

# The Ability and Responsibility of Corporate Law to Improve Criminal Fines

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*The federal government has used criminal fines to punish corporations for as long as it has been convicting corporations. Yet to this day, with more than a century in which to get the punishment right, corporate-criminal fines fail to satisfy virtually any standard justification that underlies criminal punishment.*

*Attempts to address the failure of corporate-criminal fines founder on two shoals. First, there is a deep and abiding ambiguity about what it means to designate corporate fines as a failed punishment. Second, there is a tendency to see the failure of punishment as a problem for criminal law to solve and, in doing so, to treat corporate law as a fixed, immutable feature of the legal background. This particularly is a profound mistake: the failure of corporate-criminal fines is as much a corporate-law problem as it is a criminal-law problem.*

*Corporate punishment stands at the vanguard of the conceptual and regulatory interplay between corporate and criminal law. At the heart of this conflict is an interaction between drastically different regulatory functions that operate on the basis of conflicting conceptions of the corporation: corporations as persons for criminal law, and corporations as systems for corporate law. While pluralism about the nature of corporation works well when cabined to specific legal domains, corporate-criminal punishment forces these domains, and their competing conception of the corporation, to reconcile or give way.*

*This Article explores the intimate connections between corporate law and criminal punishment—specifically, how corporate law creates the conditions for, makes necessary, and yet at the same time undermines criminal law’s efforts to punish corporations. Appreciating these interconnections requires understanding not just the conceptual frames implicit to each area of law, but also the historical contingency*

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*of associating certain conceptions of the corporation with particular legal domains. To be sure, this Article is reform-minded: I consider what it would mean to improve criminal fines through corporate-law reforms designed to redistribute the harms attendant to criminal fines in a manner that better aligns the punishment with standard penological aims. That said, the ambition first and foremost is to reveal a blind spot in current discussions of corporate-criminal punishment by drawing attention to the conceptual intricacies that attend a practice—corporate-criminal punishment—that stitches together diametrically opposed conceptions of the corporation.*

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## I. INTRODUCTION

It has been over one hundred years since the Supreme Court first blessed the practice of holding a corporation criminally responsible separate from its individual stakeholders.<sup>1</sup> Surveying the intervening century, at least one outcome seems abundantly clear: corporate criminal punishment has roundly failed. Criminal fines, the paradigmatic form of corporate punishment, not only fail to satisfy the standard goals of punishment,<sup>2</sup> but upon reflection appear to be structurally incapable of doing so.<sup>3</sup> Alternative corporate punishments adopted in the past few decades—corporate probation, forced dissolution, regulatory intervention, and suspension—are more promising in

<sup>1</sup> N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 481 (1909).

<sup>2</sup> See *infra* Part II.B.

<sup>3</sup> See *infra* Part II.C.

theory; yet these too have proven unsuccessful, albeit likely due more to a lack of political will and judicial expertise than structural defect.

Failure has provoked an array of responses. Skeptics, arguing that this failure reaffirms a conceptual incoherence in the very idea of holding a corporation criminally responsible, propose “solving” the failure of corporate punishment by abandoning entirely the practice of holding corporations criminally liable.<sup>4</sup> At the other end of the spectrum, supporters of corporate-criminal liability have invented new punishments ostensibly better suited to punish corporations than the current panoply.<sup>5</sup> Yet, despite their policy disagreements, both groups share an implicit assumption about the proper relationship between corporate law and criminal law—one that hamstringing their analyses and solutions. With few exceptions, skeptics and supporters alike take corporations and corporate law as a settled fact of the legal landscape, working to develop criminal-law solutions that improve criminal punishment within the fixed parameters of the corporate law. Too often scholarship on corporate-criminal liability and punishment relegates corporate law to a background, immutable feature that any analysis of the problem takes as a given.

It is a mistake to evaluate the failure of corporate-criminal punishment exclusively, or even primarily, through the lens of criminal law. Corporate punishment stands at the vanguard of the conceptual and regulatory interplay between corporate and criminal law. At a fundamental level, corporate and criminal law serve markedly different regulatory functions that stem from, and are informed by, diametrically opposed conceptions of what the corporation is. One legal domain treats the corporation as a single person that can be held responsible separately from its constitutive individuals.<sup>6</sup> The other domain treats corporations as systems to be designed and tinkered with in the service of facilitating productive cooperation amongst various contingencies of

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<sup>4</sup> See, e.g., Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, in PROSECUTORS IN THE BOARDROOM 38, 45 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320–21 (1996). See generally Jeffrey S. Parker, *Corporate Crime, Overcriminalization, and the Failure of American Public Morality*, in THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW 407 (F.H. Buckley ed., 2013) (discussing the American legal system’s criminalization of corporations in comparison to other countries).

<sup>5</sup> E.g., 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, 387–88 (1981) (forcing equity distributions); Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 975 (2005) (removing directors and officers); Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTING L.J. 411, 449–50 (2012) (restricting corporate political speech); Peter A. French, *The Hester Prynne Sanction*, BUS. & PROF. ETHICS J., Winter 1985, at 19, 22–23 (corporate shaming).

<sup>6</sup> See *infra* Part III.A.

stakeholders.<sup>7</sup> At the same time, these areas of law are deeply enmeshed when it comes to understanding how to think about and how to regulate corporations and corporate misconduct. Corporate-criminal punishment implicates intimate connections between corporate law and criminal punishment—how corporate law creates both the possibility of, but also the need for, corporate-criminal liability, and yet is responsible for undermining our attempts to criminally punish corporations.

This Article is the first in a series examining corporate law's contribution to the systematic failure of efforts thus far to punish corporations. Whereas subsequent entries in the series will evaluate recently developed corporate punishments like corporate probation, forced dissolution, and regulatory suspension, this Article focuses entirely on corporate-criminal fines. The fine, after all, is the paradigmatic form of corporate punishment; it is the first, and for decades the only, method by which the criminal law could hold a corporation criminally responsible for its misconduct.<sup>8</sup> Today, it continues to be the most prevalent method of punishing corporations: nearly 90% of organizations convicted between 1999 and 2012 received some form of financial sanction.<sup>9</sup> Moreover, at least at first glance, there is much to recommend about corporate-criminal fines. Comparatively speaking, fines are easy to administer; easy to scale in response to the size of the corporation, the severity of the crime, and a host of other factors;<sup>10</sup> easy to predict in their consequences to third parties (including their social benefits)<sup>11</sup>; and easy to see as fitting punishment—what better way to punish an entity designed largely to create wealth than to seize from it its wealth?

And yet, for all these purported benefits, corporate-criminal fines have failed as punishment. Moreover, this is a failure not (just) in execution, but in design; fines are structurally ill-suited to satisfy or exemplify any of the standard justifications offered on behalf of the state's rationales and authority to punish.<sup>12</sup> In this Article, I demonstrate both that this design flaw traces to features of corporate law, and that the contingency of these corporate-law features goes frequently overlooked. Criminal punishment of corporations has failed, and that failure stems in large part from unchallenged background settings of corporate law that confound criminal punishment.

Unpacking the interconnections between criminal law and corporate law as they bear on corporate punishment requires appreciating how two domains

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<sup>7</sup> See *infra* Part III.A.

<sup>8</sup> *United States v. A & P Trucking Co.*, 358 U.S. 121, 127 (1958).

<sup>9</sup> See generally *Sourcebook Archives*, U.S. SENTENCING COMMISSION, <http://www.ussc.gov/research/sourcebook/archive> [<https://perma.cc/L4Y3-LMYF>] (data compiled by author using information provided).

<sup>10</sup> See U.S. SENTENCING GUIDELINES MANUAL § 8C2 (U.S. SENTENCING COMM'N 2015) (calculating a fine for organizations).

<sup>11</sup> See Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 415 (1980).

<sup>12</sup> See discussion *infra* Part II.B.1–2.

of law work sometimes together and sometimes at cross purposes. Appreciating these interconnections requires unpacking the conceptual frameworks underlying each area of law. However, theorizing cannot occur in a vacuum; at least “[u]pon this point[,] a page of history is worth a volume of logic.”<sup>13</sup> Just as crucial as identifying how corporate law and criminal law differ conceptually is recognizing the historical contingency of associating certain conceptions of the corporation with particular legal domains. Accordingly, this Article draws variously from philosophical, legal, and historical sources. And although this Article is reform-minded, the ambition first and foremost is to reveal a blind spot in current discussions of corporate-criminal punishment by drawing attention to the conceptual intricacies that attend a practice—corporate-criminal punishment—that stitches together diametrically opposed conceptions of the corporation.

Deep, foundational questions aside, the proposal advanced here is simple: insofar as the state is committed to holding corporations criminally liable and punishing them, it should be committed to doing so well. Corporate-law reform offers a potentially promising avenue for improving the criminal punishments we already have. For these purposes, I sketch a proposal for a “Corporate-Crime Clawback” of incentive payments made to corporate stakeholders, which, combined with a reform that reverses the ordinary flow of financial harm through a corporation in the special case of criminal punishment, promises to meaningfully improve criminal fines as a form of corporate punishment.

To be sure, stakes are high in such a project: the way in which corporate law confounds criminal punishment implicates foundational, deeply held tenets of our corporate practice.<sup>14</sup> Nevertheless, insofar as the state is committed to holding corporations criminally responsible and punishing them, there are convincing reasons to modulate, or at least circumscribe, some features of corporate law for the purpose of making effective corporate punishment. Not only is corporate law able to improve criminal punishment, but—given its role in undermining the same practice that it makes both possible but also necessary—there are good reasons to think that corporate law further has a responsibility to do so.

More prosaically, the Article proceeds as follows. Part II clarifies the standards according to which I base my assessment that a punishment succeeds or fails. Because I try to take our legal practice mostly as I find it, I focus here on the standard justifications given for punishment by judges and scholars alike. I then demonstrate that, for every standard justification offered in support of punishment, corporate-criminal fines fail to deliver on that justification. Finally, Part II disambiguates the failure of punishment *qua* punishment from a separate complaint with corporate-criminal fines—namely, that fines cause innocent individuals to experience harm. I show that this

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<sup>13</sup>N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

<sup>14</sup>See *infra* Part III.A.

problem is not a problem unique to corporate punishment and that, moreover, the tools for addressing this separate problem fall within the province of corporate law rather than criminal law.

Part III unpacks the underexplored connections between corporate law and criminal law. It first captures the key features by which the two doctrines differ both with respect to the regulatory purpose the bodies of law serve and the different conceptions of the corporation according to which they implicitly operate. Corporate law operates according to what I call the “Systems Conception of the Corporation”; corporations are systems to be engineered by a combination of law, market forces, and private initiative for the purpose of serving some (usually commercial) end sought jointly by the individuals who constitute the corporation.<sup>15</sup> By contrast, criminal law presupposes what I refer to as the “Persons Conception of the Corporation”; it treats a corporation as a single person expected to conform its conduct to legal prohibitions.<sup>16</sup> These opposing conceptions of the corporation intersect at the moment of criminal liability and punishment. To that end, I demonstrate that corporate law is instrumental in creating the possibility of, but also the need for, exposing corporations to the criminal law.

At the same time, corporate law bears complicity for the failure of criminal fines. The Persons Conception of the Corporation underwriting criminal law makes it the case that the distribution of harm attendant to a corporate-criminal fine—a type of punishment that fits into a special class of punishments that I call “Negotiable Punishments”<sup>17</sup>—is turned over to the private negotiations of stakeholders inside the corporation. However, corporate law effectively imposes the adoption of an internal structure that makes any sense of negotiation farcical and the resultant distribution of harm to the corporation’s shareholders a foregone conclusion. As it turns out, this distribution is central in diagnosing why criminal fines fail the various rationales of punishment discussed in Part II.

Crucially, Part IV demonstrates that the state is not committed to turning over the distribution of harm to the private negotiations of corporate stakeholders. Nor should it. There are good reasons for the state to affect the distribution of criminal fines, even while continuing to leave the distribution of all other liabilities to the private negotiations of corporate members. Part IV thus offers an illustration of what such a reform might look like; expanding on recent innovation by federal legislators, I sketch a Corporate-Crime Clawback that shifts the harm of fines away from shareholders in a way that helps to secure standard penological benefits central to criminal law. Finally, I close by demonstrating how standard complaints against reforms of this character get their purchase only by equivocating between two characterizations—the same

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<sup>15</sup> See *infra* Part III.

<sup>16</sup> See *infra* Part III.

<sup>17</sup> See *infra* Part III.D.2.

two characterizations that Part II takes pains to disambiguate—of what it means to call fines a failed punishment.

## II. THE FAILURES OF CORPORATE-CRIMINAL FINES

### A. *How to Evaluate Corporate Punishment*

This Article takes as established territory the fact that the state can and will hold a corporation, separate from its individual stakeholders, criminally responsible for misconduct.<sup>18</sup> This authority has existed at the federal level since at least 1909, when in *New York Central & Hudson River Railroad v. United States* the Supreme Court recognized Congress's authority to extend criminal statutes—even those statutes containing general-intent provisions—to corporations.<sup>19</sup> Granted, it is a separate discussion whether the notion of corporate-criminal liability is morally and conceptually well-founded (it is) and whether the doctrine instantiating the practice accords with such a foundation (it does not).<sup>20</sup> Regardless, this Article focuses attention exclusively on the consequences of the state's decision to hold corporations responsible—specifically, on corporate punishment. It is my contention, one likely to garner widespread support across the spectrum of legal scholars, that corporate punishment is and has been a failure.

How do we judge the success or failure of a punishment? A straightforward evaluation considers whether, and to what extent, the sanction vindicates or embodies a traditional justification for imposing punishment. While philosophers and legal theorists disagree over the virtues and vices (and contours) of different justifications, the federal government at least has settled on a pluralistic approach to punishment.<sup>21</sup> According to federal law, punishment is intended to serve the following purposes, articulated most clearly in 18 U.S.C. § 3553(a):

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- ....
- (2) the need for the sentence imposed—
- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and

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<sup>18</sup> N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 481 (1909).

<sup>19</sup> *Id.*

<sup>20</sup> See generally W. Robert Thomas, When and How Corporations Became Persons Under the Criminal Law, and Why It Matters Now (Aug. 28, 2016) (unpublished manuscript) (on file with author).

<sup>21</sup> See *infra* Part III.A.

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.<sup>22</sup>

In broad strokes, § 3553(a) encapsulates what legal scholars and philosophers take to be the standard set of justifications for punishment: deterrence (“to afford adequate deterrence”), including incapacitation (“to protect the public from further crimes”) and rehabilitation (“to provide the defendant with needed educational or vocational training”); retribution (“to provide just punishment for the offense”); and a reinforcement of social cohesion via the expression of communal condemnation (“to promote respect for the law”).<sup>23</sup>

Now is as good a time as any to flag a distinction that recurs throughout this Article. The claim I am advancing is that corporate-criminal fines fail as a form of punishment. By this, I mean that fines fail to satisfy the penological rationales above, which traditionally underwrite state punishment. However, there is a separate criticism frequently conflated with the claim that fines fail as punishment. Most frequently, this second claim takes the form that corporate fines, and corporate punishment generally, harm innocent individuals. I explore this assertion at Part II.C, but it is worth making explicit now that we are dealing with two distinct criticisms. For example, a cruel and unusual punishment is (by definition) punishment. It need not be ineffective as a punishment in order to be unconstitutional; rather, separate moral and political judgments caution the prohibition of punishments that are cruel and unusual. With respect to fines, the fact that they might harm innocent individuals would constitute a further reason to consider their usage problematic, but this worry is distinct from asserting that fines fail to perform the job for which they are intended.

For now, I defend the narrower position that corporate-criminal fines fail as punishment *qua* punishment. It is a further question, discussion of which I reserve until Part IV, whether we ought to use corporate-criminal fines provided that we could reform them into a successful version of punishment.

### B. *Corporate-Criminal Fines as a Failed Method of Punishment*

Despite being a paradigmatic, ubiquitous form of criminal punishment, the corporate fine is deeply flawed. Judged against the standard justifications for criminal punishment, corporate-criminal fines do not seem to serve *any* rationale—or, at least, they do not serve any well.

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<sup>22</sup> 18 U.S.C. § 3553(a)(2) (2012).

<sup>23</sup> *See id.*

### 1. *Fines as Deterrence*

The received wisdom, for better or worse, is that corporate punishment exists almost exclusively to deter prospective misconduct. Regina Robson, in cataloguing discussions of corporate punishment, concludes that there has occurred a “virtual elimination of retribution as an acknowledged goal of [corporate-]criminal sanctioning,” with only deterrence offered to explain why the state should hold corporations criminally responsible;<sup>24</sup> Vik Khanna agrees that “deterrence, not retribution, [is] the aim of . . . corporate criminal liability.”<sup>25</sup> Pity then that fines are a famously poor deterrent of corporate crime.

One reason that fines are a poor deterrent is that corporate crime is infrequently prosecuted and that convicted corporations historically receive modest fines.<sup>26</sup> Although the average fine from 1999 to 2012 was approximately \$7.4 million, the median fine was less than \$120,000.<sup>27</sup> On the other hand, recently there have been signs of larger financial penalties for convicted corporations. In 2014, several financial firms received criminal penalties well in excess of \$1 billion each,<sup>28</sup> although a large portion of these penalties consist in restitution payments to victims.<sup>29</sup> This trend has continued in 2015; for example, five domestic banks pleaded guilty to a criminal conspiracy involving currency manipulation, for which they too received penalties well in excess of \$1 billion.<sup>30</sup> It remains to be seen whether this trend will continue.

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<sup>24</sup>Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 121 (2010).

<sup>25</sup>V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1494 & n.91 (1996).

<sup>26</sup>Memorandum from the Deputy Att’y Gen., Dep’t of Justice, to All Component Heads & U.S. Att’ys (June 16, 1999), [http://federalevidence.com/pdf/Corp\\_Prosec/Holder\\_Memo\\_6\\_16\\_99.pdf](http://federalevidence.com/pdf/Corp_Prosec/Holder_Memo_6_16_99.pdf) [<https://perma.cc/NFW8-J8H9>] (“[A] prosecutor may consider the corporation’s willingness to make restitution and steps already taken to do so . . . in determining whether to charge the corporation.”); *Fine and Punishment*, ECONOMIST (July 21, 2012), <http://www.economist.com/node/21559315> [<https://perma.cc/2BNZ-9YJD>].

<sup>27</sup>*Sourcebook Archives*, *supra* note 9.

<sup>28</sup>W.R. Thomas, *How and Why Should the Criminal Law Punish Corporations?* 113 n.38 (2015) (unpublished Ph.D. dissertation, University of Michigan) (on file with author) (listing Credit Suisse (\$2.6 billion in criminal penalties), BNP Paribas (\$8.9 billion in criminal penalties), and JP Morgan Chase (\$2.6 billion in criminal and civil penalties)).

<sup>29</sup>Sensibly, the Guidelines acknowledge that restitution is not punishment. U.S. SENTENCING GUIDELINES MANUAL ch. 8, pt. B introductory cmt. (U.S. SENTENCING COMM’N 2015).

<sup>30</sup>David McLaughlin et al., *Six Banks Pay \$5.8 Billion, Five Guilty of Market Rigging*, BLOOMBERG (May 20, 2015), <http://www.bloomberg.com/news/articles/2015-05-20/six-banks-pay-5-8-billion-five-plead-guilty-to-market-rigging> [<https://perma.cc/C9AW-T2CV>].

Regardless, there is reason for skepticism that even large fines meaningfully deter corporations. For one thing, it is likely impossible to set fines at the appropriate price to deter misconduct. Even assuming reasonable rates of enforcement, John Coffee demonstrates that the optimal fine for deterring even minor criminal activity would far outstrip the value of most corporations, leading to a mismatched calculus that he refers to as the “deterrence trap.”<sup>31</sup> Vince Buccola’s research on corporate insolvency implies that the deterrence trap, when considered diachronically, is even more of a problem than Coffee suspected.<sup>32</sup> Buccola notes that the interest of shareholders and managers diverge proportionally as a corporation approaches insolvency; officers become increasingly willing to act in their short-term interest, even if it is to the detriment of shareholders.<sup>33</sup> A similar logic informs corporate crime. The closer a corporation moves towards insolvency, the more mismatched becomes the deterrence trap—in particular, the less a large fine acts as a deterrent. Accordingly, at a time of looming insolvency, when a corporation might be most inclined to stave off collapse by engaging in criminal activity, criminal fines offer the least deterrence.

Separately, the magnitude of a fine cannot be calculated independently of enforcement rates. It is well documented that large punishments can actually discourage enforcement.<sup>34</sup> For example, the risk of bankrupting a corporation may well dissuade prosecutors from rigorously enforcing the law. To that end, according to Brandon Garrett “[t]he DOJ suffered great criticism following [Arthur] Andersen’s collapse and has since moderated its approach to explicitly take into account collateral consequences in organizational cases.”<sup>35</sup>

Finally, the corporate fine’s force as a deterrent is undermined by one of several agent/principle problems at the core of corporate law. As Larry Summers quips, “Managers do not find it personally costly to part with even billions of dollars of their shareholders’ money . . . . Paying with shareholders’ money as the price of protecting themselves is a very attractive trade-off.”<sup>36</sup> This worry bears out empirically and anecdotally. It is the central rationale offered by Professors Alexander and Cohen’s economic research into corporate crime, which concludes that “[t]here is little evidence that increasing the magnitude of monetary sanctions has a deterrent effect.”<sup>37</sup> Anecdotally,

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<sup>31</sup> Coffee, *supra* note 5, at 390.

<sup>32</sup> Vincent S.J. Buccola, *Beyond Insolvency*, 62 U. KAN. L. REV. 1, 1–2 (2013).

<sup>33</sup> *Id.*

<sup>34</sup> Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 597 (2012) (collecting examples).

<sup>35</sup> Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 880 (2007).

<sup>36</sup> Lawrence Summers, *Companies on Trial: Are They ‘Too Big to Jail’?*, FIN. TIMES (Nov. 21, 2014), <http://www.ft.com/cms/s/0/e3bf9954-7009-11e4-90af-00144feabdc0.html> [<https://perma.cc/ZCD7-Q6FT>].

<sup>37</sup> Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, in PROSECUTORS IN THE BOARDROOM, *supra* note 4, at 11, 24.

consider the recent conduct of several financial institutions after pleading guilty to manipulating currency markets.<sup>38</sup> These institutions acknowledged wrongdoing both in a guilty plea and in a mandatory disclosure notice to investors.<sup>39</sup> Yet, a second client letter—one that several institutions attached to the disclosure notice itself!—informed investors that their institutions would continue to engage in potentially criminal conduct specifically identified in the guilty plea but that was not itself the basis for the instant antitrust conviction.<sup>40</sup>

## 2. Retributivism, Fines, and Corporations

There is a widespread view that “corporate criminal liability cannot be justified retributively.”<sup>41</sup> Underlying this is anxiety about whether corporations, even if they can be subjected to criminal liability, are the kinds of agents—in particular, moral agents—for which retribution is applicable or appropriate.

The moral status and capacity of corporate agents is a contentious and somewhat unfocused topic. If all that critics have in mind is that corporations must be responsive to the sorts of normative considerations that arise in the criminal law, then I see no basis for their complaints.<sup>42</sup> For my part, I am inclined towards this minimal account of the preconditions of legal retribution. Corporations have free will in a narrow sense: they can deliberate and act consistent with their self-identified interests and separate from outside pressures.<sup>43</sup> Corporations are willing participants in broad swaths of our normative practices, even if they may not be objects of moral consideration in and of themselves.<sup>44</sup> For example, through contract law, corporations routinely

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<sup>38</sup>Michael Corkery & Ben Protess, *Rigging of Foreign Exchange Market Makes Felons of Top Banks*, N.Y. TIMES: DEALBOOK (May 20, 2015), <http://www.nytimes.com/2015/05/21/business/dealbook/5-big-banks-to-pay-billions-and-plead-guilty-in-currency-and-interest-rate-cases.html> [<https://perma.cc/E2FE-826R>].

<sup>39</sup>See Press Release, Dep’t of Justice, *Five Major Banks Agree to Parent-Level Guilty Pleas* (May 20, 2015), <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas> [<https://perma.cc/PDG4-NZLH>].

<sup>40</sup>Matt Levine, *Banks Will Keep Doing FX Stuff That Got Them in Trouble*, BLOOMBERG (May 21, 2015), <http://www.bloombergvew.com/articles/2015-05-21/banks-will-keep-doing-fx-stuff-that-got-them-in-trouble> [<https://perma.cc/2344-AXFB>].

<sup>41</sup>Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 8 (2012).

<sup>42</sup>See *infra* Part II.B (discussing the capacities of corporate agents). At the other extreme, some require far less to qualify for moral personhood. See Tracy Isaacs, *Collective Moral Responsibility and Collective Intention*, 30 MIDWEST STUD. PHIL. 59, 61 (2006) (“To the extent that they have the capacity to act on the basis of intentions, corporations and other similarly structured organizations are moral persons.”).

<sup>43</sup>See Margaret Gilbert, *Who’s to Blame? Collective Moral Responsibility and Its Implications for Group Members*, 30 MIDWEST STUD. PHIL. 94, 99–100 (2006).

<sup>44</sup>Cf. Dietmar von der Pfordten, *Five Elements of Normative Ethics - A General Theory of Normative Individualism*, 15 ETHICAL THEORY & MORAL PRAC. 449, 452 (2012) (“Only individuals can be the ultimate point of reference of moral obligations and hence

participate in a normatively laden practice akin to promising.<sup>45</sup> More generally, inasmuch as corporate attitudes derive from the contributions of individuals who themselves are uncontroversially moral agents—more on this later—it would be surprising that every emergent corporate attitude would be stripped of normative content.<sup>46</sup>

However, if critics demand something more robust—Michael Moore and Amy Sepinwall suggest that personhood requires an emotional capacity capable of manifesting what philosophers call “reactive attitudes”;<sup>47</sup> Michael McKenna suggests that robust moral agency requires a free will in some deep Kantian sense<sup>48</sup>—then claims of corporate moral agency are more complicated. That is not to say that the possibility of robust moral agency is beyond reach. David Silver, as well as Gunnar Björnsson and Kendy Hess, argue that corporations are in fact Strawsonian agents capable of reactive attitudes sufficient to give rise to moral agency.<sup>49</sup> Margaret Gilbert has extended her schema for collective attitudes to include some collective emotions.<sup>50</sup> Bryce Huebner, relying on an account broadly similar to Gilbert’s, has offered a detailed account of what it would look like for a collective to experience fear.<sup>51</sup> Peter French has done something of the same for corporate shame.<sup>52</sup>

Needless to say, it is well beyond the scope of this project to offer a full resolution of the moral status of collective entities generally and corporate agents particularly. Nevertheless, it is consistent with our criminal practice to impose punishment on corporations notwithstanding reservations about their retributive capacities.<sup>53</sup> Fines, and corporate punishment generally, are still

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the justificatory source of morals and ethics. Collective entities . . . cannot fulfill this function.” (emphasis omitted).

<sup>45</sup> See generally CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (2d ed. 2015).

<sup>46</sup> CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* 160 (2011).

<sup>47</sup> MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 614–17 (1997); Sepinwall, *supra* note 5, at 428–30. Philosophers identify as reactive attitudes those that express our holding others responsible—examples include anger, blame, gratitude, forgiveness, resentment, etc.—and presuppose our participation in personal relationships with the agents who are the source and/or target of our holding these attitudes. P.F. Strawson, *Philosophical Lecture: Freedom and Resentment* (May 9, 1962), *reprinted in* 48 *PROC. BRIT. ACAD.* 187, 195 (1963).

<sup>48</sup> Michael McKenna, *Collective Responsibility and an Agent Meaning Theory*, 30 *MIDWEST STUD. PHIL.* 16, 23–29 (2006).

<sup>49</sup> Gunnar Björnsson & Kendy Hess, *Corporate Crocodile Tears? On the Reactive Attitudes of Corporate Agents*, 94 *PHIL. & PHENOMENOLOGICAL RES.* 273, 273–74 (2017); David Silver, *A Strawsonian Defense of Corporate Moral Responsibility*, 42 *AM. PHIL. Q.* 279, 279 (2005).

<sup>50</sup> Gilbert, *supra* note 43, at 100.

<sup>51</sup> Bryce Huebner, *Genuinely Collective Emotions*, 1 *EURO J. PHIL. SCI.* 89, 95 (2011).

<sup>52</sup> French, *supra* note 5, at 22–26.

<sup>53</sup> See *infra* note 55 and accompanying text.

justifiable even if corporations are not the kind of fully formed moral agents for which retribution is a prerequisite. No one punishment need necessarily convey all rationales.<sup>54</sup> With respect to retribution specifically, the law mitigates its punishment of minors and the mentally disabled largely out of concerns about robust moral agency.<sup>55</sup> Yet mitigation is not exemption; these classes are nevertheless susceptible to criminal liability and punishment.<sup>56</sup> Separately, current ineligibility for retributive-style rationales would not preclude arguments that the state's legal regime would benefit from a practice of treating corporations as though they are capable of retribution.<sup>57</sup> Indeed, Christian List and Philip Pettit note the value of such a practice: by treating corporations as though they are capable moral agents, we may educate them to actually become moral agents.<sup>58</sup>

All that said, a more mundane, but more pressing problem is that fines—at least in the corporate context—are a poor vehicle to express retribution.<sup>59</sup> The reasons why tie into the next Part.

### 3. *Fines as Promoting Respect for Law*

Perhaps the most common lay criticism of corporate liability and punishment,<sup>60</sup> one echoed just as frequently by criminal law scholars,<sup>61</sup> is that corporations treat fines simply as “the cost of doing business.” This complaint segues into the final failure to consider, which is the corporate-criminal fine's failure to express the sort of social judgment expected to attend a criminal judgment.

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<sup>54</sup> See, e.g., *United States v. Johnson*, 529 U.S. 53, 59 (2000) (“Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.”).

<sup>55</sup> E.g., *Roper v. Simmons*, 543 U.S. 551, 571–72 (2005); *Atkins v. Virginia*, 536 U.S. 304, 318–19 (2002); see also *Miller v. Alabama*, 132 S. Ct. 2455, 2464–66 (2012) (discussing children's moral development).

<sup>56</sup> *Miller*, 132 S. Ct. at 2458; *Atkins*, 536 U.S. at 306.

<sup>57</sup> See generally Robson, *supra* note 24 (suggesting retribution rather than deterrence as the primary goal of criminal law).

<sup>58</sup> LIST & PETTIT, *supra* note 46, at 168–69; accord Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674, 677 (1968).

<sup>59</sup> See French, *supra* note 5, at 19–22.

<sup>60</sup> E.g., Danielle Kurtzleben, *Bank of America's \$17 Billion Penalty Is Arguable Too Little, Definitely Too Late*, VOX (Aug. 20, 2014), <http://www.vox.com/2014/8/8/5979563/bank-of-americas-17-billion-penalty-is-arguably-too-little-definitely> [<https://perma.cc/7FKP-VPA8>]; Katie Thomas & Michael S. Schmidt, *Glaxo Agrees to Pay \$3 Billion in Fraud Settlement*, N.Y. TIMES (July 2, 2012), <http://www.nytimes.com/2012/07/03/business/glaxo-smithkline-agrees-to-pay-3-billion-in-fraudsettlement.html> [<https://perma.cc/L9Z6-QXEU>].

<sup>61</sup> E.g., Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 278 (2008); Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1426–27 (2009); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 619 (1998); French, *supra* note 5, at 20.

“Expressive theories of law are concerned with evaluating state action” and particularly whether that action conveys “the appropriate attitudes toward persons.”<sup>62</sup> The state expresses itself through a variety of methods including lawmaking,<sup>63</sup> enforcement (or the lack thereof) of existing laws,<sup>64</sup> and, of course, punishment.<sup>65</sup>

According to expressive theories of law, one vital function of the law, and equally its enforcement, is to convey and reaffirm the right sort of moral or social judgments underpinning a particular law—that is, expressive theories “assert that state action is required to express.”<sup>66</sup>

Expressive theories have considerable traction with respect to criminal law scholarship. As Henry Hart famously put the point: “What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition.”<sup>67</sup> Likewise, Dan Kahan recognizes that the criminalization of certain activities over others reflect the background social meanings ordinarily associated with such activities:

Economic competition may impoverish a merchant every bit as much as theft. The reason that theft but not competition is viewed as *wrongful*, on this account, is that against the background of social norms theft expresses disrespect for the injured party’s moral worth whereas competition (at least ordinarily) does not.<sup>68</sup>

Thus, it is understood that through criminal law “we communicate far more about our condemnation of wrongdoing when we call conduct criminal, whether the defendant is a corporation or an individual.”<sup>69</sup> On this view, “[a]s an expression of the community’s moral judgment, there is a significant value to applying the criminal law to organizations that act through their agents, apart from any instrumental benefits from having a coercive means available to deter certain conduct.”<sup>70</sup>

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<sup>62</sup> Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV., 1503, 1520 (2000).

<sup>63</sup> See generally *id.*

<sup>64</sup> See Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 860 (2014); Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 916 (2013).

<sup>65</sup> Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 397 (1965).

<sup>66</sup> Anderson & Pildes, *supra* note 62, at 1520.

<sup>67</sup> Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).

<sup>68</sup> Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 420 (1999) (footnote omitted).

<sup>69</sup> David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1343–44 (2013).

<sup>70</sup> Henning, *supra* note 61, at 1427.

If corporate-criminal liability is a valuable practice according to the expressive theorist, then why do I nevertheless insist that fines are a failure? The reason has to do with the role of actions in expressing our underlying judgments. As Anderson and Pildes put the point:

Expressive mental states may be viewed as potentialities that can be realized in more than one expression. They are mere potentialities in the sense that they require expression to be fully realized.

. . . .

. . . We can evaluate any vehicle of expression, whether a statement or action, *in terms of how well it expresses its mental states*.<sup>71</sup>

The mere condemnation of conduct as criminal does not suffice, at least in our system, to distinguish conduct. We cannot isolate condemnation from the carrying out of punishment—what Feinberg refers to under the blanket term “hard treatment”<sup>72</sup>—that embodies our expression of condemnation. Thus, while it is true that criminal judgments are understood to express condemnation more severe than civil judgments, the state conveys, and buoys, this convention by accompanying criminal judgments with uniquely harsh punishments.<sup>73</sup> Conversely, where criminal and civil sanctions are indistinguishable, the state’s expression of uniquely *criminal* condemnation is blunted.<sup>74</sup>

This gets to the point of the cost-of-doing-business problem. I take the root of the problem here to be the fact that corporate fines are treated and perceived as no different than any other business cost. This is true prospectively in weighing the decision to commit a crime. By this, I take critics to mean that a corporation commits crimes after calculating criminality to be in the corporation’s best interest. This sort of calculation tracks Gary Becker’s economic analysis of corporate crime, whereby a person’s decision to commit a crime is a function of the benefit to be gained by the crime, weighed against the likelihood of detection (enforcement) and the severity of the sanction (punishment).<sup>75</sup> Paying a fine may well be worth the benefits of criminality; after all, it is easy to forget that “agent crimes often *benefit* organizations and are committed for that reason.”<sup>76</sup> Fines, from this perspective, act as licenses retroactively permitting the corporation’s misconduct. This same calculation and criticism apply after the fact. That is, a corporation absorbs the cost of a

<sup>71</sup> Anderson & Pildes, *supra* note 62, at 1507 (emphasis added).

<sup>72</sup> Feinberg, *supra* note 65, at 400.

<sup>73</sup> DOUGLAS HUSAK, *OVERCRIMINALIZATION* 22 (2008).

<sup>74</sup> See Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability, in* PROSECUTORS IN THE BOARDROOM, *supra* note 4, at 87, 93–96.

<sup>75</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach, in* ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 1, 2 (Gary S. Becker & William M. Landes eds., 1974).

<sup>76</sup> Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 495–96 (2006).

criminal fine in exactly the same way that it absorbs any other business cost—a civil fine,<sup>77</sup> for example, or even just an exogenous shock from a bad investment or a disappointing quarterly performance. In all of these instances, the costs hit the corporation, and immediately distribute down (primarily) to the shareholders.<sup>78</sup>

The failure of corporate-criminal fines is that, as a sanction purportedly expressing particularly severe condemnation, they nevertheless are indistinguishable from civil sanctions. Indeed, in a perversion of the idea that criminal condemnation is reserved for conduct worse than that deserving a civil judgment, corporations outside of heavily regulated industries may prefer a criminal fine over a civil penalty, as the former will likely be smaller than the latter.<sup>79</sup> That criminal and civil sanctions are mostly indistinguishable, and their effects further indistinguishable from poor managerial performance, blunts the harsh expression of condemnation a corporate conviction is intended to deliver.<sup>80</sup> In a slogan, the expressive problem with corporate-criminal fines is that there is nothing uniquely criminal about corporate fines.

### C. *How Not to Evaluate Corporate Punishment*

I have yet to consider what some take to be the central failure of corporate punishment: the harm it inflicts on innocent individuals. On this view, corporate-criminal fines fail because they invariably punish individuals within the corporation who were not subject to the criminal process or afforded its procedural protections and who may well have played no part in the underlying misconduct giving rise to the corporate prosecution. Stephen Bainbridge pithily captures the sentiment: “When you punish an entity, you’re really punishing the entity’s shareholders.”<sup>81</sup> In this, he echoes Glanville Williams’ assertion that “a fine imposed on the corporation is in reality aimed against shareholders who are not . . . responsible for the crime, *i.e.*, is aimed against innocent persons.”<sup>82</sup> This critique is as old as corporate-criminal liability itself. When first considering Congress’s ability to extend criminal statutes to corporations, the Supreme Court explicitly addressed (and, notably,

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<sup>77</sup> The major difference seems to concern tax implications. See Lynnley Browning, *Too Big to Tax: Settlements Are Tax Write-Offs for Banks*, NEWSWEEK (Oct. 27, 2014), <http://www.newsweek.com/2014/11/07/giant-penalties-are-giant-tax-write-offs-wall-street-279993.html> [<https://perma.cc/E8F2-BJ39>].

<sup>78</sup> See *infra* Part III.B.

<sup>79</sup> See generally Vikramaditya Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95 (2004) (identifying conditions under which a corporate conviction is preferable to civil or regulatory alternatives).

<sup>80</sup> Buell, *supra* note 74, at 94–95.

<sup>81</sup> *What the NY Times Doesn't Understand About Organizational Wrongdoing*, PROFESSORBAINBRIDGE.COM (May 14, 2015), <http://www.professorbainbridge.com/professorbainbridge.com/2015/05/what-the-ny-times-doesnt-understand-about-organizational-wrongdoing.html> [<https://perma.cc/RDB3-UTLG>].

<sup>82</sup> GLANVILLE WILLIAMS, CRIMINAL LAW 863 (2d ed. 1961).

rejected) characterizations “that to . . . punish the corporation is in reality to punish the innocent stockholders.”<sup>83</sup>

That corporate punishment distributes harm to innocent individuals, taken by itself, provides no support for the proposition that fines fail as a form of punishment. The fact of third-party harm is a reliable, perhaps inescapable, consequence of punishment.<sup>84</sup> To treat this fact as fatal to punishment in the corporate context is to employ unreasonable standards against corporate punishment twice over—once with respect to criminal law and once with respect to corporate law. But even granting to critics these heightened standards, nevertheless the arguments offered or implied are themselves invalid; as I demonstrate here the conclusions asserted do not follow from the premises offered.

First, however, it is worth pausing to unpack this dialectic. For one thing, we should be clear on what the failure of corporate-criminal fines is, and what the failure is not, before attempting a diagnosis or remedy. For another, the claim that corporate punishment fails because it punishes individuals gets its purchase, on my view, by conflating two separate domains, criminal law and corporate law, and obfuscating the application of reasons appropriate to one domain impermissibly into the other domain.<sup>85</sup> Inasmuch as this Article is intended to make explicit the overlooked connections between corporate law and criminal law, it seems appropriate before continuing to disambiguate the actual failure of corporate-criminal fines from this specious, albeit common, criticism.

### 1. *Corporate-Criminal Punishment and Impossible Standards*

Start with the obvious: corporate-criminal fines result in harm being distributed to individuals. Despite the fact that the state imposes its punishment against the corporation and not any individual, “[a]s in any other sanction or taxation scheme, the impact point is not necessarily the final resting point, or incidence, of the burden.”<sup>86</sup> On the standard picture, “the [most] widely used form of corporate punishment, fine, will cause economic detriment to innocent shareholders” in the form of diminished equity value.<sup>87</sup> Albert Alschuler describes the effect a bit more broadly: “Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too.”<sup>88</sup> For any given case, we safely

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<sup>83</sup> N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 492 (1909).

<sup>84</sup> See *id.*

<sup>85</sup> See *infra* Part IV.

<sup>86</sup> Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 377 (2003).

<sup>87</sup> Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 47 (1957); accord PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 190 (1984).

<sup>88</sup> Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1367 (2009).

assume that a vast majority of individuals to whom harm is distributed are innocent—that is, they have not been convicted of the same or substantially similar misconduct as has the corporation.<sup>89</sup> Moreover, many are not culpable inasmuch as they did not personally contribute to the sanctionable misconduct—for example, by carrying out the misconduct, authorizing it, or creating conditions that cannot be satisfied without resort to criminality—nor did they stand in a position to prevent it.<sup>90</sup>

So, corporate-criminal punishment distributes harm to innocent, nonculpable individuals. However, in this respect, corporate-criminal fines are like any individual punishment. Punishment, be it individual or corporate, carries a messy, spillover quality with it. Consider the effects of an individual’s incarceration: family and friends lose access to a loved one, employers lose an employee, and citizens pay for an inmate’s care.<sup>91</sup> The imposition of punishment reliably—indeed, barring highly contrived examples, invariably—results in harm being distributed to innocent, nonculpable individuals.<sup>92</sup> Indeed, Daryl Levinson argues that this spillover effect blurs any clear distinction between individual and collective punishments.<sup>93</sup> On his view, “many sanctioning regimes that are de jure individual should be understood as de facto collective.”<sup>94</sup> No surprise, then, that the Department of Justice reassures its prosecutors that “[a]lmost every conviction of a corporation, *like almost every conviction of an individual*, will have an impact on innocent third parties.”<sup>95</sup>

Thus, if the problem of corporate-criminal fines were merely that they distributed harm to innocent parties, I would say it is no problem at all—or, at least, not one unique to corporate punishment. Absent justification for treating corporate punishment differently from individual punishment with respect to their distributive consequences, arguing against punishment on this basis

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<sup>89</sup> Indeed, as Garrett notes, “More often than not, when the largest corporations are prosecuted federally, individuals aren’t charged.” James B. Stewart, *In Corporate Crimes, Individual Accountability Is Elusive*, N.Y. TIMES (Feb. 19, 2015) (quoting Professor Brandon L. Garrett), [https://www.nytimes.com/2015/02/20/business/in-corporate-crimes-individual-accountability-is-elusive.html?\\_r=0](https://www.nytimes.com/2015/02/20/business/in-corporate-crimes-individual-accountability-is-elusive.html?_r=0) [<https://perma.cc/MC5Z-SDM9>].

<sup>90</sup> *But see* CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 162 (2000) (discussing membership responsibility).

<sup>91</sup> Indeed, the social cost of prison informs Judge Posner’s suggestion that white-collar criminals receive a fine instead of imprisonment. Posner, *supra* note 11, at 415. *But cf. Is Charging Inmates to Stay in Prison Smart Policy?*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/states-pay-stay-charges> [<https://perma.cc/CJ2P-G2RA>] (identifying states that require inmates to repay costs of incarceration).

<sup>92</sup> FRENCH, *supra* note 87, at 188; Buell, *supra* note 76, at 522–23; French, *supra* note 5, at 21.

<sup>93</sup> Levinson, *supra* note 86, at 378.

<sup>94</sup> *Id.*

<sup>95</sup> UNITED STATES ATTORNEYS’ MANUAL § 9-28.1100 cmt. B (2015) (emphasis added) [hereinafter U.S.A.M.], <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.010> [<https://perma.cc/8HPB-4H2A>].

amounts to an ad hoc invocation of a double standard that no form of punishment can reliably satisfy.

There is a second sense in which the criticism of corporate-criminal fines imposes a double standard—this time between harms imposed on a corporation through punishment and all other harms imposed on a corporation. After all, that harms imposed on a corporation distribute to stakeholders within the corporation is not an occurrence unique to criminal law.<sup>96</sup> Corporate harms reliably distribute down to shareholders (and employees and consumers) irrespective of whether they arise from a criminal fine, a civil sanction, poor managerial decisionmaking, or an exogenous market shock.<sup>97</sup> Indeed, that the distribution of harm is consistent across inciting incidents is a primary reason for perceiving criminal fines as the cost of doing business.

True, there is a normative consideration here; we should care about the distributions of burdens across groups of individuals.<sup>98</sup> The category error occurs when we import criminal law considerations of guilt and innocence into the conversation. What role, precisely, does an individual's innocence play here? We do not impose damages on shareholders because they personally are tortfeasors, because they breached the corporation's contracts, or because they implemented the company's flawed business plan. No one seriously entertains the idea that a shareholder should avoid bearing the cost of a poor managerial decision merely because he is "innocent" of making the decision. Rather, the harm falls to them because the structure of a corporation, and the function of corporate law, is to distribute the benefits and burdens attributable to the corporate entity to various individuals.<sup>99</sup> Guilt and innocence are the purview of criminal law; distribution of harm is (with respect to corporations) the purview of corporate law. I address this point at length in Part IV, and so hold off on further explication for now.

## 2. *Intentional vs. Foreseeable Harm*

Critics continue to argue that the harm distributed through corporate punishment is different in kind to harm distributed through individual punishment. Corporate punishment, in their view, is categorically worse than individual punishment. There are two interpretations for assertions that the harm distributed via corporate punishment is different in kind from, and categorically worse than, the harm distributed via individual punishment. Neither interpretation is compelling.

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<sup>96</sup> See, e.g., FRANKLIN A. GEVURTZ, CORPORATION LAW § 4.3 (2d ed. 2010) (discussing bases for shareholder derivative suits to recover corporate harms that befall shareholders).

<sup>97</sup> *Id.*

<sup>98</sup> Avia Pasternak, *The Distributive Effect of Collective Punishment*, in ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 210, 210 (Tracy Isaacs & Richard Vernon eds., 2011).

<sup>99</sup> See *infra* Part IV.

The first interpretation assigns a morally significant difference between intending and foreseeing—a strategy associated with the doctrine of double effect.<sup>100</sup> This interpretation especially matches Alschuler’s assertion that “[t]he penalties imposed on innocent shareholders and employees when corporations are convicted are not incidental, collateral, or secondary. They are what the punishment of a collective entity is all about.”<sup>101</sup>

The philosophical literature is littered with thought experiments meant to capture the intuition that a wrong done intentionally for its own sake is worse than the same action taken under circumstances where the wrong was salient, but not intended, by the agent.<sup>102</sup> Roughly, according to the Doctrine of Double Effect, what grounds the divergence in intuitions is the subjective attitudes of the wrongdoer; an outcome that would be permissible (or less morally problematic) if merely foreseeable but unintended becomes impermissible (or morally worse) by virtue of being intended.<sup>103</sup>

I am skeptical that the conceptual distinction between intending and foreseeing, to the extent there is one, can bear the normative weight that Alschuler and others seems to think it does. Elsewhere I have argued against the coherence of the Doctrine of Double Effect as it would apply to the criminal law on these grounds.<sup>104</sup> Briefly, endorsing the view that intending and merely foreseeing delineate the timbre of moral (and legal) judgments elevates obviously irrelevant factual considerations to the status of decisive determinants of moral and legal permissibility.<sup>105</sup>

Regardless, there is a more pressing challenge facing those who would render corporate punishment categorically indefensible. This is the so-called Closeness Problem that consistently plagues the defense of the Doctrine of Double Effect.<sup>106</sup> In essence, many so-labeled “intending” cases can be plausibly redescribed as “foreseeing” cases, and vice versa. Worse, there exist

<sup>100</sup>The Doctrine of Double Effect is often attributed to Thomas Aquinas. Thomas Aquinas, *Of Murder*, in 3 ST. THOMAS AQUINAS SUMMA THEOLOGICA pt. II-II q. 64, art. 7, at 1465 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911).

<sup>101</sup>Alschuler, *supra* note 88, at 1369.

<sup>102</sup>See generally T.M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME* (2008).

<sup>103</sup>Alison McIntyre, *Doctrine of Double Effect*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/double-effect/> [<https://perma.cc/T96H-WG8Z>] (last revised Sept. 23, 2014).

<sup>104</sup>W. Robert Thomas, Note, *On Strict Liability Crimes: Preserving a Moral Framework for Criminal Intent in an Intent-Free Moral World*, 110 MICH. L. REV. 647, 663–66 (2012).

<sup>105</sup>*Id.* at 664–65.

<sup>106</sup>See, e.g., JONATHAN BENNETT, *THE ACT ITSELF* 204–05 (1995); H.L.A. HART, *Intention and Punishment*, in *PUNISHMENT AND RESPONSIBILITY* 113, 123 (1968); Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in *KILLING AND LETTING DIE* 266, 268–69 (Bonnie Steinbock & Alastair Norcross eds., 2d ed. 1994). See generally EZIO DI NUCCI, *ETHICS WITHOUT INTENTION* 103–32 (2014) (cataloguing failed efforts to circumvent the Closeness Problem).

no independent standards for determining which description is “correct” (assuming a correct description exists as a coherent notion).<sup>107</sup> The worry, then, is that an individual privileges a description only because it supports her pretheoretic moral judgment, which the appeal to intending/foreseeing was meant to elicit and ground.<sup>108</sup> In other words, appeals to the Doctrine of Double Effect risk begging the question.

Claims against corporate punishment of the sort above suffer acutely from the Closeness Problem. Critics assert that the goal of corporate punishment is to harm shareholders—that is, the state intends to harm innocent individuals.<sup>109</sup> (The implicit presumption is that harm experienced by innocent individuals is merely foreseeable in the individual context).<sup>110</sup> However, there are not strong, independent reasons to accept this characterization of the state’s conduct. First, it is not clear why the state would want to harm innocent shareholders, particularly as it has long been the case that shareholders have few, weak levers to reform a corporation.<sup>111</sup> Second, the state already has an institution of individual liability and punishment viz., criminal law as applied to individuals. Third, the state has ample reasons to hold corporations criminally responsible separate from their members. Chief among them is that conduct not reducible to individuals nevertheless remains criminal; the state has a duty to its citizens, and especially victims, to hold perpetrators responsible, be they individual or corporate.<sup>112</sup> It just so happens the state uses punishment, which spills over on individuals, to express condemnation.<sup>113</sup>

### 3. *Corporate vs. Individual Experiences of Harm*

Consider a separate, albeit related interpretation of the characterizations given by critics like Bainbridge, Williams, and Alschuler<sup>114</sup>—viz., that the harm distributed from corporate punishment is categorically worse. This second interpretation leverages the fact that a corporation experiences inputs,

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<sup>107</sup> See, e.g., Dan Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 851–52 (2012).

<sup>108</sup> Neil Levy, *Neuroethics: A New Way of Doing Ethics*, 2 AM. J. BIOETHICS NEUROSCIENCE, Apr.–June 2011, at 6.

<sup>109</sup> Alschuler, *supra* note 88, at 1369.

<sup>110</sup> *Id.* at 1368–69.

<sup>111</sup> See, e.g., DEL. CODE ANN. tit. 8, § 141(k) (2011).

<sup>112</sup> For a full treatment of this point, see W. Robert Thomas, *We Can, Should, and (Very Nearly) Do Hold Corporations Criminally Responsible* 78–82 (unpublished manuscript) (on file with author).

<sup>113</sup> It is a broad topic—one well beyond the scope of this Article—the limits to which the State can punish as a means of enforcing its criminal judgments. On the flip side, it is a live question whether there could exist a public institution of criminal responsibility that did not enforce its judgments by imposing harm. See Feinberg, *supra* note 65, at 400. It suffices for my purposes to observe that, irrespective of whether we *could* have such an institution, manifestly we do not.

<sup>114</sup> See *supra* notes 81–88.

or harm among them, differently than do individuals.<sup>115</sup> In ordinary cases of individual punishment, the convicted individual experiences harm directly from his punishment; innocent parties experience harm derivatively from the convict's suffering.<sup>116</sup> For example, "[w]hen an offender with children is sent to prison, his children may suffer, yet criminal justice officials may have no way to punish the offender appropriately without hurting other people."<sup>117</sup> On this view, third-party harm is dependent on the convict's harm.<sup>118</sup> By contrast, suggests the critic, a corporation cannot experience harm on its own.<sup>119</sup> Accordingly, the harm of punishment passes entirely through to innocent shareholders; their suffering is not derivative of or arising alongside the corporation's suffering of harm.<sup>120</sup> Rather, the harm experienced by individuals is a *substitute* for the corporation experiencing harm.

There are two problems here. First, it is not clear why innocents' suffering must derive from the suffering of the guilty. The occurrence is reliable, but it is not obvious how the suffering of a guilty person grounds the permissible suffering of innocents.<sup>121</sup> Rather, it seems more likely that a state's fulfilling its penological obligations grounds the excusable distribution of harm to innocents. But this grounding claim would apply equally to the corporate setting as to the individual one.

Relatedly, there is a presumption here that punishment is to be delineated by the fact that it imposes *the experience* of harm.<sup>122</sup> But this adds an unnecessary and controversial step. One might have thought that punishment imposes harm; the experience of suffering follows from that imposition but is not the defining feature. As David Lewis points out, if the state is interested in punishment as suffering, then we are seeking to normalize the wrong constraint when we talk about, say, equal punishment; courts should be interested in whether Jim's subjective misery is commensurate with John's misery in sentencing them to the same punishment, even if that means one will face considerably more jail time.<sup>123</sup> Richard Posner makes a similar observation that equality in punishment is a concept and calculation distinct from equality in the experience of punishment.<sup>124</sup>

Second, there is an equivocation driving the force of the critic's argument. The argument starts with an uncontroversial premise: the legal entity that is a

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<sup>115</sup> See Alschuler, *supra* note 88, at 1368–69.

<sup>116</sup> *See id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1367–68.

<sup>119</sup> *Id.* at 1367–69, 1392.

<sup>120</sup> *Id.* at 1367.

<sup>121</sup> See Feinberg, *supra* note 58, at 680 (partially defending historical regimes that relied on collective-criminal responsibility).

<sup>122</sup> David Lewis, *The Punishment That Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 53, 61–62 (1989).

<sup>123</sup> *Id.* at 62.

<sup>124</sup> Posner, *supra* note 11, at 410–15.

corporation does not experience the sensation of harm in the same way, if at all, that an individual experiences harm. Now, if the complaint were that corporations cannot experience harm like individuals experience harm, then it would be irrelevant. Just because a corporation does not have the single body and sense organs of an individual person, it does not preclude the fact that there is a meaningful sense in which a corporation can experience harm.<sup>125</sup> This observation is merely a specific instance of a more general principle that has been a bedrock of our legal treatment of corporations dating back at least to the founding; abandoning it would come at unimaginable cost to the modern corporation.<sup>126</sup>

And so the critic employs a stronger claim—viz., corporations do not experience harm *at all* (or do not experience harm except through the suffering their members). But these stronger claims do not follow from the former, and themselves are false. Corporations obviously can be harmed, and plausibly can experience harm: they can have their charters to exist revoked, their property seized, or their internal structures forcibly reworked in ways that severely impair the corporation from pursuing its goals.<sup>127</sup> Corporations can even conceivably experience harm not also experienced by the membership. For one, there is weak evidence of this possibility when shareholders recently saw the value of their equity increase upon the announcement of a guilty plea against domestic banks.<sup>128</sup> For another, a corporation has an internal structure that arranges interactions between individuals.<sup>129</sup> Harm imposed on a corporation's structure need not harm any given member of the corporation—indeed, they might benefit from the change—but it would still be fair to characterize forced restructuring as harm to the corporation *qua* corporation.

### III. THE INTERCONNECTEDNESS OF CORPORATE AND CRIMINAL LAW

The relationship between corporate law and criminal punishment is not obvious—or, it is so obvious as to have gone overlooked in the literature on

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<sup>125</sup> See *infra* Part III.

<sup>126</sup> For an extended discussion of the conceptual and historical shortcomings of this sort of argument, see generally Thomas, *supra* note 20, and Part III.

<sup>127</sup> See, e.g., U.S. SENTENCING GUIDELINES MANUAL §§ 8B2.1, 8D1.4 (U.S. SENTENCING COMM'N 2015) (structural reform); see also Pamela H. Bucy, *Corporate Criminal Liability: When Does It Make Sense?*, 46 AM. CRIM. L. REV. 1437, 1439 (2009) (noting that a court's "opportunity to remedy corporate misbehavior through terms of probation is almost endless"); Kyle Noonan, Note, *The Case for a Federal Corporate Charter Revocation Penalty*, 80 GEO. WASH. L. REV. 602, 615–16 (2012) (discussing the history of corporate-charter revocation).

<sup>128</sup> See Kevin McCoy & Kevin Johnson, *5 Banks Guilty of Rate-Rigging, Pay More than \$5B*, USA TODAY (May 20, 2015), <http://www.usatoday.com/story/money/2015/05/20/billions-in-bank-fx-settlements/27638443/> [<https://perma.cc/L37E-J65R>] (noting that three of five banks saw their stock value rise by 2% upon the announcement of their guilty pleas).

<sup>129</sup> See *infra* Part III.B.

corporate crime. This should not be necessarily surprising. As a matter of psychology, it may be that criminal theorists take corporate law as an unchanging feature of the legal landscape. (For their part, corporate law theorists appear to treat corporate-criminal liability as innovation whose time has come, or else a conceptual mistake.)<sup>130</sup> For another, corporate law and criminal law exist to serve different regulatory purposes and operate under the auspices of diametrically opposed conceptions of the corporation.

### A. *Competing Agendas and Conceptions of the Corporation*

Criminal law operates on a model of prohibition, specifying impermissible conduct according to whether a person commits a proscribed act (*actus reus*) concurrent with a proscribed attitude (*mens rea*).<sup>131</sup> At least in its idealized form,<sup>132</sup> the domain of criminal law bears some relationship to the moral domain, where the latter grounds the justification for the former in a manner that remains contentious among philosophers and legal scholars alike. Criminal law by and large takes the person as its object of regulation.<sup>133</sup> As a result, although corporations are not the sole focus of the corporate law, neither are they exempt from its prohibitions.

Corporate law, at least in its modern presentation,<sup>134</sup> can be generally described as employing a model of enablement rather than prohibition.<sup>135</sup> Corporate law provides individuals with a vehicle, one that provides specified legal advantages, that enables them to pursue collective, usually commercial, activity. A great portion of corporate law concerns the effective design and construction of such a vehicle: providing an internal corporate structure through which individuals can coordinate activity towards a shared goal or purpose; designating and distributing rights, powers, and responsibility among individuals within a corporation according to the roles they serve; and developing rules and principles by which the resultant collective entity operates within the larger legal and social world.<sup>136</sup>

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<sup>130</sup> E.g., Khanna, *supra* note 25, at 1532–34.

<sup>131</sup> 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 1.2 (2d ed. 2003).

<sup>132</sup> See generally HUSAK, *supra* note 73 (canvassing concerns that criminal law has divorced from morality).

<sup>133</sup> 1 LAFAVE, *supra* note 131, § 1.5.

<sup>134</sup> For an overview of corporate law as a tool of active regulation, see JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970* (1970), and Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 *GEO. L.J.* 1593, 1609 (1988).

<sup>135</sup> See Elvin R. Latty, *Why Are Business Corporation Laws Largely “Enabling”?*, 50 *CORNELL L.Q.* 599, 599 (1965) (citing Wilber G. Katz, *The Philosophy of Midcentury Corporation Statutes*, 23 *LAW & CONTEMP. PROBS.* 177, 177 (1958)).

<sup>136</sup> See, e.g., DEL. CODE ANN. tit. 8 (2011); MODEL BUS. CORP. ACT (AM. BAR ASS’N 2010).

In short, corporate and criminal law serve quite different regulatory purposes. They achieve their ends through different regulatory tactics.<sup>137</sup> And they assign to the corporation different degrees of consideration with respect to the domain's set of object of inquiry.<sup>138</sup>

Implicit to these different regulatory schemes are different ways of conceiving of the corporation; the law takes what we might call a pluralist approach about the nature of corporations. Now, there is a massive, centuries-old debate about what the proper conception of the corporation is,<sup>139</sup> and, as a corollary, whether something like this sort of pluralism ought to be tolerated. Entering that fray is for another project.<sup>140</sup> Here it suffices to point out that regardless of whether the state ought to be a pluralist about how it conceives of corporations, manifestly the state does embrace pluralism. Specifically, corporate law and criminal law are committed to different, seemingly incompatible, conceptions of the corporation.

Start with criminal law, which I have already described as regulating persons on the basis of their actions and mental states. In this respect, criminal law does not distinguish corporate persons from individual persons: both classes are presumed to be single, autonomous agents capable of acting to realize their own interests and of conforming their conduct to the law.<sup>141</sup> Criminal law, in other words, takes what Daniel Dennett describes as the “intentional stance” towards corporations.<sup>142</sup> This involves treating corporations “as entities whose behavior can be predicted by the method of attributing beliefs, desires, and rational acumen.”<sup>143</sup> Criminal law is by no means the only legal domain to adopt the intentional stance towards corporations. Property, tort, and contract all do the same.<sup>144</sup> Nor is doing so purely a legal artifice; individuals have demonstrated a propensity for adopting the intentional stance towards what social psychologists refer to as a “high entitative group”—that is, “a unified and coherent whole in which the members are tightly bound together” and which certainly includes

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<sup>137</sup> See Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 1–4 (2008) (discussing differences between corporate law and tort/crime models of regulation).

<sup>138</sup> *Id.* at 2.

<sup>139</sup> See Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1639–41.

<sup>140</sup> For my part, I am inclined to think not just that the law does embrace pluralism, but that it ought to embrace pluralism. See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926).

<sup>141</sup> See 1 U.S.C. § 1 (2012) (“In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ include corporations . . . as well as individuals . . .”). Title 18, the federal criminal code, frequently adopts or declines to override this understanding of “person.” *E.g.*, 18 U.S.C. §§ 202, 229F, 841, 921, 1341, 1343 (2012).

<sup>142</sup> DANIEL C. DENNETT, *THE INTENTIONAL STANCE* 43–68 (1987).

<sup>143</sup> *Id.* at 49.

<sup>144</sup> See Thomas, *supra* note 20, at 24, 49–54 (discussing the early treatment of corporations as single entities for purposes of property, tort, and contract law).

corporations.<sup>145</sup> For the purposes of discussing criminal law, I will refer to this way of seeing corporations as the “Persons Conception of Corporations.”

Corporate law, by contrast, takes a “design-stance” towards corporations, such that “a design of a system breaks it up into larger or smaller functional parts, and design-stance predictions are generated by assuming that each functional part will function properly.”<sup>146</sup> Call the approach towards corporations embedded in modern corporate law—one that treats corporations as systems to be engineered rather than individual, autonomous persons—the “Systems Conception of the Corporation.” Such an approach is not exclusively applicable to corporations; in extreme cases it seems we take just such a design stance towards other humans.<sup>147</sup> On the other hand, such a practice is descriptively uncommon and normatively problematic. For example, a central critique of punishment aimed to rehabilitate individual criminals is that in doing so, it treats them as systems to be reengineered, thereby failing to respect their moral autonomy as free, autonomous persons.<sup>148</sup> Moreover, certainly there is no broad-scale counterpart to corporate law applicable to individuals. Corporate law is *sui generis* in that it exists only for the corporation, and that no counterpart area of law exists to design the internal structure of individuals.

So we have two domains of law with drastically different regulatory agendas, which are committed to broadly incompatible conceptions of the corporation. I say *committed* because these conceptions are central features of their respective domains—we would have to rework profoundly our practices of corporate or criminal law were we to abandon pluralism in favor of a single conception of the corporation.<sup>149</sup> This gets to a broader, but crucial point about pluralism. Pluralism *across* domains does not license pluralism *within* a domain, any more than having pluralism about rules between the NFL and NCAA does not license pluralistic, inconsistent rules within just the NFL.<sup>150</sup>

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<sup>145</sup> Steven J. Sherman & Elise J. Percy, *The Psychology of Collective Responsibility: When and Why Collective Entities Are Likely to Be Held Responsible for the Misdeeds of Individual Members*, 19 J.L. & POL’Y 137, 149–50 (2010); see also Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2049 (2016).

<sup>146</sup> D.C. Dennett, *Intentional Systems*, 68 J. PHIL. 87, 88 (1971).

<sup>147</sup> See Strawson, *supra* note 47, at 194–95.

<sup>148</sup> VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 355 (2011).

<sup>149</sup> See generally Crane, *supra* note 137 (contrasting the two paradigms). Reconceptualization aside, the mere logistics would be a nightmare. For example, the federal code and accompanying regulations would have to be revised to specifically exclude or include corporations for purposes of criminal liability, rather than presuming corporations to be persons. Among other things, this would require actually identifying and reevaluating the upwards of 300,000 federal regulations carrying criminal penalties, which does not get to the issue of state law. Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191, 1198–99 (2015).

<sup>150</sup> See generally John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

The distinction between pluralism across domains and pluralism within domains matters especially for my discussion of criminal law, though a similar story could be told about corporate law. In particular, the criminal law cannot coherently presuppose that a corporation is a single person at the moment of conviction, only to abandon this conception at the moment of punishment and, say, go after the individuals “really” responsible.<sup>151</sup> To look past the corporate person in this manner would undermine the conceptual basis that licensed conviction of the corporation in the first place. Analogizing to contract and tort law, these domains permit looking past the corporation only under circumstances involving the use of the corporate form as a sham or alter ego for the intended purpose of immunizing an individual from responsibility.<sup>152</sup>

The broader point to be made is that corporate and criminal law operate for different purposes according to different conceptions of the corporation. Where domains of law bump up against one another, invariably those rival conceptions must find a means of reconciliation. Those intersections and reconciliations occupy the remainder of Part III.

## B. *Corporate Law Makes Corporate-Criminal Liability Possible*

Thus far, I have described two areas of law that serve radically different regulatory agendas and embrace diametrically opposed conceptions of the corporation. And yet, the purpose of this Article is to reveal the tight connections between corporation and criminal law, and especially the ways in which the core features of corporate law are responsible for confounding the criminal law’s efforts. Let’s begin, then, with the corporate law’s role in making it possible to hold corporations criminally responsible in the first place.

### 1. *A Bit of Ground-Clearing Regarding Corporate Personhood*

What it takes to be eligible for legal personhood is the subject of the next Part—a crucial topic both because the criminal law takes persons as its standard objects of regulation<sup>153</sup> and because corporate eligibility for personhood under the criminal law relies heavily on corporate law.<sup>154</sup> That said, a bit of ground-clearing first about corporate personhood may be valuable. Again, my intention is to avoid controversy where I can.

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<sup>151</sup> This approach would assume, wrongly in my view, that collective responsibility is reducible to individual responsibility.

<sup>152</sup> See, e.g., *Kutty v. U.S. Dep’t of Labor*, 764 F.3d 540, 552–53 (6th Cir. 2014) (evading illegality), *cert. denied*, 135 S. Ct. 1162 (2015); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1065–67 (1991) (undercapitalization).

<sup>153</sup> See 1 LAFAVE, *supra* note 131, § 1.5.

<sup>154</sup> See *infra* Part III.B.4.

As I understand the current legal landscape, corporations are not legal persons. By this, I mean that neither the Supreme Court, nor any other legislative or judicial body, has extended to a corporation the entire panoply of rights and responsibilities attendant to legal personhood as have been extended to individuals.<sup>155</sup> Claims that corporations actually are persons simply mischaracterize the legal status corporations actually have. On the other hand, neither is it accurate to say—though many have—that the law treats corporations merely as though they were persons, even though they are really not.<sup>156</sup> This assertion equivocates between personhood as a legal status and personhood as a surrogate or synonym for humanity. Legal personhood, as the term suggests, is a legal designation, one made against the backdrop of social and political judgments.<sup>157</sup> Thus, the conferral of legal personhood with respect to some legal domain is no more a fiction or social construct when conferred upon a commercial corporation than it is when conferred upon an individual.

With respect to personhood as a legal status, I take it to be the case that it cannot be extended by mere fiat. A tree cannot be a person under the criminal law, even if a court says it is, because granting the tree status as a legal person would not affect its ability to conform its conduct to the law.<sup>158</sup> More generally, to adopt an intentional stance towards an entity with respect to criminal law presupposes that the entity is capable of performing effectively in the type of legal obligations and prohibitions constitutive of the criminal law.

Attempts to evaluate eligibility for legal personhood traditionally approach the topic from one of two directions. The first direction assesses personhood “in terms of an essential and universal inhering nature,” which derives from the possession of some natural or intrinsic feature.<sup>159</sup> Thus we see at various points in history courts taking seriously the legal relevance of a corporation’s lack of hands, tongue, body, mind, or soul.<sup>160</sup> Those days have long since passed by, and the intrinsic approach to evaluating personhood underlying

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<sup>155</sup> See generally Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95 (2014).

<sup>156</sup> For a nice reference of different ways of describing corporations, see generally David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201.

<sup>157</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768–69 (2014) (identifying rationales for why “[t]he term ‘person’ sometimes encompasses artificial persons . . . and it sometimes is limited to natural persons”).

<sup>158</sup> See Dewey, *supra* note 140, at 660. This is not to say that an individual’s inability to conform her conduct to the law thereby deprives her of her status as a legal person; personhood is evaluated in types, not tokens.

<sup>159</sup> *Id.*

<sup>160</sup> E.g., *Bank of the U.S. v. Dandridge*, 25 U.S. (12 Wheat.) 64, 92 (1827) (Marshall, C.J., dissenting); *State v. Great Works Milling & Man. Co.*, 20 Me. 41, 44–45 (1841); *Bank of Ithaca v. King*, 12 Wend. 390, 390–91 (N.Y. Sup. Ct. 1834); *In re Sutton’s Hosp.* (1612) 77 Eng. Rep. 937, 973; 10 Co. Rep. 1 a, 32 b.

them has mostly left, too.<sup>161</sup> The other direction assesses personhood pragmatically. On this latter view, what it is “[t]o be a person is to [manifest] the capacity to perform as a person.”<sup>162</sup> Pragmatic accounts of personhood, too, have a long pedigree: Dewey traces such an evaluation of legal personhood back to a pronouncement by Pope Innocent IV in 1246 CE,<sup>163</sup> while List and Pettit identify similar strains in the philosophies of Thomas Hobbes and John Locke.<sup>164</sup> Inasmuch as the pragmatic approach supplanted the intrinsic approach to personhood during the nineteenth century and has stayed dominant since,<sup>165</sup> I will here forward explore pragmatically the role that corporate law plays in creating corporations capable of demonstrating a capacity to perform as a person.

## 2. *What It Takes for an Agent to Be a Person Under the Law*

Demonstrating a capacity to perform as a person requires first the ability to manifest intentional states and demonstrate a capacity for action. Intentional states consist of an attitude and a proposition towards which that attitude is held.<sup>166</sup> An attitude might describe the way the world is—for example, I believe that the proposition “The water glass is full” is false. Alternatively, an attitude might describe the way an agent wants its environment to be—so, I might desire that “The water glass is full” be true. Meanwhile, a capacity for action refers specifically to an agent’s ability first to identify a divergence between the environment as it is and the environment as the agent wants it to be, and second to take suitable steps to reconcile this divergence. To wrap up the example, I am able to notice that “The water glass is full” is false; that I desire “The water glass is full” to be true; and that I can reconcile my diverging attitudes by walking to the sink and turning on the tap.

Although in this simple agent the core constitutive elements of criminal liability begin to emerge—intentional states correspond to *mens rea*, capacity for action corresponds to *actus reus*—simple agency is insufficient to establish legal personhood. It is not enough to expect merely that an agent could

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<sup>161</sup> Some skepticism about the possibility of corporate-criminal liability implicitly presupposes a commitment to this anachronism, even though its rejection helped establish the modern corporation. See Thomas, *supra* note 20, at 10–11.

<sup>162</sup> LIST & PETTIT, *supra* note 46, at 173. See generally Daniel Dennett, *Conditions of Personhood*, in THE IDENTITIES OF PERSONS 175 (Amélie Oksenberg Rorty ed., 1976).

<sup>163</sup> LIST & PETTIT, *supra* note 46, at 171; Dewey, *supra* note 140, at 665.

<sup>164</sup> LIST & PETTIT, *supra* note 46, at 170–73.

<sup>165</sup> See also *id.* at 171–78 (discussing the performative/pragmatic conception of personhood and adopting it in their argument). Modern statutes treat corporations as legal persons and regulate them as such. Such treatment assumes a pragmatic/performative approach to personhood, as the alternative (intrinsicist) approach included only physical human beings and higher intelligences. See, e.g., 1 U.S.C. § 1 (2012) (stating that the words “person” and “whoever” include corporations); DEL. CODE ANN. tit. 1 § 302(15) (2011).

<sup>166</sup> LIST & PETTIT, *supra* note 46, at 21.

respond to stimuli; we need what Tim Scanlon describes as “expectation grounded in a supposed responsiveness to certain reasons.”<sup>167</sup> What is needed is an agent that can conform to the requirements of criminal law, and further can take the fact of criminality as a reason to conform its practice. More generally, a legal person is able to “perform effectively in the space of [legal] obligations”<sup>168</sup>—what Stephen Darwall refers to as “second-personal competence.”<sup>169</sup> A legal person must be capable of making, and following through on, commitments to other persons.<sup>170</sup> Effective performance in particular requires recognizing that the existence of an obligation constitutes a reason to act, and that failing to satisfy an obligation provides grounds for criticism.<sup>171</sup> Such recognition means the agent is sensitive to criticism; it is capable both of recognizing failures of rationality<sup>172</sup> and learning from past mistakes by taking action designed to avoid repeating irrational missteps in the future.<sup>173</sup> This assumes both a capacity for second-order attitudes—that is, attitudes *about* the simple attitudes already described—and specifically some motivation to reform one’s conduct by imposing checks on one’s processing.<sup>174</sup>

### 3. *What It Takes for a Collective Agent to Be a Person Under the Law*

Nothing I have said precludes the possibility of a group qualifying as a person; eligibility for legal personhood turns on whether an agent can reliably demonstrate it is appropriately “responsive to reasons,” not on whether it has a single or organic body.<sup>175</sup> All the same, qualifying for legal personhood poses special challenges for collective agents.

Here I largely follow Margaret Gilbert’s research on collective agency and plural subjects, which is broadly consonant with the pragmatic approach to

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<sup>167</sup> SCANLON, *supra* note 102, at 161; *accord* LIST & PETTIT, *supra* note 46, at 178. The sort of responsiveness in mind here tracks what Scanlon elsewhere refers to as judgment-sensitive attitudes. T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 18–22 (Harvard Univ. Press paperback ed. 2000) (1998).

<sup>168</sup> LIST & PETTIT, *supra* note 46, at 173.

<sup>169</sup> STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT* 23 (2006).

<sup>170</sup> *Id.* at 59; *accord* LIST & PETTIT, *supra* note 46, at 178.

<sup>171</sup> LIST & PETTIT, *supra* note 46, at 178; SCANLON, *supra* note 102, at 188–89.

<sup>172</sup> List and Pettit note that “if a reasoning agent fails to be rational, then the fact that it self-corrects, recognizing its failure in a manner open only to a reasoning agent, will provide a ground for continuing to view it as an agent.” LIST & PETTIT, *supra* note 46, at 31; *see also* DARWALL, *supra* note 169, at 21; Philip Pettit, *Akrasia, Collective and Individual*, in *WEAKNESS OF WILL AND PRACTICAL IRRATIONALITY* 68, 68 n.1 (Sarah Stroud & Christine Tappolet eds., 2003).

<sup>173</sup> LIST & PETTIT, *supra* note 46, at 31.

<sup>174</sup> *Id.* at 30.

<sup>175</sup> SCANLON, *supra* note 102, at 162 (defending an account according to which it is possible to hold collective agents responsible); *accord* DARWALL, *supra* note 169, at 35; LIST & PETTIT, *supra* note 46, at 178.

personhood already on display.<sup>176</sup> For Gilbert, a plural subject consists of some “population of persons who are jointly committed in a certain way.”<sup>177</sup> Individual members of a collective enter into a joint commitment to act as a single body. What it would mean for a plural subject to intend to X is for its members to act “together to constitute, as far as is possible, a single body that intends to” X.<sup>178</sup> This schema extends to a host of other intentional states.<sup>179</sup>

To clarify, acting as a single body that intends X does not require that each member *personally* intends to X.<sup>180</sup> Rather, what matters is that a member’s “behavior generally should be expressive of the [intention], in the appropriate contexts.”<sup>181</sup> For a noncorporate example, consider the U.S. Senate. The Senate acts and expresses attitudes through legislation and resolutions. Successful legislation ordinarily requires that a majority of senators communicate their support directly to the Senate clerk during a voting session.<sup>182</sup> A Senator’s personal attitudes about legislation, to the extent that they differ from the support she expresses to the clerk during a voting session, are irrelevant in determining the Senate’s attitude towards legislation. At an extreme, we could imagine that no Senator privately holds an attitude that is nevertheless appropriately attributed to the Senate.

Acting as a body becomes more challenging in the case of a sophisticated plural subject—one with a large membership, a series of open-ended joint commitments, or both. Coordinating members in such a plural subject requires a complex internal structure, constituted by interlocking rules, norms, and customs.<sup>183</sup> A plural subject’s internal structure may take a variety of shapes. It may be broadly egalitarian, it may be dictatorial, or it may be a hybrid consisting of interlocking hierarchies, delegations of authority, etc.<sup>184</sup> Return to the Senate. The Senate’s majority voting rules create the impression of an

<sup>176</sup> See generally MARGARET GILBERT, *JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD* (2014). Indeed, Darwall argues that Gilbert’s account is a second-personal one. DARWALL, *supra* note 169, at 198–99.

<sup>177</sup> Gilbert, *supra* note 43, at 99.

<sup>178</sup> *Id.* at 100 (emphasis omitted).

<sup>179</sup> See, e.g., MARGARET GILBERT, *Collective Belief and Scientific Change*, in *SOCIALITY AND RESPONSIBILITY* 37, 37 (2000) (beliefs); Margaret Gilbert, *Shared Intention and Personal Intentions*, 144 *PHIL. STUD.* 167, 167 (2009) (intentions); Gilbert, *supra* note 43, at 100 (desires).

<sup>180</sup> Margaret Gilbert, *Corporate Misbehavior and Collective Values*, 70 *BROOK. L. REV.* 1369, 1376 (2005).

<sup>181</sup> *Id.* (emphasis omitted).

<sup>182</sup> *The Legislative Process: Introduction and Referral of Bills*, CONGRESS.GOV, <https://www.congress.gov/legislative-process/introduction-and-referral-of-bills> [<https://perma.cc/6W33-YZ8R>].

<sup>183</sup> See SCANLON, *supra* note 102, at 162–65 (discussing “procedures through which [a collective agent] can make institutional decisions”).

<sup>184</sup> See, e.g., LIST & PETTIT, *supra* note 46, at 73–78 (discussing groups with heterogeneous decisionmaking structures); Gilbert, *supra* note 43, at 103–04 (discussing hierarchies).

egalitarian, deliberative internal structure. But that description is overly simplistic of the Senate's internal structure. The Senate limits members' access to voting sessions through supermajority cloture requirements—sixty Senators must vote to open and close debate on proposed legislation<sup>185</sup>—alongside an evolving practice about when members will contest cloture.<sup>186</sup> Hierarchies exist in rules (e.g., legislation ordinarily cannot reach the Senate floor without being approved by a committee),<sup>187</sup> norms (e.g., the Senate Judiciary Committee will not approve a judicial nominee before receiving a “blue slip” from both home-state senators),<sup>188</sup> and culture (e.g., the practice of treaty, nomination, and legislation “holds”).<sup>189</sup>

A well-designed structure allows individual members to manifest and express collective attitudes derived from, but independent of or autonomous from, the personal attitudes of any particular member.<sup>190</sup> Appreciating the particular structure informs the attitudes expressed. For example, Senate norms establish that the Senate adopts specific, intentional attitudes towards the meaning conveyed by legislative acts—namely, those identified by the markup committee and, to a weaker extent, the sponsoring member of the legislation.<sup>191</sup> Likewise, a plural subject's structure designates the contexts in which actions by a member should be attributed to the plural subject, as opposed to contexts where a member's actions are attributable only to the individual.<sup>192</sup> Thus, a Senator's expressing an attitude outside of a voting session is not attributable to the Senate; otherwise, every statement by a Senator made at any time would constitute the official view of the Senate.

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<sup>185</sup> RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL30360, *FILIBUSTERS AND CLOTURE IN THE SENATE* 8–10 (Dec. 2014), <http://www.senate.gov/CRSPubs/3d51be23-64f8-448e-aa14-10ef0f94b77e.pdf> [<https://perma.cc/3ZCT-YSHS>].

<sup>186</sup> E.g., Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), [http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c\\_story.html](http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html) [<https://perma.cc/8AN7-DZ4T>]; see also THOMAS E. MANN & NORMAN J. ORSTEIN, *IT'S EVEN WORSE THAN IT LOOKS* 31–81 (2013) (describing the drastic increase in cloture motions).

<sup>187</sup> *The Legislative Process: Committee Consideration*, CONGRESS.GOV, <https://www.congress.gov/legislative-process/committee-consideration> [<https://perma.cc/S9DT-CR24>].

<sup>188</sup> BESTY PALMER, CONG. RESEARCH SERV., RL31948, *EVOLUTION OF THE SENATE'S ROLE IN THE NOMINATION AND CONFIRMATION PROCESS: A BRIEF HISTORY* 7–8 (May 2009), <http://www.senate.gov/CRSPubs/a2a1fac5-da93-470d-8536-f5fb7967146c.pdf> [<https://perma.cc/CTJ2-8CFW>].

<sup>189</sup> *Id.* at 9–10.

<sup>190</sup> Philip Pettit, *Responsibility Incorporated*, 117 *ETHICS* 171, 184 (2007).

<sup>191</sup> See Anderson & Pildes, *supra* note 62, at 1522–23; Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 *S. CAL. L. REV.* 845, 863–66 (1992).

<sup>192</sup> See *supra* notes 176–81 and accompanying text.

#### 4. *Corporate Law Provides the Backbone for Corporate Personhood*

As should come as no surprise, not just any group can qualify as a legal person. It requires a sophisticated, hierarchical, but flexible internal structure for a collective entity to participate effectively in the space of legal obligations.<sup>193</sup> Yet commercial corporations are well-suited to clear this high bar. And crucially, corporate law is largely responsible for creating corporations sophisticated enough to qualify for personhood under the criminal law.

How did this happen? Corporate law plays an essential role in organizing corporations to adopt the type of internal deliberative structure that makes attributions of personhood felicitous in other contexts. In other words, corporate law provides corporations with the kind of sophisticated internal structure necessary to establish their eligibility for personhood as that legal concept is employed in the criminal law.

At its most basic, corporate law creates a system for individuals to come together to pursue a shared goal with the help of certain legal benefits—namely, limited liability, separation of ownership and management, and an indefinite lifespan for an independent legal entity.<sup>194</sup> In doing so, corporate law provides a framework through which those group members can organize their relations and interactions in order to pursue that goal. For example, corporate law provides preestablished classes of stakeholders that make up the corporation.<sup>195</sup> It divvies up decisionmaking authority amongst classes.<sup>196</sup> It specifies the scope and breadth of each class's powers and obligations with respect to other stakeholders.<sup>197</sup> On top of this, decades of judicial precedent have tested every aspect of these rules,<sup>198</sup> lending to them an extra layer of stability and credibility for new organizations.

Corporate law in particular encourages the adoption of a structure of nested hierarchies—what Peter French refers to as the Corporate Internal Decision (CID) structure<sup>199</sup>—whose “primary function is to draw experience

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<sup>193</sup> See *supra* notes 183–84.

<sup>194</sup> See, e.g., DEL. CODE ANN. tit. 8 (2011); MODEL BUS. CORP. ACT ch. 8 (AM. BAR ASS'N 2010).

<sup>195</sup> E.g., DEL. CODE ANN. tit. 8, § 141(a) (board of directors); *id.* § 142(a) (corporate officers); MODEL BUS. CORP. ACT § 8.01(b) (board of directors); *id.* § 8.40(a) (corporate officers).

<sup>196</sup> E.g., DEL. CODE ANN. tit. 8, § 141(k) (allowing removal of directors via shareholder majority); MODEL BUS. CORP. ACT § 8.08 (same); see also *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (articulating the business-judgment rule), *overruled by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

<sup>197</sup> E.g., DEL. CODE ANN. tit. 8, § 102(b)(7) (limiting directors' personal liability resulting from a breach of their duty of care).

<sup>198</sup> See generally William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570 (discussing trends within Delaware's judiciary).

<sup>199</sup> Bill Laufer has developed perhaps a more sophisticated, albeit more unwieldy, model of corporate agency. See generally WILLIAM S. LAUFER, CORPORATE BODIES AND

from various levels of the corporation into a decisionmaking and ratification process.”<sup>200</sup> The CID structure consolidates much of the intra-member deliberations within a corporation. Meanwhile, a corporation’s hierarchical CID structure creates both the fact and the perception of what social psychologists refer to as a “high entitative group” agent,<sup>201</sup> which is “a unified and coherent whole in which the members are tightly bound together.”<sup>202</sup> This unifying structure is bolstered by the fact that the corporation independently faces commercial incentives to foster its perception as a high entitative group and a single entity—among other things, to develop brand loyalty with consumers and to engender employee loyalty to the enterprise.<sup>203</sup>

It is predominantly the corporation’s hierarchical CID structure that allows it to be an effective participant in the space of legal obligations. Corporations are sufficiently well organized to express intentional attitudes and to take actions separate from their constitutive stakeholders. For example, corporations are capable of participating in the obligation-laden practice of contracting; corporations routinely manifest consent to enter into complicated contracts. And moreover, a corporation can take the fact of an obligation as reason to conform its conduct and can work to improve its rational processes.<sup>204</sup> Indeed, List and Pettit identify conditions under which corporate decisionmaking may be more rational, in the sense of improving its ability to track the truth and learn from error, than individual decisionmaking.<sup>205</sup> To continue the example, corporations demonstrate their recognition of the fact ratification of a contract constitutes a reason to conform corporate conduct to the contract’s terms; moreover, they can understand the violation of a contractual obligation as grounds for legal reproach. Analogously, and relevant for our purposes, corporations are just as capable of holding attitudes sufficient to satisfy *mens rea*, of conforming their conduct to the terms of criminal statutes, and of recognizing that misconduct’s status as criminally prohibited provides a reason to constrain corporate activity.<sup>206</sup>

Admittedly, corporate law does not require every corporation to adopt the same structure. Contrary to historical practice, a large portion of corporate law now consists of default rules that internal stakeholders may amend to suit their ends; corporate law does not preemptorily enforce the adoption of a single

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GUILTY MINDS (2006). With respect to corporate structures, the two accounts are sufficiently interchangeable for my purposes. Accordingly, for simplicity’s sake, I refer to French’s characterization unless otherwise specified.

<sup>200</sup> Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 212 (1979).

<sup>201</sup> Sherman & Percy, *supra* note 145, at 149–55.

<sup>202</sup> *Id.* at 149.

<sup>203</sup> Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 798, 810.

<sup>204</sup> SCANLON, *supra* note 102, at 162–65; Anderson & Pildes, *supra* note 62, at 1519–20.

<sup>205</sup> LIST & PETTIT, *supra* note 46, at 81–103.

<sup>206</sup> See Thomas, *supra* note 20, at 34.

internal structure applicable to every corporation.<sup>207</sup> Nevertheless, we should not underestimate the profound influence that corporate law, compounded by market forces, has on creating corporations. Diversity in culture and organizational structure is real—to a point. Yet notwithstanding these caveats about corporate law consisting largely of jurisdiction-specific default rules, the effect of these corporate default rules is to produce a broadly similar type of commercial entity.<sup>208</sup> These seemingly different corporate structures are built upon, limited by, and mediated through a core set of corporate-law rules. The core features of a corporation's structure—embodied by rules about the near-plenary power of directors, their duties of monitoring, the powers of officers, the total absence of employees as a part of the legal framework, etc.—pushes the decisionmaking process up the corporate hierarchy in a manner conducive to the production of autonomous corporate attitudes. Meanwhile, a structure of limited liability pushes the costs (and benefits) down the hierarchy and onto the shareholders.<sup>209</sup>

Corporate law, in other words, forms the backbone of the commercial corporation's internal structure. And while what is built around that backbone may be understood to distinguish what sort of (legal) person a particular corporation will be, it is the backbone itself that satisfies the conditions of personhood for the purpose of criminal law. Thus, corporate law plays a crucial role in making possible corporate-criminal liability by designing corporations to be the kind of things that can qualify as persons.

The upshot is that corporate law is not an entirely distinct field of law to be either ignored or taken for granted when discussing corporate-criminal liability. Far from it: Corporate law creates, or at a minimum plays a pivotal role in creating, the possibility of corporate persons eligible for criminal liability and punishment. In short, these seemingly distinct regulatory bodies with diametrically opposed conceptions of the corporation are in fact deeply intertwined with one another.<sup>210</sup> The systems-style tinkering of corporate law is largely responsible for creating collective entities capable of satisfying the high bar of personhood for purposes of criminal responsibility.<sup>211</sup> The Systems Conception of the Corporation, in this instance, creates the conditions necessary to license adopting the Persons Conception of the Corporation in other settings.

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<sup>207</sup> *E.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2011) (allowing incorporators to limit directors' personal liability resulting from a breach of their duty of care); *id.* § 142(a) (allowing directors to determine the number and duties of corporate officers).

<sup>208</sup> *See generally* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

<sup>209</sup> Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52. U. CHI. L. REV. 89, 93–97 (1985).

<sup>210</sup> *See supra* Part III.B.4.

<sup>211</sup> *See supra* Part III.B.4.

### C. Corporate Law Makes Corporate-Criminal Liability Necessary

The core of corporate law—a set of default enabling rules that provide a backbone structure around which to build a collective commercial enterprise—has produced an unrivaled economic success since the early twentieth century.<sup>212</sup> It has created collective entities of sufficient sophistication to license the ascription of personhood status to them across a variety of legal domains, including criminal law. With respect to criminal law, it has further created its own need for holding corporations criminally responsible separate from their members; collective activity and organization is not without consequences, some of which I argue here that it is the purview of corporate law to remedy. Although there are several separate reasons to extend the criminal law to corporations, I will focus here only on those reasons that have their roots in corporate law.

Mere eligibility for personhood status, while necessary for extending the practice, is not necessarily sufficient for doing so. There are a host of legal rights and protections not afforded to corporations that are otherwise eligible (although that list has been shrinking in recent years).<sup>213</sup> So what determines when corporations should be treated as persons? The general rough-and-ready rule, one articulated since the number of commercial corporations in America numbered in the low hundreds,<sup>214</sup> is that “[w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of” individuals within the corporation.<sup>215</sup> This sentiment is reflected in Brandon Garrett’s review of the personhood jurisprudence. Garrett suggests that corporate personhood has served to vindicate the rights of individuals; courts extend personhood to corporations when the corporation is best suited to protect the rights of the shareholders.<sup>216</sup> More broadly, it accords with the position that personhood status should be extended to entities only when it redounds to the interests of individuals within society<sup>217</sup>—a view that is

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<sup>212</sup> See Hansmann & Kraakman, *supra* note 208, at 439–40, 443–49.

<sup>213</sup> 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS §§ 7.05–.15 (perm. ed., rev. vol. 2006) (cataloguing instances where rights and protections of personhood are not extended to corporations).

<sup>214</sup> For example, economic historians agree that extending personhood to corporations served to ensure equal property protections for “owners of property held in the name of a corporation . . . [and] owners of property held in their own name.” Hovenkamp, *supra* note 134, at 1641; accord Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 793–95 (2005).

<sup>215</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014); see also *Citizens United v. FEC*, 558 U.S. 310, 351 (2010) (noting that the State may not condition the advantages of the corporate form on the forfeiture of constitutional protections); Avi-Yonah, *supra* note 214, at 793; Hovenkamp, *supra* note 134, at 164.

<sup>216</sup> Garrett, *supra* note 155, at 163.

<sup>217</sup> See von der Pfordten, *supra* note 44, at 452.

consonant with the extension of personhood status in federal jurisdiction,<sup>218</sup> contract law, and tort law.<sup>219</sup>

### 1. *Criminal Regulation as a Replacement for Corporate Law Regulation*

There are several reasons, all rooted in corporate law, why the state should extend personhood status to corporations for the purposes of criminal liability. To begin, modern corporate law created a regulatory vacuum when it abandoned its historical role as the primary tool for regulating corporate activity in the marketplace, and criminal law was well positioned to fill that gap.

The primacy of private ordering is a hallmark of modern corporate law; corporate law is more an enabling system than it is one that controls, prohibits, and regulates. This, however, is a relatively recent innovation. Until a race to the bottom kicked off by New Jersey, and eventually won by Delaware,<sup>220</sup> courts and legislatures used corporate law to regulate actively, and sometimes aggressively, corporations' activities.<sup>221</sup> The regulatory posture, then, was to control corporations indirectly by manipulating their internal structures.<sup>222</sup> A dramatic abandonment of this unworkable strategy left a regulatory vacuum, which criminal law partially filled.<sup>223</sup> More generally, the shift to treat corporations as single persons rather than systems with which to tinker requires a complementary system of regulation. Admittedly, while there is no guarantee that criminal liability would fill the void, it was nevertheless one of a handful of good candidates. The shift to modern corporate law, and particularly the elevation of a norm of private ordering, thus created a need for some form of regulation, which criminal law was well-situated to provide.

### 2. *Incorporation Facilitates and Encourages Criminality*

Second, corporate law enables and encourages corporations to adopt flexible, hierarchical structures that push information up the hierarchy and decisions down. However, the sort of structure that makes corporations such impressive vehicles of economic creation—a structure that aggregates and synthesizes information from lower members, pushing up anonymized

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<sup>218</sup> Initially, a corporation would escape federal jurisdiction if any one shareholder was a citizen of the same state as the opposing party. *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 68 (1809), *overruled by* *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844) (mentioning that Chief Justice John Marshall came to greatly regret his opinion in *Deveaux*).

<sup>219</sup> See Pollman, *supra* note 139, at 1633–39.

<sup>220</sup> Avi-Yonah, *supra* note 214, at 802; *see also* Crane, *supra* note 137, at 12–13 (2008).

<sup>221</sup> See *supra* note 134.

<sup>222</sup> See Thomas, *supra* note 20, at 26–29.

<sup>223</sup> See Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 422 (1982); Khanna, *supra* note 25, at 1486.

information up to decisionmakers, the separation of capital and management—enables, or at least facilitates, misconduct that would have been either less likely or less harmful if left to the devices of unincorporated individuals.

Incorporation brings with it a variety of well-rehearsed dangers: diffusion of responsibility, adoption of a group identity, in-group/out-group bias, bureaucratic myopia, and cognitive dissonance all conspire to make more likely criminal misconduct by a corporation than by individuals acting alone.<sup>224</sup> And don't forget that "agent crimes often *benefit* organizations and are committed for that reason."<sup>225</sup> Small wonder then that harm that can be wrought by corporations outstrips that done by individuals.<sup>226</sup> These concerns are not new; they date back to Lord Coke's infamous aside that corporations "have no souls" and arise repeatedly throughout the historical expansion of corporate liability.<sup>227</sup> Moreover, they offer an explanation to observations by social psychologists that "[h]igh-entitativity groups are perceived to be more capable of engaging in negative behaviors . . . than low-entitativity groups."<sup>228</sup> In other words, the corporate structure has a propensity to encourage misconduct that individuals would be unlikely to engage in on their own.

### 3. *Individual Criminal Liability Is Insufficient*

Third, reliance on individual criminal prosecutions is an insufficient strategy for addressing criminal misconduct surrounding corporations. This is because in most cases it will be nearly impossible to ascertain which individual's contributions rise to the level of criminality. This is a direct response to a common argument against corporate-criminal liability—viz., it is unnecessary to hold corporations criminally responsible because the state already has the authority to prosecute those individuals inside the corporation who are "really" responsible for the misconduct at issue.<sup>229</sup> Now, there is a litany of problems with this reductionist approach to corporate responsibility. For one, it presumes that the mere fact of causal reducibility suffices to obviate

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<sup>224</sup> E.g., Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1125–26 (1991); Buell, *supra* note 76, at 493–97; Gilchrist, *supra* note 41, at 10–11.

<sup>225</sup> Buell, *supra* note 76, at 495–96.

<sup>226</sup> BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 117–46 (2014).

<sup>227</sup> *In re Sutton's Hosp.* (1612) 77 Eng. Rep. 937, 973; 10 Co. Rep. 1 a, 32 b. Coke's statement is often presented as a bald (and legally irrelevant) metaphysical proposition. But a better interpretation comes from the Tennessee Supreme Court. *Murfreesboro & Woodbury Tpk. Co. v. Barrett*, 42 Tenn. (2 Cold.) 508, 510 (1865) (suggesting that corporations "have no souls" in that "[m]en, when associated together in a corporate capacity, frequently lose that regard for individual rights, they have as private persons" such that their "direct responsibility is . . . removed").

<sup>228</sup> Anna-Kaisa Newheiser et al., *Why Do We Punish Groups? High Entitativity Promotes Moral Suspicion*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 931, 932 (2012).

<sup>229</sup> See, e.g., Epstein, *supra* note 4, at 44–45.

the appropriateness of moral and legal judgments in the collective context without explaining why the same principle fails to track individual cases. Put this aside. Even granting the contestable metaphysics of responsibility that such an argument assumes, whereby collective responsibility is exactly and entirely reducible to individuals' contributions, there would still be a need to hold corporations criminally responsible.<sup>230</sup> Moreover, the reason why has everything to do with corporate law.

To start, enforcement is plagued by epistemic obstacles that make “an easy reduction” from collective activity to individual contributions effectively impossible.<sup>231</sup> Moreover, epistemic difficulties in the corporate context are not run-of-the-mill challenges present for ordinary responsibility ascriptions. Rather, an easy reduction is made practically impossible precisely because the internal structure necessary for sophisticated collective agency obscures the contributions of individual members.<sup>232</sup> In other words, the same processes, described in Part II.B, that help to make corporations the kind of agents eligible for criminal liability simultaneously prevent the state from reducing corporate misconduct back down to the level of individuals.

Were we to depend exclusively on a practice of individual criminal responsibility, many culpable individuals would go unpunished.<sup>233</sup> Worse, the effect of this epistemic obscurity created by corporate law is asymmetric.<sup>234</sup> It is especially difficult to isolate the individual contribution of those high up in a hierarchical corporate structure—a phenomenon invoked to explain the lack of senior officials prosecuted in prominent cases of corporate misconduct.<sup>235</sup> Individuals avoiding punishment would do so precisely because of the collective structure, and the collection of individuals avoiding punishment would skew towards those who already exercise the most control and who most benefit from participation in collective activity.<sup>236</sup> The set of culpable individuals most likely to avoid being held responsible would also be the set of individuals most likely to benefit from the permission of sophisticated collective activity in the first place.<sup>237</sup> This asymmetry is exacerbated by the

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<sup>230</sup> These sorts of accounting metaphors are common in the literature of collective responsibility. *E.g.*, Pettit, *supra* note 190, at 194; Sepinwall, *supra* note 5, at 433.

<sup>231</sup> LIST & PETTIT, *supra* note 46, at 76–78.

<sup>232</sup> *Id.* at 62–63 (describing this phenomenon as “feedback”).

<sup>233</sup> *Cf.* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. 13 (U.S. SENTENCING COMM’N 2015) (recognizing that “because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel [may be] able to identify the culpable individual(s) within the organization despite the organization’s efforts to cooperate fully”).

<sup>234</sup> *See* Sepinwall *supra* note 5, at 425.

<sup>235</sup> *E.g.*, David M. Uhlmann, *Crimes on the Gulf*, LAW QUADRANGLE, Fall 2010, at 31, 32.

<sup>236</sup> *Cf.* Levinson, *supra* note 86, at 349 (considering whether collective sanctions delegate deterrence decisions to better situated group members).

<sup>237</sup> *See* Lisa Kern Griffin, *Inside-Out Enforcement*, in PROSECUTORS IN THE BOARDROOM, *supra* note 4, at 110, 113.

fact that a prosecutor is best positioned to convict low-level offenders both because their contribution to misconduct is most visible and because, in an age of scarce prosecutorial resources and increasingly complicated corporate entities, a prosecutor increasingly must rely on the cooperation of the corporation itself.<sup>238</sup>

To recall, the structure of the modern commercial corporation is built upon a foundation provided by corporate law.<sup>239</sup> The state facilitates, through corporate law, institutions that are more likely to encourage criminality and simultaneously are designed with the effect of obscuring our ability to reduce collective responsibility to individual responsibility.<sup>240</sup> It is eminently reasonable to conclude the state has a duty to counteract this problem. Of course, one solution would be to prohibit the creation of such corporate structures altogether. This solution throws the baby, and the rest of the family, out with the bathwater. A better approach for satisfying the state's obligation is to hold the corporation responsible. A practice of collective punishment would be a valuable corrective to the peculiar epistemic obstacle attendant to sophisticated collective activity.<sup>241</sup>

In short, despite their distinct regulatory purposes and their diametric conceptions of the corporation, corporate law and criminal law are intimately intertwined. Corporate law creates the possibility of sophisticated collectives, which is an essential prerequisite for attributing personhood to corporations in the context of criminal law.<sup>242</sup> In other words, corporate law's systems-approach towards corporate design gives rise, at least in large part, to criminal law's claim to corporate personhood.<sup>243</sup> But meanwhile, this same contribution from corporate law creates the need for corporate-criminal liability in the first place. The corporate form developed by corporate law, for all its benefits, both encourages or facilitates criminal activity that would not antecedently occur, and then frustrates the criminal law's ability to sanction such misconduct except through the vehicle of corporate-criminal liability.

#### D. *Corporate Law Undermines Corporate-Criminal Fines*

However, as we see in this Part, corporate law—which created both the possibility and the need for corporate-criminal liability—undermines the very punishment imposed by criminal law as a response. So the same innovation that creates collective entities capable of laudable accomplishments and of sophistication to license liability also creates a need for criminal law while simultaneously undermining criminal punishment.

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<sup>238</sup> *See id.*

<sup>239</sup> *See supra* Part III.B.4.

<sup>240</sup> *See supra* Part II.C.2.

<sup>241</sup> *See generally* Levinson, *supra* note 86.

<sup>242</sup> *See, e.g.,* Blair, *supra* note 203, at 798.

<sup>243</sup> *Id.*

### 1. *Imposing Punishment vs. Distributing Harm*

I previously referred to the messy quality of punishment, whereby the harm attendant to punishment reliably spills over to innocent, even nonculpable, third parties.<sup>244</sup> Let's now be more precise in discussing this phenomenon by distinguishing the imposition of punishment from the distribution of harm. Recall Levinson observing this distinction in noting that just “[a]s in any other sanction or taxation scheme, the impact point is not necessarily the final resting point, or incidence, of the burden.”<sup>245</sup> A similar distinction underlies Feinberg's suggestion that harm is a socially constructed expression of punishment;<sup>246</sup> we could, in theory, impose punishment without the harm.

With this new conceptual distinction in hand, I can put the messy, spillover point more precisely:

1. The imposition of punishment begets the distribution of harm.
2. The distribution of harm is often at least partially haphazard in how the distribution of harm occurs.

For illustration, return to our original case of the individual defendant. The punishment there imposed—a term of imprisonment—begets a distribution of harm. A large portion of that distribution is baked into the punishment itself: the harm is the time in prison, and that harm is not transferable (the defendant cannot have someone go to prison on his behalf).<sup>247</sup> The remainder of harm, what I previously described as the messy, spillover quality of punishment, is the harm that befalls those around the defendant. We can tell a similar story for some collective punishments.

### 2. *Negotiable Punishments*

I belabor the point because corporate fines fall within a special class of punishments, ones where the division of punishment and harm is more than a conceptual nicety. What separates corporate fines and a handful of other punishments is that the distribution of harm is not, or at least need not be, largely predetermined by the choice of punishment. I call this class of punishments “Negotiable Punishments,” for reasons that will become clear shortly.

Negotiable Punishments have the following features. First, the punishment imposed is fungible and divisible; this means the process of distributing harm is amenable to fine-grained distributions. Second, because the distribution is not baked into the structure of the punishment, Negotiable Punishments

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<sup>244</sup> See *supra* Part II.C.

<sup>245</sup> Levinson, *supra* note 86, at 377.

<sup>246</sup> See Feinberg, *supra* note 65, at 423.

<sup>247</sup> At least, not in our criminal justice system. See 18 U.S.C. § 3551 (2012).

introduce a consideration not available for most other punishments: who gets to decide the distribution. Indeed, attempts to provide a taxonomy of collective punishments fail, to my mind, because they focus on the ultimate distributions that obtain rather than on who is deciding the distribution. For example, Avia Pasternak argues that punishment of a group can distribute in precisely three patterns: equally, randomly, or “in proportion to members’ differing levels of personal association with the collective harm.”<sup>248</sup>

Corporate-criminal fines are a paradigmatic instance of Negotiable Punishment as defined above—specifically, where the person being punished has been granted authority to determine the distribution of harm from its own punishment.<sup>249</sup> Instead, the state imposes a fine on a criminal corporation and leaves it to the private negotiations of the corporations’ members how to divvy up the harm. From the perspective of the criminal law, it does not matter who within the organization is ultimately responsible for covering the incidence of the fine; the state’s only interest qua enforcer of punishment is that the entirety of the fine is paid.<sup>250</sup> Whether stakeholders distribute the harm randomly, equally, proportional to some assessment of culpability, etc., is outside the interest of the state. It is this dynamic that leads me to describe fines as Negotiable Punishment—unlike most punishments, the distribution of harm can be assigned according to an agreement reached by the private negotiations of corporate members.

### 3. *The Role of Corporate Law in Undermining Criminal Fines*

The idea of turning the distribution of harm over to the private negotiations of stakeholders is in some ways a fitting approach for the criminal law to take. Among other things, it avoids the sort of looking-past concerns raised earlier, where the criminal law treats the corporations as a single person separate from its constitutive individuals at the moment of conviction only to abandon the person conception of the corporation in order to target individuals who are “really” responsible for the misconduct.<sup>251</sup> However, it is also the source of fines’ failure as punishment.

Start with the idea that the distribution of fines is turned over, by the criminal law, to the private negotiations of members. The structured relationship of individuals within a corporation falls well within the purview of corporate law; recall that corporate law enables individuals to pursue

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<sup>248</sup> Pasternak, *supra* note 98, at 220.

<sup>249</sup> Of course, it is conceivable that the State imposes a corporate fine and then further specifies which stakeholders will foot the bill. However, this is not the world we have; the status quo manifestly eschews such an approach.

<sup>250</sup> This is evidenced, among other things, by the fact that the Sentencing Guidelines do not consider the issue, despite devoting a plurality of Chapter 8 to the calculation of corporate-criminal fines. See U.S. SENTENCING GUIDELINES MANUAL ch. 8 (U.S. SENTENCING COMM’N 2015).

<sup>251</sup> See *supra* Part III.A.

collective, usually commercial, activity under the guise of a single corporate entity and further provides default rules that strongly influence the ways in which individuals relate to each other, especially in terms of rights, powers, and responsibilities within the corporation.<sup>252</sup> Put another way, the imposition of corporate-criminal fines is solidly the province of criminal law, whereas the distribution of harm from those fines is solidly the province of corporate law. And, as it turns out, corporate law has settled the distributive question in a manner that leads fines to fail as punishment for all the reasons identified in Part II.

Return to the idea that negotiated punishments are so called because they allow stakeholders to negotiate amongst themselves how to distribute the harm attendant to punishment. But negotiations do not occur in a vacuum. How group members decide to distribute harm is inseparable from—indeed, is all but determined by—the deliberative structure through which members interact. The outcome agreed upon by members within a broadly egalitarian structure—citizens in a political caucus, for example, or partners in a partnership—are likely to be quite different from the outcome “negotiated” within a rigidly hierarchical structure in which large swaths of decisionmaking authority are reserved to a concentrated class of individuals.<sup>253</sup>

As Part II demonstrated, commercial corporations have just such hierarchical structures. Moreover, the state plays a pivotal role in producing corporations that consolidate and compartmentalize decisionmaking. The state is ultimately responsible for creating, or at least permitting and endorsing entities with hierarchical structures. In particular, corporate law provides shareholders precious few direct legal tools to negotiate the distribution of harm with officers and directors.<sup>254</sup> Employees have even less recourse. Instead, and as a result, corporate punishments are distributed through and out of a corporation as if they are any other cost borne by the corporation. Thus, although members *could* agree to adopt a different distribution—the state would not turn down a payment of a fine if, for example, officers had agreed to forgo their salaries to cover the cost—the status quo of corporate law virtually guarantees that deviations from the current setup will not occur.<sup>255</sup> Indeed, plausibly the only opportunity for negotiation surrounding the distribution of corporate-criminal fines occurs at the moment the corporation’s

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<sup>252</sup> See *supra* Part III.B.4.

<sup>253</sup> See *supra* notes 171–72, 209–12 and accompanying text.

<sup>254</sup> E.g., Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 688 (2007); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 311 (1999). Indeed, this point is further complicated to the extent that it presumes “shareholders” share uniform preferences. That presumption is under particular strain with respect to diverging interests between large, controlling shareholders and their smaller counterparts. See Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 787–803 (2003).

<sup>255</sup> Bebchuk, *supra* note 254, at 688–703 (detailing reasons why shareholders are ill-equipped to meaningfully threaten bargaining positions held by a board of directors).

would-be founders are trying to decide whether to incorporate or to adopt instead a different commercial vehicle. After that, the mere decision to incorporate by itself all but guarantees the outcome of future distributions.

Thus, while it may be true that, in a formal sense, the distribution of a fine reflects the settled negotiations of the corporation's members, in reality the notion that distributions are actually negotiated is a farce.<sup>256</sup> As we've seen, the distribution of a corporate fine is, as it turns out, highly predictable: when it comes to corporate fines, "shareholders pay the fines."<sup>257</sup> This mismatch between the formal description of corporate fines as Negotiable Punishments and the reality of corporate fines falling upon shareholders is directly attributable to corporate law.

We can see now the crux of the problem that motivated this discussion in the first place. The state entrusts the distribution of harm to the private negotiations of corporate members, *but only after* creating corporate structures that virtually guarantee those negotiations will result in harm being pushed away from those in a position to control corporate misconduct and onto shareholders and employees.<sup>258</sup> Put simply, the state's blind eye towards the influence of corporate law means that it sabotages its own attempt to punish corporations with criminal fines.

#### IV. CAN AND SHOULD CORPORATE LAW IMPROVE CRIMINAL FINES?

##### A. *Can Corporate Law Reform Improve Criminal Punishment?*

What would it mean to improve the failure of corporate-criminal fines by means of corporate-law reform? Here I sketch such a proposal, which broadly consists of two parts: (1) Shift the default distribution of harm attendant to criminal punishment away from shareholders and onto a separate class of stakeholders, and (2) Build into the corporate structure clear pathways through which to negotiate a final distribution of harm, one that improves the extent to which corporate fines satisfy traditional rationales of punishment. Specifically, I suggest holding directors personally liable for paying the cost of a corporate fine, and establishing a Corporate-Crime Clawback bylaw designed to allow directors to decrease their personal exposure with funds clawed back from other stakeholders. Consider each element in turn.

##### 1. *Director Liability for Corporate-Criminal Fines*

To begin, I advocate making the directorship liable for the entire cost of a corporate-criminal fine.<sup>259</sup> Specifically, directors would be held jointly and

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<sup>256</sup> See, e.g., Alschuler, *supra* note 88, at 1367.

<sup>257</sup> *Id.*

<sup>258</sup> See *supra* Part III.D.

<sup>259</sup> I suggest ways to relax this requirement in the Objections section, see *infra* Part IV.A.3, but start with the strong version of the proposal for clarity.

severally responsible, with rights of contribution, for absorbing the harm attendant to the imposition of a fine.<sup>260</sup>

No doubt this would represent a major break from the current distribution of rights and responsibilities among corporate stakeholders.<sup>261</sup> On the other hand, corporate law has a long tradition of modifying the personal exposure of stakeholders, and of shifting the distribution of harms among classes of stakeholders. For example, jurisdictions around the turn of the twentieth century provided statutory protection for employees from corporate harms that have since been removed.<sup>262</sup> Courts further developed doctrines that constrained shareholder limited liability to provide some protection for third parties in the case of insolvency.<sup>263</sup> Indeed, as late as 1930, several jurisdictions still denied shareholders the full protection of limited personal liability we've come to expect of modern corporations.<sup>264</sup> Corporate law remains in flux in the modern era, even specifically with respect to questions about the proper distribution of harm amongst members. In the mid-1980s Delaware altered the corporate structure when it permitted a corporation, through its bylaws, to limit or eliminate entirely directors' personal liability for violations of their duty of care.<sup>265</sup> Recently, the 2010s saw debate over whether to permit "loser-pay" bylaw provisions, which would make shareholders who bring a derivative suit, rather than the corporation, pay the litigation costs of a failed suit.<sup>266</sup>

In what ways does direct liability improve the shortcomings of criminal fines as a form of corporate punishment? For one thing, shifting the default distribution of harm goes some way towards ameliorating the cost-of-doing business problem that undercuts the expressive value of corporate punishment. Recall that the state's expression of communal condemnation is undermined when the punishment expressing and bolstering that condemnation is virtually

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<sup>260</sup> See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 (AM. LAW INST. 2000).

<sup>261</sup> See *supra* Part III.D.3.

<sup>262</sup> Mass. Pub. Stat. ch. 106, § 61 (1882); N.Y. Stock Corp. Law § 57 (Consol. 1909).

<sup>263</sup> See *Sawyer v. Hoag*, 84 U.S. (17 Wall.) 610, 620 (1873) (establishing the Trust Fund Doctrine). For a discussion of the various causes behind the decline of the Trust Fund Doctrine, see Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 207–14 (1985).

<sup>264</sup> See Act of Feb. 17, 1848, ch. 40, 1848 N.Y. Laws 54; *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 550–54 & nn.5–26 (1933) (Brandeis, J., dissenting). Some held shareholders liable for twice their capital contribution. See Horwitz, *supra* note 263, at 208 (describing New York's double-liability provision as "[t]he most typical provision").

<sup>265</sup> DEL. CODE ANN. tit. 8, § 102(b)(7) (2011). See generally Thomas C. Lee, Comment, *Limiting Corporate Directors' Liability: Delaware's Section 102(b)(7) and the Erosion of the Directors' Duty of Care*, 136 U. PA. L. REV. 239 (1987).

<sup>266</sup> C. Steven Bradford, *The Death of Loser-Pays in Delaware*, BUS. L. PROF BLOG (June 15, 2015), [http://lawprofessors.typepad.com/business\\_law/2015/06/the-death-of-loser-pays-in-delaware.html](http://lawprofessors.typepad.com/business_law/2015/06/the-death-of-loser-pays-in-delaware.html) [<https://perma.cc/6ELD-U5ZX>] (discussing the continued viability of *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014)).

indistinguishable from any and all other types of corporate harm.<sup>267</sup> No longer. By resting responsibility to pay the harm from a corporate fine on directors, corporate-criminal fines stand distinct from all other forms of corporate harm.

With respect to deterrence, directors are better positioned than shareholders to detect and prevent criminal misconduct.<sup>268</sup> By contrast, under the status quo shareholders have at best weak mechanisms to influence director activity.<sup>269</sup> By having the distribution fall directly on directors, there is some degree to which the deterrent effect of fines improves. That said, shifting the distribution of harm to directors is an incomplete step towards improving deterrence. To be sure, “[c]ollective sanctions . . . have the potential to leverage group solidarity by substituting more efficient intra-group monitoring and control mechanisms for less efficient externally imposed sanctions aimed at individual wrongdoers.”<sup>270</sup> Directors have a great deal of de jure authority in the corporate structure;<sup>271</sup> they also would now have a strong incentive to shift the harm attendant to corporate punishment onto other stakeholders however possible.

However, shifting onto directors the distribution of harm attendant to corporate punishment goes only so far in improving the deterrence value of corporate fines. Directors’ current powers to monitor and appoint officers are likely not sufficiently fine-grained to achieve the sorts of efficient deterrence imagined in the quotation above; directors are not immune from the same epistemic concerns plaguing regulators, even if they are still in a better position to avoid them.<sup>272</sup> Absent clear mechanisms to facilitate negotiations over the ultimate distribution of harm, directors’ incentives will not necessarily align with the state’s interest in improving the deterrent effect of fines. The second component of reforms addresses directly this shortcoming.

## 2. *The Corporate-Crime Clawback Bylaw*

We have already seen that negotiations over the ultimate distribution of harm attendant to a corporate fine are largely influenced by the extent to which a corporation’s internal structure provides meaningful avenues of negotiations among suitably situated participants to such negotiations. Shifting the distribution of harm away from shareholders onto directors does something to improve the cost-of-doing business problem. Improving deterrence for fines requires that we establish clear pathways and mechanisms that empower

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<sup>267</sup> See *supra* notes 67–70 and accompanying text.

<sup>268</sup> See, e.g., *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996) (discussing directors’ duty to monitor); *accord* *Stone v. Ritter*, 911 A.2d 362 (Del. 2006) (reaffirming *Caremark*).

<sup>269</sup> See *supra* Part III.D.3.

<sup>270</sup> Levinson, *supra* note 86, at 379 (emphasis omitted).

<sup>271</sup> E.g., DEL. CODE ANN. tit. 8, § 141(a) (2011).

<sup>272</sup> See *supra* notes 230–32 and accompanying text.

directors to diminish their newfound share of the harm in a manner that improves the extent to which criminal fines improve corporate deterrence.

To achieve this goal, the second part of my proposal is to allow corporations to adopt into their bylaws a modified form of incentive-based clawback provisions—what I call a Corporate-Crime Clawback—that shifts the harm attendant to corporate punishment from directors onto officers and high-value employees.

The special characteristics of the Corporate-Crime Clawback provision find their roots in the recent trend not just towards having executive clawback provisions but specifically towards building them into a corporation's structure. In its basic form, a clawback provision is a term, included either in an employment contract or in the corporation's compensation policies, that allows the employer to recoup previously paid out incentive compensation—bonuses, stock options, etc., *but not* earned income—under prenegotiated circumstances.<sup>273</sup> An ordinary clawback provision thus straightforwardly redistributes costs away from shareholders and towards officers.<sup>274</sup>

Since 2002, federal securities regulators have leveraged their near-plenary, albeit indirect, control over access to major capital markets to increase the prevalence of clawback provisions.<sup>275</sup> First the Sarbanes–Oxley Act of 2002 (SOX) empowers the SEC, as opposed to the corporation itself, to claw back incentive payments to the CEO and CFO of a publically traded company after “an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct.”<sup>276</sup> Second, the Troubled Asset Relief Program (TARP), expanded the targets of clawback provisions to high-ranking individuals in addition to the CEO and CFO.<sup>277</sup> Unlike SOX, TARP required

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<sup>273</sup> One paradigmatic circumstance: an employee commits fraud against or on behalf of the corporation. Clawback provisions are also beginning to be used as a form of noncompete clause. *See, e.g.*, AM. EXPRESS, PROXY STATEMENT FOR 2012 ANNUAL MEETING OF SHAREHOLDERS 37–38 (2012), [https://www.sec.gov/Archives/edgar/data/4962/000119312512121814/d302637ddefc14a.htm#toc302637\\_25](https://www.sec.gov/Archives/edgar/data/4962/000119312512121814/d302637ddefc14a.htm#toc302637_25) [<https://perma.cc/9RJW-X5AB>] (identifying “working for certain competitors” as an instance of “[d]etrimental conduct” triggering the clawing back of compensation).

<sup>274</sup> *Id.*

<sup>275</sup> As a result, clawback provisions have exploded in prevalence; whereas fewer than 20% of Fortune 100 companies had such provisions as recently as 2006, today that number is close to 90%. EQUILAR, 2013 CLAWBACK POLICY REPORT 5 (2013).

<sup>276</sup> 15 U.S.C. § 7243(a) (2012). Notably, the misconduct at issue need not have actually been carried out by the CEO or the CFO; misconduct by *any* employee suffices to ground an action by the SEC provided the misconduct led to material noncompliance. *Sec. & Exch. Comm'n v. Jenkins*, 718 F. Supp. 2d 1070, 1075–76 (D. Ariz. 2010); *accord Sec. & Exch. Comm'n v. Microtune, Inc.*, 783 F. Supp. 2d 867, 886 (N.D. Tex. 2011) (holding that 15 U.S.C. § 7243 “contains no *personal* wrongdoing element . . . that would require scienter or misconduct on behalf of the officers in order to trigger reimbursement”), *aff'd sub nom. Sec. & Exch. Comm'n v. Bartek*, 484 F. App'x 949 (5th Cir. 2012).

<sup>277</sup> 12 U.S.C. § 5221(b)(3) (2012) (covering “senior executive officer[s] and any of the next 20 most highly-compensated employees”). TARP came under the Emergency

directors to develop clawback provisions on their own for their respective corporations.<sup>278</sup> Third, Congress in 2010 passed the Dodd–Frank Wall Street Reform and Consumer Protection Act<sup>279</sup> (Dodd–Frank) to, *inter alia*, allow for the clawback of incentive payments because of “an accounting restatement due to the material noncompliance of the issuer.”<sup>280</sup> Dodd–Frank diverges from SOX and TARP in that it incentivizes, but does not require, corporations to develop their own clawback policies, through corporate bylaws, implementing the goals outlined in § 78j-4(b) and subsequent regulations.<sup>281</sup> Thus, Dodd–Frank influences the corporate structure, creating a clawback provision that directors may enforce to recoup incentive payments.<sup>282</sup>

The Corporate-Crime Clawback builds upon these recent developments. First, like TARP and Dodd–Frank, the provision would reach past the CEO and CFO to include any employee receiving incentive payments. Second, the provision would not be included in bespoke employment contracts; the corporate bylaws would be required to specify the conditions under which an officer could have incentive payments clawed back in the event of a corporate conviction. Ideally, a corporation would be allowed to so amend its bylaws only if it further included in the new bylaws procedural protections for the exercise of the Corporate-Crime Clawback against an employee.

That said, the Corporate-Crime Clawback would differ in two important respects. First, its usage would be limited to instances involving a corporate-criminal conviction. Second the money recouped through clawbacks would directly diminish the directorship’s liability; every dollar recovered would be one less dollar for directors to pay. The effect of the Corporate-Crime Clawback bylaw would be to empower directors to distribute harm to those more likely to have carried out, or more directly in a position to have prevented, corporate crime. And unlike other clawback provisions, directors would have strong personal incentive to utilize the pathways for distributing the harm attendant to a corporate-criminal fine.

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Economic Stabilization Act of 2008 (EESA), Pub. L. No. 110-343, §§ 101–136, 122 Stat. 3765, 3767–800 (2008) (codified as amended at 12 U.S.C. §§ 5211–5241).

<sup>278</sup> See 12 U.S.C. § 5221(b)(3) (detailing conditions a clawback provision must satisfy).

<sup>279</sup> See generally Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §§ 5301–5641).

<sup>280</sup> Unlike SOX, Dodd–Frank does not require that the misreporting be the result of misconduct. 15 U.S.C. § 78j-4(b).

<sup>281</sup> It does so by prohibiting noncomplying corporations access to national securities exchanges. *Id.* § 78j-4(a). So, “incentivize” might understate it.

<sup>282</sup> Dodd–Frank’s rules concerning clawback provisions have not yet been set by regulators. Indeed, regulations governing clawback provisions may be (merely) proposed this year. Joshua Miller & Andrea Rattner, *SEC Announces Open Meeting on Proposed Clawback Requirements Under Dodd-Frank Act*, JDSUPRA (June 29, 2015), <http://www.jdsupra.com/legalnews/sec-announces-open-meeting-on-proposed-95808/> [<https://perma.cc/X8UF-UY64>]. One major point of contention is whether the exercise of Dodd–Frank clawback provisions will be mandatory or at the discretion of the Board.

### 3. *Anticipating Objections*

No policy proposal survives contact with the real world. That said, on the account provided here, I can venture answers to a few key questions and respond to a few probable objections.

*Directors would scapegoat hapless employees.* Ideally, under my proposal directors would seek in good faith to identify culpable individuals inside the corporation: those who personally contributed to the sanctionable misconduct—for example, by carrying out the misconduct, authorizing it, or creating conditions that cannot be satisfied without resort to criminality—or who stood in a position to prevent it but failed to do so. This would discourage future misconduct by distributing harm proportionally to contributors of corporate crime in a manner that criminal law is both epistemically and conceptually unable to do. Likewise, directors would avoid distributing harm to those for whom paying the cost of corporate crime would serve no deterrent value. However, insofar as directors benefit personally each time they find a culpable individual, there is a strong temptation to pay short shrift to the latter goal.

To reiterate, under my proposal adoption of the Corporate-Crime Clawback bylaw would require articulating the conditions and protections guiding its usage. Any bylaw should prioritize creating a fair process through which directors may exercise their powers to use the Corporate-Crime Clawback. We can look to administrative law for guidance on what constitutes fair process; modifying *Mathews v. Eldridge* to the current setting would mean balancing the weight of the interest of the corporation in identifying culpable individuals, the weight of the interest in individuals not being wrongly found culpable, and the marginal benefit gained from additional process.<sup>283</sup> I favor strong procedural rights—in particular, the use of third-party investigations and neutral tribunals<sup>284</sup>—for several reasons. First, individuals have much to lose from the Corporate-Crime Clawback. Analogizing to SOX, the few SEC enforcement cases that have occurred frequently clawed back millions of dollars in incentive compensation—one case clawed back a staggering \$468 million from a single individual.<sup>285</sup> Second, directors have conflicting interests insofar as they have close working relationships with corporate executives; indeed, while directors have de jure authority in the corporation, it is well settled that corporate executives have de facto authority.<sup>286</sup> Accordingly, while

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<sup>283</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Mathews* establishes the three-part modern doctrine for assessing how much process is due. See *id.*

<sup>284</sup> One could do worse than to look at the factors articulated by Judge Friendly. Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1279–95 (1975).

<sup>285</sup> Press Release, Sec. & Exch. Comm’n, Former UnitedHealth Group CEO/Chairman Settles Stock Options Backdating Case for \$468 Million (Dec. 6, 2007), <http://www.sec.gov/news/press/2007/2007-255.htm> [<https://perma.cc/VU7A-JSNF>].

<sup>286</sup> See Lucian Arye Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, J. ECON. PERSP., Summer 2003, at 71, 73–75.

some processes may be too onerous to make the Corporate-Crime Clawback feasible, the burden should fall to directors to make this case.

More importantly, and process aside, I want to note two things in defense of my proposal with respect to scapegoating. By design at least two classes of stakeholders are immune to scapegoating: shareholders and low-level employees. Shareholders cannot have costs passed to them because they are not compensated by incentives (they are owners). Likewise, low-level employees are effectively immune from scapegoating: either they do not receive incentives, or any incentives they do receive are small enough to not be worth the effort to recover. And, it just so happens that these same classes of stakeholders are those who lack negotiating leverage when it comes to the distribution of harm. One effect of my proposal, then, is to inure from harm those stakeholders least able to protect themselves from the outcome of negotiations.

Second, although we should worry about scapegoating, it would be naïve to pretend that it does not already occur in the context of corporate punishment. Consider Siemens, a corporation guilty of paying out \$1 billion through a global bribery scheme the existence of which insiders described as “common knowledge” inside the firm.<sup>287</sup> Although Siemens pleaded guilty, its punishment was greatly reduced for its “‘outstanding’ help” in developing cases against middle managers at the corporation.<sup>288</sup> Meanwhile, Garrett reports that as anticipated, “individual low-level employees . . . would get prosecuted as scapegoats while those at the top would go free.”<sup>289</sup> At least under my proposal, the scapegoating might lead to financial disgorgement rather than imprisonment—a small consolation, but a consolation nonetheless.

In short, there is cautious room for optimism that adequate process could help to produce proportional distributions, bolstered by the low bar set by the status quo.

*Executives will neuter the policy by insisting on higher salaries instead of incentive-based payments.* Likely they will try; indeed, there is already some evidence to suggest that they are already doing so in response to federal regulations creating new clawback provisions.<sup>290</sup>

However, it is important to remember why employment contracts have incentive payments in the first place—to align agent-employee’s personal interests with the principal-corporation’s interests.<sup>291</sup> That is, incentive-based payments *ceteris paribus* are not in the personal interests of employees if the

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<sup>287</sup> GARRETT, *supra* note 226, at 3.

<sup>288</sup> *Id.* at 12.

<sup>289</sup> *Id.*

<sup>290</sup> Claudia H. Deutsch, *A Brighter Spotlight, Yet the Pay Rises*, N.Y. TIMES (Apr. 6, 2008), <http://www.nytimes.com/2008/04/06/business/06comp.html> [<https://perma.cc/J5XB-QZCA>]; see also Bebchuk & Fried, *supra* note 286, at 72.

<sup>291</sup> See Gary J. Miller, *Solutions to Principal-Agent Problems in Firms*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 349, 351–56 (Claude Ménard & Mary M. Shirley eds., 2005).

same compensation could be obtained in the form of a salary.<sup>292</sup> Directors are not likely to abandon entirely this well-settled mechanism merely because officers now dislike them more.

Indeed, my proposal has an advantage over other clawback provisions. In the ordinary case, directors insisting on incentive-based payment are acting merely in their legal capacity to serve the interest of the corporation.<sup>293</sup> Under my proposal, directors now have a further personal financial interest to include incentive payments in contracts, particularly for the sorts of employees positioned to participate in, or otherwise produce corporate misconduct. Accordingly, I expect that officer pushback will be met with stiffer resistance under my proposal than under the evolving status quo.

*The magnitude of corporate-criminal fines makes my proposal infeasible.* Two responses to this point. Admittedly, it is the rare board of directors that can personally afford \$1 billion in fines. However, recall that most fines are significantly more modest: the median fine over the past fifteen years is \$125,000, while the average fine is \$7 million.<sup>294</sup> More to the point, under my proposal we would not need gigantic fines; as we have seen they are an unsuccessful solution to a problem of deterrence that my policy solves in a different way. Under my proposal, smaller fines could nevertheless accomplish the desired effect. Indeed, per Guttel and Teichman, smaller fines may have the ancillary benefit of increasing the number of prosecutions.<sup>295</sup> This is not to say that large financial penalties need go away; large restitution payments, an entirely separate topic from fines (and not a form of punishment),<sup>296</sup> may well serve social value.<sup>297</sup>

Second, there are other ways to maintain the logic of my proposal while accommodating worries about overburdening directors. One method would be to cap director's personal liability—say to their actual compensation or some multiple of it, as was once done with limited liability.<sup>298</sup> Directors could be personally responsible for only a portion—either a percentage or an absolute amount—of the total fine. I am not in a position to announce the best implementation strategy, but I trust that sentencing courts could develop best practices. Already Chapter Eight of the Sentencing Guidelines, identifies a

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<sup>292</sup> *Id.* at 351–53.

<sup>293</sup> And recall, the corporation suffers principal–agency problems with respect to directors just as with executives. Bechuk & Fried, *supra* note 286, at 73.

<sup>294</sup> *Sourcebook Archives*, *supra* note 9. For comparison, each clawback executed by the SEC, to the limited extent the SEC actually exercises its authority under SOX, often brings in over \$1 million.

<sup>295</sup> Guttel & Teichman, *supra* note 34, at 601.

<sup>296</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 8, pt. B introductory cmt. (U.S. SENTENCING COMM'N 2015).

<sup>297</sup> KUTZ, *supra* note 90, at 201.

<sup>298</sup> *See supra* note 264.

bevy of considerations that would be instructive for guiding sentencing practices on this issue.<sup>299</sup>

*Directors will seek insurance to indemnify themselves against personal liability.* The presence of insurance does not undermine the efficacy of my proposal. This is because insurers will have the same incentives as directors to defray costs by clawing back payments from executives. Indeed, insurers may be more likely to claw back payments, because they are not subject to the same working relationship that exists between directors and executives that may otherwise complicate a director's incentives.

More fundamentally, the insurance critique would matter if it were the case that directors were being made to pay on the basis of their personal culpability. If that were the case, then insurance would seem a form of shirking their due punishment. But, the motivation behind the Corporate-Crime Clawback is to alter intracorporate negotiations so as to ensure that criminal fines better serve their penological objections; director culpability does not enter into the issue, as the next Part shows.

### B. *Corporate-Law Reform, or Just More Criminal Punishment?*

The major criticism, hinted at in discussing director insurance, brings our discussion full circle back to the question of what it means for corporate punishment to be considered a failure. An intuitive reaction to my proposal is that it punishes those at the top of the structure for the sins of the corporation; revisiting Alschuler, I have done nothing to change the fact that corporate punishment “punishes the innocent along with the guilty.”<sup>300</sup> If accurate, I would be advocating violating the Persons Conception of the Corporation—convict the corporation, then look past the corporation to punish those “really” responsible—in precisely the manner that I have described repeatedly as undermining the conceptual basis for corporate-criminal liability. To add insult to injury, I would have embraced the stereotype that officers are directors and officers are always exclusively responsible for corporate crime,<sup>301</sup> despite the sensible observation from Gilbert: “What does the blameworthiness of the collective's act imply about the personal blameworthiness of any one member of that collective? From a logical point of view, the short answer is: *nothing*.”<sup>302</sup>

Such a criticism, however, misunderstands my proposal, and in doing so, elides the role that corporate law plays in influencing criminal punishment. It relies on the same category error anticipated in Part II.C: selectively import

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<sup>299</sup> See generally U.S. SENTENCING GUIDELINES MANUAL § 8C2.

<sup>300</sup> See Alschuler, *supra* note 88, at 1367.

<sup>301</sup> But see Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371 (2014) (offering an account that deems officers apt targets of punishment for corporate wrongdoing).

<sup>302</sup> Gilbert, *supra* note 43, at 109.

notions of guilt and innocence from criminal law into the exclusive purview of corporate law—viz., into a discussion of organizational design with the goal of achieving effective distribution of benefits and burdens among group members. As such, this critique merely begs the question against my proposal.

My proposal does nothing to disrupt the current practice of criminal law: a corporation is still prosecuted as a single person, and if convicted the corporation—not any of its individual stakeholders—is still punished with a fine. The inevitable byproduct of punishment is a distribution of harm to third parties.<sup>303</sup> In the case of corporate-criminal fines, it just so happens that the standard punishment for corporations leaves to stakeholders how to distribute this third-party harm.<sup>304</sup>

The corporate structure present in the status quo virtually guarantees a distribution that has the effect of undermining the deterrent and expressive values of corporate-criminal fines.<sup>305</sup> The idea behind my proposed Corporate-Crime Clawback is to embed into the corporate structure a different negotiating playing field. This playing field, applicable only in the criminal context, is likely to affect the distribution of harm in a manner that realizes, or at least improves satisfaction of, the underlying penological objections currently receiving short shrift.

Questions of guilt and innocence are wholly orthogonal to the question of the preferred distribution of harm attendant to corporate punishment. Just as before, the criminal law is not looking past the convicted corporation to harm those “really” responsible for the underlying misconduct. On the account provided, whether directors or officers are culpable for the underlying corporate misconduct has no bearing on the recommendation that corporate fines be paid by the directorship with rights of contribution via clawback against officers and high managerial agents. Granted, it may bear out empirically—though certainly not in all cases—the directors and officers are in fact more responsible than other stakeholders.<sup>306</sup> If that responsibility rises to the level of criminal conduct, by all means prosecute the individual separately alongside the corporation. But culpability of directors and officers is neither necessary nor sufficient to explain or justify the reforms proposed. In short, to criticize the Corporate-Crime Clawback on the basis that it imposes harm on ostensibly innocent third parties—a practice corporate punishment does now, just on different innocent third parties—is to criticize corporate punishment for failing a standard that virtually no punishment of any kind could satisfy.

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<sup>303</sup> See *supra* notes 86–95 and accompanying text.

<sup>304</sup> See *supra* notes 249–59 and accompanying text.

<sup>305</sup> See *supra* Parts II, III.B.

<sup>306</sup> Compare Buell, *supra* note 76, at 529 (“It is easy to imagine serious harm produced by lower-level employees . . .”), with Cindy R. Alexander & Mark A. Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1, 30 (1999) (“Even where the culprits are lower-level employees, corporate crime does not appear to be a random event beyond top management’s control.”).

Even one who accepts the conceptual distinction might be suspicious of my proposal. After all, my policy interferes with the private negotiations of corporate stakeholders, effectively forcing stakeholders to adopt a new structure whose negotiations just so happen to target officers and directors—individuals who, by my own admission, may be antecedently more likely to bear personal culpability for corporate misconduct and who regardless are the frequent target of popular ire. Does the Corporate-Crime Clawback force corporations to adopt a distribution that stakeholders would not have negotiated on their own? And if so, isn't my proposal just a roundabout way of targeting officers and directors in contravention to the Persons Conception of Corporations essential to corporate-criminal liability and punishment?

In a word, no. This line of criticism gets its purchase by smuggling into my proposal the very background corporate-law conditions whose preservation are under dispute. Allowing shareholders to bear the harm attendant to a criminal fine is neither a necessary feature of corporate law nor the agreed upon outcome simpliciter. Rather, it is a default outcome *in light of background corporate-law* rules that empower management to shift the cost of a corporate-criminal fine to shareholders.<sup>307</sup> Shifting the distribution of harm to directors or officers is problematic against this status quo backdrop of corporate law because it involves the state settling matters of internal negotiation on behalf of corporate members after acting in a manner suggestive that it would instead interface with the corporation.<sup>308</sup> But this criticism would fall flat if raised in a corporate-law regime that encourages structures where fines fall to directors and officers. For such a regime, the state would not settle matters of internal negotiations on behalf of corporate stakeholders; the corporation would be punished, and the distribution of fines could come out differently. Indeed, under such a background of corporate law, directors would be the ones who experienced harm by default; directing fines to shareholders in such a world would be like impermissibly looking past the corporate person to target individuals.

Corporate law is interested, among other things, in determining the right distributions among stakeholders of benefits and burdens, of rights and responsibilities. Under the status quo, that manifests as a predictable division of powers, rights, and responsibilities, alongside a hierarchical structure establishing the relationship between these differently empowered classes, the effect of which is to produce predictable distributions of harm.<sup>309</sup> Yet precisely under discussion is whether the status quo of corporate law serves the state's broader interests with respect to the regulation of corporate activity. Under dispute is which corporate law rule produces structures whose distributions best serve the state's interest in regulating corporations through criminal law. But the critic can get traction here only be presupposing the

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<sup>307</sup> See *supra* notes 149–52 and accompanying text.

<sup>308</sup> See *supra* notes 141–45, 149–52 and accompanying text.

<sup>309</sup> See *supra* Part III.B.

current setup of corporate law. Put succinctly, criticisms that my proposal for the Corporate-Crime Clawback punishes individuals simply beg the question.

### *C. Should Corporate Law Improve Criminal Punishment?*

The specific policy at issue—pairing director liability with the Corporate-Crime Clawback bylaw—provides an opportunity to reflect generally on the intimate connections between corporate law and criminal law, and the ways in which reforms to one legal domain might improve the other. In this final Part, I want to step back from specific policy reforms to address more generally the underlying soundness of using corporate law to improve criminal punishment.

Corporate law has created an internal structure that is ill-suited for criminal fines. Criminal law's commitment to the Persons Conception of the Corporation means that the state must turn the distribution of harm over to the private negotiations of stakeholders.<sup>310</sup> However, the internal structure provided by corporate law—the very structure responsible for making corporate-criminal liability both possible and necessary—has the further effect of rendering farcical any meaningful sense of negotiation over the distribution of harm attendant to a criminal fine.<sup>311</sup> Harm is distributed reliably away from those stakeholders who exercise control over the corporation onto shareholders with virtually no bargaining leverage.<sup>312</sup>

This distributive outcome is the source of corporate-criminal fines' failure as punishment. It undermines deterrence. It reinforces the perception that fines are simply the cost of doing business. A different distribution could improve corporate-criminal fines, and that means incentivizing a different outcome from negotiations, one that pushes the harm towards those in control of the corporation in a manner that distinguishes criminal fines from the cost of doing business. Because criminal law is hamstrung on the front—its object of regulation is the corporate person, not the stakeholders behind the corporate person<sup>313</sup>—and because the outcome of negotiations is largely influenced by the internal structure that mediate negotiations, fixing corporate fines means amending corporate law to improve the distribution of criminal fines. Accordingly, on this argument, to fix criminal fines we need to reform corporate law.

Thus arises the obvious next question: *should* we reform corporate law? Or more specifically: Given the state's commitment to holding corporations criminally responsible, is fixing (or improving) the failure of corporate-criminal fines reason enough to consider reforming the underlying corporate structure enabled by corporate law?

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<sup>310</sup> See *supra* notes 149–52 and accompanying text.

<sup>311</sup> See *supra* Part IV.A.

<sup>312</sup> See *supra* Part III.D.3.

<sup>313</sup> See *supra* Part III.A.

I believe it is. There is a tendency, at least among criminal-law scholars, to treat corporate law as a fixed commodity, and the internal structure of a corporation as an unchangeable feature of the world. But this treatment belies reality. Corporate law is not an immutable fixture of the legal landscape; I have already described several examples of dramatic changes to corporate law that left the corporation unrecognizable from its previous form.<sup>314</sup> From a more global perspective, legal historians identify no fewer than three epochal shifts in the role of corporate law and the nature of the commercial corporation in the nineteenth century alone.<sup>315</sup> Major changes to corporate law pushed on through the twentieth century and continue today; features we now assume are constitutive features of a corporation were contested well into the twentieth century.<sup>316</sup> Put starkly: There is no, and has never been, a natural corporate law.

Of course, the fact that corporate law can and does change does not put the entire enterprise up for grabs. Nevertheless, there are several reasons not to shy away from using corporate law to improve the failure of corporate-criminal fines.

### 1. *Corporate Reform Solves a Problem Created by Corporate Law*

The turn to corporate-law reform is not an ad hoc attempt to solve a criminal-law problem. Quite the contrary, I am advocating that we use corporate-law reform in order to solve a problem *created by corporate law*. The current state of corporate law inescapably impacts a corporation's structure in ways that, at least as far as criminal law is concerned, are deeply problematic. The motivation, then, is to get corporate law out of the way of the state's objective to hold corporations criminally responsible. This is particularly important because, as discussed previously, the state has repeatedly chosen to use a tort/crime model of regulation over a corporate-law model of regulation.<sup>317</sup> This seems good reason to prevent corporate law from sabotaging its regulatory replacement.

One might imagine a complaint against my proposal, or against corporate-law reform more broadly, that such reforms privatize the role of criminal punishment by relying on corporate law for its implementation. That is, the state convicts and decides the appropriate punishment, but then—particularly with corporate fines—deputizes the corporation to carry out its own punishment in a manner broadly subject to the corporation's discretion.

But this point overlooks the fact that justice is *already* being outsourced—that is the central insight to be gleaned from recognizing corporate fines as

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<sup>314</sup> See *supra* notes 260–66 and accompanying text.

<sup>315</sup> E.g., HURST, *supra* note 134; Horwitz, *supra* note 263; Hovenkamp, *supra* note 134.

<sup>316</sup> See *supra* notes 264–66.

<sup>317</sup> See generally Crane, *supra* note 137 (cataloguing instances where the federal government declined to adopt a corporate law regulatory regime over a tort/crime model).

Negotiable Punishments. I am not advocating handing over penal authority to corporations; I am advocating that the state take seriously the decision it has already made to hand over this authority. If the state is going to hold corporations criminally responsible, it further has reason to insist on distributions of harm that work to the benefit both of the state and of nonculpable individuals.

## 2. *Corporate-Law Reform Is Limited to Criminal Punishment*

Any sensible reform will or should focus on affecting the distribution of criminal fines. Granted, any reform has the potential to produce spillover consequences. That said, I intend to advocate reforms that are tied to a corporate conviction; I don't advocate altering anything about the corporate structure except for how it is to respond to the distribution of harm associated with criminal punishment.

To date, corporate law has done nothing to distinguish the distribution of criminal fines from other harms.<sup>318</sup> That may have something to do with the fact that the features of the modern corporation took root just before corporate-criminal liability attained widespread recognition.<sup>319</sup> Alternatively, it may simply be an issue overlooked in part because the practice received so little attention from courts until late into the twentieth century; for example, the underlying doctrine of corporate-criminal liability has not been revised since the Supreme Court's first opinion on the topic in *New York Central*.<sup>320</sup> Nor were the roots of modern corporate law necessarily the product of incremental reform developed across state, federal, and international jurisdictions. Consider Justice Brandeis's description of the harried birth of the modern corporation—a “race . . . not of diligence but of laxity”—that produced “the Frankenstein monster which States have created by their corporation laws.”<sup>321</sup> There is nothing to preclude different structural responses to criminal consequences than other harms, nor is there any indication that the idea of such a division has been vetted.

## 3. *Corporate Law Should Not Accept Its Complicity for the Status Quo*

Finally, if the account provided here is accurate, then nonaction by the state implies its acceptance of a status quo that permits, and often encourages, corporations to treat criminality as a business plan. This means forcing prospective shareholders to gamble on a corporation's predilection for criminal behavior. And even if shareholders were willing to take such a risk, it is a further question whether the state should endorse a society that expects its

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<sup>318</sup> See *supra* Part II.B.3.

<sup>319</sup> See generally Thomas, *supra* note 20, at pt. III.

<sup>320</sup> *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909).

<sup>321</sup> *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 559, 567 (1933) (Brandeis, J., dissenting).

citizens to gamble on the prospect of criminal activity the same as they would a bad PR strategy or poor product rollout. In this respect, I agree with Mueller that the state should not “add a [criminal law] gamble to the economic gamble which already inheres in most, if not all, stock market ventures.”<sup>322</sup>

Fundamentally, this tolerance renders a mockery of what the criminal law is supposed to represent. In what sense is the state expressing our communal condemnation of egregious wrongdoing by expecting market participants to accept the commission of crime as a cost of participation? The same worry extends to corporate law. The status quo betrays the absolute minimum limitation on corporations—the only remnant of the centuries-old belief that incorporation should serve some form of public benefit—which today exists in nearly all corporation’s articles of incorporation: the corporation must confine its activities to “any *lawful* act.”<sup>323</sup> If corporate law contributes significantly to this dysfunction, it behooves us at least to explore reform.

## V. CONCLUSION

It has been over 100 years since the Supreme Court first blessed the practice of holding a corporation criminally responsible separate from its individual members.<sup>324</sup> But tradition is not reason enough to continue a practice that has proven steadfastly ineffective. If the federal government is committed to using the criminal law to hold corporations responsible, it should consider that corporate-law reforms are a promising, albeit underexplored, method for improving the current sad state of corporate punishment. More generally, corporate-criminal punishment provides a meaningful opportunity to unpack the competing influences of seemingly incompatible regulatory and conceptual frameworks regarding corporations.

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<sup>322</sup> Mueller, *supra* note 87, at 40.

<sup>323</sup> DEL. CODE ANN. tit. 8, § 102(a)(3) (2011) (emphasis added).

<sup>324</sup> See *N.Y. Cent.*, 212 U.S. at 481.

