

## Articles

# The Expressive Cost of Corporate Immunity

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*Is it possible to justify imposing criminal liability on corporations? Two basic aspects of criminal law have no application to corporations: Corporations cannot be jailed and they cannot form mental states. Moreover, there is reason to think that much of the deterrent effect generated by corporate criminal liability could be generated more efficiently by civil liability. Still, the demand for criminal prosecution of corporations remains high. This Article seeks to understand why we have corporate criminal liability, and it concludes that expressivism is necessary to justify the practice. Expressivism justifies punishment by reference to the benefits of a statement of moral condemnation. With regard to corporations, however, the power of expressivism is strongest in the absence of liability. While there may be some expressive benefit to holding corporations criminally liable, the expressive cost of excluding corporations from criminal law altogether is the real driving force in justifying corporate criminal liability: Immunity presents a materially harmful expression. This expressive cost of immunity justifies holding corporations criminally liable. Of course, just because it is possible to justify corporate criminal liability by reference to the expressive cost of immunity, it does not necessarily follow that the current practice of prosecuting corporations serves this end well. There are reasons to think it does not, but the relationship between expressivism and corporate criminal liability suggests a fruitful path toward reimagining how and when corporations ought to be subject to criminal liability. The path to reform will be the subject of a subsequent article; this Article lays the theoretical groundwork for reform.*

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## INTRODUCTION

It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.

—Justice John Paul Stevens<sup>1</sup>

After the Deepwater Horizon oil rig exploded, burned and sank in the Gulf of Mexico, Americans watched 60,000 barrels of oil spill into the gulf each day.<sup>2</sup> The spill, forty-nine miles off the coast of Louisiana, continued unabated for three months.<sup>3</sup> It hurt people,<sup>4</sup> animals,<sup>5</sup> industries,<sup>6</sup> and ecosystems.<sup>7</sup> The total costs of the spill are still not known.<sup>8</sup> The causes, however, are: “[The] blowout can be traced to a series of identifiable mistakes made by BP, Halliburton, and Transocean that reveal such systematic failures in risk management that they place in doubt the safety culture of the entire industry.”<sup>9</sup>

The BP Gulf disaster is but a single—if exceptional in scale—instance of harmful corporate conduct.<sup>10</sup> Corporations are ubiquitous in

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1. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 972 (2010) (Stevens, J., concurring in part and dissenting in part).

2. See NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING* 146 (2011).

3. See *id.* at vi, viii.

4. See *id.* at 191–95.

5. See *id.* at 181–83.

6. See *id.* at 185–91.

7. See *id.* at 174–81.

8. See *id.* at vi (“The costs from this one industrial accident are not yet fully counted, but it is already clear that the impacts on the region’s natural systems and people were enormous, and that economic losses total tens of billions of dollars.”).

9. *Id.* at vii.

10. Notably, BP had a prior felony conviction for a violation of the Clean Air Act. The charge arose from a 2005 explosion at a Texas refinery that killed fifteen people and injured at least 170 others. BP negotiated an 11(c)(1)(C) agreement pursuant to which the corporation pled guilty to a single count and agreed to pay a \$50 million fine and serve three years probation. The victims opposed the plea, arguing the penalty was insufficient. The court ruled in favor of BP and accepted the plea. See *United States v. BP Prods. N. Am., Inc.*, 610 F. Supp. 2d 655 (S.D. Tex. 2009).

our society,<sup>11</sup> and they serve valuable functions. It is all but impossible to imagine an economy as vibrant and powerful as the one we enjoy without the corporate form. Corporations are powerful legal tools that facilitate the aggregation of capital, the reduction of transaction costs, continuity of enterprise, and institutionalization of values such as teamwork. We would have a very different economy—and very different lives—without corporations. But it remains a fact that, notwithstanding the obvious benefits, corporations can and do cause harm.

When corporations cause harm, should the corporation itself be held legally responsible, and if so, how? Should corporations be held criminally liable for certain acts of their agents, or is some combination of civil liability for the corporation and criminal liability for individual wrongdoers sufficient? The present state of the law is clear. When a corporation causes harm, it may be held civilly liable.<sup>12</sup> When a corporation violates criminal laws, it may be held criminally liable.<sup>13</sup>

This was not always so. The doctrine of corporate criminal liability is a little over a century old.<sup>14</sup> Historically, corporations were immune to criminal liability.<sup>15</sup> There are two obvious reasons *not* to apply criminal law to corporations. First, criminal law is built around the concept of *mens rea*, “a guilty mind; a guilty or wrongful purpose; a criminal intent.”<sup>16</sup> By most measures, corporations lack minds, purposes, and intents,<sup>17</sup> and therefore the criminal law would seem not to apply. Second, criminal law has traditionally been distinguished by resort to

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11. In 1909, the Supreme Court wrote that the law “cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through [corporations], and particularly that interstate commerce is almost entirely in their hands . . .” *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495 (1909). The role of corporations in society and commerce has only increased in the last century.

12. *See id.* at 493 (“It is now well established that in actions for tort the corporation may be held responsible for the acts of its agent within the scope of his employment.”) (citing *Lake Shore & Mich. S. R.R. v. Prentice*, 147 U.S. 101, 109, 111 (1893)).

13. *See id.* at 495 (holding that corporations may be held criminally liable for the acts of an agent).

14. *See generally id.* *New York Central* was not the first case to hold a corporation criminally liable, *see, e.g.*, *United States v. Van Schaick*, 134 F. 592 (1904) (holding a corporation criminally liable after a steamship accident), but it is the case most commonly associated with the doctrine of corporate criminal liability.

15. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES 464 (“A corporation cannot commit treason, or felony, or other crime, in it[]s corporate capacity; though it[]s other members may, in their distinct individual capacities.”).

16. *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 489 (E.D.N.Y. 1993) (quoting BLACK’S LAW DICTIONARY 1137 (4th ed. 1968)).

17. The language we use to describe corporate conduct is explored below. *See infra* Part II.A. There may be value to describing a corporation’s purpose, or even intent. However, this is a linguistic shortcut to describe a more complex state of affairs. *See infra* note 103 and accompanying text. Fundamentally, we mean something different when we talk about the intent, purpose, or knowledge of a corporation than when we talk about that of a natural person.

corporal punishment and deprivation of liberty. Since corporations cannot be beaten or jailed, this distinctive function of criminal law is unnecessary.<sup>18</sup> For both reasons, it is not obvious that criminal law should apply to corporations—and for a long time corporations were immune to criminal prosecution—but for the last hundred years this has not been the case.<sup>19</sup>

Clarity of the law aside, there is little agreement about whether the law is correct. The practice of holding corporations criminally liable is variously treated as a sort of judicial mistake that never got cleaned up,<sup>20</sup> as the senseless and puerile reaction of an ignorant public,<sup>21</sup> or as an inefficient relic best replaced by a civil scheme.<sup>22</sup> Yet the practice persists.

This Article maintains that criminal liability for corporations<sup>23</sup> exists for good reason. The practice can benefit society and the legal system. Whether criminal liability does so depends on how it is imposed. The present practice of criminal regulation of corporations is in some disarray.<sup>24</sup> Many have called for significant changes to the practice of

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18. See BLACKSTONE, *supra* note 15, at 464 (“Neither is [a corporation] capable of suffering a traitor’s or felon’s punishment, for it is not liable to corporal penalties . . .”).

19. See *N.Y. Cent.*, 212 U.S. at 499 (holding a corporation criminally liable for the act of its agent).

20. See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1114 (1991) [hereinafter Bucy, *Corporate Ethos*] (“The Court’s reasoning in *New York Central* contains three major flaws that other courts have exacerbated over time.”); Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L.Q. 329, 339–40 (1993) (“Not only is *New York Central* the premier decision establishing criminal liability for corporations in American law, but its flawed and outdated reasoning exemplifies subsequent courts’ analysis of corporate criminal liability.” (citation omitted)); see also Gerhard Muller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 21 (1957) (comparing the doctrine of corporate criminal liability to a weed: “Nobody bred it, nobody cultivated it, nobody planted it. It just grew.”).

21. See, e.g., Al Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1373 (2009) (comparing imposing criminal liability on a corporation to smashing a computer in frustration: “therapeutic, but it is not recommended for children or for grownups”).

22. See, e.g., Vikramaditya Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996).

23. Throughout this Article I generally use the term “corporation,” rather than the broader terms organization, group, and entity. The arguments for the most part apply to the broader category; thus, I would conclude that not only can there be a valid purpose for holding corporations criminally liable, so too there can there be a valid purpose to holding labor unions, churches, and charitable organizations criminally liable, regardless of the precise corporate form. I concentrate on corporations for two reasons: First, I am primarily interested in how our criminal justice system handles violation of laws by corporations; second, much of the literature also refers to corporations. I hope using the same language improves readability.

24. Criticism of the way corporations are currently prosecuted is widespread. Groups as diverse as the Chamber of Commerce and the National Association of Criminal Defense Lawyers have joined voices in criticism. See Brief for the Ass’n of Corporate Counsel et al. as Amici Curiae in Support of Appellant Urging Reversal, *United States v. Ionia*, 555 F.3d 303 (2008) (No. 07-5081) (urging the Second Circuit to limit the principle of respondeat superior in determining corporate criminal liability). This Article examines the proper purpose of corporate criminal liability. A better practice of corporate criminal liability—reexamined in light of the purpose developed herein—is the subject of Gregory M. Gilchrist, *Condemnation Without Basis: An Expressive Failure of Corporate Prosecutions*,

imposing criminal liability on corporations.<sup>25</sup> These calls are compelling but arguably premature: There is too little consensus regarding the justification for imposing criminal liability on corporations. Before we can fix this aspect of our legal system, we ought to understand its purpose. We must agree on whether and why corporations ought to be held criminally liable. This Article clarifies the rationale for corporate criminal liability.

Criminal liability for corporations exists in large part to deter undesirable corporate conduct and to encourage desirable corporate practices, but carrots and sticks are not sufficient justification for the imposition of criminal liability on corporations. In theory, civil liability for corporations could distribute carrots and sticks as effectively and more efficiently.

Deterrence, however, is not the only function of criminal liability. Were corporations accountable only civilly, they would be immune from criminal prosecution. That immunity has a cost, not in lost deterrent effect, but rather in expressive effect. Criminal liability carries “a formal and solemn pronouncement of the moral condemnation of the community.”<sup>26</sup> For this reason, we do not think of criminal penalties as mere prices one may elect to pay in exchange for violating the law. We would not describe a murder statute as establishing a rule that you may intentionally and unlawfully cause the death of another person *if* you are willing to be incarcerated for a span of years. The murderer is both incarcerated and condemned. Substantive criminal law does more than correlate conduct with consequences: It sets forth prohibitions. Violation of the criminal law is accompanied by opprobrium, and while the degree of condemnation varies between substantive criminal laws, the fact of condemnation is a fairly consistent aspect of criminal liability. Expressivists contend that this expression has a value—apart from any deterrent effect—that can help justify the imposition of punishment.<sup>27</sup>

This Article argues that only deterrence *and* expressivism together can justify imposing criminal liability on corporations. Others have suggested that corporate criminal liability has an expressive value,<sup>28</sup> but

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64 HASTINGS L.J. (forthcoming 2013).

25. See, e.g., ANDREW WEISSMAN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT II (2010) (urging implementation of a compliance defense to the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd–781); Ellen S. Podgor, *A New Corporate World Mandates a “Good Faith” Affirmative Defense*, 44 AM. CRIM. L. REV. 1537 (2007); Peter Spivack & Sujit Raman, *Regulating the New Regulators: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008).

26. Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

27. See generally JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 98 (1970).

28. See, e.g., Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 622 (1998) (“Deterring inefficient conduct is one socially desired objective, but repudiating

this Article reaches two novel conclusions. First, the most significant expressive value associated with corporate criminal liability is the expressive cost of immunizing corporations. People blame corporations for harmful conduct, and there is a significant symbolic or expressive cost to never subjecting corporations to criminal liability. Immunizing corporations from prosecution would present its own symbolism: Namely, corporations may violate criminal laws if they are willing to pay for it. Corporate crime would thus be little more than a menu of harms and prices. This result is contrary to strongly held societal norms (that is, for the most part, people do not believe corporations should be able to commit crimes so long as they are willing to pay for it) and a legal system that adopted this perspective would do so at a cost to its own legitimacy. The costs and benefits of legal rules to legitimacy can be illustrated through a corollary to H.L.A. Hart's internal aspect of rules,<sup>29</sup> or through Tom Tyler's thesis on procedural fairness.<sup>30</sup> This Article considers both approaches and concludes that in either assessment, immunity for corporations comes at a significant cost in terms of the legitimacy of the legal system.

This Article's second conclusion is that expressivism is particularly justified toward corporations in a way it could not be toward natural persons. Expressivism is generally a thin reed against which to balance the imposition of criminal liability. Punishment is the intentional infliction of harm on another, and to justify such a serious violation of individual liberty one ought to have a better justification than the vaguely defined benefits of an ephemeral expression. But this balance can be justified for corporations in a way that is not applicable to natural persons, based on the differences between the capacities of natural persons and those of corporations.

Calls for the reform of corporate prosecutions are right.<sup>31</sup> The system of holding corporations accountable for wrongdoing is not functioning well and could function better. Recognizing the relationship between expressivism and corporate criminal liability will be useful in identifying what reforms are really needed. A forthcoming paper will propose reform in light of the expressive function of corporate criminal liability.<sup>32</sup>

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the false valuations embodied in corporate wrongdoing is another."); *see also* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 *IND. L.J.* 473 (2006); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 *HARV. J.L. & PUB. POL'Y* 833 (2000).

29. *See* H.L.A. HART, *THE CONCEPT OF LAW* 56-57 (2d ed. 1994).

30. *See* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

31. *See supra* note 25 and accompanying text.

32. *See* Gregory M. Gilchrist, *Condemnation Without Basis: An Expressive Failure of Corporate Prosecutions*, 64 *HASTINGS L.J.* (forthcoming 2013).

Part I of this Article begins by exploring the fact and function of corporate culture. Different corporations exhibit different cultures, and these cultures exercise influence over individual corporate agents. Good corporate cultures can prevent some wrongdoing, and bad corporate cultures can encourage or at least fail to discourage some wrongdoing. Our willingness to judge corporations and the reasonableness of our judgments is closely tied to the existence of corporate cultures.

Part II considers three critical objections to imposing criminal liability on corporations. Part II.A considers the first objection, which is ontologically reductionist: A corporation is no more than the sum of its parts, and any description of “corporate action” is better described solely by reference to individuals. There is not significant support for this view in legal circles, and it does not pose a significant challenge to criminal liability for corporations; however, it is worth brief consideration because doing so illustrates the significance of corporate culture.

Part II.B considers a second objection rising from the natural law tradition. Michael S. Moore suggests that the concept of responsibility is simply too human to be applied to corporations.<sup>33</sup> This Subpart explores the relevance of personhood and capacity in assessing moral blame. Relying on positivist legal theory, it concludes that personhood is not really the issue, capacity is. Certain capacities are necessary for the assessment of moral blame, and corporations lack these capacities. Lacking capacities necessary for moral blame, corporations are not properly subject to retribution.

Since corporate criminal liability cannot be justified retributively, it must be justified—if at all—consequentially. The consequentialist justification for criminal liability is most prominently associated with deterrence. Part II.C considers the third objection to corporate criminal liability: Vikramaditya Khanna argues that the deterrent benefits of criminal liability for corporations could be secured more efficiently through civil liability.<sup>34</sup> This account is a significant challenge to the practice of imposing criminal liability on corporations because if criminal liability for corporations accomplishes nothing more than civil liability could—and it does it at greater cost—it cannot be justified on purely consequentialist grounds. While this efficiency challenge is compelling, it is ultimately unsatisfying for its failure to pay sufficient attention to the stigma of a criminal conviction and the value of expression in the legal system.

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33. See MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 618 (1997) (speculating on the possible need to add the requirement of “embodiment in a human body” to the attributes of “persons” necessary for moral agency).

34. See generally Khanna, *supra* note 22.

Part III turns to stigma and expressivism as a justification for imposing criminal liability on corporations. Part III.A identifies the expression of condemnation as the feature that most clearly distinguishes criminal from civil liability, and it grounds this expression as a corollary to Hart's internal aspect of rules. Part III.B illustrates why the expressive aspect of criminal liability, although real, ought not to be valued for its own sake. Part III.C identifies the consequential benefit of the expressive aspect of corporate criminal liability as well as the consequential cost of the expressive aspect of corporate criminal immunity. This Part turns again to Hart's internal aspect of rules, as well as Tyler's procedural fairness, to illustrate that the most powerful—and negative—expression regarding corporate criminal liability would be eliminating criminal liability altogether. Finally, Part III.D acknowledges reasons to be skeptical about expressive justifications for punishment while arguing that these reasons apply less to corporations than to natural persons.

This Article concludes by suggesting that the practice of corporate prosecutions must be reexamined in light of the expressive aspect of corporate criminal liability.

#### I. CORPORATE CULTURES AND CORPORATE RESPONSIBILITY

Why do people blame corporations? A corporation is an inanimate legal fiction.<sup>35</sup> Blaming an inanimate legal fiction might appear senseless or silly. It need be neither. Where the corporation *itself* created an atmosphere conducive to the harmful or wrongful conduct, we can meaningfully blame the corporation.<sup>36</sup>

Corporations have cultures, and corporate cultures influence the conduct of corporate agents. Distinctions between these very real aspects of corporations can give rise to judgments about the relative value of different corporations. In extreme cases, such judgments can ground legitimate condemnation or praise.

Corporations only act through the individual actions of natural persons; however, those natural persons act within—and sometimes on account of—a corporate culture. The culture or ethos of a corporation varies between corporations.<sup>37</sup> There is significant empirical support for

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35. Justice Marshall described a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence.” *Dartmouth College v. Woodward*, 5 U.S. 518, 636 (1819).

36. The virtue and psychology of blaming are beyond the scope of this Article. For a fascinating treatment of both, see MOORE, *supra* note 33, at 138–52. For purposes of this Article, it is sufficient that there is a way in which blaming a corporation is more meaningful than blaming a banana peel on which you slip. This Part (along with sections of the following Parts) describes why it can make more sense to blame a corporation than a banana peel.

37. Bucy, *Corporate Ethos*, *supra* note 20, at 1123–24 (“Much of the voluminous business

the proposition that “management’s commitment to corporate ethics, organizational culture, and institutional incentive structure . . . have been determined to significantly influence the level of organizational misconduct.”<sup>38</sup> Institutions influence people.<sup>39</sup> This influence can be positive and it can be negative.

Where the cultural influence of a corporation is positive—as it frequently is—individuals affiliated with an organization can accomplish more good collectively than they could individually. Ian Lee captures positive aspects of corporate culture by considering corporations as teams.<sup>40</sup> A team is distinguished by two factors: “group identification and the consequent adoption of collectively rational principles by the members of the team.”<sup>41</sup> Individuals who act on behalf of an organization do not do so purely in accord with their own preferences.<sup>42</sup> If they did, they could be expected only to put forth the minimum effort to receive compensation or avoid penalties, and this is not a model for corporate success.<sup>43</sup> Rather, “[s]uccessful production requires . . . that the participants . . . identify as the members of a team and that they regard doing their part towards the collective goals of the team as a principle of action.”<sup>44</sup> By identifying corporate actors as team members, Lee suggests a justification for penalizing the corporation as a whole for the failure of individual team members.<sup>45</sup>

Where the cultural influence of a corporation is negative, individuals may participate in wrongful or harmful actions in which they would not participate absent the collective.<sup>46</sup> Psychological and

literature on corporate culture is premised on the notion that organizations have distinctive cultures.”); *id.* at 1128 (envisioning a system of corporate criminal liability predicated on “proof of a corporate ethos that encourages criminal conduct”).

38. See Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 493 n.16 (2003).

39. See Buell, *supra* note 28, at 491 (“Institutions influence people in ways that sometimes make it rational to blame institutions for what people do.”).

40. Ian B. Lee, *Corporate Criminal Responsibility as Team Member Responsibility*, 31 OXFORD J. LEGAL STUD. 755, 772 (2011) (“Collectivities are not quasi-persons, but *teams*.”).

41. *Id.*

42. *Id.* at 768 (“Teamwork, I would suggest, is a context in which individual behaviour is not driven solely by utility maximization.”).

43. *Id.* at 769 (“[O]ne normally wants team members to devote more than the bare minimum of effort that will prevent their incurring contractual penalties or dismissal from the team.”).

44. *Id.*

45. *Id.* at 779 (“[P]unishment should take the form of a setback to the team’s goals rather than the infliction of direct harm upon the members.”).

46. Cognitive biases “result in behavior that systematically departs from that predicted by the traditional rational choice model.” Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 27 (2002). In a group setting these systematic biases can result in high numbers of deviations from the rational choice model. *Id.* at 27–30 (describing herding and overconfidence as two examples). Moreover, group decisionmaking has been shown to be subject to its own biases. See IRVING L. JANIS, VICTIMS OF GROUPTHINK 9 (1972) (“[G]rouphink’ . . . [is] a mode

sociological studies support the claim that institutions allow individuals to commit wrongs they otherwise would not commit.<sup>47</sup> Reasons for this include: a diffusion of responsibility,<sup>48</sup> a contagion effect whereby the concordant acts of others insulate one's own acts from critical reflection;<sup>49</sup> and a rationalization to avoid signaling concern to others.<sup>50</sup>

This really is the key point: Corporations employ natural persons, and those natural persons act in various ways to serve the goals of the corporation. The corporation in turn creates various incentives to motivate these natural persons to act in certain ways through these incentives and through some uniformity of communication, establishes a culture,<sup>51</sup> and that culture can cause the natural persons employed by the corporation to act in ways they would not act were they not in a group setting—were they not in that culture.<sup>52</sup>

Massey Energy provides a stark example of company culture directly contributing to the death of twenty-nine men. On April 5, 2010, “a powerful explosion tore through the Upper Big Branch mine, owned by Massey Energy.”<sup>53</sup> The explosion killed twenty-nine miners and left one seriously injured.<sup>54</sup> A spark from a mining tool ignited a pocket of methane, and the methane ignited coal dust.<sup>55</sup> The resultant explosion traveled through more than two miles of mine.<sup>56</sup> An independent commission conducted extensive analysis and investigation before concluding that the explosion was caused by extensive safety violations and was “a completely predictable result for a company that ignored

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of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action.”). People behave differently in groups.

47. Buell, *supra* note 28, at 493–97.

48. *Id.* John Darley points to the diffusion of information and the diffusion and fragmentation of responsibility as aspects of organizations that cause ordinary people to participate in harmful actions. See John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in *CODES OF CONDUCT* 16 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

49. Buell, *supra* note 28.

50. *Id.*

51. See Bucy, *Corporate Ethos*, *supra* note 20, at 1123 (“Today, the term [ethos] refers to the characteristic spirit or prevalent tone of sentiment of a community, institution or system.”).

52. Eli Lederman observes that, if this is the basis of holding corporations liable, then “it is not necessarily claimed that the accused is the perpetrator of the illegal act or omission but, rather, that it is the entity that is responsible for creating the conditions and the environment that engendered the offense, and hence its liability.” Eli Lederman, *Models for Imposing Corporate Criminal Liability: from Adaptation and Imitation to Aggregation and the Search for Self-Identity*, 4 *BUFF. CRIM. L. REV.* 641, 707 (2000). I agree with Lederman in this; in most cases where people blame a corporation, they are not suggesting the corporation “committed” the crime directly; a natural person did that. They are suggesting that the corporation somehow influenced the natural person or persons to act.

53. See GOVERNOR'S INDEP. INVESTIGATION PANEL, *UPPER BIG BRANCH 4* (2011) [hereinafter *UPPER BIG BRANCH REPORT*].

54. *Id.*

55. *Id.* at 16.

56. *Id.*

basic safety standards and put too much faith in its own mythology.”<sup>57</sup> The safety lapses were so extensive that the commission concludes they could “only be explained in the context of a culture in which wrongdoing became acceptable, where deviation became the norm.”<sup>58</sup> Relying on Diane Vaughan’s study of the Challenger disaster,<sup>59</sup> the commission described the “[n]ormalization of deviance” as “a gradual process through which unacceptable practices or standards become acceptable.”<sup>60</sup> “As the deviant behavior is repeated without catastrophic results, it becomes the social norm for the organization.”<sup>61</sup> Methane gas, coal dust, and a spark caused the explosion, but the culture of Massey Energy caused the presence of methane gas, coal dust, and a spark.

It makes sense, therefore, that we judge different companies differently. A company’s culture is its character, and that character influences its actions, good and bad.<sup>62</sup> By way of example, consider two hypothetical corporations: Corporation Alpha has a strong culture of compliance with U.S. law; Corporation Beta does not.

Corporation Alpha’s culture is reflected in part through extensive efforts to educate executives, managers, and sales personnel about the requirements of the Foreign Corrupt Practices Act (“FCPA”).<sup>63</sup> Alpha requires personnel to attend training not only as to the requirements and restrictions imposed by the FCPA, but also addressing the reasons for restricting payments to foreign government officials. Using materials from Transparency International<sup>64</sup> and the Organization for Economic Co-operation and Development,<sup>65</sup> Corporation Alpha educates its employees about the impact of corruption on both foreign populations and the rule of law. By demonstrating that even small bribes can generate a culture of corruption in a nation, Corporation Alpha argues

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57. *Id.* at 108.

58. *Id.* at 101.

59. DIANE VAUGHAN, *THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA* (1996).

60. See UPPER BIG BRANCH REPORT, *supra* note 52, at 97.

61. *Id.*

62. Bucy sees functional similarities between corporate culture in criminal prosecutions of corporations and intent in criminal prosecution of natural persons. See Bucy, *Corporate Ethos*, *supra* note 20, at 1114 (“In the context of a fictional entity, [corporate ethos] translates into intention.”). While there may be functional similarities in Bucy’s proposal, ethos in the corporate context is more akin to a natural person’s character than it is to her intention. A corporation’s culture or ethos is not act-specific, unlike a natural person’s intent. Rather, and more like a natural person’s character, the corporate culture exercises some non-specific, but nonetheless real, influence over specific decisions.

63. See 15 U.S.C. §§ 78dd–78i (1998).

64. See, e.g., CORRUPTION PERCEPTIONS INDEX 2011, TRANSPARENCY INTERNATIONAL (2011), <http://cpi.transparency.org/cpi2011/results/#CountryResults>.

65. See generally OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, S. Treaty Doc. 105-43 (1998); see also OECD PUBL’G, *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2011).

that the people of the nation are hurt (to the extent they are deprived of the legitimate distribution of government services), and eventually the nation itself is hurt. A corrupt nation is not the sort of place Corporation Alpha can effectively do business. Bribes beget bribes, and the rule of law falters. Corporation Alpha might, in a single instance, be able to benefit from a bribe, but over the long-term bribes undermine the very viability of its place of business.<sup>66</sup> Corporation Alpha makes more money in Germany<sup>67</sup> than Somalia.<sup>68</sup> Corruption is not the sole reason for this, but it is a factor. Corporation Alpha is committed to compliance with the FCPA.

Corporation Beta has no comparable program. To the contrary, Corporation Beta has a history of compensating country managers based solely on sales volume. There is no distinction or allowance made for the different cultures and regulatory systems of different nations in which it does business. An employee who is assigned to manage business in a highly corrupt country is given no guidance other than that which all other employees receive: Sell and get paid.<sup>69</sup> The failure to even acknowledge or address the variable conditions between different countries creates a culture in which personnel who wish to succeed are rewarded for mirroring the culture in which they operate. If this means paying bribes, they will pay bribes.

The problem is that a violation of the FCPA can happen at Corporation Alpha just as it can happen at Corporation Beta.<sup>70</sup>

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66. Businesses have been promoting such broad training for some time, and with some success. A 2007 survey of senior corporate executives conducted by the Economist Intelligence Unit found over 65% of respondents “believe a level playing field is crucial to their company’s future business activities.” See PRICEWATERHOUSECOOPERS, CONFRONTING CORRUPTION: THE BUSINESS CASE FOR AN EFFECTIVE ANTI-CORRUPTION PROGRAMME 2, 36 (2008).

67. Ranked 14th out of 182 countries listed on Transparency International’s 2011 Corruption Perception Index. See CORRUPTION PERCEPTIONS INDEX 2011, *supra* note 64.

68. Ranked 182nd (tied) of 182 countries listed on Transparency International’s 2011 Corruption Perception Index. *Id.*

69. These concrete distinctions between Alpha and Beta in the isolated context of foreign corruption are components of what, at some higher level of abstraction, would be considered corporate culture. See *supra* text accompanying notes 37–38. For a fascinating summary of literature examining distinctions in corporate cultures, see Bucy, *Corporate Ethos*, *supra* note 20, at 1123–27.

70. This does happen. Compliance programs are helpful, but they are not guarantees against wrongdoing. In 2011, Johnson & Johnson (“J&J”) entered a Deferred Prosecution Agreement with the Department of Justice (“DOJ”) resolving an investigation of payments in violation of the FCPA. See Deferred Prosecution Agreement, U.S. Dep’t of Justice and Johnson & Johnson (Apr. 8, 2011). In resolving the matter, the DOJ stipulated that: “J&J had a pre-existing compliance and ethics program that was effective and the majority of problematic operations globally resulted from insufficient implementation of the J&J compliance and ethics program in acquired companies.” *Id.* ¶ 4.k.v. Note that, although some of the violations for which J&J was held accountable (through the Deferred Prosecution Agreement) resulted from insufficient implementation of its compliance and ethics program in newly acquired companies, others did not. For those other violations, J&J had what the DOJ determined to be “a pre-existing compliance and ethics program that was effective.” *Id.* An

Corporation Alpha's culture and program should be helpful to discourage and to avoid violations, but they cannot guarantee that no employee ever will decide to pay a bribe for the benefit of the corporation. Now assume this occurs: An employee at Corporation Alpha pays a bribe. An employee at Corporation Beta pays an identical bribe in identical circumstances. Under the above hypothetical, Corporation Alpha is in some sense less culpable than Corporation Beta for the criminal conduct of its employee.<sup>71</sup>

So we can make judgments between corporate cultures. Whether these judgments are appropriately categorized as moral or merely preferential is not particularly important.<sup>72</sup> And it should be noted that, even if these judgments are merely preferences as opposed to moral truths, that does not mean they are somehow weak or fickle.<sup>73</sup> The important fact is that we favor Corporation Alpha's conduct and disfavor Corporation Beta's conduct.<sup>74</sup>

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effective program merely reduces non-compliance.

71. Notably, it is even possible that Corporation Alpha would be less culpable than Corporation Beta in a scenario where a Corporation Alpha employee paid a bribe and no Corporation Beta employee paid one. Since the culpability of a corporation stems from how we value the corporation's influence over its agents, an argument could be made for a less result-driven imposition of punishment. I do not favor result-independent punishment for corporations, because *ex ante* prescriptions are less likely to minimize corporate wrongdoing than criminal liability predicated on the principle of *respondet superior*. I touch on this idea further below, *see infra* note 174, but complete exploration of this idea is beyond the scope of this Article.

72. Or, at least for purposes of this Article, the distinction is not important. The distinction between morality and preference is well beyond the scope of this Article. This Article considers the purpose of punishing corporations criminally and concludes, in part, that there is an instrumental reason to do so. Whether we judge certain corporate conduct morally superior or merely preferred, the instrumental function of criminal liability for corporations is to increase favored (morally or otherwise) conduct and decrease disfavored conduct. To maintain that the condemnation of a corporation for harm it caused is moral as opposed to merely a question of preference, then one would need to respond to Moore's concerns about capacity, which seem to me compelling. *See infra* text accompanying notes 96–108. Philip Pettit has proposed a model to do so, identifying rational autonomy in group entities. *See* Philip Pettit, *Responsibility Incorporated*, 117 *ETHICS* 171, 178–79 (2007) (arguing that group entities are capable of forming “a robust pattern of attitudinal and behavioral rationality”).

73. *See* Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in *NATURAL LAW THEORY* 169 (Robert P. George ed., 1992) (“[M]any deep emotions . . . are strong, steady, and remarkably resistant to both deliberate change and the vicissitudes of circumstance. Think, for example, of parental love and concern.”).

74. So too, sharks that attack people are (generally) disfavored; sharks that do not attack people are favored. Apple trees that produce fewer apples (all else being equal) are disfavored; those that produce more apples are favored. If laws could influence sharks or trees (even indirectly, say, by influencing fishermen or farmers), then a law might aim to encourage that which is favored. Such application of law to influence things other than natural persons is entirely uncontroversial. The controversy surrounding criminal liability for corporations stems from the application of what is often viewed as a uniquely moral area of law (criminal law) to an inanimate entity. The remainder of this Article tackles this problem.

## II. THREE CHALLENGES TO HOLDING CORPORATIONS CRIMINALLY LIABLE

In this Part, I consider three challenges to the imposition of criminal liability on corporations. Each challenge is eventually rejected; however, each challenge also illustrates an aspect of corporations necessary to the expressive justification for corporate criminal liability.

The first challenge is reductionist: Corporations are no more than the sum of their parts; corporate action is best described by reference solely to individual actions; liability ought to attach only to individual actions.<sup>75</sup> The second challenge concerns personhood and capacity: Corporations lack certain capacities that natural persons have; these capacities are necessary for moral desert; corporations cannot be subject to moral blame.<sup>76</sup> The third challenge recognizes the value of punishing corporations, but questions whether criminal law is the appropriate instrument for that purpose; it suggests civil law will generally be a more efficient legal instrument for deterrence purposes.<sup>77</sup>

### A. CONTRARY TO THE INDIVIDUALIST ACCOUNT, CORPORATIONS DO ACT

The most fundamental objection to imposing criminal liability on corporations is that the very idea makes no sense: It is absurd to speak of assigning *any* form of responsibility to a corporation.<sup>78</sup> “Individualists” maintain that, because a corporation is a legal fiction referring to a collection of persons and agreements, the actions of a corporation only can be described by exclusive reference to individual actions.<sup>79</sup> Accordingly, the individualist is skeptical about the possibility of assigning responsibility to a corporation.<sup>80</sup>

Indeed, according to the individualist, something may be lost in terms of accuracy: Blaming an entire corporate entity for the acts of a few individuals is less accurate than blaming only those few individuals.

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75. See *infra* Part II.A.

76. See *infra* Part II.B.

77. See *infra* Part II.C.

78. See, e.g., Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982) (“Since it is a legal fiction, a corporation is incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations.”).

79. Professors Fisse and Braithwaite point to Hayak as an example of a relatively extreme ontological individualist. Hayak wrote: “There is no other way toward an understanding of social phenomena but through our understanding of individual actions directed toward other people and guided by their expected behavior.” BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 19 (1993) (quoting F.A. HAYAK, INDIVIDUALISM AND ECONOMIC ORDER 6 (1949)).

80. *Id.* at 24 (“Corporations are often regarded as blameworthy, but according to the logic of methodological individualism, such blameworthiness reduces to blameworthiness on the part of individual representative or to causal responsibility (as opposed to moral responsibility) on the part of the corporation.”). This view thus denies there is any responsibility for the corporation apart from the responsibility assigned to individual corporate actors.

Innocent persons associated with the corporation are wrongfully harmed,<sup>81</sup> and, to the extent the blame is diluted amongst wrongdoers and innocents alike, the wrongdoers escape some portion of their just deserts.

There are two reasons that corporate conduct is not better and more accurately described by reference to the individuals through whom the entity acts. First, the proposed description is too complex to be useful, and the proposed description is subject to challenge with regard to the degree and types of detail it must include. Second, the proposed description fails to account for the fact that corporations *qua* corporations do have cultures,<sup>82</sup> and these cultures—which cannot be described solely by reference to individual acts—do influence individuals within the corporation.

### *I. The Individualist Account Is Unmanageable*

The individualist is correct that there is no single referent in the physical world that corresponds with “corporation,” but that does not mean the term is indeterminate or empty. Consider the example of a decision made by the White House:

“[T]he White House decided” is a simplification given that many actors typically have a say in such decisions. Nevertheless, it is probably less of a simplification than the statement “the President has decided.” Indeed, it may be fanciful to individualise a collective product. The President may never have turned his mind to the decision; he may have done no more than waive his power to veto it; or he may have delegated the decision totally.<sup>83</sup>

The general statement that “the White House decided” may actually be more accurate than the specific claim that “the President decided.” But this does not quite respond to the individualist claim. The individualist would suggest there is a more accurate way to describe the decision depending on the actual events that led to the “decision.” For example:

1. The President appointed his Chief of Staff.
2. The Chief of Staff delegated responsibility for issue *X* to Staffer *A*.

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81. The most obvious example of harm caused to innocent people through corporate prosecution is that caused to the shareholders. At least for publicly held firms, most shareholders exercise no meaningful control over the corporation and thus are, by most measures, innocent of wrongdoing. Nonetheless, shareholders suffer harm from criminal prosecution in the form of loss in investment value. See 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, 401 (1981) (describing the “overspill of the penalty initially imposed on the corporation” as harming innocent stockholders, bondholders, creditors, employees, and consumers).

82. See *supra* Part I.

83. FISSE & BRAITHWAITE, *supra* note 79, at 23.

3. Staffer *A* consulted with Congresspersons *L* through *P* about issue *X*.
4. Informed by her discussions with Congresspersons *L* through *P*, Staffer *A* consulted with the Chief of Staff.
5. The Chief of Staff convened a meeting between himself, Staffer *A*, and the President.
6. The President was unable to attend the meeting because of an unrelated event.
7. The decision had to be made the afternoon of the meeting. The President remained unavailable.
8. The Chief of Staff discussed the issue with Staffer *A*.
9. The Chief of Staff instructed Staffer *A* to draft a press release announcing the decision on issue *X*.
10. The Press Secretary reviewed and edited the press release, which was in turn issued to the public.

But this description is both lengthy and incomplete. Should we also include 3(a): Congressperson *L* consulted with her Staffer *B*? Or 3(b): Three months earlier, Staffer *B* met with Lobbyist *Q*? The list could go on ad infinitum.

So, a practical problem with the individualist account is clear: In its effort to achieve accuracy, it adopts unwieldy language. Language is a tool; if we make it too complex it does not work. Relatedly, the language proposed by the individualist is entirely contrary to the way people talk about entities. The fact is, we routinely speak of actions by entities and corporations.<sup>84</sup> The individualist theory is so at odds with how we talk about corporations that it generates at the very least some suspicion as to its validity and utility.<sup>85</sup>

The more significant problem for the individualist is that the proposed language is bound to be misleading even were we able to communicate effectively in such detail. It would be misleading because

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84. Consider two entirely unremarkable examples from a single newspaper article: “Health and Human Services Secretary [Kathleen Sebelius] publicly overruled the Food and Drug Administration, refusing Wednesday to allow emergency contraceptives to be sold over the counter, including to young teenagers. . . . Teva Pharmaceuticals, [the pill’s maker], had applied to make Plan B easily accessible to everyone.” Gardiner Harris, *Plan to Widen Availability of Morning-After Pill Is Rejected*, N.Y. TIMES, Dec. 7, 2011, at A1. According to the article, a natural person in a position of authority overruled a prior “decision” by an administrative agency. Similarly, the article describes a corporation as “mak[ing]” a type of pill and also as having “applied” for permission to market the pill in a particular manner. None of this is noteworthy. Indeed, the noteworthy article would be that which tried to explain these events without reference to corporation or entity-level actions.

85. A related response to the individuals account is made by Sara Beale: “[C]orporations are not fictions. Rather, they are enormously powerful, and very real, actors whose conduct often causes very significant harm both to individuals and to society as a whole.” Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1482, 1482 (2009). Beale expands the practical point by noting that “the power now wielded by corporations is both enormous and unprecedented in human history.” *Id.* at 1483. While this response would not satisfy the individualist, it does highlight how unhelpful the individualist account can be.

there is not likely to be agreement as to what facts are necessary to the description. One might reasonably argue that any description beyond the specific actions amongst White House personnel is unnecessary, but even then accurate descriptions could become unwieldy and subject to disagreement. If four staffers were involved in a decision, each might have a different understanding and belief about his or her own role in the decision. In that case, accuracy might be bolstered by simply describing each act and statement made by each person within the White House related to the decision, but this description would introduce yet another layer of complexity and detail. It, too, would be subject to reasonable disagreement as to what acts and statements qualify as “related to the decision.”

Shifting the example to the corporate context, consider an oil spill following the burning and sinking of an off-shore drilling platform. The platform ignited following an explosion caused by a leak of methane gas. The platform designers recognized the risk of such a leak and addressed it with a special seal known in the industry as a blowout preventer. In this case, the blowout preventer failed to function properly. The blowout preventer failed because it had been installed incorrectly. Assume that a single corporation built, assembled, owned, and operated the drilling platform. An individualist might argue the corporation did none of those things (except maybe owning). Rather, three employees of the corporation actually installed the blowout preventer. Is it more accurate to say that those three employees are responsible for the oil spill than to claim the corporation is responsible for the oil spill? No: The former is more precise but potentially less complete and thus potentially less accurate than the latter. Those three employees may not have been well trained. Perhaps a particular Human Resources employee failed to coordinate their training when they started. Then again, maybe Human Resources customarily took a lax approach to training. Maybe the employees were not supplied with proper tools for the task. Their supervisor may share the blame for failing to identify, procure, and supply the proper tools. Then again, maybe that supervisor failed to do so because her supervisor mandated that she make across-the-board spending cuts, and those tools were among the cuts. One could carry the example on indefinitely.

The point is, there may be an individualist-reductionist way to describe what occurred, but it is likely to be complex, convoluted, and incomplete.<sup>86</sup>

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86. This is but a specific instance of the problem of logical atomism. John Wisdom described the problem this way:

[T]his request for a definition of what it is for individuals to be nationally related as opposed to non-nationally related, comes from another great class of unsatisfiable requests for

2. *The Individualist Account Is Less Accurate for Failing to Account for Culture*

The individualist account fails to account for the fact that corporations *qua* corporations influence individual behavior. It fails to account for the fact of corporate culture. As described in Part I, corporations have cultures, and corporate cultures affect how corporate agents behave. The inability of the individualist to account for corporate culture undermines its accuracy and utility. The corporate individualist can't see the forest for the trees.

The individualist might object that nothing is described by reference to culture (or the influence of the collective on the individual or teams) that cannot also be described by reference to individual actions. Indeed, it is conceivable that this is correct, but the objections to describing a single corporate act solely by reference to individuals<sup>87</sup> become even more pronounced if we describe a corporate culture in this manner. To properly describe a corporate culture at the individual level, one might need to reference decades of actions by tens of thousands of people. Even if this were possible, it would be more impractical, less useful, and more potentially misleading than the individualist effort to describe a single corporate act. As such, it would be less useful and more misleading than descriptions of a corporate culture or ethos generally.

These responses to the individualist objection might not satisfy the individualist. The individualist objection is fundamentally an ontological objection—namely, there is no property of a corporation that cannot (given unlimited time and computing power) be accurately described by reference to individual acts.<sup>88</sup> As such, this Article does not directly engage the objection. Rather, this Article responds that the objection is

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analysis. The only definition in terms of individual statements which will mean the same as “nationally” will involve the expression “and so on”. The only possible definition of “chairishly related” will also involve the expression “and so on”; it will involve an infinite disjunction of conjunctions of statements about sensations. And it will be complained that it is just this infinity which is mysterious. It is true that if a person is satisfied about the category of chairs (or nations) then all that now puzzles him is the nature of the distinction between chairish groupings of sensations on the one hand, and non-chairish groupings on the other (between national groupings of individuals and non-national). But about this he may well be insatiable.

John Wisdom, *Metaphysics and Verification*, 47 *MIND* 452, 478–79 (1938).

87. See *supra* Part II.A.1.

88. There may appear to be parallels between the issue of corporate action and the reductionism/emergentism debate as it relates to the philosophy of the mind. The apparent parallels are, however, predicated on a failure to distinguish between the question being asked in each case. With relation to the study of the mind, the question is ontological—is there a phenomena of mental activity beyond what is described by reference solely to the physical? With regard to corporations, this seems a relatively easy question to answer: No. A corporation is merely the sum of its parts. That it is so, however, does not bear directly on the questions of how we can meaningfully describe corporate conduct and whether it makes sense to blame a corporation.

unhelpful. The goal remains to determine whether and for what purpose criminal liability might be imposed on a corporation. The objection that there is no meaning to “corporation” that cannot be better described at the individual level is belied simply by the practical impossibility and inaccuracy of the demanded individualist description. At least until the individualist can introduce a meaningful language for describing corporate actions only by reference to individuals, the inquiry as to corporate criminal liability must proceed by reference to corporate action. It may be an imperfect language, but it is the language we have.

#### B. CONTRARY TO THE NATURAL LAW ACCOUNT, CAPACITIES MATTER, NOT PERSONHOOD

Moore introduces a significant challenge to any form of corporate responsibility from the natural law perspective.<sup>89</sup> He contends that moral responsibility is reserved for persons.<sup>90</sup> “Persons” are those who possess certain capacities considered necessary for one to be subject to moral responsibility.<sup>91</sup> Corporations lack those capacities and therefore cannot be subject to moral responsibility. This Part considers Moore’s position and concludes that corporations do lack certain capacities people have. And Moore is correct that at least some of those capacities are necessary for the application of moral desert. However, contrary to Moore’s position, punishment may be imposed for reasons other than just deserts retributivism—namely, consequentialist reasons.

##### 1. *Certain Capacities Are Necessary for Moral Responsibility*

Moore identifies the capacities necessary for a moral being by isolating those aspects of insanity that negate guilt at criminal law.<sup>92</sup> Insane people lack certain common traits and this explains why they are not culpable.<sup>93</sup> These traits, according to Moore, are critical to personhood for purposes of assigning responsibility.<sup>94</sup>

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89. MOORE, *supra* note 33, at 595. Of course, not all who could be called natural law theorists adhere to this view. For example, Roger Scruton argues in favor of recognizing corporate personhood for the specific purpose of bringing corporations within the ambit of responsibility. See Roger Scruton & John Finnis, *Corporate Persons*, 63 PROC. ARISTOTELIAN SOC’Y, SUPPLEMENTARY VOLUMES 239, 240–41 (1989). John Finnis rejects this project altogether. See *id.* at 274 (“‘Personality’ is a distracting metaphor in a realistic moral and political analysis of human associations and their actions.”).

90. MOORE, *supra* note 33, at 616–17.

91. *Id.* at 616 (identifying rationality, autonomy, emotionality, unified character, and unified consciousness as necessary for moral responsibility).

92. *Id.* at 596.

93. *Id.*

94. It is not immediately obvious what work “personhood” is doing in this argument. The consequence of the definition is that, as will be discussed below, corporations are not persons. However, Moore might have concluded that corporations cannot be criminally liable by reference only to the missing attributes that Moore associates with natural persons—omitting any conclusion as to the

Moore writes: “Rationality and autonomy are the major presuppositions about persons made by the general part of the criminal law.”<sup>95</sup> To these he adds “emotionality,” which encompasses the capacity of having mental states “distinct . . . from beliefs, desires, and intentions.”<sup>96</sup> Although it is a difficult question whether corporations possess rationality as defined by Moore, it is quite clear they lack autonomy and emotionality. The autonomy Moore requires is the “capacity to choose and cause the realization of one’s choice,”<sup>97</sup> and “the objects of one’s choices are the mental states of desire, belief, intention, and emotion that make up one’s character.”<sup>98</sup>

This is a place where the utility of speaking of a corporation *qua* corporation begins to break down. While it does make sense to speak of a decision by a corporation,<sup>99</sup> it makes less sense to speak of a corporation having the capacity, *qua* corporation, to “choose and cause the realization of [its] choice.”<sup>100</sup> And it makes even less sense to speak of a corporation possessing “the mental states of desire, belief, intention, and emotion.”<sup>101</sup> The legal element of mens rea can be imputed to a corporation,<sup>102</sup> but that does not mean the corporation is capable of having a particular state of mind. When we discuss mental states, the analogy between corporations and persons is no longer useful.<sup>103</sup> Even more clearly, a corporation does not have emotionality. Emotionality is the capacity to have mental states other than beliefs, desires, and intentions, such as joy, fear, anger, or the experience of seeing red. Corporations do not have these capacities; they do not experience *qualia*.<sup>104</sup> Returning to the language developed in Part II.A, we might

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“personality” of a corporation. See, e.g., Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights*, 105 COLUM. L. REV. 209 (arguing that “person” is too diffuse and vague a concept to contribute to difficult questions of human rights). For more on this issue, see MOORE, *supra* note 33, at 610.

95. MOORE, *supra* note 33, at 614.

96. *Id.*

97. *Id.* at 612.

98. *Id.*

99. See *supra* Part II.A.

100. MOORE, *supra* note 33, at 612.

101. *Id.*

102. See *N.Y. Cent. & Hudson R.R. Co. v. United States*, 212 U.S. 481, 493 (1909) (“[A] corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil.” (quoting *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 297 (1899))).

103. “It is at this point that analytical obscurity has created massive confusion.” Howard M. Friedman, *Some Reflections on the Corporation as Criminal Defendant*, 55 NOTRE DAME L. REV. 173, 180 (1979).

104. By *qualia* I mean what Thomas Nagel described as the “subjective character of experience.” Thomas Nagel, *What Is It like to Be a Bat?*, 83 PHIL. REV. 435, 436 (1974). For Nagel, “fundamentally an organism has conscious mental states if and only if there is something that it is like to be that

meaningfully say: Corporation A decided to change its logo from red to blue, but we would not claim that Corporation A could experience the mental phenomenon a natural person experiences upon seeing red.

## 2. *Personhood Is Not Important*

Corporations are not persons, and to Moore this conclusion matters. Moore contends there is a singular and correct answer to the question of whether a corporation is a person,<sup>105</sup> and about this I disagree. When someone asks whether a corporation is a person, she presumably is not asking whether a corporation is a living human being, a natural person.<sup>106</sup> She is asking something about how the corporation ought to be treated. To answer the question, I would want to know: For what purpose? For what purpose would you like to know whether corporations ought to be treated as persons? And, in considering how to answer the question, I might resort to analogy. It may be useful to note that we punish persons and we do not punish trees, to ask what characteristics persons have that trees lack, to then ask whether any of these characteristics explain why we punish persons and not trees, and finally to assess whether corporations are more similar to persons than to trees according only to those characteristics. But the entire inquiry begins with the premise that we are asking not whether corporations really are persons, but rather whether they ought to be treated as persons for a particular purpose.

For Moore, the question—“Is a corporation is a person?”—is a factual one, not a purposeful one, and this stems from the fact that he is a moral realist.<sup>107</sup> If there are going to be moral facts, there had better be facts about objects for the moral facts to reference. Hence, Moore is a metaphysical realist about facts.<sup>108</sup> A corporation is either a person or it is

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organism—something it is like for the organism.” *Id.* To my thinking, there is nothing it is like to be a corporation, just as there is nothing it is like to be a cloud or a pebble. I acknowledge, however, that there is considerable debate amongst philosophers on this point (at least with regard to corporations, networks, computers, and thermostats, if not clouds and pebbles). That debate is beyond the scope of this Article. I will briefly note that even were one’s theory of consciousness to attribute consciousness to corporations, I suspect corporate consciousness would be sufficiently different from human consciousness so as not to jeopardize the question of moral desert addressed in this Part.

105. Moore writes:

My own view is that the legal and moral questions of whether some entity is or is not a person, whether that person performed an action, whether he did so intentionally or with a certain motive, whether that act proximately caused harm, whether the actor acted under threats of another amounting to duress, and whether the actor is mentally ill, are all factual questions.

MOORE, *supra* note 33, at 624.

106. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 971 (2010) (Stevens, J., concurring in part and dissenting in part) (“The fact that corporations are different from human beings might seem to need no elaboration. . . .”).

107. Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061 (1982).

108. See Brian Bix, *Michael Moore’s Realist Approach to Law*, 140 U. PA. L. REV. 1293, 1298–300

not, and its “personhood”—or lack thereof—will carry moral consequences.<sup>109</sup>

Moore rejects a functionalist approach, and he considers it necessary to do so in order to preserve meaning: “[P]reoccupation with the consequences of *saying*, for example, that a corporation is or is not a legal person, cannot be exclusive of some concern as to whether corporations *are* legal persons.”<sup>110</sup> But this conclusion assumes there is a meaningful and singular answer to the question: Are corporations persons? Preoccupation with whether corporations *are* persons is itself the problem.

Moore’s concern is the loss of certainty,<sup>111</sup> but certainty through definition can be unnecessarily limiting. Some legal concepts may be defined best by reference to their consequences or by their relations to other concepts.<sup>112</sup> Jeremy Waldron identifies legal terms like “corporation” as “tokens” of the “systematic interconnection” of rules.<sup>113</sup> By locating the meaning of legal concepts in the systematic relations described by the concepts, Waldron rescues the positivist approach from the skepticism and vacuity asserted by Moore.<sup>114</sup> We can recognize broad

(1992).

109. MOORE, *supra* note 33, at 623 (“If one adopted [a functionalist position] about the legal and moral usages of the word ‘person’, one would urge that *anything* could be called a person—it would simply depend on whether one wished to attach the legal or moral consequences of being so labeled to that entity.”).

110. *Id.* at 624.

111. *Id.* (“If our legal concepts had as their only meanings that certain consequences could be achieved by their use, they would be completely vacuous.”).

112. Moore does acknowledge two categories of “things” beyond natural kinds. A nominal kind “does not exist as a kind in nature,” and “as a kind its only nature is given by the common label attached to various specimens.” Michael S. Moore, *Law as a Functional Kind*, in *NATURAL LAW THEORY* 206 (Robert P. George ed., 1992). A functional kind shares a nature that is “a function and not a structure.” *Id.* at 208. As such, “items making up a functional kind have a nature that they share that is richer than the ‘nature’ of merely sharing a common name in some language.” *Id.* Brian Bix has expressed some skepticism about whether or how “functional kinds” fit within Moore’s metaphysical realism. See Bix, *supra* note 108, at 1329 (“Unlike other aspects of Moore’s metaphysical realist approach to law, the discussion of ‘functional kinds’ seems to make no ontological or epistemological claims (or to require any special ontological or epistemological assumptions).”). If one understands Moore’s categories as Bix does, it may appear that Moore does not disagree with the functionalist approach Waldron described. See *infra* text accompanying notes 114–120; see also Bix, *supra* note 108, at 1329 (“I do not believe that [Moore] has claimed (let alone proven) anything with which critics of metaphysical realism need disagree.”).

113. Jeremy Waldron, “*Transcendental Nonsense and System in the Law*,” 100 *COLUM. L. REV.* 16, 25 (2000).

114. Waldron describes the meaning of theoretical terms that seem to defy clear definition as follows:

Theoretical terms are—if you like—flags of systematicity. In their very abstraction from ordinary usage, they remind us that we are dealing with a web-like structure, not just individual items on a list of propositions. . . . The use of technical expressions like “corporation,” “legal personality,” “jurisdiction,” “locus standi,” and the like alerts us to the

systematic meaning—and even the potential instrumental assignment of meaning—without losing meaning altogether.<sup>115</sup> Accepting contextual definitions of legal concepts does not eradicate meaning; it shifts the referent of the concept from an ideal to a function, a relation, or a circumstance.<sup>116</sup> There are things we can know about what it is to be a corporation, but we cannot list all the things that could possibly be known about *corporationhood*. There is no perfect and complete definition of “corporation.”<sup>117</sup> At the same time, definitions matter. How we define a corporation at law will have consequences,<sup>118</sup> and to the extent we can foresee those consequences they ought to inform the definition.

To proceed otherwise risks what Hart criticized as “the growth of theory on the back of definition.”<sup>119</sup> The natural law theorist views the legal definition as a deep fact about the world.<sup>120</sup> Accordingly, definitions are called upon for some heavy lifting.<sup>121</sup> Hart rejected this understanding

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fact that the members of an array of legal rules are understood to be related to one another systematically, so that (for example) there will be consequences for what we say about standing to sue commercial enterprises if we reorganize the internal boundaries of our legal system, and consequences for what we say about civil procedure if we offer legal recognition to new forms of commercial enterprise.

*Id.* at 23.

115. One difference between Moore and a positivist is simply what each demands of and expects from definition. “If our legal concepts had as their only meanings that certain consequences could be achieved by their use, they would be completely vacuous.” MOORE, *supra* note 33, at 624. Moore’s functional kinds would appear to admit some flexibility to this standard (by identifying kinds through common function), but for Moore, definition is always an exercise of discovery, never assertion. “In order to find the meaning of ‘pain’ we must build a theory about the true nature of pain, and there can be no sufficient conditions that fix the meaning of ‘pain.’ We fix the meaning as we discover more and more about what pain really is.” Moore, *supra* note 107, at 1130.

116. In this way, theoretical legal terms as described by Waldron are not different than all terms as described by Quine. See WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* 35–61 (1960).

117. Again, this really amounts to a restatement of the problem of logical atomism. See *supra* Part II.A.1.

118. Waldron, *supra* note 113, at 23 (“[T]here will be consequences for what we say about standing to sue commercial enterprises if we reorganize the internal boundaries of our legal system, and consequences for what we say about civil procedure if we offer legal recognition to new forms of commercial enterprise.”).

119. H.L.A. HART, *DEFINITION AND THEORY IN JURISPRUDENCE* 7 (1953).

120. Moore, *supra* note 107, at 1130.

121. Justice Frankfurter famously rejected the definition-driven approach in deciding whether federal courts sitting in diversity jurisdiction must apply state statutes of limitations. See *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Casting aside the rigid restraint of a substance/procedure distinction, Frankfurter explained:

Matters of “substance” and matters of “procedure” are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, “substance” and “procedure” are the same keywords to very different problems. Neither “substance” nor “procedure” represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.

*Id.* at 108.

of legal definitions and instead advocated using the analogies inherent in definitions to illustrate, rather than resolve, issues.<sup>122</sup> Thus, rather than ask what is a corporation, we should ask, for example, “[u]nder what types of conditions does the law ascribe liabilities to corporations?”<sup>123</sup> The latter question will “clarify the actual working of a legal system and bring out the precise issues at stake when judges . . . make some new extension to corporate bodies of rules worked out for individuals.”<sup>124</sup> Hart also illustrates the flaw in prioritizing definition: It demands a logical consistency of terms, but its terms were developed in context and by analogy, and without consideration of all possible circumstances under which that term would or would not be effective.<sup>125</sup> So, although it may make sense for a court to rule, in a particular context and for a particular purpose, that a corporation will be treated as a person, there is little reason to suggest that, as a result, in all contexts and for all purposes, corporations must be treated as persons and the legal consequences that follow from that designation are predetermined by the initial designation in an entirely unrelated context.<sup>126</sup>

### 3. *Moral Capacity Is Necessary for Just Deserts Retributivism but Not for Consequentialism*

The personhood of corporations is really not the issue. The culpability—or blameworthiness—of corporations is what we care about.<sup>127</sup> The attributes Moore isolates as critical to personhood are those

122. HART, *supra* note 119, at 25 (“By contrast the confusing way of stating the issue is to bring in definitions of what a Company is and to deduce from them answers to the question in hand.”).

123. *Id.* at 24.

124. *Id.*

125. *Id.* at 25 (“These statements confuse the issue because they look like eternal truths about the nature of corporations given us by definitions: so it is made to appear that all legal statements about corporations *must* square with these if they are not to be logically inconsistent.”).

126. Judge Posner makes a similar point about the limits of analogy in *Overcoming Law*. See RICHARD A. POSNER, *OVERCOMING LAW* 518–19 (1996). Joan Heminway argues that this point underlies the difference between Justice Stevens and the majority in *Citizens United*:

Under the Court’s view in *Citizens United*, it appears that once one concludes that a corporation is a person, it is a person for all purposes, bar none. As the Stevens opinion points out, this ignores policy underpinnings of the various laws that may use the concept of corporate personhood.

Joan Heminway, *Thoughts on the Corporation as a Person for Purposes of Corporate Criminal Liability*, 41 *STETSON L. REV.* 137, 143 (2011) (footnote omitted).

127. Moore *does* care about personhood. MOORE, *supra* note 33, at 610. He suggests that, should other forms of life with comparable capacities be discovered, it might be appropriate to amend the definition of person to require “embodiment in a human body.” *Id.* at 618. Thus, it appears Moore does require responsibility be assigned only to those that share certain capacity attributes with natural persons *and that are natural persons*. It remains unclear to me what work personhood is doing or why it matters unless we introduce non-materialist data. And Moore may be doing just that. See Moore, *supra* note 112, at 190–91 (defending a natural law theory predicated on the theses that moral qualities do exist and that “such qualities are mind- and convention-independent”).

attributes that give the capacity to make a rational choice.<sup>128</sup> And this matters, because for Moore, retributivism, and only retributivism, justifies punishment: “[W]e ought to punish offenders because and only because they deserve to be punished.”<sup>129</sup> “For Moore, moral culpability is the same as desert.”<sup>130</sup>

If we can only punish—and if we can only hold responsible—those that *deserve* punishment,<sup>131</sup> Moore’s conclusion about who or what may be held responsible seems correct.<sup>132</sup> Moore contends that responsibility is necessarily linked to cognitive and volitional capacities.<sup>133</sup> And this comports with how we generally think of responsibility.<sup>134</sup> As much as corporations do have cultures,<sup>135</sup> and as much as those corporate cultures can influence real persons in the corporation in their choice to commit crimes,<sup>136</sup> a corporation lacks mental states,<sup>137</sup> and therefore cannot be said to rationally choose a culture for itself.<sup>138</sup> Corporations act, but they do not think in a way that accords with the concept of just deserts.<sup>139</sup>

128. Moore identifies the key features of personhood as rationality and autonomy. See MOORE, *supra* note 33, at 610.

129. *Id.* at 153.

130. Dan Markel, *What Might Retributive Justice Be?*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* 65 n.6 (Mark White ed., 2011).

131. Sara Beale counters the conventional wisdom on this point, by noting that even outside the realm of corporate criminal liability, we fail to “confin[e] criminal liability to moral blameworthiness.” See Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1482, 1488–90 (2009) (giving examples of schizophrenia, accomplice liability, and strict liability crimes).

132. Al Alschuler pokes fun at the idea of blaming a corporation this way:

People indignant about an injury produced by a corporation’s employees may treat the corporation as *deodand*. They may truly personify and hate the corporation. They may hate the mahogany paneling, the Lear jet, the smokestack, the glass tower, and all of the people inside. They—the mahogany and all of them—are responsible for the medical fraud, the oil spill, the price fixing, and the illegal campaign contributions. To superstitious people, villains need not breathe. They may include Exxon, Warner Lambert, and the cable company.

Alschuler, *supra* note 21, at 1336.

133. See MOORE, *supra* note 33, at 588.

134. “Guns don’t shoot people, people do.” Of course, absent a gun, a person cannot be shot. But the power of the statement comes not from a causal analysis, but from a volitional analysis. Absent a gun, a person cannot be shot; but so too, absent a person operating the gun, a person cannot be shot (in all but the most outlandish examples). The gun and the person are both necessary and not sufficient causes of a person being shot. The difference is, a person can be blamed (and influenced); a gun cannot. So too we do not blame the moose that wrecks a car or the tornado that destroys a house. *But see* Paul Schiff Berman, *Rats, Pigs and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288 (1994) (reviewing and analyzing historical cases of putting animals and inanimate objects on trial).

135. See *supra* Part I.

136. See *supra* Part I.

137. See *supra* text accompanying note 104.

138. See *supra* text accompanying notes 98–115.

139. There are arguments to the contrary. See, e.g., Pettit, *supra* note 72. This Article does not

But maybe we need not limit culpability to a just deserts model, and we need not limit the imposition of criminal liability to an exclusive retributivist model.<sup>140</sup> Imposition of criminal liability might be imposed—even if we do not think it is deserved—so long as we think it is effective. This is not to suggest that desert should never be a limiting principle; rather, it is to consider that the reasons for demanding that desert limit the imposition of criminal liability on people may not apply when considering the imposition of criminal liability on corporations.<sup>141</sup>

#### 4. *The Possibility of Undeserved, but Efficacious, Corporate Liability*

Assigning responsibility for solely instrumental reasons might seem contrary to our basic understanding of responsibility.<sup>142</sup> There is a moral limit on the assignment of criminal responsibility in the form of fairness. Assessing responsibility based on something other than capacity and intention might appear “unfair, in that it holds us responsible for that which we could not have helped—our selves—rather than for that which we have chosen to do, or could have chosen not to do.”<sup>143</sup>

Efficacy is not the only good.

The moral concept of fairness is also a good.<sup>144</sup> A functionally efficacious assignment of responsibility may still be rejected as unfair.

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engage those arguments, not because they are not compelling, but rather because they do not affect the thesis of this Article. *See supra* note 72 and accompanying text.

140. Moore offers significant justification for his view that punishment ought to be imposed because, and only because, it is deserved, hinging on what might be called the value of empathetic moral outrage. His view—in part—is that, while there may be virtue in turning the other cheek if you’ve been slapped, “there is no virtue in turning someone else’s cheek when they have been slapped.” MOORE, *supra* note 33, at 164. Furthermore, Moore believes there is a non-instrumental virtue in condemning moral wrongs. *Id.* at 163–65. I disagree with Moore’s conclusions regarding the value of positive retributivism (punishment if and only if deserved), but this broader issue of the purpose of punishment is beyond the scope of this Article. Suffice to say the position that punishment can be justified on non-retributivist grounds is not unique.

141. Invoking retribution as a limiting principle is often referred to as negative retributivism. *See* J. L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 4 (1982). “Within what can broadly be called a retributive theory of punishment, we should distinguish negative retributivism, the principle that one who is not guilty must not be punished, from positive retributivism, the principle that one who is guilty ought to be punished.” *Id.* To be clear, Moore is positive retributivist. *See* MOORE, *supra* note 33, at 33 (“Retributive justice demands that those who deserve punishment get it.”).

142. The common understanding of responsibility is captured by Moore. *See supra* notes 91–95 and accompanying text. It is a capacity-based responsibility.

143. *See* Nicola Lacey, *Responsibility and Modernity in Criminal Law*, 9 J. POL. PHIL. 249, 263 (2001).

144. *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

We can easily rationalize the sacrifice of procedural justice from a consequentialist perspective. The measurable marginal benefits of participationless procedure may exceed

Imprisoning all members of a particular ethnic group after a terrorist attack might reduce terrorism if it were known that the terrorism was being perpetrated only or even predominantly by members of that group.<sup>145</sup> Still, assuming this were a known effective method of reducing terrorism, moral principles of fairness and legal principles of due process would counsel against the reaction.<sup>146</sup>

Retribution as a rationale for punishment (or the assignment of responsibility) responds to this concern. Retribution does not so much *justify* the assignment of responsibility as *limit* it.<sup>147</sup> Only those who deserve blame may be punished.<sup>148</sup> Were we to assign blame and apportion punishment solely on utilitarian grounds, then persons who did not commit offenses may, in some cases, be held responsible and punished because doing so generates greater compliance with the substantive rules.<sup>149</sup>

Nicola Lacey presents a surprising but compelling conception of responsibility that permits the legal imposition of responsibility for purely instrumental reasons.<sup>150</sup> Lacey cautions against the assumption

the marginal costs. In the end, however, these rationalizations ring hollow. Procedure without justice sacrifices legitimacy. Law without legitimacy can only guide action through force and fear.

*Id.* at 321; *see also*, Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 162 (2011) (“[T]he perception of procedural fairness is critical to fostering public confidence in the legal system.”).

145. It is worth noting that—even on this unduly certain hypothetical—it is by no means clear that such broad imprisonment would be effective. It would be ineffective if the perceived overbreadth of punishment undermined others’ incentive to obey the law. *See* Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 294 (1983) (“Penalties may fall on law abiders, and thus there is less reason to obey the law and abjure the gains of crime.”).

146. *But cf.* *Korematsu v. United States*, 323 U.S. 214 (1944).

147. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 478 (1997) (“[D]eviation from a desert distribution can incrementally undercut the criminal law’s moral credibility, which in turn can undercut its ability to help in the creation and internalization of norms and its power to gain compliance by its moral authority.”). In this, Moore and Hart align, albeit briefly and incompletely. *Compare* Michael Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS 179, 180 (Ferdinand Schoeman ed., 1987) (“A retributivist will subscribe to [the view that only the guilty are to be punished].”), *with* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 181 (2009) (“Thus a primary vindication of the principle of responsibility could rest on the simple idea that unless a man has the capacity and fair opportunity or chance to adjust his behavior to the law its penalties ought not to be applied to him.”). The difference, for Moore, is that the retributivist believes desert is not only a necessary condition of punishment, but a sufficient condition. MOORE, *supra* note 33, at 180.

148. *See* HART, *supra* note 147, at 8–13; *see also* Markel, *supra* note 130, at 51 (“Retributive punishment for legal wrongdoing is justified in part because in treating the offender as a responsible moral agent it communicates to him a respect for his dignity as an autonomous moral agent.”).

149. Again, there may be utilitarian arguments against this practice that require no reference to retribution. *See supra* note 145. But, there almost certainly would be cases at the margins in which a pure utilitarian calculus counsels assigning blame to the non-blameworthy. Requiring a retributive function for punishment guards against that result.

150. *See* Lacey, *supra* note 143, at 249–76.

that legal and moral responsibility are coextensive and share philosophical foundations.<sup>151</sup> And she presents a historical argument that capacity-based responsibility in criminal law is a relatively recent phenomenon: Historically, responsibility was assessed not in light of capacity, but rather in light of character and reputation.<sup>152</sup>

Lacey suggests that “we let go of the metaphysical fantasy that responsibility just ‘is’ a certain kind of thing, and think instead of responsibility as a normative device—a matter of construction and ascription—then we can begin to ask common questions about responsibility across social institutions.”<sup>153</sup> This move echoes Hart: The legal definition as an ontological quest is unhelpful and potentially misleading.

Moral responsibility may hold claim to metaphysical status,<sup>154</sup> but criminal responsibility does not. Criminal responsibility, as a legal concept, is instrumental and circumstantial, but that is not to say it is devoid of meaning. Criminal responsibility has meaning; that meaning, however, is contingent on the systematic relations among a wide range of legal rules. Legal responsibility may be assigned to corporations, or apples or unicorns, or none of these things. Whether we assign responsibility to a corporation will have consequences.<sup>155</sup> We may judge from those consequences whether we wish to assign responsibility to corporations or not.<sup>156</sup>

Here we can begin to see the power of Moore’s conclusion that corporations lack the critical capacities we often associate with blameworthiness.<sup>157</sup> Corporations do not have autonomy or

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151. *Id.* at 253–54.

152. Lacey writes:

[C]ertain key facts suggest that the understanding of criminal responsibility at the time of Blackstone did not lie in findings about the defendant’s cognitive or volitional capacities, let alone in his or her subjective state of mind in the way that psychology has taught us to think about responsibility conditions such as ‘intention’ today. Rather, it lay in an evaluation of the defendant’s conduct judged in the light of evidence about his or her character and reputation.

*Id.* at 257.

153. *See id.* at 275.

154. Natural law theory is more closely associated with moral realism, and because natural law theory is often in opposition to legal positivism, it might be assumed that legal positivism is not compatible with moral realism. That assumption is erroneous. As Jeremy Waldron explains: “[L]egal positivism is meta-ethically neutral. It takes no position on the nature of moral judgement. It is compatible with moral realism and with moral anti-realism. All it says is that legal decision-making is one thing, moral judg[ment] another.” Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in *NATURAL LAW THEORY* 158, 161 (Robert P. George ed., 1992).

155. *See supra* note 118 and accompanying text.

156. *See supra* text accompanying notes 111–118.

157. *See supra* text accompanying notes 91–107.

emotionality.<sup>158</sup> As such, they do not *deserve* blame.<sup>159</sup> It is not that they do not deserve blame because they cannot *act* in a manner that is harmful to others.<sup>160</sup> And it is not that they do not deserve blame because they cannot *cause* others to act badly.<sup>161</sup> They do not deserve blame because they lack the volitional capacities we associate with moral blameworthiness.<sup>162</sup>

Retribution applies only to those that deserve blame.<sup>163</sup> And just as we should not be angry with a corporation, we also should not feel empathy for a corporation. The corporation lacks this degree of moral standing because it lacks the capacities of a natural person.<sup>164</sup> Blame does not apply, but neither does fairness.<sup>165</sup>

Hart declared the need for a retributive basis for punishment in order to protect against the potential injustice of punishment apportioned on mere utilitarian grounds.<sup>166</sup> People understand other people to act intentionally, based on the sorts of capacities Moore identified as key to personhood.<sup>167</sup> Only people who act intentionally are worthy of blame.<sup>168</sup> And blaming those who lack the capacity to act intentionally would be unfair; it would also tend to undermine public respect for the system that imparted blame unfairly.<sup>169</sup>

158. See *supra* text accompanying notes 96–98.

159. See HART, *supra* note 147, at 181 (“[U]nless a man has the capacity and fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him.”).

160. They can. See *supra* text accompanying notes 79–87.

161. They can. See *supra* text accompanying notes 35–90.

162. See *supra* text accompanying notes 92–103.

163. See MOORE, *supra* note 33, at 33 (“Retributive justice demands that those who deserve punishment get it.”). Not all retributivists accept this limit. Dan Markel presents a fascinating theory of retributivism predicated not on desert, but on a communication to an actor about consequences, which communication also is pregnant with the recognition that the actor has the capacity to alter conduct in accord with the communication. See Markel, *supra* note 130, at 50–51. Markel’s Confrontational Conception of Retributivism (“CCR”) would be applicable to corporations (so long as one accepts my premises that corporations can influence conduct of their agents and that corporations can change in response to external stimuli) where Moore’s more traditional conception of retributivism would not. In this regard, CCR may disentangle complete-personhood capacity from the imposition of criminal liability as effectively as the recognition that corporations can be subject to purely consequentialist manipulation in a way natural persons cannot be. CCR is not the same as consequentialism, see *id.* at 59–60, but it too might be a fruitful mechanism for explaining corporate criminal liability.

164. See *supra* text accompanying notes 128–139.

165. To be clear, fairness does not apply to corporations *qua* corporations. Fairness considerations would apply to the natural persons affiliated with the corporation. For more on this, see *infra* note 171.

166. See HART, *supra* note 147, at 12.

167. MOORE, *supra* note 33, at 588.

168. Hence, the insane are not guilty. See *id.* at 595.

169. Hart described the risk this way:

Human society is a society of persons; and persons do not view themselves or each other merely as so many bodies moving in ways which are sometimes harmful and have to be prevented or altered. Instead persons interpret each other’s movements as manifestations of

Applied to corporations, however, this concern carries diminished weight. Fairness no more applies to corporations than does blame. Hart rightly worried about a system that “treated men merely as alterable, predictable, curable or manipulable things.”<sup>170</sup> But it is difficult to understand an objection—sociological or moral—to treating corporations exactly this way.<sup>171</sup> As a result, a purely consequentialist theory of punishment might justify corporate criminal liability in a way it could not justify criminal liability for people.

### C. CONCURRING WITH THE EFFICIENCY CHALLENGE, DETERRENCE ALONE CANNOT JUSTIFY CORPORATE CRIMINAL LIABILITY

Corporations can be deterred by criminal liability, but that fact may not justify criminal liability. After all, perhaps corporations could be deterred by civil liability just as well, and more efficiently. This is the argument made by Vikramaditya Khanna in *Corporate Criminal Liability: What Purpose Does It Serve?*<sup>172</sup> Khanna argues that corporate criminal liability is an inefficient tool for influencing corporate behavior. He concludes that criminal liability for corporations is more costly and ultimately no more effective than civil liability.<sup>173</sup>

This Part first demonstrates the basic point that corporations are susceptible to deterrence. It then considers Khanna’s argument that deterrence cannot justify corporate criminal liability. For the most part, I agree with Khanna’s conclusions. However, while deterrence alone is not

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intention and choices, and these subjective factors are often more important to their social relations than the movements by which they are manifested or their effects. . . . This is how human nature in human society actually is and as yet we have no power to alter it. The bearing of this fundamental fact on the law is this. If as our legal moralists maintain it is important for the law to reflect common judgments of morality, it is surely even more important that it should in general reflect in its judgments on human conduct distinctions which not only underly morality, but pervade the whole of our social life. This it would fail to do if it treated men merely as alterable, predictable, curable, or manipulable things.

HART, *supra* note 147, at 182–83.

170. *Id.* at 183.

171. This is not to suggest, by any means, there would not be concerns about the fairness of a legal action against a corporation considered in terms of real people affected. In deciding to apply criminal liability to a corporation, there will be real issues of fairness to the corporation’s shareholders, employees, creditors, customers, and others. But the point addressed in this Section is that assessing responsibility based on something other than its capacity and intention is unfair. Since corporations have no capacity and intention, assessing responsibility against the corporation might appear unfair. But, just as corporations have no capacity and intention, so too there is a diminished demand for “fairness” to the corporation *qua* corporation. Accordingly, the fairness concern—as applied to the corporation—is empty. Fairness must remain a central concern with regard to natural persons affected by the imposition of liability on a corporation.

172. Khanna, *supra* note 22.

173. *Id.* at 1533–34.

sufficient to justify criminal liability over civil liability for corporations, expressivism can justify criminal over civil liability.

### *I. Corporations Can Be Deterred*

Corporate criminal liability can change corporate conduct for the better. A corporation found criminally liable might terminate bad actor personnel. It might redesign reporting structures to avoid or limit future problems. It might change compensation practices to remove incentives that could lead to misconduct. Indeed, given the diversity of corporate functions, corporate structures, and potentially illegal corporate conduct, the spectrum of possible changes is nearly unlimited.<sup>174</sup> Specific deterrence occurs when a company makes changes such as these in an effort to avoid subsequent wrongdoing.<sup>175</sup> General deterrence occurs when a company makes such changes not in response to its own liability, but in response to the liability of another corporation and in an effort to avoid similar future liability.<sup>176</sup>

Corporations are deterred by the threat of punishment. Punishment for corporations might take a number of forms. A corporation could be compelled to pay money or be put on probation for the violation.<sup>177</sup> It

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174. The very complexity of potential problems and fixes renders *ex ante* and uniform prescriptions for corporate change potentially problematic. This fact represents a challenge for suggestions that criminal liability for corporations include a good faith defense that could be satisfied by an effective compliance program. See Ellen S. Podger, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1538 (2007) ("To properly reward law-abiding corporations, an affirmative defense should be offered to those who present 'good faith' efforts to achieve compliance with the law as demonstrated in their corporate compliance program."); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 676 (1995) ("A corporation should be able to defend against vicarious criminal liability by showing that it had a clear and effective policy for complying with the law in place at the time of the violation, and that the employee's acts violated that policy."). These proposals have gained political steam lately as the Chamber of Commerce has initiated a lobbying effort to revise one of the statutes most actively enforced against corporations. See WEISSMAN & SMITH, *supra* note 25 (urging implementation of a compliance defense to the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, *et seq.*). Professor Kim Krawiec has written about the concern that such a defense might generate costly but largely cosmetic compliance programs ill-suited to actually deter corporate wrongdoing. Krawiec, *supra* note 38. The sheer complexity of and variation between entities, corporate cultures, corporate functions, potential problems, and potential fixes is another problem with the good faith compliance defense. I consider the desirability and efficacy of a good faith defense further in *Condemnation without Basis: An Expressive Failure of Corporate Prosecutions*, 64 HASTINGS L.J. (forthcoming 2013).

175. See *United States v. Peltier*, 422 U.S. 531, 556 (1975) (defining specific deterrence as "punishing an individual so that he will not repeat the same behavior").

176. See *United States v. Politano*, 522 F.3d 69, 74 (2008) ("General deterrence is about preventing criminal behavior by the population at large and, therefore, incorporates some consideration of persons beyond the defendant.").

177. See 18 U.S.C. § 3551(c) (2006) (permitting a sentence of probation and/or the imposition of a fine against an organization convicted of a crime).

could be barred from some aspect of its business.<sup>178</sup> It could be subjected to any number of requirements as a condition of its probation.<sup>179</sup> The Securities and Exchange Commission has issued innovative sanctions in the civil context.<sup>180</sup> Many of these corporate governance sanctions might also be imposed in the criminal realm.<sup>181</sup> Fundamentally, though, for a corporation, any penalty should be translatable to money. A fine of X dollars to be paid immediately is a loss of X dollars. Being barred from an aspect of the business for two years, where that aspect of the business generates Y dollars, is a loss of at least Y dollars.<sup>182</sup> Reporting requirements have at minimum a transaction cost that is a loss of Z dollars. Whatever it is, it's money to the corporation.<sup>183</sup>

Corporations maximize money.<sup>184</sup> This statement, of course, is grossly simplified. Just as one will find nuance, complexity, and confusion in trying to identify the precise manner in which a corporation acts,<sup>185</sup> one will find the same difficulties in identifying precisely *why* a corporation acts.<sup>186</sup> These disputes are related to the fact that speaking of a corporation acting is a sort of shorthand. In fact, different people with disparate

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178. See, e.g., 48 C.F.R. § 9.405(a) (2012) (“Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action.”). As currently defined, debarment is not punishment but rather a distinct collateral consequence of conviction. However, there is no deep reason that this must be the case, and debarment, exclusion, or other probationary penalties could be incorporated into punishments.

179. See 18 U.S.C. § 3563 (listing possible conditions of probation).

180. Jayne W. Barnard, *Corporate Therapeutics at the Securities and Exchange Commission*, 2008 COLUM. BUS. L. REV. 793, 796 (2008) (“[T]hese undertakings have required the creation of new management positions, adoption of new accounting and reporting practices, reconfiguration of corporate training programs, and establishment of specific board-level committees and procedures.”).

181. *Id.* at 795 (“The[] reforms [the DOJ has required in criminal actions] have included the appointment of an independent monitor, the implementation of a detailed legal compliance program, specific prescriptions regarding management’s communications with outside auditors, splitting the positions of CEO and Chairman, and the appointment of additional outside directors.”(footnotes omitted)).

182. It may be more, depending on the external value that aspect of the business had and the collateral consequences of being barred from the business for a period.

183. Which is not to say all punishments are equally easy to value in terms of dollars, a corporation can likely more easily measure the financial impact of a specific fine to be paid by a date certain than it can measure the financial impact of debarment or monitoring.

184. This phenomenon is more frequently described as “corporations maximize profits,” or “corporations maximize shareholder interests.” As the remainder of this paragraph describes, each of these is both correct and incomplete. For purposes of the instant analysis, the significantly more vague statement “corporations maximize money” is sufficient.

185. See *supra* text accompanying notes 33–88.

186. See Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA J. INT’L & COMP. L. 463, 475 (2006) (“When economists model the behavior of corporations, they often assume that corporations maximize value to shareholders; but sometimes they assume that corporations maximize the interests of their managers or some combination of shareholders’ and managers’ interests.”).

incentives take independent actions that result in what is usefully described as corporate conduct.<sup>187</sup> Some of these actions may not be profit maximizing for the corporation (where, for example, a manager makes departmental cuts that will increase his annual bonus but which do not serve the purpose of maximizing corporate profits).<sup>188</sup> Still, at the most general level, it is largely uncontroversial that corporations are profit-maximizing actors and corporate conduct will generally, if not perfectly, trend toward making more money and losing less money.<sup>189</sup> That which results in a net deprivation of corporate money will be disfavored. So, criminal liability for corporations—a rule that creates the risk of costing the corporation money should the corporation be found in violation of it—should have some tendency to shift the behavior of the corporation.<sup>190</sup>

## 2. *Deterrence Alone Cannot Justify Corporate Criminal Liability*

So corporations can be deterred by criminal liability, but does criminal liability do anything that civil liability could not do more cheaply? Khanna identifies four characteristics differentiating criminal and civil corporate liability:<sup>191</sup> “Corporate criminal liability has stronger

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187. See Roderick M. Kramer & David M. Messick, *Ethical Cognition and the Framing of Organizational Dilemmas: Decision Makers as Intuitive Lawyers*, in CODES OF CONDUCT 59 (David M. Messick & Ann E. Tenbrunsel eds., 1996) (“[I]t has long been appreciated that cooperative choice entails trade-offs between individual and collective interests and between short-term and long-term gains and losses.”). For a compelling analysis of factors influencing group decision making, see Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 19–32 (2002).

188. One might be tempted to dismiss instances such as this as malfunctions in incentive structures—a circumstantial technical flaw in a particular instance. This would probably underestimate the challenge of aligning individual incentives with the best interests of the corporation in all cases. Especially with large organizations, the complexity of decision making and reporting structures is likely such that no amount of time or good intentions can create a perfect alignment of individual incentives with corporate best interests (even assuming, perhaps incorrectly, that people could agree on the correct measure of “corporate best interests”). Accordingly, I do not mean to downplay the magnitude of individual/entity conflicts or the challenge they present for corporate governance generally. On the other hand, the general statement that corporations tend to act towards maximizing profits and/or shareholder interest is correct.

189. Hence the models generally relied on by economists. See *supra* note 187.

190. Ian Lee captures the theory of corporate liability incentives as follows:

Many economic theorists of the firm believe that market forces lead rational individuals to create corporate arrangements in which managers and the board of directors have strong incentives to maximize corporate profits. From this belief, it follows that society has reason to be concerned that managers and boards may cause corporations to pursue profits regardless of the cost for society. But, it also follows that the behaviour of managers and boards of directors will be highly responsive to corporate liability; monetary sanctions affecting the corporation’s bottom line will cause corporate managers and boards of directors to internalize the social costs of their decisions.

Lee, *supra* note 40, at 758.

191. Khanna also aptly notes that the distinction is oversimplistic, and that “[n]umerous corporate

procedural protections; more powerful enforcement devices; more severe and, arguably, unique sanctions (such as stigma); and a greater message-sending role than corporate civil liability.”<sup>192</sup> To determine whether corporate criminal liability is socially desirable (in comparison with civil liability), he considers whether and when these characteristics of criminal liability are desirable.<sup>193</sup> He analyzes the desirability of each characteristic according to whether,<sup>194</sup> how well, and at what cost, it serves the purpose of imposing liability on corporations in the first place.<sup>195</sup> Khanna’s analysis finds that in most cases, the distinctive characteristics of criminal liability are either not socially desirable as applied to corporations, or insufficiently distinctive to justify criminal liability instead of civil liability.<sup>196</sup>

*a. Sanctioning Characteristics*

Criminal sanctions are one of the most distinctive aspects of criminal justice. Often we know that a proceeding is criminal because the defendant has life or liberty at stake. Civil proceedings generally cannot result in the deprivation of life or liberty as a direct sanction;<sup>197</sup> criminal proceedings can. Of course—as has long been noted<sup>198</sup>—a corporation has no liberty of which it may be deprived.<sup>199</sup> The direct sanctions for corporate criminal

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liability strategies form a continuum between these two extremes.” Khanna, *supra* note 22, at 1493. While this is true as long as the discussion remains abstract, in the context of the U.S. criminal justice system there are clear distinctions and consequences that will follow depending on whether a liability scheme is categorized as civil or criminal. Accordingly, I understand his statement that “[t]he label placed on each corporate liability strategy along the continuum between criminal and civil liability is unimportant” to be about the theory of corporate liability, abstracted from the requirements of a particular legal system. *Id.*

192. *Id.* at 1492. As Khanna notes, the distinction is inherently simplistic, and there may well be hybrid systems of liability that involve some, but not all, of these factors. *Id.* at 1493. Additionally, these factors could each be present to a greater or lesser degree. *Id.*

193. *Id.* at 1493.

194. Khanna avoids the concerns of the natural law theorist by asserting that “deterrence, not retribution, [is] the aim of both corporate criminal liability and corporate civil liability.” *Id.* at 1494.

195. *Id.* at 1493.

196. *Id.* at 1533 (“[C]orporate criminal liability would only be socially desirable in the rarest of circumstances.”).

197. Exceptions would include civil contempt or involuntary commitment as a result of mental illness.

198. *See, e.g.,* Coffee, *supra* note 81, at 390.

199. One might argue that a corporation has a life of which it might be deprived by sanction. The analogy of a corporate death penalty is poor because those sanctions that result in the end of corporate viability are available civilly as well and thus cannot be compared to the individual death penalty. Indeed, perhaps this description is backwards. Just as the concepts of desert and fairness do not apply to corporations as they apply to individuals, so too the concept of death does not apply to corporations as it applies to individuals. As a result, what might bear a passing resemblance to death with respect to a corporation is so different than actual death that the procedural requirements for its imposition are not comparable.

wrongdoing will be monetary (or easily monetized).<sup>200</sup> As described above, a corporation may be fined, put on probation, or subject to debarment-type sanctions.<sup>201</sup> It may even be terminated.<sup>202</sup> Each of these sanctions is interchangeable with fines. Business lost from debarment has value; licenses have value; monitoring and probation carry costs. Each of these sanctions effectively imposes some monetary loss on the corporation.<sup>203</sup> Accordingly, the direct sanctions can be replicated by civil liability.<sup>204</sup>

Stigma, or the reputational cost of criminal liability, is a less direct, but equally real, sanction. The reputational loss associated with the imposition of criminal liability may be what distinguishes criminal from civil liability for corporations.<sup>205</sup>

Khanna argues that the unique reputational impact of criminal liability cannot justify the imposition of criminal liability as opposed to civil liability.<sup>206</sup> According to Khanna, reputational effect for a corporation can be monetized and thus handled equally well, if not better, by the imposition of a fine.<sup>207</sup> Khanna describes the problem of calculating the value of a reputational impact *ex ante*.<sup>208</sup> The reputational impact is imprecise and unpredictable.<sup>209</sup> As a result, where the goal is

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200. Indirect sanctions, such as reputational costs, are addressed below. *See infra* text accompanying notes 205–221.

201. *See supra* text accompanying notes 177–179.

202. The U.S. Sentencing Guidelines provide that in certain extreme cases “the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets.” U.S. SENTENCING GUIDELINES MANUAL § 8C1.1 (2011).

203. The distinction between a fine and these other sanctions may simply be in the calculability of the loss. Whereas a fine of \$500,000 due immediately carries a value to the corporation of \$500,000, the actual cost of debarment may be difficult to calculate *ex ante* as it will likely turn on unknown facts about the future conduct of corporate actors, corporate customers, corporate competitors, and markets generally.

204. *See* Khanna, *supra* note 22, at 1499 (“[Legally imposed criminal] sanctions are or can easily be made available in corporate civil liability regimes.”).

205. *Id.* at 1497 (“The arguably unique sanctioning characteristic of criminal liability is the criminal sanction’s potentially stigmatizing effect.”); *see also* Buell, *supra* note 28, at 500 (“[I]mposing entity criminal liability may inflict reputational harm at the level of the institution and . . . reputational effects are likely to flow through to institutional members in ways that deter wrongdoing and encourage compliance efforts.”).

206. Khanna, *supra* note 22, at 1511 (“[C]riminal reputational sanctions are probably not superior to civil reputational sanctions.”).

207. *Id.* at 1504 (“[W]e should prefer cash fines over reputational sanctions as long as the corporation is not judgment-proof.”). Khanna arrives at this conclusion after describing the significant costs of reputational sanctions that are not present with fines (including the facts that the value of a fine is recouped by the collecting entity, while the value of reputation is a net loss to society, and that reputational sanctions are imprecise and are thus likely to result in over- or under-deterrence). *Id.*

208. *Id.* at 1504 (“Inquiring into the impact of a reputational penalty on corporate sales and the impact of corporate mitigation efforts could prove very costly because reputational penalties may be subject to considerable uncertainty.”).

209. *Id.*

achieving the optimal sanction to deter crime, we should not rely on reputational harm.<sup>210</sup>

Samuel Buell argues otherwise.<sup>211</sup> He describes the significant impact of reputational harm associated with corporate criminal liability<sup>212</sup> and argues that it cannot be replicated by a civil fine.<sup>213</sup> And, whereas Khanna concentrates on the difficulty of predicting reputational harm ex ante, Buell is more troubled by the problem of calculating the optimal sanction ex ante: What “if we cannot fully determine ex ante, as an empirical matter, the quantity of sanction that will succeed in deterring misconduct in firms or, indeed, the amount of misconduct in firms that is acceptable because further deterrence would be too costly?”<sup>214</sup> Because we cannot determine the optimal sanction ex ante, Buell invokes the unpredictability of reputational impact as a benefit that cannot be replicated by civil fines.<sup>215</sup> The reputational impact of criminal conviction serves as “a more decentralized regulatory approach, relying on social assessment of the seriousness and costs of wrongdoing in firms.”<sup>216</sup>

Khanna begins with the assumption that there is a calculable, optimal deterrence model and concludes that it can be set by civil penalties in most cases. Buell begins with the assumption that we cannot determine the optimal deterrence model and therefore sanctions are properly set according to the public marketplace of reputational sanctions. Both positions suffer from the same problem: lack of ex ante information.

Skepticism about the possibility of calculating optimal sanctions is warranted. It is not possible to imagine the scope of all possible corporate criminal wrongdoing and the value thereof to all possible corporations. Fines will likely under- or over-deter.<sup>217</sup>

But it is then a leap to conclude, as does Buell, that because we cannot know the optimal sanction ex ante, reputational impact will be appropriately matched to the harm. It is true that reputational impact is imprecise, difficult to predict, and stems from the marketplace of ideas. It is also true that we cannot calculate the optimal sanction in advance. But

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210. *See id.* at 1512 (“We should not therefore rely on corporate criminal reputational penalties and reliance on any corporate reputational penalty should be minimal.”).

211. Buell, *supra* note 28, at 500.

212. *Id.* at 504–07.

213. *Id.* at 512–16 (disputing Khanna’s contention that cash fines might replace reputational harms).

214. *Id.* at 514.

215. *Id.*

216. *Id.*

217. Indeed, to the extent corporations value a type of crime that benefits the corporation differently, any set fine would likely under-deter and over-deter at the same time with regard to different corporations.

that we have two unknowns does not allow us to conclude that they will match.

Indeed, there is reason to doubt that reputational impact will be matched to the harm in many cases.<sup>218</sup> Different corporations value their own reputations differently, and a corporation's reputation is multifaceted. A pharmaceutical company might highly value its reputation for scientific advances and quality control. That same company might not highly value its reputation for compliance with environmental regulations if it concluded that its environmental record was unlikely to influence customers and contractors one way or another.<sup>219</sup> On the other hand, an oil company might have greater concern about its environmental reputation.<sup>220</sup>

The imprecision inherent in reputational sanctions undermines their utility in controlling corporate crime. The deterrent effect of reputational costs associated with criminal violation of environmental laws would vary between the pharmaceutical company and the oil company, but there is no reason to suppose society places similarly disparate value on preventing each type of company from polluting the groundwater. The community whose water is polluted does not care much whether it was done by Big Pharma or by Big Oil; we would like to discourage both equally, and reputational sanctions are unlikely to do so.

Reputational sanctions are a distinctive element of criminal liability.<sup>221</sup> In any one case, the harm to a corporation's reputation has a monetary value to that corporation. As a result of the imprecision and lack of uniformity in reputational harm, however, this impact is not a

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218. Coffee, *supra* note 81, at 427 ("Adverse publicity is something of a loose cannon; its exact impact cannot be reliably estimated nor is it controllable so that only the guilty are affected.")

219. Such a company would be more concerned with the reputational impact of a finding of flaws in its production process than with a finding of illegal waste water dumping. At the pharmacy, customers are worried about getting safe and effective medicine; external and circumstantial harms to the environment may not figure so prominently in their mind at the moment of purchase.

220. So, for example, in 2000, then "British Petroleum," "at a cost of \$200 million, . . . began an enormous corporate rebranding exercise, shortening its name from British Petroleum to BP, coining the slogan 'Beyond Petroleum' and redesigning its corporate insignia." See Darcy Frey, *How Green Is BP?*, N.Y. TIMES, Dec. 8, 2002, at 99–100. Presumably such decisions reflected (at least in part) a belief that consumers might make purchasing decisions (gas for cars) with some thought to the environmental reputation of the oil company.

221. Michael Block and others have argued that the reputational harm associated with criminal liability for corporations is not materially different from that associated with civil liability. Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395, 415 (1991) ("[T]he market effect of the initial announcement of FAA fines assessed for safety violations is very similar in magnitude to the effects of being charged or convicted of fraud."). Buell reviews this and other similar studies, notes the small sample sizes and other limitations of the studies, and concludes that the conclusions seem "doubtful." See Buell, *supra* note 28, at 508–10. I tend to agree with Buell. Additionally, the lack of uniformity between different corporate reputations suggests another reason to be skeptical about a singular assessment of the value of a criminal versus a civil violation.

strong justification for imposing criminal liability on corporations generally (although it may be for a particular type of crime in a particular industry).

*b. Enhanced Procedural Protections*

Criminal litigation provides the defendant with enhanced procedural protections.<sup>222</sup> Could these be the basis for preferring criminal liability over civil liability for corporations? Khanna specifically considers the higher standard of proof,<sup>223</sup> the prohibition against double jeopardy,<sup>224</sup> the right to a jury trial,<sup>225</sup> and the requirement of grand jury indictment.<sup>226</sup> These generally exist for the purpose of avoiding false convictions even at the cost of increased false acquittals.<sup>227</sup> To the extent the concern about false convictions is considerably diminished with respect to corporations,<sup>228</sup> these procedural protections serve less purpose than in individual prosecutions.

Additionally, each of the procedural protections accompanying a criminal action renders (to greater and lesser degrees) enforcement against corporations more costly.<sup>229</sup> These procedural protections are generally available to individuals because we prefer wrongful acquittals to wrongful convictions.<sup>230</sup> To the extent that preference is diminished with regard to corporations, so too is the value of enhanced procedural protections diminished. Khanna concludes that the value is diminished sufficiently that, in most cases, their costs cannot be justified.<sup>231</sup>

But protecting against false convictions is not the only function of enhanced procedural protections for criminal defendants. While many note that the enhanced procedural protections are necessary because of the heightened jeopardy faced by a criminal defendant,<sup>232</sup> it is less

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222. See, e.g., *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”).

223. See Khanna, *supra* note 22, at 1512.

224. See *id.* at 1517.

225. See *id.* at 1518.

226. See *id.* at 1519.

227. See *id.* at 1512–20.

228. See *supra* text accompanying notes 156–170. Khanna too concludes this concern is diminished: “Although there may be many good reasons to offer these protections to individuals, false convictions of corporations are not as problematic to society as false convictions of individuals.” Khanna, *supra* note 22, at 1512.

229. See *id.* at 1512–20.

230. See Gilchrist, *supra* note 144, at 149–53.

231. See Khanna, *supra* note 22, at 1520 (“In sum, criminal procedural protections are rarely desirable for corporate defendants.”).

232. See Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 680 (1999) (“Because both the stigma from being labeled a ‘felon’ and the harm suffered by the defendant

commonly observed that this is a two-way street.<sup>233</sup> Just as the enhanced procedural protections guard against wrongful assignment of the stigma of criminal conviction, so too do they preserve the meaning of that stigma. The person condemning or blaming the convicted may do so confidently, comforted by procedural protections that guarded against erroneous conviction.<sup>234</sup> Procedural protections not only protect the innocent, they preserve the meaningfulness of convictions and hence the reputational impact accompanying a conviction.

As discussed in the preceding Subpart, however, it would be difficult to justify criminal liability for corporations on the basis of reputational impact. There is too much variability in this particular sanction, and there is little reason to think that variability is linked to the harm the law seeks to prevent. Therefore, while the procedural protections unique to criminal law serve a function even with regard to corporations, they too are not the basis on which to justify criminal liability over civil liability for corporations.

### c. *More Powerful Enforcement Devices*

Generally the tools of criminal law enforcement are broader and more powerful than those of civil agencies. Khanna compares civil investigative demand powers—such as those wielded by the Securities and Exchange Commission or the DOJ’s Antitrust Division—to grand jury investigative powers in the criminal realm.<sup>235</sup> He concludes that, “in terms of information gathering at the prelitigation stage, public civil enforcement provides powers virtually identical to those provided by public criminal enforcement.”<sup>236</sup> This conclusion is perhaps premature, though not necessarily wrong as a result. Civil enforcement agencies do lack tools—such as wiretaps, search warrants and custodial interviews—

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from the punitive sanction is so great, the federal Constitution grants a criminal defendant a vast array of procedural protections not afforded a defendant in a civil action.”); Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 121 (1996) (“Civil commitment does not require the same procedural protections as criminal incarceration because the detention is not punishment and does not carry the same stigma.”); Frank J. Vandall, *The Criminalization of Products Liability: An Invitation to Political Abuse, Preemption, and Non-Enforcement*, 57 CATH. U. L. REV. 341, 355 (2008) (“[T]he stigma associated with imprisonment, as distinguished from the payment of damages, is a significant justification for the greater procedural protections available to criminal defendants.”).

233. Buell, *supra* note 28, at 516 (“The more the criminal proceeding is stripped of its special procedural characteristics, the less meaning the reputational sanction will carry.”).

234. This is a solely descriptive statement. There are real reasons to question whether the confidence in the procedural protections is justified. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 227–36 (2011). One might also question whether there is a normative value of condemning another person. *But see* MOORE, *supra* note 33, at 138–52 (1997) (arguing that there is a normative value to assigning blame). I am not addressing these questions.

235. Khanna, *supra* note 22, at 1522–24.

236. *Id.* at 1524.

that are available in criminal enforcement. Still, if the best defense of criminal liability for corporations is that it expands the scope of investigative methods, that would be a very weak defense. No one has argued that individual criminal liability should be abandoned for those corporate agents that cause the wrongdoing.<sup>237</sup> The question is whether the imposition of criminal liability on corporations found to have committed wrongdoing can be justified. Any investigative techniques and tools available only in criminal law enforcement would remain available for investigating the role of individuals regardless of whether corporations *qua* corporations remain subject to criminal liability. Therefore, corporate criminal liability cannot be defended on the basis that by virtue of being criminalized the wrongdoing is easier to detect.<sup>238</sup>

*d. Message-Sending Role*

Khanna concedes that “[o]ne function of the criminal law is to shape preferences and convey society’s condemnation of certain types of behavior. Thus, criminal liability may be warranted simply because criminal liability is a valuable mode of communication to society.”<sup>239</sup> He then rejects this possibility.<sup>240</sup> Khanna suggests that other means of communication, “such as news conferences, corporate civil liability, and managerial criminal liability, [can] accomplish this end.”<sup>241</sup> This is Khanna’s most troubling conclusion. While it is undoubtedly true that there are various ways a government can communicate society’s condemnation of certain types of behavior, it is not at all obvious that all means are equally effective.<sup>242</sup> Perhaps criminal liability serves as a

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237. Khanna concludes that a combination of corporate civil liability and individual criminal liability would best serve the purposes of deterrence. *See id.* at 1532.

238. This conclusion follows even accounting for the significant incentive corporations have to cooperate with criminal investigations and the fact that compelling cooperation and investigations of corporations by corporations is one of the strongest law enforcement tools in the world of white-collar crime. *See, e.g.,* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 696 (1997); Miriam Hechler Baer, *Cooperation’s Cost*, 88 WASH. U. L. REV. 903, 920–24 (2011) (describing the manner in which inducing cooperation from corporations increases detection and deterrence). The conclusion that enhanced law enforcement does not itself justify criminal liability for corporations is correct because the ability to induce cooperation is not limited to the criminal realm. The power of inducement might be particularly strong because of the strength of direct sanctions attached to criminal liability, but there is nothing about those sanctions (aside from reputational sanctions), that cannot be replicated in a civil action. *See supra* text accompanying notes 197–202; *see also* Khanna, *supra* note 22, at 1526.

239. Khanna, *supra* note 22, at 1531.

240. *Id.*

241. *Id.*

242. *See* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1876 (1992) (“[E]ven if the civil law could provide equivalent deterrence, it may not be able to perform as successfully the socializing and educative roles that the criminal law performs in our society.”).

particularly effective form of communication.<sup>243</sup> This idea is further explored in the next Part.

It is worth noting that Khanna hypothesizes that communication through corporate criminal liability may be counterproductive as “citizens might find imposing criminal liability on fictional entities farcical, and this response may decrease the criminal label’s effect for other types of crimes.”<sup>244</sup> As will be further discussed below, the concern about diluting the impact of criminal liability is real, but there is hardly a real worry that there is a widespread view that criminalizing corporate conduct is farcical. There are strong views about that in the academy, but those views are generally offered as a tonic against the prevailing popular view that corporate conduct *should* be subject to criminal liability. At least presently, I see little reason to worry about diluting respect for the criminal justice system by allowing criminal liability to attach to corporations.<sup>245</sup>

In sum, Khanna’s analysis of the four distinguishing characteristics of criminal law is compelling and seems largely right<sup>246</sup>—until he gets to the message-sending role of criminal sanctions, which he seems to discount too quickly. In the next Part I examine the consequential value of expressivism in criminal liability and suggest this consequentially valued expression might justify criminal over civil liability for corporations.

### III. THE EXPRESSIVE COST OF CORPORATE IMMUNITY JUSTIFIES IMPOSING CRIMINAL LIABILITY FOR CORPORATIONS

#### A. CRIMINAL LIABILITY HAS A DISTINCTIVE EXPRESSIVE ASPECT

Criminal liability is distinguished from civil liability by the stigma that accompanies it. The imposition of criminal liability conveys an expression of condemnation lacking in civil liability.<sup>247</sup> A tortfeasor owes money, but should not necessarily feel shame over the tort.<sup>248</sup> A finding

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243. He instead concentrates on the lack of consensus about when and what messages need to be sent. Khanna, *supra* note 22, at 1531–32.

244. *Id.* at 1531.

245. To the contrary, I think just the opposite is true. *See infra* text accompanying notes 304–307.

246. Coffee has identified additional “political, pragmatic and institutional” reasons to favor criminal over civil liability. Coffee, *supra* note 81, at 448. Namely, criminal dockets tend to move more quickly than civil dockets, and there presently exists a “great infrastructure of criminal law enforcers,” unmatched in the civil realm. *Id.* at 447. As Professor Coffee recognizes, however, these are circumstantial aspects of the legal system that could be changed.

247. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 405 (1958) (“[Crime] is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”).

248. Of course, those found civilly liable may in fact feel shame or other feelings more consonant with receiving the moral opprobrium of society. This might be true, for example, in a professional malpractice case. The professional found to have committed malpractice is unlikely to view the

of criminality, on the other hand, carries a stamp of opprobrium as part and parcel of the finding.<sup>249</sup>

The source of the expressive aspect of criminal liability can be found in what Hart described as the “internal aspect of rules.”<sup>250</sup> The internal aspect of rules is that which causes people subject to the rules to accept an obligation to act in accordance with the rules.<sup>251</sup> There is an internal aspect to the legal system. Hart does not contend that everyone subject to a law adopts the internal view,<sup>252</sup> but in a “reasonably just society” most people value obeying the law for its own sake.<sup>253</sup> This obligation is entirely independent of any penalty for failing to do so.<sup>254</sup> The internal

liability as of mere monetary consequence. The distinction between criminal and civil in such cases may be not so much a distinction of consequences as a distinction between the formally intended consequences. A finding of criminal liability is meant to stand as a moral condemnation of sorts; on the other hand, a finding of civil liability is meant to identify who should bear the cost of an act that, while not celebrated, is not morally condemned.

249. The distinction between crime and tort is fuzzy and there may be findings of criminality that carry no moral condemnation. Because a legislature may decide what conduct to criminalize, there is no mechanism to ensure only that meriting moral condemnation is criminalized. But the central examples of criminal liability can be distinguished from the central examples of civil liability on the basis of the relative moral condemnation associated with each. And it ought to be so. “[C]riminal law works best when it deals with conduct of the defendant that the law thinks worthy of moral condemnation, and . . . it works worst when in the name of effective social control it modifies its standards by judging actors at their peril.” Richard A. Epstein, *Crime and Tort: Old Wine in Old Bottles*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 231, 248 (Randy E. Barnett & John Hagel III eds., 1977).

250. See HART, *supra* note 29, at 56–57.

251. *Id.* at 56–57.

What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society. These are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules. For them the violation of a rule is *not merely a basis* for the prediction that a hostile reaction will follow *but a reason* for hostility.

*Id.* at 90 (emphasis added).

252. *Id.* at 115–16 (“[A person] obeying a rule . . . need not, though he may, share the internal point of view accepting the rules as standards for all to whom they apply.”). “But this merely personal concern with the rules, which is all the ordinary citizen *may* have in obeying them, cannot characterize the attitude of the courts to the rules with which they operate as courts.” *Id.*

253. See, e.g., Robert Cooter, *The Intrinsic Value of Obeying a Law: Economic Analysis of the Internal Viewpoint*, 75 *FORDHAM L. REV.* 1275, 1277 (2006) (“In a reasonably just society, most people prefer to obey most laws, and some people are indifferent towards obeying some laws.”).

254. See, e.g., Benjamin C. Zipursky, *Legal Obligations and the Internal Aspect of Rules*, 75 *FORDHAM L. REV.* 1229 (2006).

Is it essential to legal obligations that their violation is attended by sanction? The answer, for Hart, was “no,” but a doubly qualified no. In the first instance, having a sanction attached to noncompliance is not part of what it is for there to be a legal obligation. The concept of legal obligation is cashed out by reference to the injunctive force of a valid primary rule of conduct. Such a rule does not depend for its existence on a sanction.

*Id.* at 1242.

aspect of rules is at odds with Holmes' famous description of law as purely sanction-based and devoid of moral obligation:<sup>255</sup>

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.<sup>256</sup>

The internal aspect of rules suggests otherwise: Laws do not merely price, they obligate.

It should be noted that some laws do—at least arguably—merely price. These laws too, however, have an internal aspect. For example, some argue that rules of tort impose an obligation not to violate the rule.<sup>257</sup> Yet I introduced this Section with the observation that criminal law obligates in a way other laws—like tort laws—do not. There remains something different between the obligation established by criminal law and that established by tort law. This distinction is most clear where tort law is understood as merely establishing a pricing system for certain conduct and certain results.<sup>258</sup> Both the obligation and pricing views of tort law are consistent with the fact that tort law has an internal aspect. In the case of tort as obligation, the internal aspect is obvious. The tort-as-obligation understanding would express the rules as “Do not do X; violation of this rule will be penalized by Y.” The internal aspect of this rule is that those subject to the rule accept an internal obligation to “not do X.” On the other hand, if the rules of tort law merely set prices, the rule can best be expressed as “Doing X will result in Y.” In this case there remains an internal aspect to the rules—not that there is an obligation to *not* do X, rather, there is an obligation to pay Y *if* you do X. The expression of the rule changes, and the expression of the internal aspect of the rule changes accordingly, but either way the rule contains

255. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”).

256. *Id.* at 459.

257. See John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1576 (2006) (“If tort law were really, as Holmesians support, a regulatory scheme for deterring and compensating, the traditional vocabulary and syntax of tort ought to have developed quite differently than it did.”).

258. See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155 (1982).

[M]anagers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so.

*Id.* at 1177 n.57. Notably, Easterbrook and Fischel in making this claim expressly “put to one side laws concerning violence or other acts thought to be malum in se.” *Id.* at 1168 n.36.

an internal aspect.<sup>259</sup> The debate between those who see tort rules as obligations and those who view tort rules as pricing is not about the presence or absence of an independent obligation to comply with the command of the law; rather, it is a debate about what the law commands. Either way, there is an obligation to comply with the command, however it is understood.

In the context of criminal law, however, the internal aspect of the law is simpler and more obvious. Substantive criminal law is not a pricing system; it is a set of commands and prohibitions.<sup>260</sup> Compared with civil liability, criminal liability is more difficult to impose—the defendant is afforded more significant procedural protections—the reason for this is at least in significant part because criminal liability carries a greater stigma than civil liability.<sup>261</sup> Depending on how one understands the mandate of civil laws (obligation creating or pricing), it may be too strong to say that criminal liability carries a *kind* of opprobrium that civil liability lacks.<sup>262</sup> It may merely carry a *heightened degree* of opprobrium compared to civil liability. But whether the distinction is one of degree or kind, there is a distinction between the opprobrium associated with a violation of criminal law and that associated with a violation of civil law.<sup>263</sup>

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259. Similarly, contract law might be understood to promote efficient breach. In that case, the substantive law of contract might be understood to impose an obligation: “Breaching the contract will result in Z.” Or, it might be understood to protect promises. In that case, the substantive law of contract might be understood to impose an obligation: “Do not breach a contract; violation of this rule will be penalized by Z.” There is an internal aspect to both rules.

260. See Coffee, *supra* note 242, at 1876 (“The difference between a price and a sanction is at bottom the difference between, on one hand, a tax that brings private and public costs into balance by forcing the actor to internalize costs that the actor’s conduct imposes on others and, on the other, a significantly discontinuous increase in the expected cost of the behavior that is intended to dissuade the actor from engaging in the activity at all.”).

261. See *In re Winship*, 397 U.S. 358, 363 (1970) (“The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.”).

262. Of course, if there is any context in which Holmes’ understanding of law as purely sanction-based is correct, it would be with regard to large corporations. Holmes’ bad man may be a particularly apt description of corporations. “[I]s not the perspective of a large bureaucratic corporation whose sole or primary aim is maximization of profit very close to that of the ‘bad man’—amoral, rational, calculating, purposeful, pursuing its own agenda?” William Twining, *Other People’s Power: The Bad Man and English Positivism 1897–1997*, 63 BROOK. L. REV. 189, 210 (1997); see Jill E. Fisch, *The Bad Man Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1600 (2006) (quoting Twining and concluding that “the bad man, with his nonexistent moral compass, offers us a mechanism for understanding the duties imposed on amoral corporations by the law”).

263. One problem with understanding civil laws as obligation-creating as opposed to pricing rules, is that doing so undermines the distinctively prohibitive character of criminal law. See Coffee, *supra* note 242, at 1877 (reviewing non-deterrent functions of criminal law that would be undermined were a separation between civil and criminal law not maintained).

Strong opprobrium is part of the punishment, and part of what makes the punishment criminal.<sup>264</sup> Criminal sanctions contain an expressive element lacking in civil liability. Could this be the aspect of criminal liability that justifies its application to corporations? Peter Henning argues it may be: “As an expression of the community’s moral judgment, there is a significant value to applying the criminal law to organizations that act through their agents, apart from any instrumental benefits from having a coercive means available to deter certain conduct.”<sup>265</sup> In the following Subparts, I consider the benefits of that expression of judgment and whether they can justify corporate criminal liability.

#### B. THE EXPRESSIVE ASPECT OF CRIMINAL LIABILITY CANNOT BE VALUED FOR ITS OWN SAKE

The fact that criminal liability is accompanied by moral condemnation does not establish that condemnation is beneficial. Expressivism is *not* a good in and of itself.

Many theorists have rightly attacked expressivism to the extent it is offered as its own good. Hart described a “denunciatory theory of punishment.”<sup>266</sup> He rejected the theory by challenging the very value of expressing condemnation: It may be a fact, but is it good?<sup>267</sup>

264. As Dan Kahan describes:

The expressive theory of punishment says we can’t identify criminal wrongdoing and punishment independently of *their* social meanings. Economic competition may impoverish a merchant every bit as much as theft. The reason that theft but not competition is viewed as *wrongful*, on this account, is that against the background of social norms theft expresses disrespect for the injured party’s moral worth whereas competition (at least ordinarily) does not. Military service and imprisonment may be equally destructive of a person’s liberty; the reason that imprisonment but not conscription is regarded as *punishment* is that against the background of norms only imprisonment expresses society’s moral condemnation.

Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 420 (1999). Similarly, Joel Feinberg distinguishes civil penalties from criminal punishment in this way:

[P]enalties have a miscellaneous character, whereas punishments have an important additional characteristic in common. That characteristic, or specific difference, I shall argue, is a certain expressive function: punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those “in whose name” the punishment is inflicted. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.

FEINBERG, *supra* note 27, at 98.

265. Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1427 (2009).

266. See HART, *supra* note 147, at 170 (defining the theory as positing that “the ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime”). This theory is distinguished from what this Article describes as the expressive value of punishment in that it posits that moral expression is the primary and perhaps sole justification for punishment. *Id.* This Article makes no such claim; rather, this Article contends that

Surely to think of the apt expression of feeling—even if we call it moral indignation rather than revenge—as the ultimate *justification* of punishment is to subordinate what is primary to what is ancillary. We do not live in society in order to condemn, though we may condemn in order to live.<sup>268</sup>

Condemnation is not an end; it is a means. Al Alschuler lampoons the contrary position: “[I]mposing punishment expresses a community’s values and feels really good. The society that slays together stays together.”<sup>269</sup>

If the expressive value of punishment could be justified no further than expression-for-expression’s-sake—or that it feels good—it would be inadequate to justify the imposition of criminal liability.<sup>270</sup> After all, criminal liability is inherently serious. It is serious for those shareholders who lose money.<sup>271</sup> It is serious for those employees whose jobs might be jeopardized.<sup>272</sup> It is serious for the managers who, even when they avoid personal criminal liability, may be subject to remedial actions affecting pay, reporting structures, and responsibilities. And these consequences are only those affiliated with any imposition of liability—criminal or civil. Beyond that, the point embraced by this Article is that there is something distinctively severe about criminal liability. The expression itself imposes a burden on all affiliated with the corporation.<sup>273</sup> The severe consequences of criminal liability for a corporation and all its affiliates cannot be justified except by reference to something more

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there is a consequentialist value to expression in criminal liability, and that value helps explain why criminal liability is appropriate even where—as with corporations—imposition of civil liability may generate sufficient deterrence at lower cost.

267. *Id.* at 170–72 (Hart rejected the theory for three reasons; only the third is relevant here).

268. *Id.* at 172.

269. See Alschuler, *supra* note 21, at 1373 n.81.

270. I address these and other issues in *Condemnation Without Basis: An Expressive Failure of Corporate Prosecutions*, 64 HASTINGS L.J. (forthcoming 2013).

271. See Coffee, *supra* note 81, at 401.

272. See *id.*

273. This point should not be overstated. As described above with regard to reputational effects, the expression of condemnation associated with criminal liability can vary widely depending on the substantive crime at issue and the nature of the corporation. It can affect different corporate affiliates differently as well. Thus, a U.S.-based medical researcher at a pharmaceutical company likely feels very little of the condemnation stemming from the company’s technical violation of foreign anti-corruption laws. But, as the condemnation becomes more severe, one would expect more corporate affiliates to feel its impact. For example, although not related to criminal allegations, the condemnation toward AIG following its bailout was so severe that employees who had nothing to do with the financial problems or the controversial bonuses reported feeling its impact. See Russell Goldman & Ann-Marie Dorning, *Employees Fear for Their Lives: The Other AIG Outrage*, ABCNEWS, Mar. 27, 2009, available at <http://abcnews.go.com/Business/story?id=7184097&page=1> (“Employees of American International Group not involved with the shady credit default swaps that led to the company’s near-collapse last year are angry for being unfairly blamed for a mess they say they had nothing to do with and are scared by threats of violence against them and their families.”).

serious than making people feel good. It must be consequentially justified.

C. THE EXPRESSIVE ASPECT OF CRIMINAL LIABILITY HAS CONSEQUENTIAL VALUE

Corporations can act, and fail to act, *qua* corporations, in ways that merit condemnation.<sup>274</sup> The culture of a corporation as a whole can give rise to meaningful judgment of that corporation.<sup>275</sup> Punishment as an expression of that judgment could serve any number of goals.<sup>276</sup> Of course, in describing the value of expressivism as something distinct from deterrence, it is important to maintain a clear distinction between the two functions. The impact of criminal liability on a corporation's reputation may have a deterrent effect, and it may stem from a societal judgment against the corporation; however, expressivism is distinct from deterrence. Expressivism values the expression of condemnation for its consequential benefits *apart from* any deterrent effect it may have on the corporation.<sup>277</sup>

There are two functions of expressive punishment—independent of any deterrent effect—that are useful. First, the expression of condemnation can influence the values of a society. Second, the failure to express condemnation through the imposition of criminal liability, where such condemnation is widespread, undermines the legitimacy of the criminal justice system.

1. *The Consequential Value of Expression in Corporate Criminal Liability*

Criminal liability carries its own normative punch. The power of criminal liability to influence normative beliefs is predicated on the fact that every criminal sanction carries some normative value related only to

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274. See *supra* Part I.

275. See *supra* text accompanying notes 70–74.

276. Heidi Hurd and Michael Moore suggest this list:

Thus, a utilitarian might plausibly suppose that the denunciation of crimes, criminals, their motives, etc., will (1) vent a society's vengeful emotions in a way that prevents some members of that society from taking the law into their own hands, (2) reinforce the values of law-abiding citizens in a way that keeps them law-abiding, (3) shame others who are less law-abiding out of breaking the law, (4) educate the populace in the principles of morality that keep most people from being harmed by others, (5) satisfy what most people most want, (6) maintain a sense of social cohesion by giving members of society an identity defined by a set of shared values, etc.

Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1111 (2004).

277. The deterrent effect of reputational impact on the corporation can be real, but it is too imprecise and sometimes too disconnected from the harm to be prevented to serve as a strong justification for imposition of criminal liability. See *supra* text accompanying notes 205–221.

its status as a crime (as opposed to whatever normative value accompanies the substantive conduct proscribed). That is to say, there are two reasons criminal liability is accompanied by condemnation. First, the substantive law is what it is often because of some measure of societal belief that the proscribed conduct is morally wrong; this might be thought of as the substantive prong of moral condemnation affiliated with criminal liability. Where one is found to have engaged in the proscribed conduct, one is subject to whatever moral judgment—if any—caused the substantive law to be enacted in the first place.

Then there is a procedural prong to the moral condemnation affiliated with criminal liability: This is the internal aspect of rules.<sup>278</sup> People subject to the rule accept an obligation to act in accordance with the rule simply by virtue of it being the rule.<sup>279</sup> Failure to do so is judged—independent of any judgment regarding the substantive conduct—as a failure to comply with the accepted obligation. A finding of criminal liability is a formal declaration that the guilty party violated the criminal law, and this carries independent judgment.<sup>280</sup>

This type of judgment—for failing to follow the law—imparts to criminal laws an authority unrelated to the underlying morality or normative judgments that caused the law to be enacted. The internal aspect of criminal laws is particularly strong because substantive criminal rules are recognized as clear prohibitions in a way civil rules are not.<sup>281</sup> As a result, criminal law can shift societal norms.<sup>282</sup> A particular act might be subject to little or no moral judgment; however, where that act is prohibited by criminal law, the commission of the act carries at least the opprobrium associated with violating the obligation to obey the law. Because criminal laws have this normative component, they have the potential effect of shifting social norms over time.<sup>283</sup>

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278. See *supra* text accompanying notes 250–258.

279. See *supra* Part III.A.

280. The severity of this pronouncement for individuals can be seen in the use of the label “felon.” One who is convicted of a felony is not merely convicted, she is formally—and nearly permanently—labeled a felon. That label carries severe social and legal consequences. See George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 *UCLA L. REV.* 1895, 1906–07 (1999) (identifying various consequences of being a felon).

281. See *supra* text accompanying notes 260–264.

282. See, e.g., Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 *DUKE L.J.* 1, 17 (1990) (identifying shaping preferences as an important, if frequently ignored, purpose of criminal punishment).

283. For an example of corporate criminal law that might have affected public morality one might consider enhanced enforcement of the Foreign Corrupt Practices Act. The dramatic increase in enforcement since 2000 seems to have been accompanied by some shift among corporate personnel about the moral status of bribing foreign officials. A 2007 survey of senior corporate executives conducted by the Economist Intelligence Unit found over 65% of respondents “believe a level playing field is crucial to their company’s future business activities.” See PRICEWATERHOUSECOOPERS, *supra* note 66, at 2, 36. Environmental laws may be another area where increased enforcement has shifted

That the normative value of criminal law can be harnessed to influence society's values<sup>284</sup> in specific contexts seems uncontroversial.<sup>285</sup> However, difficult questions remain: How strong is law's normative harness and how heavy are society's moral views? The answer, no doubt, is highly variable between types of crimes, norms, societies, and legal systems.<sup>286</sup> But even recognizing that the capacity of criminal law to shift societal norms is limited, it is nonetheless a function unique<sup>287</sup> to criminal law, and thus a function that might help explain one consequential benefit of expression through the imposition of criminal liability on corporations: It influences what society will and will not accept in terms of corporate conduct.<sup>288</sup>

## 2. *The Consequential Cost of Expression in Corporate Criminal Immunity*

The expressive value of criminal liability has a still more profound effect: It prevents too great a disparity between legal standards and social norms. Imposition of criminal liability expresses condemnation; where that expression deviates too far from social norms, it does so at a cost to the legitimacy of the legal system. This is what I consider to be the restraining effect of expressivism. Generally, the expressive value of punishment serves to "strengthen faith in rule of law among the general public."<sup>289</sup> Expressivism can serve as a harness to gently and slowly pull social norms.<sup>290</sup> But it is a weak harness against generally heavy norms. The real power of expressivism is a limiting power: Criminal liability can stretch beyond that which is contrary to social norms only so far; at some

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societal norms.

284. Again, of course there is a plurality of opinions and lack of pure moral consensus. This Article maintains that we can still meaningfully talk about moral views prevalent in a society (for example, murder is wrong) while recognizing even wide-spread disagreement at the margins (for example, physician-assisted suicide is . . .).

285. See, e.g., Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 29 (2007) ("The criminal justice system, as an institution involving legislatures, legal philosophers, various criminological experts, and enforcement agencies, also has the power to persuade citizens about the moral appropriateness of its enacted laws."); see also Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 HASTINGS L.J. 137, 190 (2007) (pointing to "campaigns to prosecute 'dead-beat dads' or drunk drivers" as examples of the use of criminal law to shift societal norms).

286. The perception of procedural fairness of a particular legal system is one of the factors that would likely influence the strength of bond between the declarations of the criminal justice system and the values of the people. See TYLER, *supra* note 30 (arguing that evaluations of relative procedural fairness have an impact on respect for the authority of a legal system).

287. Or, at least uniquely strong. See *supra* text accompanying note 260.

288. See Dau-Schmidt, *supra* note 282, at 37 ("Criminal law is viewed as part of an overall social process of shaping peoples' preferences to conform to established social norms and notions of morality.").

289. MARK A. DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* 173 (2007).

290. See *supra* text accompanying notes 284–288.

point, imposing criminal liability to activity about which there is insufficient opprobrium begins to cost the legal system in legitimacy. Similarly, there is a similar cost when the legal system fails to impose criminal liability to conduct against which there is sufficiently strong opprobrium.

This legitimacy cost might be understood in two ways. Tom Tyler has produced significant empirical support showing the importance of congruity between the normative values and legal prescription.<sup>291</sup> People who agree with the law are more likely to obey the law. Where the law deviates too far from normative values, it does so at some cost to people's willingness to obey the law. But there is also a strong procedural component to whether people view law as legitimate.<sup>292</sup> Legitimacy is predicated on a view that the legal system is fair, neutral, respectful, and honest.<sup>293</sup> Where the law functions in ways deemed inconsistent with these procedural values, it does so at a cost to its legitimacy.<sup>294</sup>

Alternatively, the cost can be understood as a corollary of the internal aspect of rules. The internal point of view—that one has an obligation to obey the law simply because it is the law—need not be, and is not, adopted by all people subject to a law.<sup>295</sup> Law has an internal aspect, but not all people subject to the law recognize that aspect. As a purely descriptive matter, the more the substance of the law deviates from a person's normative views, the less likely the person is to recognize the law as an authority meriting compliance for its own sake. Where people subject to the law do not adopt the internal view—where they do not accept an obligation to comply with the law independent of any consequences associated with failure to do so—the law loses some efficacy. The law then becomes reliant entirely on force—the penalties for non-compliance—to generate compliance.

Corporate immunity from criminal prosecution would come at a significant legitimacy cost. Failure to subject corporations to even the possibility of criminal prosecution—or a policy of immunity for corporations—would deviate too far from the perception that corporations can and should be blamed for certain wrongdoings. The

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291. See TYLER, *supra* note 30, at 64 (“The most important normative influence on compliance with the law is the person's assessment that following the law accords with his or her sense of right and wrong . . .”).

292. See Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 663 (2007) (“[P]eople are more interested in how fairly their case is handled than they are in whether they win . . . . [N]umerous studies conducted over the last several decades have consistently found this to be true.”).

293. *Id.* at 664; see also TYLER, *supra* note 30, at 163–65.

294. See Tyler, *supra* note 292, at 664; see also TYLER, *supra* note 30, at 163–65.

295. See *supra* note 253 and accompanying text.

legitimacy cost of this immunity is the strongest argument in favor of criminal liability for corporations as opposed to mere civil liability.

Were corporations immune to criminal sanctions, criminal conduct that benefited the corporation would result in nothing more than a civil penalty. Civil penalties lack the expression of condemnation inherent in criminal penalties.<sup>296</sup> The label matters. Even identical penalties in the civil and criminal arenas carry different messages. The criminal penalty expresses opprobrium. The civil penalty expresses the cost of doing business. A criminal penalty can carry felon status. A civil penalty is little more than a price tag.<sup>297</sup>

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

In some instances, there will be justification for treating corporations and people differently. The distinction in capacity between corporations and natural persons may provide a reason to do so.<sup>298</sup> But this raises an empirical issue: How much do people tend to discount corporate capacity to influence criminal conduct, and is that amount sufficient to justify fundamentally different treatment by the criminal justice system? Public reaction to corporate wrongdoing suggests the discount is not so great as to merit entirely distinct treatment. Indeed, Dan Kahan contends that “members of the public tend to experience *greater* moral indignation toward corporations than toward natural persons for the same crimes.”<sup>299</sup>

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296. See *supra* text accompanying notes 260–264.

297. See Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618–19 (1998) [hereinafter Kahan, *Social Meaning*] (“Criminal liability ‘sends the message’ that people matter more than profits and reaffirms the value of those who were sacrificed to ‘corporate greed.’ . . . [C]ivil damages seem to connote that society is ‘pricing’ corporate crime.”); see also Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 622 (1996) (“[I]f the offense was committed in the course of commercial activities, a fine is likely to be derided as merely the ‘cost of doing business.’”).

298. See *supra* notes 127–136 and accompanying text.

299. Kahan, *Social Meaning*, *supra* note 297, at 618 n.42 (citing Valerie P. Hans & M. David Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 LAW & HUM. BEHAV. 151, 158, 162 (1989)) (emphasis added); see, e.g., Joann L. Miller et al., *Felony Punishments: A Factorial Survey of Perceived Justice in Criminal Sentencing*, 82 J. CRIM. L. & CRIMINOLOGY 396, 412–14 (1991). This is a delicate point. If taken as a statement of normative value, it could become grounds for the same ridicule invited by proposing moral condemnation of inanimate objects. Given that corporations are distinguished from natural persons by having *less* capacity, it would seem odd to attribute *greater* blame to a corporation than to a natural person for the same crime. The explanation for this distinction may be that people are naturally less sympathetic to corporations than to natural persons. Or, it may be that with diminished capacity, corporations also merit diminished mercy. Erin Shelley presents an argument, supported by psychological literature, that harms caused by corporations are perceived as more

People blame corporations for criminal violations committed in the corporation's name or for corporate benefit.<sup>300</sup> The failure to criminally punish corporations for these wrongs would undermine public respect for the criminal justice system.<sup>301</sup> It would represent a failure of procedural justice and a lack of neutrality,<sup>302</sup> thus undermining the legitimacy of the legal system. It would also shift the substantive law away from the norm that corporations ought to be blamed when they cause criminal harm.

Some have claimed that the reputational harm for a corporation found criminally liable is not greater than that for a corporation found civilly liable.<sup>303</sup> If true, this would bring into question whether criminal liability really carries a unique or uniquely strong expression of condemnation. And the current enforcement environment suggests a

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significant by reason of the fact that they were caused by a corporation; this too could explain the heightened condemnation of corporations that cause harm compared to individuals who cause comparable harm. See Erin Shelley, *Perceptual Harm and the Corporate Criminal*, 81 U. CIN. L. REV. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2022379](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2022379). The reasons behind the distinction are beyond the scope of this Article. But, if taken merely as an accurate description, it becomes a fact for which any theory of corporate criminal liability must account.

300. This is merely a descriptive claim. Alschuler is quite critical of the tendency to blame inanimate objects, but he does not deny the tendency. See *Two Ways to Think About Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1336 (2009). Perhaps this is a subset of what Mackie calls the paradox of retribution: “[O]n the one hand, a retributive principle of punishment cannot be explained or developed within a reasonable system of moral thought, while, on the other hand, such a principle cannot be eliminated from our moral thinking.” See Mackie, *supra* note 141. Mackie resolves the paradox by recognizing retributive tendencies as based in a specific type of emotion, which emotion is deeply ingrained, perhaps biologically mandated, and is subject to neither eradication nor rational explanation. So too with corporations: People blame them; it's difficult to justify that blame, but it's more problematic to ignore that blame.

301. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457 (1997):

The criminal law can have a second effect in gaining compliance with its commands. If it earns a reputation as a reliable statement of what the community, given sufficient information and time to reflect, would perceive as condemnable, people are more likely to defer to its commands as morally authoritative and as appropriate to follow in those borderline cases in which the propriety of certain conduct is unsettled or ambiguous in the mind of the actor. The importance of this role should not be underestimated; in a society with the complex interdependencies characteristic of ours, an apparently harmless action can have destructive consequences. When the action is criminalized by the legal system, one would want the citizen to ‘respect the law’ in such an instance even though he or she does not immediately intuit why that action is banned. Such deference will be facilitated if citizens are disposed to believe that the law is an accurate guide to appropriate prudential and moral behavior.

302. That is, if people do not perceive a material distinction between crime by corporations and crime by individuals, or a material distinction between punishing corporations and punishing individuals, the failure to punish corporations criminally will violate the neutrality principle. See Tyler, *supra* note 292, at 664 (“Neutrality involves making decisions based upon consistently applied legal principles . . .”). This is not to suggest that people would never perceive a material distinction between individual criminal actors and corporate criminal actors; it is enough that people will not *always* perceive such a distinction to justify the imposition of criminal liability on corporations in some cases.

303. See *supra* note 221.

factor that may be diluting the expressive aspect of criminal liability: The increased use<sup>304</sup> of criminal law enforcement to secure civil resolutions<sup>305</sup> goes a long way toward blurring the lines between civil and criminal law. It would not be shocking if this blurring diminished the expressive aspect of criminal liability.<sup>306</sup>

As a normative matter, the distinction ought to be maintained because it has social value.<sup>307</sup> If the current practice of corporate criminal prosecutions has blurred the distinction between criminal and civil, this is reason to revisit the practice. Criminal sanctions generally do carry a distinctive expressive element, and they ought to do so.

But it also seems premature to declare that the public no longer ever perceives a difference between criminal and civil liability for corporations. In cases of deeply unpopular harms possibly caused by organizations (for example, oil spills or the recent financial crisis), the imposition of mere civil penalties generates popular anger. By way of example, on April 16, 2010, the Securities and Exchange Commission (“SEC”) charged Goldman Sachs with “defrauding investors by misstating and omitting key facts about a financial product tied to subprime mortgages as the U.S. housing market was beginning to falter.”<sup>308</sup> Within two business days, Congresswoman Marcy Kaptur sent a letter to Attorney General Eric Holder.<sup>309</sup> In the letter, the Congresswoman noted that while the SEC had charged Goldman, the SEC’s power is limited to civil actions.<sup>310</sup> She accordingly asked the Department of Justice to “open a case on this matter and investigate it with the full authority and power that your agency holds.”<sup>311</sup> The letter declared: “If both global and domestic confidence in the integrity of the U.S. financial system is to be regained, there must be confidence that

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304. See Gov’t Accountability Office, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS (2009) (measuring a marked increasing in the use of DPAs and NPAs in the 2000s).

305. See Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008) (describing significant shifts in the pattern of criminal investigations of corporations that increasingly result in pre-indictment civil resolutions).

306. In fact, this is precisely the concern raised by Professor Coffee twenty years ago. See Coffee, *supra* note 242, at 1877.

307. See *supra* text accompanying notes 279–288.

308. See Press Release, Securities & Exchange Comm’n, SEC Charges Goldman Sachs with Fraud in Structuring and Marketing of CDO Tied to Subprime Mortgages (Apr. 10, 2012), available at <http://www.sec.gov/news/press/2010/2010-59.htm>.

309. See Eric Zimmerman, *House Democrats Calling for Criminal Investigation of Goldman Sachs*, THE HILL (Apr. 21, 2010), <http://thehill.com/blogs/blog-briefing-room/news/93553-dems-push-for-criminal-investigation-of-goldman-sachs>.

310. See *id.*

311. *Id.*

criminal acts will be vigorously pursued and perpetrators punished.”<sup>312</sup> People do perceive a difference between civil liability and criminal liability for organizations, at least in some cases.

There is, however, another reply to the objection that criminal liability no longer carries a distinctive stigma for corporations: The absence of a strong expressive element to the *imposition* of criminal liability does not necessarily entail the absence of a strong expressive element to corporate *immunity* from prosecution. Consider what is really on the table: Should the legal system ever hold corporations criminally liable? If the answer is no, corporations will be immune from criminal prosecution. Even were it the case that individual corporate convictions fail to carry the sort of expression of condemnation traditionally associated with criminal conviction, it does not follow that blanket immunity from criminal law would have little expressive value. The systemic shift from a world in which corporations are expressly forbidden from committing crimes (criminal liability) to one in which otherwise criminal conduct is merely priced for corporations (civil liability) would itself represent a significant expression.

The expressive cost of corporate immunity is likely greater than the expressive value of corporate criminal liability. Immunizing corporations from criminal prosecution would undermine perceptions of the procedural fairness of our legal system and it would create a significant disparity between the values of the legal system and existing social norms. Corporate criminal liability is justified, because the alternative—immunity—costs too much.

#### D. EXPRESSIVISM IS JUSTIFIED TOWARD CORPORATIONS IN A WAY IT IS NOT TOWARD NATURAL PERSONS

There is a problem with expressivism: It is particularly susceptible to Hart’s concern about law “treat[ing] men merely as alterable, predictable, curable, or manipulable things.”<sup>313</sup> Imposing criminal liability merely on the basis of its expressive value very much threatens to treat people as means to an end. There would be a real reason to question the priorities of a legal system that treated a natural person’s life or liberty as means to achieve the end of societal expression. The life and liberty of natural persons should take precedence over goals of societal expression.

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312. See Letter from Marcy Kaptur to Eric Holder (Apr. 19, 2010), available at <http://www.dailykos.com/story/2010/04/20/859209/-Marcy-Kaptur-Demands-AG-Holder-Investigate-Goldman-Sachs-Sign-the-Petition>. To date, sixty one members of congress have co-signed the letter. See *Standing up to Wall Street Greed*, CONGRESSWOMAN MARCY KAPTUR, [http://www.kaptur.house.gov/index.php?option=com\\_content&task=view&id=637](http://www.kaptur.house.gov/index.php?option=com_content&task=view&id=637) (last visited Oct. 2, 2012).

313. HART, *supra* note 147, at 183.

For this reason, purely expressivist justifications of punishment are correctly subject to strong challenge.

The challenge, however, applies less in the context of corporate criminal liability for two simple reasons. First, there is no claim that expressivism is the sole or even primary justification for corporate criminal liability. Changing corporate conduct—deterrence in a broad sense—is the primary justification for corporate punishment. Expressivism is not intended to justify the imposition of punishment itself. It is offered as a justification for the imposition of criminal liability on corporations instead of mere civil liability.

Second, to state the obvious, corporations are *not* natural persons.<sup>314</sup> As was addressed above,<sup>315</sup> there is good reason to be less concerned about fairness to corporations than to natural persons. Whereas treating natural persons as a means to the end of expression is deeply troubling, treating corporations as means to the end of expression does not raise the same concerns.

#### CONCLUSION

Deterrence is and will remain the dominant purpose of imposing any sort of liability on corporations. Corporations can cause harm, and liability for certain harms can cause corporations to alter their behavior to cause less harm. That is really why we hold corporations liable.

Deterrence, however, does not clearly justify criminal liability over civil liability. Corporate punishments are basically about money. And civil penalties can also produce money damages—probably more efficiently than criminal penalties. There are reputational effects affiliated with criminal sanctions that may not be replicated by civil sanctions. However, reputational impacts are unpredictable, and there is little reason to believe they align with the amount of desired deterrence in any case.

But criminal liability for corporations remains an important aspect of our legal system. Criminal liability is justified over mere civil liability because of its expressive value. That expressive value is most clear where we consider the alternative: corporate immunity. Immunizing corporations from criminal prosecution would serve as a statement that the legal system was pricing corporate crime and differentiating between powerful corporations and mere persons. While the differentiation between corporations and persons may be justifiable philosophically, it deviates too far from the fact that people do blame corporations when they commit crimes. Isolating corporations from this blame through

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314. *See supra* note 103.

315. *See supra* text accompanying notes 157–171.

immunity from criminal prosecution would create legitimacy costs. People would lose respect for a legal system that expressed values so contrary to their own.

Understood in this way, the purpose of corporate criminal liability is deterrence and maintaining expressive consistency. Maintaining expressive consistency is the distinctive reason to impose criminal, as opposed to mere civil, liability on corporations. As such, there is work to be done. The practice of corporate criminal liability is in some disrepair. Corporations are subject to regulation by prosecutors through the threat of debilitating criminal sanctions.<sup>316</sup> The doctrine of respondeat superior, coupled with the severity of criminal sanctions, leaves corporations often unable to defend themselves in any but the most gentle manner.<sup>317</sup> A new understanding of the purpose of criminal liability for corporations calls for a re-examination of the practice of criminal liability for corporations to determine how best to align the practice with the purpose. If criminal liability exists for its expressive value, criminal prosecutions of corporations should be reconsidered in light of their expressive value. The expression inherent in no-fault civil settlements under threat of indictment is weak, and arguably harmful. Such resolutions carry the expressive downsides of criminal immunity (corporate crime is priced; corporations are treated differently than persons in a way not clearly justified) and the additional expressive cost of appearing unprincipled (corporations are compelled to pay fines under threat of indictment). If the expressive value of criminal liability matters, prosecutions should proceed with some consideration for the expressive costs and benefits affiliated with the action.

Criminal liability is not going to attach to every corporate wrong, nor should it. Corporate indictments can have severe consequences for innocent parties. The increased use of Deferred Prosecution Agreements and Non-Prosecution Agreements stems from this recognition. Maintaining the expressive value of criminal prosecutions does not mean abandoning such tools. It means structuring a system of liability, prosecutorial discretion, and criminal penalties that express clear condemnation when it is appropriate to do so. Indeed, the result of reassessing the practice of criminally prosecuting corporations in light of its expressive value may well be to *decrease* the sum total of criminal sanctions against corporations. Reform is needed, but it should be reform that bolsters the expressive value of corporate criminal liability. And it should be reform that recognizes the expressive cost of immunity.

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<sup>316</sup> See Spivak & Raman, *supra* note 305.

<sup>317</sup> Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 277–81 (2008).