibility. By contrast, I argue that corporate officials may be blameworthy even where they did not operate with a culpable mental state.

The arguments of this Article unfold against extensive debate over the relative merits of civil or criminal law responses to corporate wrongdoing,<sup>34</sup> and that debate in turn rests significantly on a series of questions about the proper relationship between efficiency and desert.<sup>35</sup> If the doctrine's critics are right, the corporation is a fictitious entity and so cannot be said to *deserve* anything. On their accounts, then, we should consider the matter entirely from the perspective of efficiency.<sup>36</sup> But public sentiment proceeds otherwise, and the considerations marshaled here amount to a reconstruction of the public's response—one that aims to make respectable what these critics heretofore have derided. As such, one goal of the Article is to secure a role for retribution in the response to corporate crime. While I do not seek to determine the relative ordering or weights of efficiency and desert, I anticipate that the efficiency-based arguments against the doctrine will be cabined to a significant extent if I can make good on the claim that retribution has a role to play in our response to corporate crime.<sup>37</sup>

---

34. Compare Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 835 (1994), Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 323 (1996), and Khanna, *supra* note 19, with Coffee, *supra* note 28, at 424–25, 447 (noting the uniquely stigmatizing effect of the criminal law), William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 648, 716–18 (1994), and William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1309–1310 (2000). See generally Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001) (arguing that the law of white-collar crime contains an appealing mix of civil and criminal sanctions that together serve the social goals of moral condemnation, deterrence, prevention, restitution, acceptance of responsibility, and so on, and that our response to street crime should involve a civil and criminal mix, too). In a stream of recent work, Dan Markel has advanced a deep and thoughtful retributive justification for punitive damages, which he conceives as intermediate between civil and criminal sanctions. See generally Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009).

35. See generally KIP SCHLEGEL, *JUST DESERTS FOR CORPORATE CRIMINALS* (1990); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998).

36. Cf. Kahan, *supra* note 35, at 610, 622 (arguing that efficiency itself is underspecified and ought to include considerations not just of material costs and benefits but also of the social good resulting from possibilities to discharge indignation at wrongdoing); Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 111–24 (2010) (arguing that, as the deterrence rationale for corporate criminal liability came to dominate the debate, the justifiability of the doctrine waned).

37. The strongest implication for the reductionist arises on a Kantian conception of responsibility, according to which retribution is lexically prior to efficiency. See, e.g., V.S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239, 1278 n.243, 1283 (2000). As such, corporate criminal liability would be justifiable no matter how inefficient. Cf. CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 205 (2000) (“I argue that we have ethical reason to treat shareholders as liable for their company’s deficiencies in meeting its reparative duties to accident victims. (I leave open the question of whether countervailing economic or procedural reasons override the ethical argument.)”). Critics of corporate criminal liability recognize the significance of retribution and marshal a denial of the corporation’s moral agency as a starting premise of their arguments. For them, it is only because the corporation does *not* deserve to be held responsible that the debate about corporate criminal liability can focus exclusively

The Article proceeds as follows. Part I first aims to diagnose the seeming intractability in the debate about corporate criminal liability by exposing a dogmatic precept that both parties to the debate share. In that precept, the justifiability of the doctrine turns on the question of whether the corporation is the kind of entity that can be held morally, and hence criminally, responsible. I argue that this question is likely unanswerable. While the standstill might prompt us to abandon the doctrine altogether, I argue that doing so would leave us with a surplus of blame, for which there would then be no target. I conclude that we should instead abandon the dogmatic constraint and see if we can justify corporate criminal liability on other grounds.

The remainder of the Article takes up that challenge. Part II relies upon a team-production model of the corporation and a normatively expansive conception of the corporate official's fiduciary relationship to argue that corporate officials bear moral responsibility for the crimes of their corporation whether or not they participate in those crimes. In Part III, I argue that the corporate official's moral responsibility for a corporate crime licenses our holding the corporation criminally liable, and I identify a series of sanctions that could direct our outrage in the face of corporate crimes to the blameworthy corporate official.

### I. THE DOGMA OF CORPORATE CRIMINAL LIABILITY

The debate about corporate criminal liability has centered around considerations of corporate ontology, as both critics and supporters share the view that it is the *corporation's* features that will either negate or sustain claims that it is an appropriate object of retribution.<sup>38</sup> The underlying commitment on both sides of the debate is, then, the notion that *corporate ontology is destiny*.<sup>39</sup> Yet, as I shall argue in Part I.A,

---

on considerations of efficiency. See, e.g., Fischel and Sykes, *supra* note 34, at 320.

38. Kip Schlegel puts the matter thus: “[T]he propriety of allocating punishments to the corporations themselves according to blame depends, quite clearly, on whether these corporate offenders can ever be considered blameworthy to begin with.” SCHLEGEL, *supra* note 35, at 76; see also Michael J. Phillips, *Corporate Moral Personhood and Three Conceptions of the Corporation*, 2 BUS. ETHICS Q. 435, 436 (1992) (“[T]he presence or absence of corporate moral personhood determines whether corporations are subject . . . to blame for their failure to meet [their moral] obligations.”).

39. Cf. Meir Dan-Cohen, *Sanctioning Corporations*, 19 J.L. & POL’Y 15, 18–19 (2010). Dan-Cohen has noted that the debate about criminal liability is also plagued by misleading ontological presupposition. *Id.* More specifically, he argues that the debate is beset by an “assumption of individuality” according to which “corporations are punishable if and only if punishing them would amount to or be the equivalent of punishing individual human beings.” *Id.* at 18. Dan-Cohen goes on to argue against the assumption by disaggregating two questions: first, whether corporations should be subject to the government’s coercive power when they commit a criminal offense, and second, whether, in exercising that coercive power, the government should be subject to the evidentiary, substantive and procedural constraints that limit governmental coercion of individuals. *Id.* at 19. Dan-Cohen answers the first question in the affirmative, but the second in the negative, on the ground that corporations lack the dignity in virtue of which coercive action must be constrained when directed at

questions about corporate ontology are likely irresolvable. It is because the debate about corporate criminal liability has focused on these questions, I conclude, that it has been doomed to intractability.

In Part I.B, I argue that we should abandon the dogmatic focus on corporate ontology because it is unnecessary and undesirable. More specifically, I contend that there is no reason to think that the justifiability of corporate criminal liability must turn on the corporation's ontological status. The doctrine could instead be understood as embodying a form of *shared* rather than *collective* responsibility.<sup>40</sup> In other words, it is possible that the doctrine targets the corporation because its *members* deserve punishment and not because *it* does. I seek to motivate that possibility by noting that often we experience more outrage in the face of corporate crime than can legitimately be aimed at the crime's individual perpetrators. I suggest that this surplus outrage might stem from a legitimate sense that there are members of the corporation who deserve blame for its crime even though they didn't participate in it. I thereby set the stage for a theoretical defense of the claim that corporate officials are morally responsible for any corporate crime, which I undertake in Part II.

#### A. CORPORATE ONTOLOGY AS DESTINY

Corporate criminal liability has its genesis in an extension of civil law's doctrine of respondeat superior to the criminal law.<sup>41</sup> But respondeat

---

individuals. *Id.* at 30–35. I find Dan-Cohen's account deeply nuanced and appealing and, among those theorists who attempt to draw an ontological distinction between the individual and the corporation, Dan-Cohen's account must surely rank with the best. But it requires that one embrace a Kantian transcendental notion of human dignity and, as such, is not likely to provide a ready resolution to the debate I describe in this Part, since many of the participants in the debate do not share Dan-Cohen's Kantian commitments.

40. On an account of collective responsibility, at least some part of the responsibility of a collective cannot be distributed to the collective's members but must instead rest with the collective itself. See, e.g., David Copp, *On the Agency of Certain Collective Entities: An Argument from "Normative Autonomy,"* 30 *MIDWEST STUDIES IN PHILOSOPHY* 194, 211 (2006); Feinberg, *supra* note 6, at 677. See generally George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt,* 111 *YALE L.J.* 1499 (2002). For the view that at least some of the responsibility for a collective wrong must rest with the collective itself, see, for example, Tracy Isaacs, *Collective Moral Responsibility and Collective Intention,* 30 *MIDWEST STUDIES IN PHILOSOPHY* 59, 62 (2006). For some seminal works on collective responsibility, see generally David Cooper, *Responsibility and the "System,"* in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY: THE MASSACRE AT MY LAI* 86 (Peter A. French ed., 1972); PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984); MARGARET GILBERT, *SOCIALITY AND RESPONSIBILITY* 129 (2000); Philip Pettit, *Responsibility Incorporated,* 117 *ETHICS* 171, 177 (2007); see also *infra* notes 42, 45–47, 55–58. On an account of *shared* responsibility, the members of a group will bear responsibility for at least some group acts in which they did not participate. See generally KUTZ, *supra* note 37; LARRY MAY, *SHARING RESPONSIBILITY* (1996); Meir Dan-Cohen, *Responsibility and the Boundaries of the Self,* 105 *HARV. L. REV.* 959 (1992).

41. See, e.g., *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 493 (1909).

superior is a notoriously problematic rationale for criminal responsibility.<sup>42</sup> Enter attempts to articulate accounts of direct criminal culpability—that is, accounts arguing that the corporation can be culpable in its own right and hence *deserves* to be punished when it violates the criminal law—as well as rejoinders from the doctrine’s critics that claims of corporate desert are spurious. I refer to those who contend that the corporation can deserve punishment in its own right as *retributivists*, and those who deny this contention, typically on the ground that a corporation is nothing other than a nexus of contracts, as *reductionists*.<sup>43</sup>

Generally speaking, there are two points of departure for a retributivist defense of corporate criminal responsibility. First, one can invoke our *practices* of assigning responsibility and argue that, because we treat corporations as morally responsible, corporations must be moral agents—that is, the kind of entities that can bear moral, and hence criminal, responsibility. Second, one can tackle the issue from the other direction by arguing that corporations possess the kind of features that can sustain ascriptions of moral responsibility.<sup>44</sup>

This second alternative can itself take one of two forms. The first elides the question of moral agency altogether and argues that features of corporate *organization* ground blame and, hence, criminal responsibility.<sup>45</sup> The second seeks to argue that the corporation possesses capacities that would qualify it for moral agency, and hence suit it for moral responsibility.<sup>46</sup> In this Part, I first address practice-based accounts and then turn to organizational and capacity-based accounts.

---

42. See, e.g., Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation*, 44 AM. CRIM. L. REV. 1343, 1360 (2007) (“Respondeat superior . . . is an infirm theory on which to base criminal punishment.”). Cf. Weissman & Newman, *supra* note 19, at 411–14 (2007) (arguing that federal corporate criminal law, which embodies a vicarious responsibility rationale, ought to be revised to include “an additional criminal element that the corporation failed to have reasonable policies and procedures to prevent” the commission of the crime).

43. Though the term “reductionist” might be pejorative in some contexts, it is routinely used neutrally in the debate over corporate personhood to describe those who deny the real existence of the corporation. See, e.g., Dan-Cohen, *supra* note 39, at 18. The poles in this debate have also been described as realist and nominalist. See, e.g., Eric Colvin, *Corporate Personality and Criminal Liability*, 6 CRIM. L.F. 1, 2 (1995); Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 680 (2000). See generally David Millon, *New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993).

44. Brent Fisse and John Braithwaite advance both strategies in their defense of corporate criminal liability. See Fisse & Braithwaite, *Allocation*, *supra* note 28, at 482–88.

45. Cf. David Luban, Alan Strudler & David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2367–77 (1992) (classifying defenses of corporate moral responsibility as rooted in the corporation’s structure, culture, or capacity to encourage evil-doing, and rejecting all three).

46. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 658 (1926) (“[B]efore anything can be a jural person it must intrinsically possess certain properties, the existence of which is necessary to constitute anything a person.”).

I. *Practice-Based Accounts of Corporate Criminal Responsibility*<sup>47</sup>

Proponents of corporate moral responsibility sometimes argue that our practices of assigning moral responsibility to corporations establish that corporations are appropriate bearers of these assignments—in short, that they are moral agents. These theorists take such discourse about the corporation at face value.<sup>48</sup> Samuel Buell, for example, asserts that these ascriptions of blame to entities “show that we understand entities . . . to be responsible for consequences of actors’ conduct.”<sup>49</sup> Lawrence Friedman infers from the tendency to speak of corporations as “‘real’ entities . . . in moral discourse,”<sup>50</sup> that the “corporation *qua* corporation can *suffer* moral condemnation for its wrongdoing through criminal conviction and punishment.”<sup>51</sup>

The problem with these statements is that they are irremediably ambiguous.<sup>52</sup> It may be that sometimes we exhaust our emotional responses to an entity’s wrongdoing by aiming these responses only at the entity. Think here of indignation directed at corporations that employ child laborers: We appear to be content to vilify, say, The Gap,

47. The claims addressed in this Subpart seek to establish that our practices of holding groups morally responsible entail that they *are* morally responsible. Dan Kahan appeals to our practices of blaming corporations in an effort to defend corporate criminal responsibility but elides the question of whether the corporation *deserves* punishment. *See, e.g.*, Kahan, *supra* note 35, at 618–19. Instead, his point is that our practices reveal the social value of corporate criminal responsibility—a value that is overlooked, according to him, by economists who focus only on the material costs and benefits of corporate criminal responsibility. *Id.* at 610, 619–22. While I agree that society values punishing corporations, I believe that we should indulge this value only if corporations deserve punishment.

48. *Cf.* FISSE & BRAITHWAITE, CORPORATIONS, *supra* note 28, at 847 (1993) (“It is not a legal fiction for the law to hold corporations responsible for their decisions; in all cultures it is common for citizens to do so. When the law adopts these cultural notions of corporate responsibility, it does more than reflect the culture; it deepens and shapes the notions of corporate responsibility already present in the culture.”); Lawrence E. Mitchell & Theresa A. Gabaldon, *If I Only Had a Heart: Or, How Can We Identify a Corporate Morality?*, 76 TUL. L. REV. 1645, 1652 (2002) (citing as inconclusive evidence for the view that the corporation possesses its own morality the fact that we hold the corporation itself to account when it acts badly, and that we aim our opposition to corporate actions at the corporation itself).

49. Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 492 (2006).

50. Friedman, *supra* note 22, at 847 (quoting Eric Colvin, *Corporate Personality and Criminal Liability*, 6 CRIM. L.F. 1, 24 (1995)).

51. *Id.* at 852 (emphasis added).

52. Indeed, reductionists and retributivists disagree about whether we intend these statements to be taken at face value or instead whether we deploy them as a shorthand for responsibility we intend to assign to the corporation’s individual members. *Compare* Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, BUS. & PROF’L ETHICS J., Spring 1983, at 13 (“To say that a corporation is morally responsible for some wrongful act, then, is but an elliptical way of saying (if what one is saying makes sense) that some people within the corporation are morally responsible for the act . . .”), *with* Kevin Gibson, *Fictitious Persons and Real Responsibilities*, 14 J. BUS. ETHICS 761, 761 (1995) (“I contend that it also makes sense to say that the corporation is itself a moral agent, so that the claim that it is praiseworthy or blameworthy is not always reducible to a claim about the acts of members of the corporation.”).

Inc., without seeking to transmit all (or even any) of our indignation to those who are members of that corporation.<sup>53</sup> Similarly, we are inclined to lay blame with groups themselves when the harm they cause results from features endemic to the structure or organization of the group itself, over which no individual member has control.

In other instances, however, we are not content to have the buck stop at, or even rest with, the collective. Indeed, we view the collective front with suspicion—as a spurious tool with which to shield the individuals who orchestrated or otherwise contributed to the harm. For example, I doubt that anyone who reviles the Nazi SS for the atrocities it committed means to have *any* part of that response rest with the institution itself. Though we may here refer to the collective, it is only the members themselves whom we really seek to blame. In the corporate context, this insight has found its way into doctrine, as courts impose liability upon a corporation's owner where they view the corporation as nothing other than her alter ego.<sup>54</sup>

The ambiguity in statements in which we blame the corporation, or appear to be blaming the corporation, arises because of an obvious, but often unremarked, difference between corporations and individuals. In the case of individuals, the buck must stop with them—there is no part of the individual that is itself a moral agent and could thus qualify for an assignment of moral responsibility.<sup>55</sup> By contrast, collectives are comprised of members who are themselves moral agents. We cannot discern, then, from the face of our practices of blaming collectives (to the extent that we do blame them) whether we mean that the collective itself is responsible or instead whether we invoke the collective as a shorthand way of referring to those members who bear responsibility in its stead. We should adopt the collectivist's interpretation of these practices, then, only if there are independent grounds for thinking that collectives possess the kind of features that *justify* our holding them morally responsible. It is to a consideration of these features that I now turn.

## 2. *Organizational-Based Defenses of Corporate Criminal Liability*

Some theorists have sought to defend corporate criminal liability by pointing to features internal to the corporation rather than to our discourse about it. Two strategies arise here. First, some accounts point

---

53. See, e.g., Sidharth Pandey & Anchal Vohra, *Global Media Slam GAP for Child Labour Clothing*, NDTV.COM (Oct. 30, 2007), <http://www.ndtv.com/convergence/ndtv/story.aspx?id=NEWEN20070031262&ch=10/30/2007%209:28:00%20PM>.

54. See, e.g., *Cheatle v. Rudd's Swimming Pool Supply Co.*, 360 S.E.2d 828, 830 (Va. 1987).

55. I am reminded here of the old-school parenting tactic of asking the child-culprit of some offense, "Which hand did it?" and targeting that hand for the ensuing sanction. That the question and resulting punishment are ridiculous supports, I believe, the claim made in the text accompanying this footnote.



to elements of a corporation's structure or culture that conduce to crime and hence allegedly are blameworthy in and of themselves. Other accounts seek to make out the corporate analogs of the traditional actus reus and mens rea elements of criminal law. In this Subpart, I confront the first of these strategies; I take up the second in the next Subpart.

It is an ineluctable fact of group dynamics that the group setting can both cause people to engage in wrongful acts that they might not have committed otherwise<sup>56</sup> and magnify the effects of the harm caused by these wrongs.<sup>57</sup> Sometimes, the very structure of the group can create opportunities to contribute to wrongdoing unwittingly, as when the bureaucracy of a corporation impedes members from knowing what others are doing, and it is the combination of their actions that produces the wrongful act.<sup>58</sup> This is just the set of conditions that prompted the articulation of the much reviled "collective knowledge" doctrine<sup>59</sup> in *United States v. Bank of New England*.<sup>60</sup> In that case, the First Circuit held that a bank could be said to know that withdrawals had exceeded the level above which reporting was necessary when tellers knew the amount of the withdrawals in question but did not know the reporting limits, and other bank employees knew the reporting limits but did not know the amount of the withdrawals.<sup>61</sup> The court found that that the knowledge of a corporation "is the sum of the knowledge of all of the employees," and in that way it was able to impute to the corporation a crime of which none of its individual members was culpable.<sup>62</sup>

In other instances, the group's culture promotes wrongdoing, and its members can then rationalize their participation in crime by appealing to the corporation's interests.<sup>63</sup> For example, Pamela Bucy argues that such

---

56. See, e.g., John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 BROOK. L. REV. 1177, 1186–92 (2005); Luban, Strudler & Wasserman, *supra* note 45, at 2356–65.

57. See, e.g., Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1324 (2003) ("With a shared identity, performance increases markedly . . . . Conspiracies, which often cultivate such an identity, therefore can be more productive (and impose greater harm) than isolated individuals.").

58. Luban, Strudler & Wasserman, *supra* note 45, at 2365; cf. Kutz, *supra* note 37, at 150 ("When we act together, it becomes easy to inhabit an essentially *bureaucratic* frame of mind, in which ultimate ends are less salient than the instrumental procedures used to effect those ends.").

59. David Luban has perhaps the wittiest rejoinder to this definition of collective knowledge, deeming it "as bizarre as announcing that four fiddlers playing in separate rooms make a string quartet." David Luban, *What's Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43, 70 (1996).

60. 821 F.2d 844, 856 (1st Cir. 1987).

61. *Id.* at 855.

62. *Id.*

63. See, e.g., ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* 101 (1988) (describing how employees come to rationalize departures from known moral dictates and eventually to feel that their conduct, if not honorable, is at least morally blameless); Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scienier*, 2006 COLUM. BUS. L. REV. 81, 160–61; Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM.

things as a corporation's hierarchy, goals, employee education efforts, incentive structure, and compliance program constitute its "ethos" and, depending on their contents, can encourage corporate crime.<sup>64</sup> Further, even those corporate employees who decline to participate directly may feel sufficiently aligned with the group's overall mission that they submerge any impulse to oppose the wrongdoing in their midst.<sup>65</sup>

The question for our purposes is whether these features of organizational life can ground the *corporation's* criminal responsibility for its wrongful acts.<sup>66</sup> Bucy argues that the federal vicarious liability standard should be replaced by a corporate-ethos standard, since the latter better tracks the corporation's desert.<sup>67</sup> Buell marshals an impressive case for the claim that "institutions can cause harm"<sup>68</sup> and concludes that they "therefore can be blameworthy."<sup>69</sup>

Legal doctrine reflects these positions. For example, in *United States v. Hilton Hotel Corp.*, the Ninth Circuit acknowledged that violations of the Sherman Act committed by Hilton Hotel's agents were contrary to the corporation's stated policy, but nonetheless affirmed a conviction against Hilton.<sup>70</sup> In reaching its decision to impute the agents' acts to Hilton, the court relied in part upon features of the corporation's organization and culture—in particular, the "[c]omplex business structures, characterized by [the] decentralization and delegation of authority, commonly adopted by corporations for business purposes," and the fact that the crimes in question appeared to be motivated by a "desire to enhance profits."<sup>71</sup> Further, the notion that organizational features can influence criminality has also found its way into model statutes. The Australian Model Criminal Code, for example, permits corporate criminal liability, *inter alia*, where the "corporate culture . . . directed, encouraged, tolerated or led to non-compliance."<sup>72</sup>

---

BUS. L. REV. 71, 89–90; *cf.* William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1329–32 (2002) ("To tell a compelling causation story on this scenario, we must look to Enron's organizational culture . . . . At Enron, winning was everything and everything became a tournament.").

64. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1121–46 (1991).

65. MAY, *supra* note 40, at 73; Buell, *supra* note 49, at 497.

66. *Cf.* Luban, Strudler & Wasserman, *supra* note 45 (grounding the responsibility of the corporation's *members* in the structural and cultural features of the corporation that permit its members to persist in culpable ignorance).

67. Bucy, *supra* note 64.

68. Buell, *supra* note 49, at 497.

69. *Id.*; *cf.* Abril & Olazábal, *supra* note 63, at 162–65 (railing against the impropriety of an "individual-oriented paradigm" for determining corporate scienter and proposing a multifactor test for corporate mens rea that would make the corporation guilty of securities fraud if its culture promoted the fraud).

70. 467 F.2d 1000, 1004, 1008 (9th Cir. 1972).

71. *Id.* at 1006.

72. AUSTL. MODEL CRIMINAL CODE §§ 501.2, 501.3.1 (2009).

Notwithstanding the increasing acceptance of organizational bases for criminal liability,<sup>73</sup> the fact that a corporation's structure or culture can contribute to its engaging in criminal activity does not entail that the corporation deserves prosecution and punishment. A corporation's structure or culture is a ground of *its* culpability only if the corporation itself is responsible for its structure or culture—that is, only if the corporation is the kind of entity that can bear responsibility in the first place.<sup>74</sup> In this way, organizational accounts, like practice-based accounts, are parasitic on capacity-based accounts: Whether or not a corporation deserves punishment in virtue of its structure or culture—like the question of whether or not corporations are referents of the statements in which we predicate blameworthiness of them—turns on the nature of the corporation's capacities. It is to capacity-based accounts that I now turn.

### 3. *Capacity-Based Defenses of Corporate Criminal Liability*

Debates about corporate personality tend to take a dichotomous view of the issue, with the corporation alternately described as real or fictive;<sup>75</sup> an association or an aggregation;<sup>76</sup> a distinct entity or a nexus of contracts.<sup>77</sup> Yet the matter is much less stark than these debates convey.<sup>78</sup> On the one hand, the corporation is an irreducibly distinct entity—that is, it exists over and above the individuals who constitute it.<sup>79</sup> The fact that the corporation persists through turnover in its individual

---

73. See, e.g., Abril & Olazábal, *supra* note 63, at 165.

74. Cf. Luban, Strudler & Wasserman, *supra* note 45, at 2373–75 (arguing that it might be useful to identify organizational features conducive to crime for purposes of explaining how corporate crime occurs and locating areas where change is needed, but that this identification does not entail anything about the corporation's moral agency).

75. Cf. Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 260–62 (1911) (defending the view that corporations are real entities insofar as they exist over and above the individuals constituting them, but are fictive persons because they enjoy personhood only by virtue of law). Compare *McCabe v. Ill. Cent. R.R. Co.*, 13 F. 827, 830 (N.D. Iowa 1882) (arguing that the corporation is a creature of law and so exists only in the state of incorporation), with *Petrogradsky Mejdunarodny Kommerchesky Bank v. Nat'l City Bank of N.Y.*, 170 N.E. 479, 482 (N.Y. 1930) (“[E]ven in the absence of a charter or other token of the will of government there are groups so natural and spontaneous as to evoke legal recognition of a corporate existence.”).

76. See, e.g., Fletcher, *supra* note 40, at 1549.

77. See *supra* note 43.

78. See generally William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471 (1989) (arguing that the nexus-of-contracts theory, developed in the 1970s, is not a novel understanding but instead one moment in a two-century-long history in which managerialist and reductionist conceptions of the corporation have alternately gained prominence).

79. Cf. CHARLES C. ABBOTT, *THE RISE OF THE BUSINESS CORPORATION* 15 (1936) (“[A] group of persons organized as a corporation constitutes a whole which is greater than the sum of its parts. In the same way that a house is something more than a heap of lumber and an army something more than a mob it is urged that a corporate organization is something more than a number of persons.”).

constituents demonstrates as much.<sup>80</sup> Nonetheless, mere existence is a far cry from moral agency.<sup>81</sup>

There is good reason for skepticism about the corporation's moral agency, not least of all because moral agency at least arguably requires a capacity for the moral emotion, and it is doubtful that the corporation possesses this capacity. More specifically, on at least one established account of moral agency, only those who can experience guilt and remorse can bear moral responsibility,<sup>82</sup> and this is so for at least two reasons. First, moral agency presupposes a capacity to appreciate right and wrong, and that capacity in turn requires not only recourse to moral rules but also a rich sense of compassion and moral imagination. In particular, only by imagining what one's contemplated course of conduct will *feel* like from the perspective of those it affects can we discern that conduct's propriety.<sup>83</sup> Second, the expressions of resentment and indignation that are constitutive of blaming make sense only if the target of these expressions can be made to feel bad about the blamed conduct. Put differently, the point of censure is not just to condemn the wrong but also to inflict upon the wrongdoer the pain of disapprobation.<sup>84</sup>

---

80. Cf. H.L.A. Hart, Professor of Jurisprudence, University of Oxford, Definition & Theory in Jurisprudence, Inaugural Lecture at the University of Oxford 17–18 (May 30, 1953) (“[E]ven if all the members and servants of the Company are dead there are yet conditions under which it is true to say that the Company still exists . . .”). For a more skeptical view of whether the corporation exists as a “thing” in its own right, see John Hasnas, *Where Is Felix Cohen When We Need Him?: Transcendental Nonsense and the Moral Responsibility of Corporations*, BROOK. J.L. & POL’Y (forthcoming) (manuscript at 16–17), available at <http://faculty.msb.edu/hasnasj/GTWebSite/Cohen.pdf>.

81. A word about terminology: The term “agent” is sometimes used to describe one who acts on behalf of another, and at other times used to refer to one who can act of his own accord, or act intentionally. I adopt the latter use throughout. By “moral agent,” I shall refer to the agent who is capable of acting in a manner fitting for ascriptions of moral responsibility.

82. There is general agreement among philosophers of responsibility that a responsibility assignment crucially involves the reactive attitudes. Debate remains, however, about whether the reactive attitudes are constitutive, or instead merely corollaries, of a responsibility assignment. See Gary Watson, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 256, 257 (Ferdinand Schoeman ed., 1987). I do not stake a position on that debate here.

83. Steven Walt and Bill Laufer contend that a capacity to discern right and wrong is necessary for criminal responsibility, but a capacity for emotion is not. Steven Walt & William S. Laufer, *Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions*, 18 AM. J. CRIM. L. 263, 276–77 (1991). For the reasons adduced in the text accompanying this footnote, they unduly ignore the relationship between these two capacities. In any case, Laufer, at least, appears to have acknowledged a greater role for the emotions in determining desert. In a later article, Laufer and his coauthor, Alan Strudler, acknowledge that corporations are likely incapable of remorse. William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, 44 AM. CRIM. L. REV. 1307, 1317 (2007). Though Laufer and Strudler do not conclude that corporations are therefore inappropriate targets of criminal law, they do contend that we should not assume that a corporation's outward displays of contrition reflect anything like the change of heart that diminishes the warrant for retribution in the case of individuals. *Id.* at 1316–17.

84. Susan Wolf argues that a capacity for emotion is necessary for moral responsibility since emotion provides the motivation necessary to ensure that one abides by moral rules. Wolf, *supra* note

It is likely because a capacity for emotion is so central to moral agency that opponents of corporate criminal liability frequently note the corporation's inability to experience guilt.<sup>85</sup> Yet proponents of the doctrine do not appear to have sought to argue to the contrary,<sup>86</sup> and no wonder.<sup>87</sup> Where would a capacity for corporate emotion reside? Where is the corporate heart that would swell with compassion at the misery of others? What is the corporate analog of the pit of the stomach in which we experience guilt upon recognizing that we have acted wrongfully? What is the locus of the corporation's shame?

I mean for these rhetorical questions to be persuasive but not necessarily decisive. One could just deny that a capacity for emotion is in fact a prerequisite for moral agency.<sup>88</sup> But the denial would call attention to a more general problem with attempts to argue for or against the corporation's moral agency: The endeavor presupposes agreement on the conditions necessary and sufficient for moral personhood. There is no consensus on what it takes to qualify for membership in the class of moral persons, let alone moral agents. (The intractability of the abortion debate should demonstrate at least that much.)<sup>89</sup> Moreover, even for

16, at 278–79. Thus, she argues, “[I]t seems inappropriate to regard sociopaths as wholly morally responsible agents. It seems wrong, in particular, to blame them . . . for failing to constrain their behavior according to rules they are incapable of being motivated to obey.” *Id.* For Wolf, then, emotion is not necessary for discerning right and wrong, as I argue it is; instead, emotion is necessary for securing the motivation necessary to obey rules that, according to her, sociopaths (and, presumably, others like them) have within their grasp. *Id.*

85. See, e.g., Alschuler, *supra* note 1, at 1392 (“[A]ttributing blame to a corporation is no more sensible than attributing blame to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime.”); Khanna, *supra* note 19, at 1494 & n.91.

86. Peter French alleges that the corporation can experience regret, but that regret, as he characterizes it, is not an emotional experience but instead an intention to avoid like behavior in the future. FRENCH, *supra* note 40, at 164–66. Without the emotional experience of regret it remains mysterious that one could discern what constitute like behavior. In any case, regret is a far cry from remorse. Alan Strudler, for example, posits regret as the reactive attitude appropriately experienced by one who has caused harm *without fault*. See Alan Strudler, *Mass Torts and Moral Principles*, 11 L. & PHIL. 297, 322–25 (1992).

87. There is philosophical literature on the possibility of collective emotions, though it is unpersuasive for reasons I have adduced elsewhere. See Amy J. Sepinwall, *Responsibility for Group Transgressions* 82–85 & 90–92 (Dec. 16, 2010) (unpublished Ph.D. dissertation, Georgetown University) (on file with Georgetown University Library).

88. Fisse and Brathwaite, for example, suggest that the corporation might be especially well-suited to moral responsibility precisely because it lacks the capacity for affect and can therefore exercise judgment unclouded by emotion. FISSE & BRATHWAITE, *supra* note 28, at 30–31. It is not clear, however, that rational choice devoid of emotion in fact conduces to good moral judgment. One is reminded of Hannah Arendt's characterization of the typical Nazi functionary who “does not regard himself as a murderer because he has not done it out of inclination but in his professional capacity. Out of sheer passion he would never do harm to a fly.” Hannah Arendt, *Organized Guilt and Universal Responsibility*, in *THE PORTABLE HANNAH ARENDT* 146, 154 (Peter Baehr ed., 2000). Pure rationality, it would thus seem, can lead to the most egregious conduct.

89. See, e.g., *Roe v. Wade*, 410 U.S. 113, 159 (1973) (“When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary,

those criteria of moral agency where there is widespread agreement—for example, that moral agency requires a capacity for belief or intentions—there is deep disagreement about whether the corporate versions of these capacities suffice.<sup>90</sup> And that disagreement rests, in turn, on debates about the adequacy of functionalist theories of the mind—debates that date back to Aristotle and have continued vitality today.<sup>91</sup> In short, it is foolhardy to think that white-collar-crime scholars can make progress on questions that have confounded philosophers of mind for millennia. If corporate ontology is destiny, as the dogma holds, then it is no surprise that the doctrine of corporate criminal liability remains a “black hole” more than 100 years after its inception.<sup>92</sup>

#### 4. Summary

This Subpart began by surveying three different strategies theorists have invoked in support of the claim that corporations are moral agents. First, I considered the fact that, in common parlance, we blame corporations, and found this fact to be inconclusive, since we might mean not that the corporation is itself blameworthy but instead that some or all of the individuals who together constitute the corporation are blameworthy. I next turned to accounts that ground the corporation’s purported blameworthiness in its structure or culture, and found that these accounts—like the discourse-based accounts we considered first—presupposed the corporation’s moral agency, rather than proved it. Corporate moral agency could be defended, then, only by an account that established that the corporation possessed the capacities necessary and sufficient for moral agency. I argued that there is no settled view on what capacities these are, let alone whether the corporation possesses them. It appears, then, that on the terms of the dogma holding that corporate ontology is destiny, the debate about corporate criminal liability is a draw.

---

at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”); Amy J. Sepinwall, *Defense of Others and Defenseless “Others,”* 17 YALE J.L. & FEMINISM 327, 342–43 (2005) (“[I]t is not at all clear that unborn children do possess the moral worth of persons; instead this is, manifestly, an area of deep controversy.”).

90. Compare FRENCH, *supra* note 40, at 43 (arguing that a corporation’s capacity to exhibit regret by changing course when it has transgressed is all one needs for the emotive part of moral agency), with Thomas Donaldson, *Personalizing Corporate Ontology: The French Way*, in SHAME, RESPONSIBILITY AND THE CORPORATION, *supra* note 29, at 99, 109 (expressing deep skepticism that one could qualify as a moral person if one lacked a capacity for sympathy, as persons do in French’s conception of them). Compare Wolf, *supra* note 16, at 278–79 (arguing that a capacity for emotion is necessary for moral responsibility), with Walt & Laufer, *supra* note 83, at 276–77 (denying same).

91. See generally Janet Levin, *Functionalism*, STAN. ENCYCLOPEDIA PHIL. (Apr. 6, 2009), <http://plato.stanford.edu/entries/functionalism/#AntFun>.

92. Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1183 (1983) (referring to corporate criminal liability jurisprudence as “the blackest hole in the theory of corporate criminal law”).

## B. DEBUNKING THE DOGMA

Because it is so unlikely that one could successfully defend the claim that the corporation deserves prosecution and punishment in its own right, critics of corporate criminal liability conclude that the criminal law should extend only to the individual perpetrators of the corporate crime. Yet this restriction fails to align with our common-sense reactions to organizational wrongdoing. As noted in the Introduction, even in cases where we can identify individual perpetrators, we may still have a reserve of indignation, arguably because our sense of the wrong exceeds the responsibility borne by the individual perpetrators.

More specifically, two kinds of cases seem most readily to prompt our sense that responsibility for the wrongdoing extends beyond the responsibility we would assign to the individual wrongdoers. First, and more obviously, are those cases where the amount of harm caused in the crime's commission is greater than the amount of wrongdoing we can assign to individuals within the corporation, even when we contemplate their culpability in the aggregate. The BP oil spill might well be representative, insofar as the explosion leading to the deaths of the oil-rig workers and to the spill itself appears to have been caused by a series of errors of judgment and oversight, no one of which alone was causally necessary or made it more likely than not that the explosion would occur, but which together produced calamity.<sup>93</sup> In such a case, the culpability of each individual is relatively small, but the disastrous consequence of their combined contributions is so large as to exceed even the sum of the blame we would assign to each of them.

A related set of cases arises when the person who carries out the corporate criminal act is individually blameless,<sup>94</sup> and the culpable mental

---

93. The Obama Commission investigation into the causes of the explosion and oil spill has identified many missteps, implicating BP, Halliburton, Transocean, and the Federal Minerals Management Service (MMS). NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING* 89–128 (2011). For example, BP made at least four different errors in the way that it plugged the well, including having used nitrogen foam cement, which is lighter than normal cement. *Id.* at 100. BP's choice of cement was made more risky still because it turned out that the particular nitrogen foam cement used was unstable, as Halliburton had learned through tests it conducted, but whose results Halliburton had neglected to convey to BP. *Id.* at 101–02. Other errors leading to the explosion included: failures in monitoring, poor maintenance of the equipment that would otherwise have prevented the explosion, inadequate training of the rig crew to handle an event of this kind, and a poorly conceived response plan, as well as inadequate oversight by the MMS, which ought to have noticed the errors in the response plan. *Id.* at 57, 71, 115, 224.

94. The term “individually blameless,” inelegant as it is, is meant to signal a distinction between the individual who is culpable in his own right (for example, one who has committed the actus reus with a culpable mental state) and the individual who is culpable solely in virtue of his membership in the corporation that has committed a crime. I leave open the possibility that membership can itself ground blameworthiness, and I seek to make good on this possibility with regard to corporate officials in the next Part.

state resides in one or more high-level corporate officials who were physically removed from that act. For example, in *Commonwealth v. McIlwain School Bus Lines, Inc.*, a school bus driver ran over and killed a young girl whom the driver had just dropped off.<sup>95</sup> A Pennsylvania superior court allowed a homicide indictment against the bus company to go forward in light of allegations that the company had failed to equip the bus with safety mirrors that would have allowed the bus driver to see the child after she had left the bus.<sup>96</sup> If the bus driver had no reason to know of the blind spot, then he could not be said to have been culpable in the girl's death. Prosecuting him would therefore be inappropriate. Yet the girl's death was no mere accident; instead, it resulted from the company's cavalier failure to equip its buses with mirrors mandated by Pennsylvania state law.<sup>97</sup> This failure was a criminal omission, and to prosecute no person or entity would thereby leave some portion of the injury unaddressed.<sup>98</sup> In both *McIlwain* and the BP disaster, there seems to be wrongdoing in excess of that which can be assigned to the individual actors.

But there is a second kind of case—one that has gone relatively unnoticed even among retributivist supporters of corporate criminal liability.<sup>99</sup> In this kind of case, the crime seems so ineluctably to belong to the corporation that to prosecute and punish only the culpable individuals would fail to match our sense of the wrong. The Johnson & Johnson drug recall is exemplary here.<sup>100</sup> Imagine that all of the

---

95. 423 A.2d 413, 413 (Pa. Super. Ct. 1980).

96. *Id.* at 418–19; see also John E. Stoner, Comment, *Corporate Criminal Liability for Homicide: Can the Criminal Law Control Corporate Behavior?*, 38 Sw. L.J. 1275, 1283 (1985).

97. *McIlwain*, 423 A.2d at 416.

98. *Cf.* *Commonwealth v. Angelo Todesca Corp.*, 842 N.E.2d 930, 934–36, 943 (Mass. 2006) (upholding the conviction of a corporate defendant for vehicular homicide in a case where the corporation refused to replace the back-up alarm on one of its trucks, despite repeated requests from the truck's driver, and the driver subsequently ran over and killed a police officer while reversing the truck).

99. Most retributivists concerned with a remainder contemplate cases in which no individual is blameworthy and yet, according to them, the corporation as a whole is culpable. See, e.g., Paul B. Thompson, *Why Do We Need a Theory of Corporate Responsibility?*, in SHAME, RESPONSIBILITY AND THE CORPORATION, *supra* note 29, at 113, 118–19 (“Who is responsible when specialized systems cause morally unacceptable consequences? Well, it might be the specialist, or it might be the person who deals directly with the specialist, or it might be some superior officer; but there are convincing reasons for thinking that none of these people are responsible in many cases. . . . [In such cases,] it is meaningful to find the system itself responsible. . . .”); PATRICIA H. WERHANE, PERSONS, RIGHTS, & CORPORATIONS 56 (1985) (“[A]t least in principle, it is possible that there could be corporate immoral ‘action’ that is the result of a series of blameless [individual] actions.”); Gibson, *supra* note 52, at 762 (1995) (“[I] want to say that there are cases where no individual or group is found to be blameworthy and yet we want to maintain that moral *as well as* legal culpability is appropriate[ly] ascribed to the corporation.”). I doubt that these cases are coherent. In any event, my concern is with cases where the crime redounds to both the individual wrongdoers and the corporate officials, and I argue that every instance of corporate crime is such a case.

100. See Mina Kimes, *Why J & J's Headache Won't Go Away*, CNN MONEY (Aug. 19, 2010, 7:47



employees involved in the contamination of the recalled drugs and all of the executives who were charged with overseeing and ensuring the safety of the drug production have been identified. If only these individuals were prosecuted and punished, one might well feel as if something were amiss. In particular, targeting only the individual wrongdoers would imply that the offense is exclusively theirs. But Johnson & Johnson is in the business of serving the health and safety of consumers. If its drugs are adulterated, some blame for the offense seems to extend beyond the blame borne by the individual offenders.<sup>101</sup> If that is right, then someone—or something—should be punished in response to this additional blameworthiness.

It is worth noting that the insight about surplus blame is not lost on corporate officials. They seem to recognize that they are bearers of blame where some of their employees engage in wrongdoing on the corporation's behalf, and they have developed a robust culture of apology as a result. Paradigmatic here is the Japanese ritual of *shintai ukagai*, in which corporate officials bow in apology, and sometimes even submit letters of resignation, in response to corporate wrongdoing, independent of their participation in that wrongdoing.<sup>102</sup> And American executives hardly recoil from an apology practice either, issuing statements of remorse for such wrongs as prohibiting airplane passengers from breastfeeding while on board,<sup>103</sup> contributing corporate funds to support the election of a politician opposed to gay rights,<sup>104</sup> engaging in unspecified “wrong” that contributed to the 2008 economic meltdown,<sup>105</sup> and producing the worst environmental disaster in American history.<sup>106</sup>

---

AM), [http://money.cnn.com/2010/08/18/news/companies/jnj\\_drug\\_recalls.fortune/](http://money.cnn.com/2010/08/18/news/companies/jnj_drug_recalls.fortune/); *supra* note 13 and accompanying text.

101. See, e.g., Lyndsey Layton, *Drug Company Tried to Buy Up Defective Motrin Before Recall*, STAR TRIBUNE.COM (May 27, 2010), <http://www.startribune.com/nation/95075064.html> (“It is a moral outrage for a company specifically marketing its products for children to allow a culture of neglect and irresponsibility to taint the medicines that parents and physicians trust to help children get well.” (quoting Rep. Darrell Issa)); see also Heavey, *supra* note 13 (“When a parent gives her child a Tylenol Product or other children’s medicine produced by Johnson & Johnson, they are relying on the 120-year-old reputation of a company who claims that it puts ‘the needs and well-being of the people we serve first.’” (quoting Rep. Darrell Issa)).

102. See, e.g., Jeff Kingston, *Toyota Bows and the Japanese Art of Apology*, BBC NEWS (Feb. 10, 2010, 3:20 PM), <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/8508531.stm> (describing the various cultural meanings of bowing, and noting that Toyota President Akio Toyoda was criticized for failing to demonstrate sufficient humility in the press conference he gave apologizing for Toyota’s brake problems); see also JON P. ALSTON & ISAO TAKEI, JAPANESE BUSINESS CULTURE AND PRACTICES: A GUIDE TO TWENTY-FIRST CENTURY JAPANESE BUSINESS 40 (2005); BOYE DE MENTE, JAPANESE ETIQUETTE & ETHICS IN BUSINESS 172–73 (5th ed. 1987).

103. See *Mesa Air Group Comments on Breastfeeding Incident*, PR NEWswire (Nov. 17, 2006), <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/11-17-2006/0004477112>.

104. Brian Bakst, *Target Apologizes for Political Donation to Group Supporting Anti-Gay Candidate*, HUFFINGTON POST (Aug. 5, 2010, 6:42 PM), [http://www.huffingtonpost.com/2010/08/05/target-apologizes-for-pol\\_n\\_672167.html](http://www.huffingtonpost.com/2010/08/05/target-apologizes-for-pol_n_672167.html).

105. Graham Bowley, *\$500 Million and Apology from a Bank*, N.Y. TIMES, Nov. 18, 2009,

The foregoing suggests that we need not understand the public's impulse to see the corporation suffer as the raving delusion of a seething mob that unduly anthropomorphizes the corporation, as some reductionists do.<sup>107</sup> Instead, we may well rage against the corporation because we intuit that the corporation's crime ramifies beyond those who bear individual culpability for it. Correspondingly, corporate officials might take on blame themselves, as when they issue apologies, because at some level they understand that any act of the corporation is, in some sense, an act of theirs.

In the next Part, I seek to articulate a theoretical basis for these inchoate sentiments. But first I should note that while these sentiments may be most readily activated in cases like the BP oil spill or the Johnson & Johnson recall, we should not therefore conclude that these are the only kinds of cases in which corporate officials who did not participate in the corporate crime might nonetheless bear blame for that crime. Instead, for the reasons I articulate in Part II, every case in which a corporation commits a crime is a case in which there is a "remainder." If the crime genuinely can be imputed to the corporation, then the senior executives and directors of the corporation necessarily deserve blame even if they did not personally participate in the crime, and even if we can identify and convict each of the crime's participants. The crime occurred during their tenure, and that alone is sufficient to render them blameworthy. If I am right, then the reductionist rejection of corporate criminal liability leaves us with a limp criminal law, one that cannot respond to corporate wrongdoing without causing remainder.

The prospect of corporate impunity is, of course, the menace that precipitated American corporate criminal liability.<sup>108</sup> Yet the doctrine's initial rationale neglected the question of desert, and supporters of corporate criminal liability have yet to allay the anxiety that the law's quest for accountability has imposed liability on entities and their members when the latter, and possibly the former too, do not deserve it.<sup>109</sup>

---

(Abstracts), at A1.

106. See, e.g., Richard Simon & Michael Muskal, *Gulf Oil Spill: BP's Tony Hayward Apologizes*, L.A. TIMES BLOG (Jun. 17, 2010, 9:17 AM), <http://latimesblogs.latimes.com/greenspace/2010/06/gulf-oil-spill-bps-hayward-apologizes.html>.

107. See, e.g., Alschuler, *supra* note 8, at 312; Kathleen F. Brickey, *Rethinking Corporate Criminal Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 593 (1988).

108. See N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495-96 (1909) (justifying an application of criminal liability to the corporation on the ground that "the great majority of business transactions in modern times are conducted through [corporate] bodies," and too much mischief would result if the corporation could escape criminal sanctions on the basis of its corporate form).

109. For the claim that corporate prosecutions unwarrantedly punish innocent corporate members, see *supra* note 30 and accompanying text.

In short, both parties to the debate embrace an unassailable truth: only moral agents deserve retribution. But both also fail to see that the corporation is not the only candidate for retribution when it comes to its crimes. Instead the corporation is constituted by individuals, all of whom at least presumptively satisfy the criteria for moral agency. More to the point, at least some of these individuals might deserve blame in the wake of a corporate crime, or so I argue in the next Part.

The debate about corporate criminal liability has too long been held hostage to considerations of corporate ontology. It is time to release ourselves from the constricted approach reductionists and retributivists adopt and see if retribution for corporate wrongdoing can be obtained when this approach does not hold sway.

## II. CORPORATE OFFICIALS' MORAL RESPONSIBILITY

A requirement of participation is taken to be a *sine qua non* for moral responsibility and criminal liability.<sup>110</sup> As such, individuals who did not participate in a transgression of their group tend, on this basis, to deny that they had *anything* to do with that transgression.<sup>111</sup> Thus, for example, employee protests in the wake of Arthur Andersen's indictment focused on the fact that the company employed 85,000 people, the vast majority of whom had nothing to do with the Enron fraud.<sup>112</sup>

These denials of involvement may well be compelling in the case of lower-level employees working in a branch or division other than the one in which the crime occurred; they do not, however, hold true for officers and directors. Indeed, the central claim of this Part is that, when it comes to corporate officials, nonparticipation does not entail noninvolvement or immunity from blame.

110. See Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251, 252 & n.6 (2009).

111. The tendency can be seen most readily, perhaps, in cases of historic injustices, where none of the current members of the group were alive at the time of its transgression. Thus, for example, Rep. Henry Hyde's blithe quip in response to claims that Americans owe reparations for slavery: "I never owned a slave. I never oppressed anybody. I don't know that I should have to pay for someone who did [own slaves] generations before I was born." Jeffrey Ghannam, *Repairing the Past*, 86 A.B.A. J. 38, 70 (2000).

112. See Samuel Loewenberg, *Andersen Workers Rally for Embattled Employer*, BALT. SUN, (Mar. 22, 2002), [http://articles.baltimoresun.com/2002-03-22/business/0203220101\\_I\\_andersen-employees-arthur-andersen-capitol](http://articles.baltimoresun.com/2002-03-22/business/0203220101_I_andersen-employees-arthur-andersen-capitol). In the words of one protester, "A few people did something, and we're all being punished for it." *Id.*; cf. Hasnas, *supra* note 30, at 1269 ("Arthur Andersen's crime, as determined by the jury, consisted solely of one of Andersen's in-house counsel recommending that a manager change the wording of a draft memorandum . . ."); Robin Phelan et al., *Remember When—Recollections of a Time When Aggressive Accounting, Special Purpose Vehicles, Asset Light Companies and Executive Stock Options Were Positive Attributes*, 11 AM. BANKR. INST. L. REV. 1, 10–11 (2003) ("What is Arthur Andersen and *who* got what they deserved? You know, some secretary in Des Moines that doesn't have a job now or some junior auditor in Atlanta? . . . [T]hat's who got punished."). For a deterrence-based argument against sanctions that would lead to a firm's demise, see generally Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271 (2008).

More specifically, I offer a normatively robust conception of the corporate official's fiduciary duties, and I argue that the corporate official bears moral responsibility for the corporation's crime in virtue of these duties, independent of the official's participation in the crime. The argument proceeds in two steps. First, I argue in Part II.A that the corporation is a *team*, or a joint endeavor in which members bear special obligations to one another.<sup>113</sup> Then, in Part II.B, I describe the special role of corporate officials on this team, the obligations attending that role, and the ways in which those obligations make the corporate official a legitimate target of blame for the corporation's crime.

One preliminary note: It may be that some corporate officials will have participated directly in the corporate crime; others may not have participated, but they may have known of and tolerated the crime, or else they may have willfully blinded themselves to its occurrence. Contemplating the responsibility these officials bear in virtue of membership alone is complicated by the fact that they also bear at least some individual responsibility for the corporation's offense. To keep things clean, then, I restrict my focus in this Part to the corporate official who *did not* participate directly in the group transgression at issue. We may imagine that she was not on the scene, did not help to plan or instigate the crime or to recruit or command others to participate; she did not have foreknowledge of the offense and was not obligated by her position to have had such knowledge.<sup>114</sup>

#### A. THE CORPORATION AS A TEAM

A number of corporate law scholars have described business organizations, and the corporation in particular, as a team. For example, in a now classic article, Armen Alchian and Harold Demsetz draw out the team-production elements in all forms of economic organization.<sup>115</sup> In a similar vein, Frank Easterbrook and Daniel Fischel have noted that “[m]uch production is performed in teams,”<sup>116</sup> and Margaret Blair and Lynn Stout have argued that the public corporation is best understood not along a “grand-design principal-agent” model,<sup>117</sup> but instead as a “team production”<sup>118</sup> that “depend[s] at least as much upon *horizontal*

---

113. See *infra* notes 115–17 and accompanying text.

114. Compare these conditions with those grounding the doctrine of the responsible corporate officer. See *supra* note 33.

115. See generally Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AMER. ECON. REV. 777 (1972).

116. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 9 (1991).

117. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 263 (1999) [hereinafter Blair & Stout, *Team Production*].

118. *Id.* at 263–70.

relationships as vertical ones.”<sup>119</sup> Or, as they put it more succinctly elsewhere, “[a] corporation is a collective enterprise.”<sup>120</sup>

The team-production account of the nature of the corporation is congenial to the account of responsibility I shall go on to advance, because it highlights the ways in which the corporation consists of a joint project over which none of its members has ultimate control.<sup>121</sup> Indeed, economic theorists of the firm identify the inevitable vulnerability of production in a team setting as the fundamental problem that individuals in a corporation confront;<sup>122</sup> Blair and Stout go so far as to conceive of this problem as the central rationale for the body of corporate law that has developed.<sup>123</sup>

Yet while I agree that the problem of mutual vulnerability is foundational, I part ways with the economic account when it comes to solving that problem. The economists’ solution hews to a self-interested rational-actor model. The challenge, as they see it, is to curb shirking and rent seeking among individuals ordinarily motivated by “their own opportunistic instincts.”<sup>124</sup> In contrast, I believe that something loftier than self-interest can secure group members’ mutual forbearance from free riding and rent seeking. Blair and Stout gesture to the possibility that “trust” has a role to play, too, although they acknowledge that “[e]conomic theory has not yet developed a general theory of trust”<sup>125</sup> and that “much work remains to be done” in this area.<sup>126</sup> I am not

119. *Id.* at 264.

120. Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1737 (2001) [hereinafter Blair & Stout, *Trust*].

121. It may be worth noting that the adherent of a team-production model of the corporation may be agnostic on the question of whether the corporation exists over and above its members, or instead whether it is, as the reductionist believes, simply a nexus of contracts. For no matter one’s theory of the firm, it is difficult to deny the intricate web of interrelationships that constitute the corporation, and through which it achieves its objectives.

122. See, e.g., EASTERBROOK & FISCHER, *supra* note 116, at 9–10 (“So long as no monitor can determine what each member’s marginal contribution to the team’s output is, each member will be less than a perfectly faithful representative of the interests of the team as a whole.”); Alchian & Desmetz, *supra* note 115, at 779–83; cf. Blair & Stout, *Team Production*, *supra* note 117, at 272 (noting that the parties to a joint enterprise “will each find themselves at the other’s mercy”).

123. Blair & Stout, *Team Production*, *supra* note 117, at 287–319.

124. *Id.* at 271; see also Frank H. Easterbook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 702 (1982) (identifying the penalties for breach of fiduciary duties as the force that will keep the fiduciary in line); Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1043 (2011).

125. See Blair & Stout, *Team Production*, *supra* note 117, at 317.

126. *Id.* at 318. In a subsequent article, Blair and Stout provide an engaging analysis of the social phenomenon of trust, and they seek to reread corporate law opinions as texts that signal to corporate officials that trust is due in their corporate roles. Blair & Stout, *Trust*, *supra* note 120. Nonetheless, Blair and Stout do not probe the normative foundations of trust. As they acknowledge:

confident that economic theory can get at the root of trust. In particular, there is a deep moral foundation for trust, and that foundation sustains, and informs, fiduciary duty law, as I shall argue in the next Part.

In short, the economic model offers a compelling vision of the corporation as a team. But that model does not do enough to elucidate the normative dimensions of team membership. I offer that elucidation now.

#### B. FIDUCIARY DUTIES AND THE GROUND OF THE CORPORATE OFFICIAL'S RESPONSIBILITY

If the corporation is a team, it is not a team in which all players are expected to contribute equally. Instead, some corporate stakeholders, like suppliers and consumers, fall outside the normative reach of the corporation's joint project; they could not be said to bear obligations to seek to advance the corporation's interests. The same might be true for low-level employees and minority shareholders. Corporate officers and directors, on the other hand, are deeply implicated in the team; to extend the sports metaphor, they variously play the role of umpire, rule drafter, coach, manager, and star player.<sup>127</sup> And, in carrying out these roles, they enjoy a power and discretion that subjects the corporation's other members to greater risks and vulnerability than those the corporate officials bear.<sup>128</sup> It is for this reason that the corporate official is bound by a set of fiduciary duties.<sup>129</sup>

But the nature of those duties cannot adequately be captured in the cramped terms of the economic scholar, at least if the duties are to be

---

[O]ur approach to the social [science] evidence is for the most part a crude, behaviorist one. We treat individuals as black boxes whose interior workings are unobservable. . . . But why do people take account of others' welfare? . . . Further work on th[is] and related questions would be immensely valuable.

*Id.* at 1779–80.

127. *Cf.* Michelle M. Harner, *Corporate Control and the Need for Meaningful Board Accountability*, 94 MINN. L. REV. 541, 542 (2010) (“Although a variety of parties can influence corporate decisions, courts generally impose fiduciary duties only on corporate directors, senior management, and certain shareholders.”). Though I do not focus on activist or majority shareholders, I leave open the possibility that they too deserve blame for corporate wrongdoing on the grounds that I go on to advance. *See generally* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255 (2008).

128. *Cf.* David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249, 1255–56 (2011) (“The inequality and asymmetry within the relationship usually flows from the fiduciary's possession of greater expertise or greater information than the beneficiary, leaving the beneficiary vulnerable to the fiduciary's predation.”); Leonard I. Rotman, *Fiduciary Law's “Holy Grail”: Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 926 (2011) (“After lying dormant for some time, fiduciary law experienced a renaissance . . .”).

129. *See* Rotman, *supra* note 128, at 941–42 (“Fiduciary law exists to protect important social and economic interactions of high trust and confidence that create an implicit dependency and peculiar vulnerability of the beneficiary to the fiduciary.”).

appropriately reflective of and responsive to what is morally at stake when individuals pursue joint action together.<sup>130</sup>

In this Part, I leverage a normatively expansive conception of the fiduciary duties that officers and directors bear. I seek to elucidate the moral foundation for that conception, and I spell out some of the special obligations generated in light of that foundation. The conception of the fiduciary relationship that I advance here provides grounds for finding the corporate official blameworthy for a crime of her corporation.

When one thinks of fiduciary duties, one typically has in mind the particular obligations to which they give rise—for example, duties to avoid conflicts of interest<sup>131</sup> and exhortations to act in good faith.<sup>132</sup> Nonetheless, one can infer from the aspirational nature of the fiduciary relationship a more expansive conception of its normative content.<sup>133</sup> It is

130. Cf. Rafael Chodos, *The Nature of Fiduciary Law and Its Relationship to Other Legal Doctrines and Categories: Fiduciary Law: Why Now? Amending the Law School Curriculum*, 91 B.U. L. REV. 837, 845–46 (2011). Chodos draws out the distinctions between transactions and relationships. He argues that the latter subject one or both parties to vulnerability and require “loyalty, integrity, trust, and faith” as a result, and he conceives of the fiduciary’s role as fitting squarely within his conception of a relationship. *Id.* at 845.

131. See AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE § 5.02 (2008).

132. See generally Clark W. Furlow, *Good Faith, Fiduciary Duties, and the Business Judgment Rule in Delaware*, 2009 UTAH L. REV. 1061.

133. The conception of fiduciary duties at issue here aligns with that embraced by theorists who view fiduciary duties as mandatory. See, e.g., Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 829–30 (1983); Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1682 (1990). See generally Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000). It likewise aligns with those who understand fiduciary duties to consist of more than just a set of specific obligations. See, e.g., Mitchell, *supra*, at 1694–95. These theorists stand in opposition to theorists of a more economic cast, who view fiduciary duties as subject to negotiation and waiver. See generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). Though I do not seek here to intervene in the debate between these two camps, I note that others have advanced persuasive arguments for eschewing a contractarian understanding of fiduciary duties. See, e.g., Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1431–38 (1985); John C. Coffee, Jr., *No Exit?: Opting Out, the Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919, 933–36 (1988); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 249–51 (1995); Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1554–55 (1989). Indeed, commentators have noted that, in the exchange between contractarians and noncontractarians, the latter appear to have won the day. See William W. Bratton, *Self-Regulation, Normative Choice, and the Structure of Corporate Fiduciary Law*, 61 GEO. WASH. L. REV. 1084, 1103–1104, 1119–20 (1993); cf. Chodos, *supra* note 129, at 839 (“Contemporary contract law . . . is after all a law of transactions, while fiduciary law is ultimately a law of relationships.”); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879–80 (arguing that efforts to understand the fiduciary relationship by analogy to contract law are “insidiously misleading” and “surely mistaken”). Given these statements, I take it that the position I adopt here is not unduly question begging. It may also be worth noting in this vein that business scholars have identified the normative content of fiduciary duties—and in particular the trust they embody—as a key ingredient for corporate success. See, e.g., JORDAN D. LEWIS, TRUSTED PARTNERS: HOW COMPANIES BUILD MUTUAL TRUST AND WIN TOGETHER (1999); Blair and Stout, *Trust*, *supra* note 120, at 1740 & n.8. To the extent that

within this content, I believe, that the ground for assigning responsibility to corporate officials for corporate crime can be found.<sup>134</sup>

At the core of the corporate fiduciary relationship is a kind of self-abnegation. For example, the fiduciary is to “act to further the interests of another in preference to h[er] own.”<sup>135</sup> She “must subordinate h[er] individual and private interests to h[er] duty . . . whenever the two conflict.”<sup>136</sup> She does not just forswear self-interest; she is “selfless.”<sup>137</sup>

The fiduciary’s obligations give rise to a set of “expectations”<sup>138</sup> or “pressures.”<sup>139</sup> These may be enforced from without,<sup>140</sup> but they also compel from within. Thus the fiduciary is subject to “*internal pressures*—including such internal pressures as a director’s sense of honor; her feelings of responsibility; her sense of obligation to the firm and its shareholders; and, her desire to ‘do the right thing.’”<sup>141</sup>

Further, fiduciary duties consist not just of specific obligations but also of a kind of normative penumbra that gives these obligations their

contractarian scholars embrace a shareholder-primacy norm, then, they may have reason to support a more robust conception of the fiduciary relationship.

134. Kelli Alces has argued that corporate fiduciary duties have been rendered superfluous; financial incentives have taken their place since these have been deemed more effective at aligning the interests of corporate officials with those of shareholders. See Kelli A. Alces, *Debunking the Corporate Fiduciary Myth*, 35 J. CORP. L. 239, 258–59 (2009). Alces’s point of departure is a conception of the corporation according to which corporate officials’ primary obligations go to shareholders. *Id.* at 245–48. I am concerned with a conception of the corporation that recognizes the entitlements of nonshareholding stakeholders—entitlements that sometimes trump those of shareholders. This is a conception of the corporation that dates back to Adolf A. Berle & Gardiner C. Means, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932). See, e.g., William W. Bratton & Michael L. Wachter, *Tracking Berle’s Footsteps: The Trail of The Modern Corporation’s Last Chapter*, 33 SEATTLE U. L. REV. 849, 850 (2010) (“Those who pick up the book looking for the origins of shareholder primacy reach the last chapter only to find the shareholders trumped by the public interest.”). In any event, Alces’s account is positive, not normative. If the 2008 financial meltdown is any indication, we should not be particularly sanguine about the prospect that financial incentives will best protect shareholder interests. It might well be time, then, to insist upon the norms and values that have traditionally infused the fiduciary relationship.

135. Frankel, *supra* note 133, at 830; see also Bratton, *supra* note 133, at 1101 (“[T]he ethical fiduciary abjures self-interested pursuits.”); DeMott, *supra* note 133, at 882 (“The fiduciary’s duties go beyond mere fairness and honesty; they oblige him to act to further the beneficiary’s best interests.”).

136. *Bayer v. Beran*, 49 N.Y.S.2d 2, 5 (1944).

137. Frankel, *supra* note 133, at 830.

138. See Bratton, *supra* note 133, at 1099 (noting that implicit in the ALI’s Principles of Corporate Governance lies “an assumption that ‘shareholder expectations’ explain and justify corporate fiduciary law”).

139. See Frankel, *supra* note 133, at 830.

140. *But cf.* Lynn A. Stout, *On the Proper Motive of Corporate Directors (Or, Why You Don’t Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1, 8 (2003) (finding external enforcement mechanisms inadequate).

141. *Id.* at 8–9; cf. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1013 (1997) (“[A]ll of us internalize rules and standards of conduct with which we generally try to comply. We do this not only because we may fear some sanction, formal or informal, but also because doing so is important to our sense of self-worth, because we believe that doing a good job is the right thing to do.”).



content and force.<sup>142</sup> Thus the duties themselves are often writ large. For example, the fiduciary is to “prefer[] the community to the self”<sup>143</sup> and pursue the “collective good.”<sup>144</sup> Moreover, underpinning the fiduciary’s encompassing duties is an equally expansive moral vocabulary that defines them in terms of “[l]oyalty, fidelity, faith, and honor”<sup>145</sup> or “the overarching concepts of allegiance, devotion and faithfulness.”<sup>146</sup>

This is all very lofty stuff, and one might well wonder about its source. It seems clear that the mere concern preoccupying the economist to deter shirking and rent seeking cannot sustain exhortations to honor, devotion, and the like. I shall now argue that we can understand the normatively robust conception of the fiduciary duty in light of a foundational moral obligation each of us bears to *recognize* one another.

While I offer a more developed account of the duty of recognition and its role in group settings elsewhere,<sup>147</sup> for these purposes some brief remarks will suffice. To begin, it is worth noting that the duty of recognition entails more than mere respect for others’ rights effectuated through a policy of non-interference. I cannot ignore you and recognize you at the same time. Instead, recognition requires that I affirmatively express my awareness of your presence, as someone who is trying to make her way in the world as I am, and as someone whose ends are not less valuable than my own simply on the basis that they are yours and not mine.<sup>148</sup> Put differently, I recognize you, at least in part, by getting you to recognize that I recognize you.<sup>149</sup>

142. Cf. Rock, *supra* note 141, at 1097 (“[F]iduciary duty law evolves primarily at the level of norms rather than the level of rules.”).

143. Frankel, *supra* note 133, at 830.

144. *Id.* at 832.

145. *Id.* at 830.

146. Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1, 26 (2006) (citing Chancellor Chandler’s opinion in *In re Walt Disney Co. Deriv. Litig.*, No. 411,2005, 2006 WL 1562466, at \*24 & n.98 (Del. June 8, 2006)); see Rotman, *supra* note 128, at 932 (“[F]iduciary law is premised upon broad-based notions of justice and morality that extend well beyond any comparables associated with the ordinary laws of civil obligation.”).

147. Sepinwall, *supra* note 87, at 165–78.

148. Cf. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1981) (grounding restrictions on individuals’ unfettered pursuit of self-interest on a conception of persons as equally rational and hence equally deserving of being able to pursue their respective ends).

149. Cf. VINCENT DESCOMBES, *MODERN FRENCH PHILOSOPHY* 139 (1998) (ascribing to Jacques Derrida the claim that “[t]o pretend, [one must] actually do the thing; [one has] therefore only feigned pretence”).

I note here that theorists have offered differing accounts of the ground of the duty of recognition. Some of the literature deals explicitly with recognition, with the seminal work furnished by Hegel in his *Phenomenology of Spirit*. But for Hegel, recognition has a self-reflexive aspect—one recognizes another as a self-conscious subject and thereby comes to recognize oneself as a self-conscious subject. See, e.g., HEGEL’S *PHENOMENOLOGY OF SPIRIT* 50–57 (Howard P. Kainz trans., 1994). Given the role that recognition by another plays in forming one’s identity—and the correspondingly devastating role that misrecognition can play—the Hegelian notion of recognition has gained prominence in contemporary works on identity politics. See generally Charles Taylor, *The Politics of Recognition*, in

The general duty of recognition entails a set of specific obligations when we do things together, and the team-production account of the corporation, given its emphasis on the mutual vulnerability of the team's members, draws out the need and role for recognition. Individuals come together in the firm because it is beneficial to enlist others in accomplishing a particular set of ends. It follows, then, that no team member can wholly conduct each aspect of the joint activity herself. If she could, the activity would not be joint in any genuine sense; others' contributions, to the extent they could make any, would be superfluous. So it is that each member of the firm relinquishes firsthand control over the enterprise and comes to depend in part on the others for the joint enterprise's success. This is, as I have indicated, beneficial to each, but it is also disquieting.

Each team member is, in a sense, the source of the others' disquiet, and so each is especially well placed to counteract that disquiet by offering assurances of recognition.<sup>150</sup> In particular, the team members—especially those who operate with the greatest discretion and so put others at special risk—bear an obligation to convey that they are not in this alone and solely for themselves. Thus, team membership demands *deindividuation*: the team member must act so as to underscore the softening of boundaries between self and others. We can understand the corporate official's fiduciary obligations as a set of duties intended to express and enact a deindividuated stance: Through these obligations, the corporate official makes clear that she forsakes her claims to act for her own sake. That is, *she conveys that she is a team member*, and this is so in three respects.<sup>151</sup>

First, corporate officials legitimately are subject to an obligation to privilege the interest of the business venture relative to their own.<sup>152</sup> Thus

MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Guttmann ed., 1994); Nancy Fraser, *Rethinking Recognition*, NEW LEFT REV., May–June 2000, at 107. And, within a more traditional Kantian vein, there are accounts of respect that resonate with the duty of recognition as I construe it. See, e.g., CHRISTINE M. KORSGAARD, THE SOURCES OF NORMATIVITY 139–40. See generally ROBIN S. DILLON, DIGNITY, CHARACTER, AND SELF-RESPECT (1995).

Theorists also disagree about whether the duty of recognition ought to emanate from, or respond to, some universal quality in virtue of which all humans deserve respect or instead from the features that make a particular person unique. For a developed account of the different forms recognition can take, see Taylor, *supra*, at 25. I do not seek to intervene in these debates here.

150. Cf. Richard Holton, *Fiduciary Relations and the Nature of Trust*, 91 B.U. L. REV. 991, 993 (2011) (“Some have suggested that trust requires getting the trustee to *recognize* one’s own vulnerability.” (emphasis added)).

151. Compare this with *Meinhard v. Salmon*, in which Justice Cardozo famously identified something like the duty of deindividuation among partners to a joint venture. 164 N.E. 545, 548 (N.Y. 1928). As he explained, the managing partner “had put himself in a position in which thought of self was to be renounced, however hard the abnegation.” *Id.*

152. See, e.g., Blair & Stout, *Trust*, *supra* note 120, at 1782 (“The hallmark of a fiduciary relationship is the legal requirement that the fiduciary act for the exclusive benefit of her beneficiary.”); Leo E. Strine, Jr. et al., *Loyalty’s Core Demand: The Defining Role of Good Faith in*

corporate stakeholders may seek to insist that corporate officials act with a certain regard for the corporation to which they all belong—this just is the duty of good faith.<sup>153</sup> Indeed, the law prohibits corporate officials from seeking to exploit their positions for unauthorized personal gain even when the corporation would not thereby be harmed.<sup>154</sup> Moreover, as some commentators contend, the corporate official must do more than just pursue the corporation's ends; she should adopt these as her own.<sup>155</sup> Put differently, the corporate official should “*care for*” the interests of the corporation.<sup>156</sup> The corporate official who neglects to view the way in which her corporation-related activities might impact the corporation may then rightly be charged with a kind of solipsism that violates the nature of her role.<sup>157</sup>

Second, although corporate officials always retain a genuine right of exit, the smooth operation of the corporation, and perhaps its success as well, require that corporate officials psychologically suspend their insistence upon this right.<sup>158</sup> The corporate official should not proceed with one foot always outside the door but instead with two feet planted firmly within the office she holds.<sup>159</sup> The very origin of the notion of a fiduciary duty suggests a recognition that the fiduciary and the

---

*Corporation Law*, 98 GEO. L.J. 629, 634 (2010) (“[I]t has been traditional for the duty of loyalty to be articulated capaciously, in a manner that emphasizes not only the obligation of a loyal fiduciary to refrain from advantaging herself at the expense of the corporation but, just as importantly, to act affirmatively to further the corporation’s best interests.”).

153. See generally Furlow, *supra* note 132 (arguing that good faith is the state of mind with which the corporate official enacts the duty of loyalty); Strine, *supra* note 152 (same).

154. See, e.g., *Astra USA, Inc. v. Bildman*, 914 N.E.2d 36, 47 (Mass. 2009) (citing *Feiger v. Iral Jewelry, Ltd.*, 363 N.E.2d 350, 351 (N.Y. 1977), for the proposition that “[o]ne who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary. . . . Nor does it make any difference that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent”); see also Clark, *supra* note 26, at 73–74; DeMott, *supra* note 133, at 888 (noting that the obligation to account arises even when the fiduciary’s unauthorized act benefits the beneficiary).

155. See, e.g., Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFF. L. REV. 99, 103 (2008) (“[T]he irreducible core of the fiduciary relationship is the fiduciary’s obligation to adopt the principal’s goals, objectives, or ends.”).

156. Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 45–47 (2003) (emphasis added).

157. Cf. Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 908 (2011) (Fiduciary duty . . . is a duty of unselfishness.”).

158. See generally Dennis J. Callahan, *Medieval Church Norms and Fiduciary Duties in Partnership*, 26 CARDOZO L. REV. 215 (2004).

159. This is standard advice in work seeking to convey the attributes of highly successful managers. For example, Rosabeth Moss Kanter of Harvard Business School identifies “strong commitment” as one of the six “extras” that great corporate leaders possess. *Six Extras That Build Power and Leadership*, HARV. BUS. REV. BLOG (Oct. 18, 2010, 11:39 AM), <http://blogs.hbr.org/kanter/2010/10/six-extras-that-build-power-an.html>. She goes on to explain that “people want to be led by committed leaders, not those whose eyes are always on another project or who make it clear that other parts of their lives matter more to them.” *Id.*

entrusters' fates rise and fall together.<sup>160</sup> As a result, the “fraternity” created by the fiduciary relationship would be “destroyed if one partner secure[d] himself against all loss.”<sup>161</sup> Self-protection and jumping ship thus violate the very spirit of the fiduciary relationship.

Finally, righteous indignation is foreclosed to the corporate official even if she has not participated in the wrongful act or event. She may not join outsiders in decrying the corporate crime as if she is no more a party to it than they are. Instead, the corporate official's loyalty and devotion should prompt her to bow her head alongside the crime's perpetrators;<sup>162</sup> she should stand in solidarity with them as they are judged.<sup>163</sup> Accepting responsibility for what she did not do but in which her agency is nonetheless manifest *is* the “punctilio of [her] honor.”<sup>164</sup>

Interestingly, business scholars who write for an executive audience discourage finger-pointing in the wake of corporate wrongdoing, and instead exhort the corporate official to take stock of her own role and encourage her subordinates to do the same. Thus, for example, Rosabeth Moss Kanter writes,

One sign of a [corporate] losing streak . . . is finger-pointing in response to problems, instead of soul-searching. . . . In contrast, the turnaround leaders . . . put their companies and teams back on a winning path . . . . They ask[] everyone, whether directly involved with the problems or not, to examine their own responsibility . . . .<sup>165</sup>

160. See Callahan, *supra* note 158, at 231.

161. *Id.* (alteration in original) (internal quotation marks omitted).

162. Cf. Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 981 (1999) (arguing that CEOs are like sovereigns and that, as such, they may be “deposed when things go wrong within the company—even things over which they had no effective control”).

163. Cf. LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS* 82–83 (1987) (positing solidarity as a ground of *collective* (not shared) responsibility for the acts of some member(s) of an informal group such as a mob).

164. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). Given the emphasis on loyalty and constancy, one might think outmoded the understanding of fiduciary duties relayed in this Part. An objector might concede that this understanding aptly characterized the relationship between the corporate official and his firm a generation or so ago, when individuals spent their entire careers within one company. But the average management professional today moves between companies every 6.1 years. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *EMPLOYEE TENURE IN 2010*, at 2 (2010). Given this much mobility, the notion of a commitment to the corporation, with its attendant robust obligations, might seem far-fetched—or so the argument would go. In response, it might be noted that twenty percent of marriages in the United States end within the first five years, and thirty-three percent end within the first ten years. See, e.g., Nat'l Ctr. for Health Statistics, *New Report Sheds Light on Trends and Patterns in Marriage, Divorce, and Cohabitation*, CTR. FOR DISEASE CONTROL & PREVENTION (July 24, 2002), [http://www.cdc.gov/nchs/pressroom/02news/div\\_mar\\_cohab.htm](http://www.cdc.gov/nchs/pressroom/02news/div_mar_cohab.htm). Nonetheless, one is not therefore entitled to be cavalier about one's commitment to one's spouse while one is in the marriage. By the same token, the fact that a corporate official might well move on to another “team” in a few years should not entail that she may curb her commitment to her current firm during her tenure there.

165. Rosabeth Moss Kanter, *Why Blame Makes for Bad Business: Lessons from Arizona*, HARV. BUS. REV. BLOG (Jan. 18, 2011, 10:57 AM), <http://blogs.hbr.org/kanter/2011/01/replace-finger-pointing-with-s.html>.

It is in light of the corporate official's fiduciary obligations, understood as demands of deindividuation pursued in recognition of the vulnerability to which team production subjects the corporation's members, that we are licensed in blaming her for the corporation's offense. We might say that the nature of the corporate official's responsibility is *normative*, in the sense that the corporate official is obligated to accept it. But that responsibility is also *moral*: For one thing, as a team production, the corporation consists of intricate networks of interactions, and we cannot be sure that the corporate official's participation in these networks did not conduce, however unwittingly, to the crime. But more than that, her contributions to the corporation reflect the way in which her agency is bound up with the corporation's. The fiduciary relationship demanded of her effects, or at least ought to effect, a transformation in her identity insofar as her role within the corporation comes to be among the salient features defining who she is.<sup>166</sup> She must accept blame, then, not because—or just because—doing so is implicit in her job description, but because the corporate crime redounds to her. Accordingly, when the corporate official disclaims responsibility, she does more than betray her fiduciary obligation to the corporation;<sup>167</sup> she betrays a truth about herself.

Now, what does all this mean for the way we, and the law, ought to respond to corporate officials whose companies commit crime? And what is the relationship between their responsibility and the doctrine of corporate criminal liability? It is to these questions that I now turn.

### III. THE RATIONALE, AND APPROPRIATE PUNISHMENT, FOR SHARED RESPONSIBILITY IN CORPORATE CRIME

The foregoing has sought to establish that we experience more indignation in the face of corporate crime than can be discharged upon the crime's individual perpetrators, and yet the corporation cannot absorb this indignation. At the same time, corporate officials who do not participate in the corporate crime do not deserve individual criminal prosecution, and yet they nonetheless deserve some blame for the crime and are required to accept blame on the corporation's behalf.

In this Part, I seek to move from the moral account of the last Part to a defense of corporate criminal liability. To that end, I argue in Part

---

<sup>166</sup> Cf. KUTZ, *supra* note 37, at 141 (arguing that the will of each participant is manifested in their shared project, and thus each participant bears a kind of responsibility for anything untoward committed in the course of pursuing the shared project); David Enoch, Being Responsible, Taking Responsibility, and Penumbra Agency at 30 (unpublished manuscript) (on file with the Author) (arguing that authentic membership in a group requires that the member “incorporate [the group's] actions into her agency by taking responsibility for them”).

<sup>167</sup> See generally Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 488–94 (2009) (describing the duty of loyalty as a prohibition on betrayal).

III.A that corporate officials' responsibility justifies corporate criminal liability. In Part III.B, I describe the implications of this justification for the way in which we sanction corporations and their officials.

Two notes will be useful before proceeding. First, recall that the paradigm case for the account to be advanced is the case in which there is an uncontroverted corporate crime. There are many instances in which an employee of the corporation acts criminally and it is not at all clear whether her act is *ultra vires* or instead an act of the corporation. I suspect that some of the skepticism about an account deeming the corporate official blameworthy for a crime committed by her subordinate arises because the skeptic contemplates a case in which it would be a mistake to ascribe the subordinate's act to the corporation, and thus a mistake to assign responsibility for the subordinate's act to the corporate official. In other words, the skepticism arises because of a concern about whether the corporation has committed a crime, and not because of a worry about shared responsibility. As I stated at the outset, the account of shared responsibility provides grounds for assigning blame to the corporate official for a corporate crime; it does not, and does not seek to, illuminate the circumstances in which the corporation has or has not committed a crime.<sup>168</sup> In what follows, I assume, as I have throughout, that there is a corporate crime, though I do not seek to defend the ascription of the criminal act to the corporation.

Second, one might think it problematic to treat the corporate official generically, as I have thus far, without distinguishing between the relative blameworthiness of executives holding different positions within the corporation, or between inside and outside directors. To be sure, a more fine-grained treatment of the response each corporate official deserves would be necessary if one were concerned with individual sanctions. The purpose of the account in the last Part, however, was to provide grounds for punishing the corporation. Each corporate official bears enough responsibility, I submit, to license our prosecuting the corporation and imposing upon it the sanctions I shall go on to describe. Parsing the relative amounts of blame each corporate official deserves, and identifying whether and, if so, what individual sanctions might be appropriate is a project that will have to await another day.<sup>169</sup>

#### A. THE JUSTIFICATION FOR CORPORATE CRIMINAL LIABILITY

The last Part sought to articulate a *moral* argument for the propriety of assigning blame to corporate officials. I argued that the corporate

---

<sup>168</sup> See *supra* text accompanying notes 25–26.

<sup>169</sup> I begin to undertake that project in Amy J. Sepinwall, Making Corporate Officers Responsible: The Responsible Corporate Officer Doctrine Reimagined (draft paper) (on file with the Author).

official is blameworthy, first, in the sense that her fiduciary relationship requires him to accept blame (normative responsibility). But she is also blameworthy by virtue of the way her fiduciary relationship causes her will to become bound up with the will of the corporation such that she cannot separate herself from it (moral responsibility).

In short, the corporate official is a legitimate target of blame when her corporation transgresses. But notice that the ground of her blame does not correspond to the traditional predicates for criminal liability. In particular, the corporate official can be blameworthy on the account just advanced even if she did not harbor a culpable mental state.<sup>170</sup> As such, it would be inappropriate and unjust to prosecute and punish her individually.<sup>171</sup> But I do not believe that we subject corporate officials to injustice when we prosecute their corporation and impose upon the corporation sanctions whose moral force these officials can be made to feel.

We can, I submit, leverage the corporate official's blameworthiness in order to defend the doctrine of corporate criminal liability: We hold the corporation criminally responsible in response to our indignation, and we have the corporate officials bear this indignation to give it force. In other words, we deploy the prosecution and punishment of the corporation in order to target corporate officials, who justifiably receive our outrage on its behalf.

This understanding of corporate criminal liability does more than simply rationalize corporate criminal liability; it also explicates the impulse behind it. Our belief that the indignation evoked by corporate crime cannot be fully discharged upon the crime's perpetrators arises because we sense—even if only inchoately—that there are individuals who did not participate in the crime and yet whose membership in the corporation nonetheless properly confers upon them some culpability. While the individuals in question might include stakeholders other than the corporation's officers and directors, the demanding fiduciary relationship of officers and directors makes them especially warranted targets for our indignation.

In the next Subpart, I contemplate some ways in which doctrine, through the operation of sanctions, can reflect this justification.

---

170. For the claim that criminal liability requires a culpable mental state, see, for example, Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 731 (1960) ("The proliferation of so-called 'strict liability' offenses in the criminal law has occasioned the vociferous, continued, and almost unanimous criticism of analysts and philosophers of the law.").

171. Contrast this situation with one where the corporate official has been delinquent in a way that satisfies the elements of the responsible-corporate-officer doctrine. See *supra* note 31. Moreover, even where corporate officials have acted culpably, some commentators have argued that individual prosecutions would be undesirable. See, e.g., Geoffrey P. Miller, *A Modest Proposal for Fixing Delaware's Broken Duty of Care*, 2010 COLUM. BUS. L. REV. 319, 332–33.

## B. CORPORATE OFFICIALS' RESPONSIBILITY AND CORPORATE CRIMINAL LAW SANCTIONS

Corporate law scholars have noted that the law's arsenal of corporate sanctions is undersupplied.<sup>172</sup> At the same time, courts have already shown remarkable creativity in devising ways to transmit the sting of a finding of corporate fault to the corporation's officials. Consider, for example, the Dalkon Shield case, in which the pharmaceutical company A.H. Robins was found liable for knowingly distributing an intrauterine device that posed an undisclosed risk of morbidity and mortality and that caused miscarriages and death in some of the women who used it.<sup>173</sup> At the close of the trial, the presiding judge ordered the CEO, the general counsel, and a senior corporate executive of A.H. Robins—none of whom had been sued individually—to appear in his courtroom, where he proceeded to sear them for their greed and shocking indifference.<sup>174</sup> Other courts have barred convicted white-collar criminals from serving on corporate boards—even those of charitable organizations<sup>175</sup>—or required them to publish notices of apology.<sup>176</sup> And in a case involving a remorseful white-collar criminal who had already compensated the victim of his swindle, a court rejected the prosecution's request for a thirty-four month prison term and instead sentenced the defendant to two years of community service during which he would be required to teach business ethics!<sup>177</sup>

Commentators have sought to enlarge the variety of sanctions as well, by advocating such things as mandated dilution of existing share value through the issuance of additional shares,<sup>178</sup> a three-strike corporate death penalty,<sup>179</sup> and “Hester Prynne” sanctions aimed at shaming the corporation itself.<sup>180</sup> The first of these follows from a

---

172. See, e.g., Mitchell & Gabaldon, *supra* note 48, at 1655 (“Even at this late stage of corporate development, we have relatively few and unsophisticated ways of holding corporations accountable for their bad behavior.”).

173. Morton Mintz, *A Crime Against Women: A.H. Robins and the Dalkon Shield*, MULTINATIONAL MONITOR, Jan. 15, 1986, at 1–2.

174. *Id.* at 5–6. The judge's comments were later found to be prejudicial, and were thus expunged from the record. See Barnard, *supra* note 162, at 1000.

175. See, e.g., SEC v. First Pac. Bancorp, 142 F.3d 1186, 1194 (9th Cir. 1998).

176. See Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 385 (1999).

177. Les Perraux, *Ad Exec Spared Prison: Ordered to Teach Business Ethics in 1st Fraud Conviction in Federal Sponsorship Scandal*, TORONTO SUN, Sept. 20, 2005; see also Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 421–22 (2007).

178. Coffee, *supra* note 28, at 413.

179. Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 942 (2005).

180. Peter A. French, *The Hester Prynne Sanction*, BUS. & PROF'L ETHICS J., Winter 1985, at 19, 21–22; see also Coffee, *supra* note 28, at 425, 431; Fisse, *supra* note 92, at 1141, 1229.



deterrence-based rationale for corporate criminal liability, and the latter two turn upon the retributivist conception of the corporation as a moral person capable of death and shame. In this way, these proposals are inapposite to the justification for corporate criminal liability advanced above.

What is needed is a set of sanctions whose sting is directed toward corporate officials but whose severity corresponds to the magnitude of their blameworthiness. I believe that the four sanctions below fit the bill.

### I. *Corporate Felony Disenfranchisement*

In most states, individuals convicted of a felony lose their voting rights and these are not restored until these individuals enter,<sup>181</sup> or complete,<sup>182</sup> probation. In Kentucky and Virginia, convicted felons may be permanently stripped of their voting rights.<sup>183</sup> While others have powerfully criticized the fairness and constitutionality of these restrictions (rightly, in my view),<sup>184</sup> I believe that there is a corporate analog to individual disenfranchisement that would not suffer from the same moral and constitutional infirmities.

To be sure, corporations do not have voting rights. Nonetheless, in the wake of the decision in *Citizens United v. FEC*, corporations may spend unlimited funds on independent “electioneering communications.”<sup>185</sup> Importantly, the rationale for that decision rests not on a finding that corporations warrant free speech protections in their own right. Instead, the Court found that restrictions on corporate political speech constituted impermissible discrimination on the basis of the nature of the speaker: The worth of speech, the Court intoned, “does not depend upon the identity of its source, whether corporation, association, union, or individual.”<sup>186</sup> Supporters of the decision understand this rationale in reductionist terms. Thus, sympathetic commentators insist that “corporations are associations of individuals, and individuals do not lose their First Amendment rights simply because they decide to join with

---

181. These states include California, Colorado, Connecticut, New York, and South Dakota. See *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CENTER FOR JUSTICE, [http://www.brennancenter.org/page/-/d/download\\_file\\_48642.pdf](http://www.brennancenter.org/page/-/d/download_file_48642.pdf) (last visited December 23, 2011).

182. There are twenty states that restore voting rights after the convict has completed her prison term, parole, and probation, including Alaska, Maryland, New Jersey, Texas, Washington, and Wisconsin. See *id.*

183. See *id.*

184. See, e.g., George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1902 (1999); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1155 (2004).

185. 130 S. Ct. 876, 887 (2010). “Electioneering communications” are defined as messages sent via broadcast, cable, or satellite and intended to promote a candidate running for election, where the message is disseminated within thirty days of a primary race or sixty days of a general election. *Id.*

186. *Id.* at 904 (citation omitted).

other individuals under a particular organizational form, whether corporate or otherwise.”<sup>187</sup>

Insofar as the rationale for recognizing corporate free speech rights rests upon the free speech rights that the members of the corporation possess, denying the corporation convicted of a crime political speech rights impairs the political engagement of the corporation’s culpable members. Commentators have noted that corporate political expenditures will most likely represent the views of senior managers and directors, rather than those of lower-level employees or shareholders.<sup>188</sup> Thus, restrictions on the corporation’s ability to engage in electioneering communications remove one avenue through which corporate officials might otherwise voice their political preferences. In this way, the restrictions function as an analog to the disenfranchisement most state felons endure. At the same time, because the corporation’s members retain the political free speech rights they enjoy as private citizens, the proposed corporate “disenfranchisement” does not constitute an individualized punishment.<sup>189</sup> Further, the duration or extent of the disenfranchisement can be set in accordance with the egregiousness of the crime. Finally, this sanction cannot be readily transmitted to low-level employees or consumers, as corporate fines can, and so escapes the objection that corporate punishment falls on those who deserve it least.<sup>190</sup>

187. Steve Simpson, *Citizens United and the Battle for Free Speech in America*, OBJECTIVE STANDARD, Spring 2010, at 28; see also Jack Kenny, *McCain-Feingold and Free Speech*, NEW AM., Mar. 15, 2010, at 16 (“[C]orporations are made up of people who have constitutionally protected rights. Nothing in the Constitution suggests that people lose their right to free speech when joined together in a corporation.”); Stephen Bainbridge, *Citizens United v FEC: The First Amendment Rights of Corporate “Persons.”* PROFESSORBAINBRIDGE.COM (Jan. 21, 2010, 8:35 AM), <http://www.professorbainbridge.com/professorbainbridge.com/2010/01/citizens-united-v-fec-the-first-amendment-rights-of-corporate-persons.html> (“[P]eople shouldn’t lose their speech rights just because they exercise these rights through the corporation in which they have invested.” (quoting Larry Ribstein, *Is a Corporation a Person?*, IDEOBLOG (May 22, 2004, 8:56 AM), [http://busmovie.typepad.com/ideoblog/2004/05/is\\_a\\_corporatio.html](http://busmovie.typepad.com/ideoblog/2004/05/is_a_corporatio.html))).

188. See, e.g., CIARA TORRES-SPELLISCY, BRENNAN CENTER FOR JUSTICE, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 9 (2010) (“[O]ne potential risk posed by deregulation of corporate money in politics is that corporate managers who were restrained by the PAC requirement will spend much more money on politics—using the corporate treasury to support their personal political agendas.”).

189. To be clear, I do not mean to endorse individual felony disenfranchisement, which I take to be a draconian and unconstitutional response to individual conviction. Nonetheless, insofar as each of the individual members of the corporation that undergoes “disenfranchisement” retains her political speech rights, I do not believe that the proposal advanced here suffers from the same flaws.

190. See *supra* note 30 and accompanying text. While corporate felony disenfranchisement appears to be an appropriate response to corporate crime, for the reasons adduced in this Subpart, we would need to exercise care in tailoring the sanction to prevent the corporation from funneling the money it would have spent on electioneering communications to other avenues through which it could buy political or legislative influence. Cf. Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1499–1500 (2005) (noting, in relation to the McCain-Feingold Act’s prohibition on independent corporate political expenditures—the prohibition overturned in *Citizens United*—that “regulatory restrictions on one type of participation simply channel corporate expenditures elsewhere”).

## 2. *The Corporate Criminal Law Sermon*

Suits addressing corporate wrongdoing do not frequently yield verdicts adverse to the corporation,<sup>191</sup> and yet, commentators argue, their power to admonish the corporation is not thereby diminished.<sup>192</sup> More specifically, judicial opinions can articulate standards of appropriate conduct,<sup>193</sup> and the authority underpinning these opinions can serve to enforce standards articulated elsewhere.<sup>194</sup> Further, when these opinions castigate parties before the court for their failure to adhere to these standards, the reprimand can provide a kind of restoration to those harmed by the misconduct,<sup>195</sup> even if the wrongdoers are not subject to material sanctions.

It is for this reason that Edward Rock has referred to these opinions as “corporate law sermons,”<sup>196</sup> and he has argued “that we should understand [court-made] fiduciary duty law as a set of parables or folktales of good and bad managers and directors, tales that collectively describe their normative role.”<sup>197</sup>

All of this suggests that corporate criminal liability confers upon judges an opportunity to educate corporate officials about the nature and scope of their fiduciary duties, to excoriate them where they fail to live up to these, and to lend judicial affirmation to the victims’ view that they have been wronged. In other words, corporate criminal liability has a didactic and norm-enforcing function.<sup>198</sup> The corporate criminal trial is the forum wherein the expectation of commitment is reinforced and, in

---

191. Rock, *supra* note 141, at 1016; cf. Reza Dibadj, *Delaying Corporate Law*, 34 HOFSTRA L. REV. 469, 473–82 (2005) (detailing the generally weak enforcement of corporate criminal law).

192. See, e.g., Viet D. Dinh, *Structures of Governance: “Fixing” International Law with Lessons from Constitutional and Corporate Governance*, 3 N.Y.U. J.L. & LIBERTY 423, 434 (2008) (“To me, the interesting point to take away from these illustrative cases is the transformative effect they have had on the primary conduct of directors even though the courts did not, and generally do not, impose liability on directors.”); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1265 (1999); Jonathan C. Lipson, *The Expressive Function of Directors’ Duties to Creditors*, 12 STAN. J.L. BUS. & FIN. 224, 262 (2007) (“[W]e recognize that law—and in particular law made by courts—can have meaning and social force independent of the ‘holding’ of a particular case.”).

193. Rock, *supra* note 141, at 1016.

194. See, e.g., *In re Walt Disney Co.*, 907 A.2d 693, 762–63 (Del. Ch. 2005) (castigating Michael Eisner for failing to adhere to corporate best practices, but refusing nonetheless to find him liable on the ground that the law demands something less than adherence to aspirational ideals).

195. Cf. Lipson, *supra* note 192.

196. Rock, *supra* note 141, at 1016.

197. *Id.* at 1106. Rock is referring here specifically to Delaware law, but there is reason to think that if other states saw the volume of cases that Delaware does, they too would be positioned to provide moral education through their opinions.

198. Cf. Blair & Stout, *Trust*, *supra* note 120, at 1796 (“Corporate case law . . . can encourage corporate participants to internalize norms of cooperation through social framing—providing information about the social context of relationships within the firm. Judicial opinions unambiguously communicate that directors are fiduciaries and that fiduciary relationships call for trustworthy (loyal and careful) behavior.”).

the event of a conviction, the obligation of corporate officials to accept blame is given judicial authority.

The judicial opinion, where it engages in sermonizing,<sup>199</sup> is then a kind of sanction for the corporate official.<sup>200</sup> Where the corporation is convicted, or pleads guilty, we can bolster the effect on the corporate official through a required court appearance and perhaps even through adverse publicity, as I go on to describe.

### 3. *The “Icon” Proceeding for Corporate Officials*

In an effort to effect “reintegrative shaming,”<sup>201</sup> Jayne Barnard has sought to expand upon a provision of the Organizational Sentencing Guidelines that permits a judge to require a corporation’s CEO to appear in court to receive the corporation’s sentence.<sup>202</sup> More specifically, Barnard argues that the mandated appearance should follow every corporate conviction and that it should sometimes include the corporation’s directors as well as its CEO.<sup>203</sup>

Barnard singles out the CEO because she is pivotal in setting the corporation’s ethical tone<sup>204</sup> and because she is the public face of the corporation.<sup>205</sup> Directors ought sometimes to be included, Barnard continues, because they “represent the conscience of the company” and constitute, “collectively, the company’s chief law enforcement officer.”<sup>206</sup> In short, the CEO and directors are appropriate targets for Barnard because of their roles and purported causal connection to the corporate crime through their articulation of the company’s culture or conscience. Furthermore, Barnard justifies her proposal in light of its deterrent and rehabilitative potential.<sup>207</sup>

As should by now be clear, I am concerned with retribution, and the argument advanced herein is that corporate officers and directors deserve some blame for the corporation’s crime. Because all officers and directors partake of a fiduciary relationship to the corporation, and because it is this relationship that grounds their responsibility, I see little

---

199. Rock, *supra* note 141, at 1016.

200. Geoffrey Miller has proposed that allegations of gross negligence on the part of corporate directors should prompt a judicial inquiry—that is, “an official investigation into plausible claims of gross negligence coupled with a public report on the results of that review.” Miller, *supra* note 171, at 336; *see also id.* at 336–45. This is an intriguing suggestion, though one less suitable for the paradigm case I contemplate, in which the corporate official has done nothing wrong in her own right.

201. Barnard, *supra* note 162, at 965 (quoting JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989)).

202. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5, cmt. n.15 (2010).

203. Barnard, *supra* note 162, at 963–64.

204. *Id.* at 976.

205. *Id.* at 981.

206. *Id.* at 985.

207. *See, e.g., id.* at 964, 981.

reason to distinguish between or among them as Barnard does. Nonetheless, the details of Barnard's proposal—especially the opportunity it provides for the judge to voice the “community's abhorrence of the crime”<sup>208</sup>—are useful here. In short, the law can solidify the connection between corporate criminal liability and corporate officials' guilt by requiring these officials to appear in court and receive the community's condemnation through the judge's words.

#### 4. *Adverse-Publicity Sanctions for Nonparticipating Corporate Officials*

The foregoing sanctions presume that the corporate official has not contributed to the crime in any culpable way. Nonetheless, there is a circumstance in which the corporate official who did not contribute to the crime might come to bear individual culpability in light of her responses to the completed corporate crime. Most notably, consider cases where the officials in a corporation refuse to accept a deferred-prosecution agreement or a settlement requiring a guilty plea when they have good reason to believe the corporation is guilty, and it then comes to be convicted at a subsequent trial. Here, each corporate official is morally responsible not just for acting dishonorably by shirking her duty to accept blame but also perhaps for subjecting the corporation to more liability than it might have incurred were it to have cooperated.<sup>209</sup>

In such a case, it may well be appropriate to impose upon the corporation a sentence that stigmatizes its corporate officials. For example, the corporation could be required to pay for the publication of a notice of apology that mentions not just the nature of the crime of which the corporation has been convicted and the names of any individuals convicted of the crime, but also the names of the corporation's directors and officers, along with their titles.<sup>210</sup>

Unlike the preceding sanctions, which are largely symbolic, one might worry that this sanction will have pecuniary consequences. This might seem unfair given that, *ex hypothesi*, the corporate official has not culpably contributed to the crime. But the adverse-publicity sanction, as I envision it, would apply only when the corporate official has good reason to know of the corporation's wrongdoing and yet has declined to cooperate with a criminal investigation, to the detriment of the corporation. It does not, in such cases, seem unfair to alert other corporate insiders, as well as the public at large, to the fact that this corporate official has, in a sense, been unfaithful.<sup>211</sup> With that said, we

---

208. *Id.* at 983.

209. *Cf.* WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS 58–60 (2006).

210. Dan Kahan and Eric Posner advocate something similar, although they do not include a requirement that the corporation publicize the names of those of its corporate officials who have not been convicted of the corporate crime. Kahan & Posner, *supra* note 176, at 385–86.

211. *See, e.g.*, Strine et al., *supra* note 152, at 645 n.41.

might require that, before permitting the adverse-publicity sanction to be imposed, the prosecution establish that the official knew of the crime at the time she maintained the corporation's innocence.

#### CONCLUSION

We do not need to rely on assertions about the corporation's moral agency to arrive at a retributivist defense of corporate criminal liability. Instead, holding corporations criminally liable can be a legitimate and appropriate way of discharging our indignation in the face of corporate wrongdoing—indignation that is not fully exorcised by prosecuting only the crime's individual perpetrators.

To hold the corporation criminally liable is to acknowledge and respond to the fact that there are individuals within the corporation who are blameworthy independent of their participation in the corporate crime. In particular, corporate officials occupy a position within the corporation that forecloses disclaimers of innocence and makes them appropriate objects of blame. These officials are bound by normatively robust fiduciary duties, which compel them to recognize that their fates are interwoven with that of the corporation, and that they rise or fall with it.

To punish the corporation *is* to punish these officials. Corporate-felon disenfranchisement removes from the corporation enhanced rights that its officials enjoy as a result of the corporate form and their positions within it. The educative and norm-propagating function of the judicial opinion—and especially the corporate criminal law opinion—provides judicial enforcement of the requirements of allegiance and honor demanded by the fiduciary relationship. The corporate-icon proceeding gives voice to the community's condemnation. And the publicity sanction, where it is appropriate, further strengthens the norms of honor underpinning the fiduciary relationship.

In short, the law need not leave us with a remainder when it comes to corporate crime. We should visit the full force of the criminal law upon the crime's individual perpetrators. But we should also prosecute and punish the corporation, because doing so appropriately targets the officers and directors whose fiduciary duties make them legitimate objects of blame.