The Moral Agency of Corporations and its Implications for Criminal Law Theory

Sylvia Rich, DPhil Law

HT 2016

Word Count: 86, 844

Abstract

This thesis analyses the corporation, a business entity, as a form of group agent and considers its treatment under criminal law. I use group agency theory, drawn from the philosophy of action, to explain how a corporation can be a rational, moral agent with an existence separate from its individual human members' existence. Sceptics about corporate entity often tie moral agency to emotional capacity, something that many theorists, including many who defend the existence of corporate agency, find that the corporation lacks. As against this, I argue that corporations are indeed emotional entities, drawing group-level emotional states from the emotions of various members. Critics of corporations also argue that there are structural reasons why corporations are essentially immoral, or bad moral agents. As against this, I argue that while there are strong reasons why corporations tend to do bad things, they are structurally neutral.

In the second half of the thesis, I use the conceptual framework of the corporate moral agent to attempt to bring clarity to various problems within the criminal law as it applies to corporations. While corporations can be brought up on charges of committing acts that require a mens rea element, the law and legal theorists have long struggled with how to locate mens rea within the corporation. I build on collectivist theories of mens rea to explain a form of corporate recklessness, as an instance of corporate mens rea. The applicability of excuses to corporations is also an undertheorized area. I show how, in very limited circumstances, a corporation may be able to make out the excuse of duress, though that excuse relies on the accused acting from the emotion of fear. Finally, I consider the applicability of various theories of punishment to the corporation.

Table of Contents

Table of Cases

Table of Legislation

Acknowledgements

I have had so much help in completing this piece of work. My supervisor John Gardner has been unfailingly generous with his time, his ideas, and his words of encouragement. My thought process has benefited greatly from our many conversations. Likewise my co-supervisor Julian Roberts has kept me going with words of encouragement, critiques, and invaluable practical advice throughout the process. I am extremely grateful to both of them.

Lucia Zedner, Andrew Ashworth, and James Edwards all acted as assessors at interim assessments within the DPhil. They gave me valuable insights without which the project would be much poorer than it is now. I am grateful to Andrew Botterell for his very thoughtful and helpful comments on chapter 7. Many friends and colleagues have been instrumental in keeping me on track, notably Kate West, Kate Greasley, Kezia Speirs, Jo Simon, Leah Trueblood, and Raquel Barradas de Freitas.

My mother, Ethel Saltzman, has encouraged me, listened to me, supported me, and done more copy-editing than I had any right to ask for. My father, Harold Rich, has been an incredible source of support, always believing in my capabilities and always wanting me to make the unconventional choice and take risks, assuring me that he would be a safety net if the risks didn't pan out. My sister Rachel Rich has also been a guide and dispenser of useful advice, as have Graeme Davies, Benjamin Rich, and Maria Panova.

I owe an immense debt of gratitude to Darcy-Jonas Daszkowski, who got me out of the house every morning, encouraged me and even gently harassed me into working when it was necessary. And to Cadence Rich-Daszkowski, whose two-cheek kisses, cuddles, smiles, compliments, and enthusiastic greetings every afternoon made my heart light every day since his birth: he may have taken away some of the sleep a DPhil student wants, but he gave me instead purpose, love and perspective.

Thank you also to the ***Fonds de recherche société et culture Québec*** for financial assistance in this project.

Copyright Permission

Much of the material for chapter seven, 'Sentencing Theory and the Corporate Entity,' has been previously printed as Sylvia Rich, "Corporate Criminals and Punishment Theory," (2016) 27 ***Canadian Journal of Law and Jurisprudence*** 97 and is copyrighted 2016 to the ***Canadian Journal of Law and Jurisprudence***. It is reprinted with permission of Cambridge University Press.

1. Introduction

The practice of imposing criminal liability on corporations has become increasingly entrenched in Anglo-American jurisdictions. This is a relatively recent development in the history of law,[1] and though judges, legislators, and commentators have made some progress in fitting the criminal law to corporate entities, it is still the case that the rules of liability and sentencing lack the strong theoretical underpinnings and coherence that the criminal law has in its application to natural persons. Criminal law is predicated on the notion that people may commit morally blameworthy acts. This bedrock assumption becomes problematic when applied to corporations. For a person to be morally blameworthy requires them to be able to reason morally, which is why small children and non-human animals are not considered to be morally blameworthy even when they commit bad acts. Corporations have for a long time been subjects in law, with the ability to appear in court, but it is not immediately obvious that they have either the ability to reason or to judge morally. This dissertation attempts to reconcile the principles of criminal law, resting as these do on the existence of moral agency, with their application to corporate subjects. It does so by defending a theory of corporations as moral agents.

The statement that corporations are persons is often met with incredulity and even anger at the cynical machinations of corrupt political systems.[2] This is despite the

---

[1] In England and Wales it occurred sometime in the 19th century for non-mens rea offences, see Celia Wells, ***Corporations and Criminal Responsibility*** (2nd ed., Oxford University Press 2001), 86. The same is true for the U.S., see Kathleen F. Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (1982) 60 Washington ULRev 393, 405-406

[2] For examples of this see ***The Huffington Post***, 15 January 2012

fact that there have been non-natural legal persons since at least the Middle Ages.[3] There is a prevalent view that corporations are not moral agents and only make the choices that are expedient, meaning they must be guided towards moral choices through incentives and disincentives. This misconception has had a significant impact on how the state has treated corporations. If corporations are moral agents, then their pursuit of profits should not be any less constrained by moral considerations than that of a human profit-seeker. Yet the criminal law has difficulty incorporating them fully into its doctrines, while other branches of law have had no such difficulty.

The criminal law's gradual taking on of corporations as criminal defendants has been somewhat ad hoc and often it has proceeded on a basis of convenience rather than with an adherence to principle.[4] There are many, many critics of the idea that corporate entities have a separate reality at all. John Finnis, for instance, writes that only individual humans are rational, and that any talk of corporate rational agency must be metaphorical.[5] This thinking necessarily leads to a corollary in the criminal law that corporate crime is simply a fiction, a pragmatic move by the state to increase the severity of disincentives it can offer to corporations in order to regulate their behaviour. So G.R.

---

http://www.huffingtonpost.com/2012/01/15/occupy-dc-passes-corporate-personhood-resolution_n_1207041.html (accessed 2 September 2013); ***Reclaim Democracy: Restoring Citizen Authority Over Corporations*** http://reclaimdemocracy.org/corporate-personhood/ (accessed 2 September 2013) and 'Occupy DC Passes Corporate Personhood Resolution'; also William S. Laufer, ***Corporate Bodies and Guilty Minds*** (U Chicago, 2006), 52 (commenting on the phenomenon rather than endorsing it)

[3] Christian List and Philip Pettit, ***Group Agency: The Possibility, Design and Status of Corporate Agents*** (OUP, 2011) 11

[4] William Laufer writes, in the U.S. context, 'The progression of the corporate criminal law over the past century has been almost entirely atheoretical—or with unarticulated theory—in spite of a spirited debate held on the sidelines by lawyers, judges, legal intellectuals, and philosophers.' Laufer (n 2), 51

[5] John Finnis, 'The Priority of Persons,' in Jeremy Horder, ed., ***Oxford Essays in Jurisprudence***, Fourth Series (Oxford University Press 2000) 1, who writes that only individuals are rational, and corporations may be considered rational actors only metaphorically (at 9)

Sullivan writes that any exercise in corporate criminal liability 'must be an exercise in consequentialism. There is no conceptual basis for a retributivist response to corporate illegality and no basis … for the claim that corporations are substantive moral agents.'[6] This thesis spends its first three substantive chapters countering the claim that corporations are not moral agents.

In chapter two, I set out a theory of corporations as a form of group agent, drawing on elements in the work of Michael Bratman, Margaret Gilbert, Philip Pettit, and Christian List and Philip Pettit on group agents generally.[7] I combine this picture of group agency with Peter French's different, but in my view compatible, understanding of the corporation, here specifically the business company, whose agency consists in acts that can be properly redescribed as corporate acts when the individuals who carry them out act according to the procedures prescribed by their organization's Corporate Internal Decision (CID) Structure.[8] The result of the joint intentions of members and the structure through which they organize their actions creates an agent that is a rational, self-aware and more or less stable over time (or where it is not stable, acknowledges a break in stability and accepts that the lack of continuity requires an explanation, as a rational individual would). Its agency is not divorced from that of its members, and there is no new metaphysical stuff that appears in the universe to account for it. And yet this agent

[6] G.R. Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55 Cambridge LJ 515, 516

[7] Michael E. Bratman, 'Shared Intention' (1993) 104 Ethics 97, 97-98, Michael E. Bratman, ***Shared Agency: A Planning Theory of Acting Together*** (Oxford University Press 2014), Margaret Gilbert, ***A Theory of Political Obligation: Membership, Commitment, and the Bonds of Society*** (Oxford University Press 2006), Margaret Gilbert, ***Joint Commitment: How We Make the Social World*** (Oxford University Press, 2013), Margaret Gilbert, ***Sociality and Responsibility: New Essays in Plural Subject Theory*** (Rowman and Littlefield 2000), Margaret Gilbert, 'How we feel: understanding everyday collective emotion ascription' in ***Collective Emotions***, Christian von Scheve and Mikko Salmela, eds. (Oxford University Press 2014), Philip Pettit, 'Collective Persons and Powers' (2002) 8 Legal Theory 443, Philip Pettit 'Responsibility Incorporated' (2007) 117 Ethics 171, List and Pettit (n 3)

[8] Peter A. French, ***Collective and Corporate Responsibility*** (Columbia 1984)

has a separate ontological existence, and a social reality, that supervenes on the agency and existence of its members.

In chapter three, I move on to the separate question of moral agency. I assert that moral agency is not just a facet of all rational agency, though this makes my task in showing that corporate entities possess it more difficult. Critics of corporate agency often attack moral agency specifically, and the ability to reason morally is a justification for criminal law, making it a serious threshold consideration for whether an entity is an appropriately named subject of the criminal law. Moral agency has been tied to emotional capacity, thus someone who wishes to assert its presence must either deny this connection or assert that emotional capacity is present in the subject. I take mostly the second route here, and make a very robust assertion that corporations do have emotional states. Having done this, I nevertheless take the time to create some doubt as to the connection between emotions and morality. The corporate agent, as this understanding continues to develop, is a self-aware agent that is not only rational but moral, and emotional, though with a narrower range of emotions than individual humans, based on its purpose-directed nature. In the final section of the chapter I draw some conclusions about what this agent's value is, and what its rights and responsibilities might be, based on this picture.

In chapter four I address a question that naturally follows on from the conclusion that corporations are agents with human-like moral agency: if corporations are moral and rational agents just like humans, why do they often seem so bad? Is there something in the corporate structure that makes it tend towards immorality? If so, it could have to do with a financial and moral distancing that corporations create between individual members' actions and their results. Philosophers such as Elizabeth Wolgast and Christopher Kutz have argued that this is the case, that group or agential relationships create this distance that makes it easier to accomplish bad acts.[9] Corporations create a limitation of liability for investors, which protects them financially from fully taking on the risk of their risky actions. It also creates a group mentality, which might allow individuals to blindly follow others into bad actions, without properly reflecting on their own role in these actions. A relationship of agency can also create a fragmentation of moral responsibility that makes it easier to act in ways counter to one's own moral instincts, or so Wolgast argues powerfully but ultimately wrongly. While this fragmentation of knowledge and responsibility does occur in corporations, a unification of agency also means that there is an entanglement of responsibility for the actions of one's fellow members. So, watching a neighbor do a bad action does not necessarily create any responsibility. However, when someone becomes a member of a group, the member next to her is no longer a neighbor, but a fellow member, and responsibility for fellow members in an organization extends in a way that responsibility for neighbours does not.

This should not be mistaken for an argument for ***personal*** responsibility of the member who watches another accomplish a bad act. But in her quality as a member of the organization, the member who becomes aware of something wrong has a membership responsibility to the corporation to make that wrong act known. Whether or not personal responsibility is thus entailed is the topic of another piece of writing, and I am here concerned solely with what this means for the group agent itself.

Thus, the agent itself does not tend towards badness. I argue in this chapter that many of the criticisms of corporations are more properly criticisms of the business ethos

[9] Elizabeth Wolgast, ***Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations*** (Stanford Series in Philosophy, Stanford University Press, 1992), Christopher Kutz, ***Complicity: Ethics and Law for a Collective Age*** (Cambridge University Press 2000)

of capitalist societies. The corporate form is a vehicle of choice for this cultural imperative, but the vehicle is not where the problem arises. The grouping of individuals into organizations creates some perils, but it also creates moral advantages, as chapter four details.

These three chapters together create a fairly detailed picture of what the business corporation's nature is, an entity that is the result of social relations between people in a capitalist society. With all of this in mind, the dissertation considers how the criminal law ought to interact with this particular moral agent. Lawmakers manifest their discomfort in treating corporations as moral agents through various alterations of doctrine: true mens rea offences are twisted into vicarious liability or strict liability offences when it comes time to apply them to corporations,[10] or that corporate sentencing focuses almost exclusively on the issue of deterrence,[11] when retributivism is a leading theory for sentencing individuals. These distortions erode the philosophical grounding of the criminal law, and thus lessen the reputation and authority of the law. This dissertation attempts to show that some of these distortions are unnecessary, as they are based on the false understanding that corporations do not possess moral agency.

The dissertation considers three main areas of criminal law separately, seeing how the theory of corporate moral agency brings additional cohesion to the law in each area. I understand the criminal law as encompassing the rules of sentencing, though I realize that criminal law theory is often understand as being separate from punishment theory. Nevertheless, it seems to me that the issues of criminal liability and punishment for crime

---

[10] In the U.S. this is done in a particular obvious way through the application of a vicarious liability standard for corporate mens rea, see Laufer (n 2), 52

[11] Hazel Croall and Jenifer Ross, 'Sentencing the Corporate Offender: Legal and Social Issues' in Cyrus Tata and Neil Hutton, eds, ***Sentencing and Society*** (Ashgate 2002) 535

are so interrelated that it is quite sensible to treat them as being part of the same system. In chapter five, I take on the fairly notorious problem of how best to attribute mens rea to corporations. I describe the judicial and legislative doctrines in force in England and Wales, the U.S., and Canada, which are all individual-centred, though in three different ways. Then I move on to describe various scholarly contributions, that are more collectivist in nature, and the Australian legislative scheme, which embraces this newer collectivist approach by referring to corporate culture.[12] The corporate culture standards take the right approach but risk vagueness. I attempt to bring a refinement to the part of this field that concerns recklessness as a mens rea, a standard of subjective mental state that will be sufficient for a large number of the crimes that corporations are accused of. I set out to describe a doctrine that I name corporate structural recklessness, that depends on an extended explanation of what recklessness is and how a goal-oriented group agent might engage in it in relation to particular criminal acts. While it does not deal with crimes of intention or knowledge, it is a theoretical basis on which a broader theory of mens rea could be constructed. The main contribution of this doctrine is to offer some greater specificity to the theories of criminogenic corporate culture that Bucy, Colvin, and the Australian Model Criminal Code have adopted.

In chapter six, I consider the applicability of excuses to corporations. As defendants in criminal courts, it is open to corporations to plead an excuse such as duress or provocation, and as such there is a practical reason to engage in this analysis. It also offers an opportunity to deepen the connection between corporations and emotions, as the excuses that I focus on, duress and provocation, are rooted in emotional responses to

[12] see e.g. Pamela H. Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1990-91) 75 Minn L Rev 1095, Eric Colvin 'Corporate Personality and Criminal Liability' (1995) 6 CrimL Forum 1, French (n 8), Australian Model Criminal Code (2009) 2.5.3(6)

extreme situations. I argue, using historical cases and thought experiments, that corporations can indeed experience the kind of destabilizing fear that would ground a claim of duress, but that this could only happen in very pervasive cases of fear.

Finally, in chapter seven I move on to punishment theory and corporate sentencing. The theory that is most often found to be relevant in corporate sentencing is deterrence, though rehabilitation has gained a foothold more recently. Retributivism is not often mentioned, or where it is, it is mentioned as being inapplicable. This is a marked difference from how theory treats individual sentencing, where since the 1970s there has been a real emphasis on retributivism or desert theory as a justification of punishment in general and a sentencing goal in particular cases.[13] But retributivism seems to many to be incompatible with the nature of corporate entities, either because they are not morally blameworthy agents (an argument that rests on the idea that they are not moral agents), or because their crimes are not truly morally blameworthy acts, but more akin to regulatory infractions, that is, a valid subject of governmental disincentivizing while nevertheless not carrying any moral weight. I refute both of these objections, yet run into a more profound one. Corporations, while they can have emotional states, cannot suffer in the way that is necessary for an object of punishment, and so state punishment can never be successfully imposed. I conclude that corporations can be sentenced, but not truly punished, and that this poses a greater problem for a retributivist theory of punishment than it does for deterrent or rehabilitative theories. With all this in mind, however, I still make a case for retributivist principles to be considered in crafting corporate sentences. The fact that corporations cannot be punished, however, does have

[13] R.A. Duff, 'Penal Communications: Recent Work in the Philosophy of Punishment' (1996) 20 Crime and Justice 1, 1

one practical consequence, which is that the upper limits to sentences that retributivism requires may be more flexible, as they can be governed by a deterrence rationale instead.

In a short concluding chapter, I make some stronger connections between the themes explored in the six substantive chapters. The five substantive chapters of the thesis all form a whole in showing how corporations intend, believe, feel, and act, in general and when they commit criminally prohibited acts.

A note on method

In this work, I present a view of the nature of corporate entities that is grounded in the philosophy of action and ethics. This philosophical analysis of the ontology of the corporation is a central theme of the thesis. Its second central theme is the application of criminal law to the corporation. These two subjects are mutually illuminating: while the nature and workings of corporations need to be in some way understood by the law for it to treat corporations within its doctrines, the principles of responsibility and moral agency that criminal law has examined and theorized also help explain the nature of moral agency for corporations. This methodological approach owes some inspiration to Nicola Lacey's elucidation of how the explanatory relationship between philosophy and law does not always need to flow one way, from philosophy to law, but that law and legal theory might provide valuable insights to philosophy as well.[14]

The theory of corporations as moral agents is built up through an examination of sources in the philosophy of action (Michael E. Bratman, Margaret Gilbert, Philip Pettit, and Christian List and Philip Pettit writing together) and also from theories of moral

[14] Nicola Lacey, 'Responsibility without Consciousness' (2015) Oxford Journal of Legal Studies 1, 10 and 21

responsibility in ethics (Peter French, Elizabeth Wolgast, Christopher Kutz, and Larry May, among others). Many of the themes in the ontology chapters come back and get expanded and coloured in in the legal theory chapters: so that in chapter two the concept of rational agency is introduced, and then this discussion comes back in a more specific and focused way in chapter five's discussion of mens rea for corporations. Chapter three contains a detailed explanation of how it comes to be that corporations are moral agents. Much of this discussion centers around the idea of emotions, and whether corporations have emotions. The concept is taken up in a discussion of duress and provocation in chapter 5, and the idea of corporate emotionality is used there, but that discussion also creates an opportunity to get more specific about what corporate emotions might be and when they arise.

The principles of criminal law that I use are not the doctrines of a particular jurisdiction. They are principles that are common to Anglo-American jurisdictions, and references are made throughout the text to British, American, Canadian and Australian legal examples. It is the principles of that legal tradition that interest me. I draw these out from criminal law theory, from legislation and from some cases. This work does not spend any great deal of time laying out actual corporate criminal law doctrine, except as this is helpful in understanding what these principles are. So, in the chapter on mens rea, I do spend some time on prevailing doctrines of corporate mens rea in all four of the jurisdictions mentioned above, but this is simply because each one is different and they show interesting alternatives for how to locate intentionality within a group. I do not privilege these over the mens rea proposals of Pamela Bucy, Eric Colvin, Peter French or William Laufer, but use all of these sources, as well as theoretical writing on mens rea more generally, to create my own view of how recklessness could be said to apply specifically to a corporation.

The attitudes I take towards corporate ontology and towards legal theory are different: on the one hand, I treat corporations descriptively, attempting to discern what they are, rather than making recommendations for what they ought to be. Though such recommendations might be helpful, I leave them to others, because of a sense that they would muddy the project that I am engaged in, that of trying to discern the nature of corporations in order to see what the criminal law ought to do with what is there. On the other hand, my approach to the criminal law has been neither wholly descriptive nor wholly normative, it is rather interpretive, in the sense that it holds the criminal law to its own best practices and use of principle, and criticizes departures from these. It does not seek to create new theories of the nature of criminal law, but does suggest considerations or adjustments to bring more consistency to the law's treatment of individuals and corporations.

2. Beyond Legal Personhood: Corporations as Rational Agents

> The integrated collectivity will not be distinct from its individual members in the sense that it will not be capable of existing in the absence of such members. But it will be distinct in the sense of being a center for the formation of attitudes that are capable of being quite discontinuous from the attitudes of the members.[1]

Introduction: Personhood and agency

Corporations are highly complex entities that act in ways that have a great effect on the world around them. They also appear to change the way that some of their member individuals, such as directors, shareholders, and employees, think, at least while those individuals are acting for or through the corporate entity. What are corporations exactly? Some people deny that they have any reality at all, beyond a shorthand way of talking about a lot of individual activity.[2] Yet this explanation ignores the social reality of corporations and misses the way in which organizing individuals into a group can create a

[1] Philip Pettit, 'Collective Persons and Powers' (2002) 8 Legal Theory 443, 459

[2] See e.g. John Hasnas, 'Where is Felix Cohen When We Need Him?: Transcendental Nonsense and the Moral Responsibility of Corporations' (2010) 19 JL & Pol'y 55, 68-69

group with interests, desires and purposes of its own, separate from those of its members. For instance, a corporation's goals can be much more long-term than an individual's, since the corporation is not limited by the natural lifespan of a human being. So then what is the corporation? Is it a person? An agent? An instrument, or machine? The corporation is a legal construct but also a real social entity.

This chapter attempts to clarify the nature of the corporate person and to explore its dimensions in some depth, in order to have a well-defined subject when prescribing how the criminal law might best interact with this subject, as chapters 5, 6 and 7 will do. Personhood is a concept that has been claimed as exclusive legal territory.[3] The law decides who is a person, and the very idea of a person in this sense of the word only speaks to an ability to be recognized by the law. In a contractual analysis, personhood is a fundamental and unremarkable part of how corporations and other organizations operate: when entering into contracts, the issue of personhood is trivial: the law of contract tells us everything that we need to know about how to treat the different people in the transaction, and this branch of law has long been untroubled about treating corporations the same as any other capable parties to the contract. The capacity to sue and be sued for breach of contract brings up no critiques from lay audiences.

The criminal law brings up more complex issues. Here, personhood is not simple, even in the restricted legal sense of the term. As Tracy Isaacs observes, 'whereas the legal concept is stipulative, once written it carries with it much of the conceptual substance of the moral and physical concepts of personhood.'[4] In criminal law, this merging of

---

[3] See e.g. Hans Kelsen, ***General Theory of Law and State*** (Anders Wedberg trans., Russell and Russell 1961) 95

[4] Tracy Isaacs, 'Corporate Agency and Corporate Wrongdoing' (2013) 16 New Crim LRev 241, 258

concepts is inescapable, as the legitimacy of state punishment is premised on the existence of the type of moral responsibility that allows for blameworthiness.[5] Moral values influence the course of criminal law much more explicitly than in an area such as contract, thus bringing into clear relief the problems of when to treat corporations similarly to humans, and when to treat them differently. When the criminal law acknowledges legal capacity, it invests the subject with a whole host of features such as the ability to understand cause and effect and to act voluntarily. Without these, an entity cannot be a subject of criminal law. Arguments in favour of inclusion must go beyond merely showing that the person is capable of sending representatives to court, but that it has the capacity to understand and act on the basis of moral reasons and to receive censure and punishment for wrongdoing.

Personhood, on this understanding, is not only a legal concept but a social and moral one. The social existence of a person is an important component of its personhood, though sociality is not sufficient on its own to make an entity a person. Some animals have richly social relationships with humans and with other animals, but this does not turn them into persons on most understandings of personhood.[6] Yet the ability to interact, rather than just to act, is a part of what makes an entity a person. The capacity of reason, roughly understood as the ability to perceive facts and respond to their

[5] Peter A French, ***Collective and Corporate Responsibility*** (Columbia 1984) 173, David A. Frenkel and Yotam Lurie, 'Culpability of Corporations—Legal and Ethical Perspectives' (2001-202) 45 ***Crim LQ*** 465, 465; of course some have disputed that moral responsibility is a precondition for punishment, but the idea that moral culpability is at least in some way connected to punishment is overwhelmingly accepted by punishment theorists.

[6] There are of course arguments that some animals should be given the status of legal persons, but that is controversial, see Michael Tooley, 'Are Nonhuman Animals Persons?' Tom L. Beahchamps and R.G. Frey, eds, ***The Oxford Handbook of Animal Ethics*** (OUP 2011). The more common understanding of animals is that even if they should be granted some status beyond mere property, they are not agents capable of moral agency, and so cannot be held responsible for actions in the criminal sense.

existence by changing one's outlook (this will be elaborated further below), is another necessary component, as this is what makes it possible for an entity to count itself responsible for its behaviours. In addition to acting according to reasons, an entity must be self-aware (and therefore self-reflective) in order to be a person, on the basis that that self-awareness over time is what allows us to hold someone to her words and actions. This requirement is extrapolated from Philip Pettit's conclusion that a person is not merely one who acts from internal, intentional states of mind. A person must also have some sense that these internal states and their corresponding actions belong to herself, and that this ownership of one's intentions and actions is what allows a person to achieve rational unity.[7] Self-awareness is necessary for an entity to have a notion of a self that persists over time, which is the only way that an entity might take ownership of its acts of last week as well as of its acts of this moment. Thus in order to find that an entity has the same agential status as a person, beyond bare legal personality, that agent must be able to perceive facts, respond to them by changing its outlook, and have a sense of self such that it can avow its own intentions and actions through time.

Self-aware rational agency, while it is sufficient to understand how a corporation may be seen as an entity with a separate existence from that of its human agents or employees, may not be sufficient to justify the law's decision to lay criminal responsibility before an entity. Rational agency and self-awareness are not all that is required in the context of labeling an entity as a criminal. Criminals must also be able to form moral judgments, which many people understand as separate from rational judgments. This thesis will tend to refer to that quality as moral agency, though the use of this term to

[7] Pettit (n 1) 461

mean something more than rational agency is itself contestable.[8] In my sense of the term, moral agency includes a capacity to understand the moral dimension of a decision (or moral capacity, for short) as well as to take actions with normative dimensions. Whether corporations possess rational agency and whether they possess moral agency are two separate controversial questions,[9] but are related in the sense that moral agency always implies rational agency. If it has all of these qualities, an entity will be a person-like agent. In this chapter, I will show how complex corporate entities have rational agency and self-awareness through time. In the next chapter, I will address the relationship between rational and moral capacity, and show that on any plausible understanding of moral capacity, corporations are morally capable.

The nature of corporate agency

Though a corporation is a legal person by definition of law, it may be questioned whether it is even an agent of any sort. It may be that the corporation comes into existence without the ability to act at all. If the corporation is understood as being essentially contained within the charter that brings that corporation into being, then it may not be able to act. A corporation can come into being as long as it has a name, a named director, a few pieces of information and that someone makes a small payment for administrative purposes.[10] A new legal person comes into being.[11] But the corporate

---

[8] Though many philosophers do think that moral ability is simply a facet of rational ability, see French (n 5) 91-93 and my own further discussion of this topic in chapter three.

[9] On the controversy over rational agency see, for instance, Ian Ashman and Diana Winstanley, 'For or against Corporate Identity? Personification and the Problem of Moral Agency' (2007) 76 JBusEthics 83. On the controversy over moral agency see, for instance, Michael McKenna, 'Collective Responsibility and an Agent Meaning Theory' (2006) 30 Midwest Studies in Philosophy 16 and further discussion below

[10] Companies House, online, https://ewf.companieshouse.gov.uk//runpage?page=welcome, accessed

charter cannot act unassisted. Significantly, the law requires that the corporation have at least one agent, the director, in order to exist. Though the corporation has a director, it is not its director. The director (or another) must act for the corporation, as an agent, in the sense of 'a person or organization acting on behalf of another, or providing a particular service'[12] in order for it to have agency in the sense of a 'capacity to act.'[13]

It will be useful to stop for a moment to disentangle these different senses of the terms agent, agency and principal, all of which are used in the context of corporate criminal law. The first sense of agency (agency1) is the ability to act, whether for oneself or another. The second sense (agency2) is acting for another, called a principal. While a human may act as an agent2 for another and may act through an agent2 or for himself, a corporation may act as an agent2 for another, but cannot be an agent1 without an agent2 acting for it. If Mary gives Ann the power to sign documents for the sale of Mary's house in Bigtown while Mary is in the country, Ann acts as Mary's agent (in the sense of agency2). By doing so, Ann gives Mary the ability to function as an agent (with agency1) in Bigtown as well as in the country, because she acts through Ann in Bigtown. This makes Mary into the principal, with Ann as her agent. If a corporation is to be an agent (with agency1), it must have agents (with agency2) to act on its behalf. Simply, the corporation always needs someone to sign the documents on its behalf, since the corporate charter cannot hold a pen.

11/02/2013

[11] In the United States, for instance, 2 million new companies get brought into being every year: Brandon L. Garrett, ***Too Big to Jail: How Prosecutors Compromise with Corporations*** (Harvard University Press 2014), 22

[12] ibid

[13] Oxford English Dictionary, online edition, accessed 11/02/2013

The fact that the corporation must act as a principal through agents2, is one of the complications that make it difficult for the criminal law to attribute actions to the corporate agent itself — the law sometimes has trouble disentangling whether it was the corporation acting through an agent, or was that agent acting on her own behalf. Criminal lawyers reading this will additionally recognize that the principal here is rather the inverse of the principal in cases of complicity, where the terminology has it that the principal is the person who physically performs the criminal act. In agency law, the principal refers to the person in whose name the action is performed. While the corporation is a principal, it is also always an agent2 for other principals, the shareholders. In addition to this, a corporation always has principals that it acts for, as an agent2. These principals will sometimes be the shareholders,[14] who are the ultimate beneficiaries of the corporation's activities. But the corporation's principals are also often understood to be the directors of the corporation, because these directors need to have the freedom to make the type of discretionary decisions that principals make.[15] And of course it is no accident that the word agency gets used in these two seemingly contradictory ways, since agency is the capacity to act, and acting in the sense of authoring an action requires rational ability (otherwise, as Marion Smiley puts it, it is not an action but simply a kind of behaviour).[16] But acting is also something one can do at the direction of another. All this complexity stems from the twinned facts that corporations

[14] Paul Rose, 'Common Agency and the Public Corporation' (2010) 63 Vand LRev 1353, 1359 refers to these as a 'collective principal' thus adding a further layer of complexity to the issue of groups versus individuals. Rose makes an error, in my opinion, when he links these shareholders as principals to the corporate managers as agents. A better explanation would have the shareholders as collective principal to the corporation, and the corporation as agent to them, though as principal to the managers.

[15] Donald C. Langevoort, 'Agency Law Inside the Corporation: Problems of Candor and Knowledge' (2002-03) 71 U Cin LRev 1187, 1191

[16] Marion Smiley, 'Collective Responsibility' ***The Stanford Encyclopedia of Philosophy (Fall 2011 Edition),*** Edward N. Zalta (ed.)

are not independently sentient beings and that individuals often use corporations to act in ways that they cannot individually. They are also both property and persons, a dual nature that the law often says is impossible.[17]

In order to build up a picture of corporate agents (of agency1), let us first consider the simplest corporation, a closely held corporation with only one human agent (of agency2), who is its director and sole shareholder. This director is a human person with full capacity and judgment, and if she acts for the corporation herself then the corporation will, we may suppose, act as a responsible agent, with reasons for decisions and consistency of judgment, since its intentions are derived directly from the rational thought processes of one rational human mind. The corporation is still a separate person, and the director-owner will often act differently, and make different decisions, when she acts as an agent for the corporation than she does when acting on her own behalf. As a person making decisions for her home, the director might choose to buy light fixtures that are much more expensive than is necessary to effectively perform their function, on the basis that she enjoys the way they look. They give her pleasure. But at her office, making a corporate decision, she buys less expensive, less beautiful lights, despite the fact that she spends as much time there as at home, recognizing a need to be more cautious in her corporate spending and deciding that her personal enjoyment is less important in the context of this decision. This is a plausible case of taking the same decision-maker, presenting her with the same choices, and obtaining a different outcome, because the agent's method of making decisions changes depending on what role she is inhabiting. In both cases she operates rationally (making her decision for clear reasons). Acting as the

[17] See for instance Bernard M. Dickens, 'Living Tissue and Organ Donors and Property Law: More on ***Moore***' (1992) 8 Journal of Contemporary Health Law and Policy 73

agent of the corporation, even though not answerable to any human person other than herself, changes the type and nature of the reasons that the individual will take into account in making her decisions. Her rationality yields different outcomes when she acts in the name of the corporation.

Already in this simple case, where the corporation and the individual share a mind (the director's mind), we see how agency2 changes the decision-making and actions of an agent1. Nevertheless, this case is not yet of particular interest to criminal law. If all corporations were of this type, they would not pose any particular difficulties for the criminal law's goals of attributing responsibility or punishing wrongdoing, and indeed the state would likely never have extended criminal liability to corporations if corporations were all of this type.[18] If this corporation hires an assassin to murder the CEO of a rival business, the elements that the criminal law concerns itself with – intention, recklessness, lack of legally-recognized defence, moral blameworthiness – are all easy to locate in the corporation's one directing mind. The state has no particular interest in pursuing this type of corporation as an accused.[19] We all know who is responsible for the murder: the director who alone is in control of the actions of the corporation. Since the criminal law has greater coercive power over individuals (it can do everything to the director that it can to the corporation, and has the added sanction of imprisonment), it makes much

[18] There being no benefit in holding the separate entity liable, even in cases where the corporation has more than one owner but is closely held, see Kathleen F. Brickey, 'Close Corporations and the Criminal Law: on "Mom and Pop" and a curious rule' (1993) 71 Wash ULQ 189, 195 and 198

[19] Pamela Bucy makes the same point: 'With closely held corporations, the real question is not under what test a court should convict a corporation, but why. Because criminal liability of the individual owner(s) is present in virtually every instance, conviction of the corporate shell is generally superfluous. Unlike the large corporate entity that could continue to encourage new generations of executives to commit criminal acts, the closely held corporationg enerally has no identity apart from the convicted individual.' Pamela H. Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1990-91) 75 Minn L Rev 1095, 1151

more sense to concentrate the prosecutorial resources on the natural person if that person is the alter ego of the corporation that has committed the offence.[20] Additionally, many jurisdictions have civil forfeiture provisions that would allow them to seize corporate assets without separately pursuing the corporation.[21] While there could be rules in some jurisdictions that would create a practical reason to pursue the corporation,[22] there is no principled reason why it would be beneficial to pursue this corporation independently. Nevertheless, the corporation is still a separate entity, and the owner does not confuse herself and her corporation, but acts differently when acting for the corporation.

It does not take too many more participants to bring up some questions about the corporation's direct relationship with its principals. Once the corporation has three voting board members, there is good reason to begin to see the group itself as an agent in its own right, and that this group agent can be a locus of agency and responsibility itself. Christian List and Philip Pettit demonstrate the autonomy of corporate intentionality using what they call the discursive dilemma. The basic discursive dilemma, as List and Pettit explain it, describes how a group may decide an issue quite differently than its members, and indeed may do so irrationally, even when its members are acting rationally (where consistency is an attribute of reason). Consider this case, drawn from List and Pettit: a legislature is deciding how to balance its budget. They are looking at 2 ways of balancing the budget, and are also voting on whether it is necessary to balance the budget

[20] ibid

[21] Stefan D Cassella, 'Overview of asset forfeiture law in the United States' (2004) 17 S Afr J Crim Just 347; M. Michelle Gallant and Colin King, 'The Seizure of Illicit Assets: Patterns of Civil Forfeiture in Canada and Ireland' (2013) 42 Comm L World Rev 91; Bucy ibid 1151

[22] In some jurisdictions penalties could be greater for corporations than for individuals, thus giving prosecutors a deterrence-based incentive to pursue the corporation even when it is closely held. In France, for instance, there are some offences for which the maximum financial penalty is greater for a corporation than for an individual, Code pénal version consolidée au 18 février 2012, art. 131-38

at all.[23] So, they vote on three questions: should we increase taxes? Should we reduce spending? Do we need to balance the budget (which can be done either by increasing taxes or reducing spending)? If the first legislator wants to increase taxes, the second to reduce spending, and the third to do neither in full knowledge that this will result in a deficit budget, aggregating their votes will result in the following (see table 1):

	Increase taxes	Reduce spending	Balance the budget
Legislator A	Yes	No	Yes
Legislator B	No	Yes	Yes
Legislator C	No	No	No
Majority decision:	No	No	Yes

In other words, the legislature has decided to balance the budget but has voted against any measures that would allow it to do so. This is an irrational legislature. What List and Pettit propose is that when groups seek to become rational agents, as they often do, they should not be bound to take their votes on each issue independently. They should, instead, recognize the interdependence of these issues. Note that simply allowing the vote to rest on either premises or conclusion would lead to incompleteness[24] — the legislature has come to a no decision on both increasing taxes and reducing spending, but this does not properly give voice to what the group wants, and looking at the conclusion independently would not tell us how to proceed. However, prioritizing certain premises over others and understanding the relationship between the premises, and allowing for deliberation at the group level, can lead the group to become a rational agent that comes to rational conclusions.

[23] Christian List and Philip Pettit, ***Group Agency: The Possibility, Design and Status of Corporate Agents*** (Oxford University Press 2011), 46

[24] ibid 56

The discursive dilemma also shows us how group agents that are rational may form attitudes that are distinct from any of the individual members' attitudes, and that are sometimes quite at odds with those attitudes. Consider a corporation made up of directors who are going to vote on three propositions that together will determine a certain course of action. For instance, a member has proposed that the corporation buy a new fishing boat (see table 1). A second member proposes that the corporation install expensive safety provisions if they do buy the boat. This same member proposes that the corporation take the boat close to a popular beach where there is lucrative fishing to be exploited. Member A votes for propositions 1, but against 2 and 3. Member B votes against 1 and 2, but for 3 (being of the opinion that they should use an existing boat to exploit the fish near the crowded beach), while Member C votes for 1, 2 and 3.

	Vote 1 (new boat)	Vote 2 (safety provisions)	Vote 3 (fish near a crowded beach)
Member A	Yes	No	No
Member B	No	No	Yes
Member C	Yes	Yes	Yes
Majority decision:	Yes	No	Yes

As a result of the vote, the corporation makes the composite decision 1 + not-2 + 3 = buy the boat, don't install the safety provisions, and still fish near the heavily attended beach. Note that no member individually voted for this conclusion, and each member may depart with the understanding that the corporate position is not really a reflection of her own views. And indeed it is not: member A did not want to risk fishing near a crowded beach, and because of that she voted against the safety provisions as an unnecessary expense, unnecessary since the boat would not create a danger if it stayed away from the beach. Member B wanted to exploit the waters near the beach but he was ready to spend the extra money to make it as safe as possible. Member C did not want the new boat at all, but was ready to go to the crowded waters with an existing boat that had adequate safety provisions. The company, because of its poor decision-making procedure, chose to buy a new boat and use it in an unsafe way. This composite decision is not in any way irrational (note that the company did not vote on whether it cared about safeguarding the beachgoers), but it may well be morally dubious. It also sets the corporation on a path that is different from the path any member would have chosen. If the boat kills a sunbather, and would not have done this had it had adequate safety provisions, arguably each single board member could say, I am not responsible because I voted against a crucial element of this plan. The separability of the members' own views from the decision of the corporation casts the corporation as 'an autonomous subject.'[25] The opinion of the corporation cannot be traced back to any individual member's opinion, and so there is no way that it can simply be an aggregate of the three members' minds. Corporate intentionality is made up of the intentions of three individuals but is distinct from them, and may sometimes make the corporation a meaner or riskier agent than its members are individually, a subject that I explore in more depth in chapter four.

Though none of the board members intended to bring about the result, they could also be convicted as joint perpetrators of an intentional offence, as long as they foresaw that their actions could result in that offence being committed (at least under English law).[26] One cannot draw a line from this to an idea of non-responsibility for the individuals, of course, but it is still interesting that a corporation could be constructed so

[25] Philip Pettit, 'Responsibility Incorporated' (2007) 117 Ethics 171, 181

[26] Kai Hamdorf, 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law' (2007) 5 J Intl Crim Justice 208, 221

as to behave according to intentions that no individual member would approve. However, if the collective enacts procedures (this does not have to be done formally, but will often be done automatically by the rational members of the corporation, when conflicts arise) such as those suggested by List and Pettit and mentioned above, then the corporation can become 'an intentional subject in its own right.'[27] This is not to say that the corporation is in some mystical way separate from its members — the member individuals are what constitutes the collectivity. But it is, in Pettit's structure, 'distinct in the sense of being a center for the formation of attitudes that are capable of being quite discontinuous from the attitudes of the members.'[28] This comes from the fact that the group might come to different conclusions on an issue than its individual members (if for instance that issue is resolved through a combination of votes on sub-issues) but could also organize itself to be aware of its views and to hold itself to being consistent and logical in its attitudes and actions.

It might be possible to disregard the corporation entirely and treat this as a case of three co-perpetrators. Whether or not a particular jurisdiction would be able to pursue the trio as co-perpetrators might depend on the jurisdiction's rules on aiding and abetting. Nevertheless, it would not offend fairness to change the law so that it disregarded the corporation in this case and treated the three members as the three co-perpetrators, as it was they and only they who came together to commit this crime. Though the three-person corporation shows that corporate intentionality cannot be reduced to individuals, the individuals involved are all well informed enough and have an active enough role in

[27] Philip Pettit, 'Collective Persons and Powers' (2002) 8 Legal Theory 443, 456

[28] ibid 459

the outcome that it does not yet offend logic or morality to consider them directly, looking through the corporation to the individual agents.

If the corporate structure grows to incorporate more members and becomes a medium-sized or a large company, the option to treat board members as joint perpetrators effectively disappears. Here we move into the realm of the collective agent whose agency is impossible to reduce to the agency of its component individual actors. The effect of individuals functioning as part of a corporate entity is different from the effect of each of them performing those same actions if those actions are not understood as fitting together into a greater whole, the corporate action.

When considering a corporation with hundreds of shareholders, a board of directors, executives, professional managers at various levels, and a large number of employees who act for the corporation in a variety of capacities from talking to customers in retail stores to contracting with factories overseas, the situation has changed significantly from the three-person corporation. True, the corporation is still a legal person with a named director, a charter and a set of purposes. Now, though, it is highly unlikely that every agent in the corporation will be aware of any single decision the corporation makes, let alone be able to control all decisions. A large corporation requires that many act together, that decisions are apportioned to various members, and that they work together to accomplish bigger projects and more projects than an individual could be in direct control of alone. In this way, it is necessarily a social entity.

When one speaks about group entity membership in this large a group, it is confusing to even know what membership might mean. Shareholders, directors, managers and employees with various levels of discretion are all members of the group entity. This conclusion is in contrast to List and Pettit's apparent assumption that only voting members of a corporation are members. They write that there are two roles group members can occupy, the authorizing role and the active role. The authorizing role for a corporation means 'accepting its right to use the resources in which one owns shares for corporate purposes…' and the active role is found in activities such as 'attending the annual general meeting or in assuming responsibility in the board.'[29] This is odd because List and Pettit acknowledge, for instance, that all members of a church are group members, not just those who vote on policy. The lens through which I understand the corporate entity includes employees, as they act for the group and may have more or less discretion in making decisions for the corporation, depending on the job they are hired to do. Employees become members by formalizing some relationship with the group wherein they manifest an intention to participate as a member of the group. Note that this does not mean that every employee must be a loyal employee, or every shareholder must be reading up on the details of her investment. But each of them agrees to participate in furthering the goals of the corporation.

The basic concept of a group agent is that it comes into being when members intend to act as a group. The ability to intend, crucial as it is to planning and carrying out one's plans and achieving one's desires, is a central element in being a person-like agent.[30] This is why group intention – sometimes called joint intention, shared intention, or interlocking intention – is picked out as a central requirement for the existence of a group agent. When a collection of people shares an intention to perform some activity as a group that satisfies the conditions for agency, they form an agent.[31] This is how a

[29] List and Pettit (n 23), 35; for an opposed view see French (n 5) 14

[30] Michael E. Bratman, 'Shared Intention' (1993) 104 Ethics 97, 97-98

[31] Pettit (n 1) 179

collection of individuals can come together and form two teams for a casual football game. It is the shared intention of acting together that creates two groups that the individuals participate in and each group makes group-level decisions about strategy, and executes group actions such as winning the game – note that only as a team can they win a game; an individual cannot win a game of football.[32]

Margaret Gilbert makes certain insightful observations about what conditions an activity must satisfy in order to be a joint activity, an observation that will be useful to understanding certain membership obligations that I will argue for in the chapters on mens rea and excuses. Specifically, when one is acting in a group, one gains the right to make rebukes or demands. Gilbert provides the example of two people going for a walk.[33] One difference between two people who happen to be walking next to each other, and two people who are going for a walk together, is that in the latter case, it would be appropriate for one of them to say to the other, 'slow down, you are walking too fast.' The slower walker gains the standing to make this rebuke, as Gilbert explains, 'by virtue of her participation with [the other walker] in the joint activity of walking together.'[34] The fact that they join into a group together gives them obligations towards each other, too. Gilbert gives the example that the faster walker might have an obligation to walk slowly to accommodate the slower walker.[35] Note that this could be a very weak obligation, one that might be broken by so simple an act as saying, 'Look, I'm going to walk ahead for a bit, I'll meet you back at the house.' Nevertheless, until the joint activity is called off in

[32] French (n 5) 5

[33] Margaret Gilbert, ***A Theory of Political Obligation: Membership, Commitment, and the Bonds of Society*** (Oxford University Press 2006), 103

[34] ibid 104

[35] ibid 105

this way, there is some obligation to the other members in the activity. This obligation might be stronger or weaker depending on how the joint activity is set up.

This gives us a starting point, and is effective for understanding small and ephemeral groups, and also a structure for understanding more complicated groups. More is required to explain how large, organized groups that persist over time continue to be agents when not every person involved is continually reaffirming the joint intention. Institutional groups (unlike ephemeral groups such as a team quickly brought together for a casual football game), 'have identity criteria that do not wholly consist in the presence of overlapping participatory intentions.'[36] A corporation or a government is more than just a group of people with interlocking intentions.

Peter French's Corporate Internal Decision (CID) Structure gives an insight into how we can comprehend the corporation as more than a small kernel of individual minds acting together. The CID Structure is a key to understanding the corporation. Every corporation has a CID Structure. It is made up of the corporation's charter and hierarchy documents as well as its usual decision-making and operational procedures.[37] As French explains, CID Structure has two elements: the first is the corporate power structure, which shows who has authority over whom and what. This structure could be described by a flow chart. The second is a series of rules, often described as corporate policy, which describes how actions are taken in that corporation. These can be formal and informal, and cannot be gleaned entirely by looking at formalized guidelines.[38] As French writes, 'When operative and properly activated, the CID Structure accomplishes a subordination

[36] Christopher Kutz, ***Complicity: Ethics and Law for a Collective Age*** (Cambridge University Press 2000), 105

[37] Peter A French, 'The Corporation as a Moral Person' (1979) 16 Am Phil Q 207, 211

[38] French (n 5) 62

and synthesis of the intentions and acts of various biological persons into a corporate decision.'[39] In other words, the logic of the corporate structure is what joins the participatory intentions together and keeps them working as they should.

The CID Structure allows us to understand which are, and which are not, actions of the corporate person. It is more than the decisions that a boardroom formally adopts, as it involves all the decisions that flow from this. Everything the corporation's agents do in pursuit of the corporation's goals, and those things that flow naturally from the pursuit of those goals, are actions of the corporate person. This shows that at least some actions are corporate actions – whether only decisions made in pursuit of the corporation's own goals can count as corporate decisions is yet another question, which is considered more fully in chapter 4's discussion of corporate mens rea and recklessness.

Gunther Teubner sees the substratum of the legal person as 'an autonomous communicative process, with actual people simply being treated as part of this process' environment.'[40] The corporation cannot break down to individuals, because there is a 'cyclical linkage of identity and action' that allows the organization to acquire 'a hitherto unachieved autonomy vis-à-vis its environment, both the external environment of market and politics and the internal environment of members and others involved in the organization.'[41] This account may seem esoteric but coheres well with the elements of rational agency taken from French's and from List and Pettit's accounts. The idea of joint intention is here expanded: it becomes manifest as the set of actions that involve more than just one person. Teubner's account fits well with French's idea of the CID structure,

[39] French (n 5) 212

[40] Gunther Teubner 'Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person' (1988) 36 Am J Comp L 130, 135

[41] ibid 144

as Teubner explains that the essence of the legal person 'lies not in resources nor in people but in the legal reconstruction of a collectivized action system.'[42] It is the legal structure that transforms individual action into group action.[43] While not the same as French's CID Structure in its details, both accounts show how we can look to the corporation's rules to determine whether an action is individual or collective in character, and that these rules go far beyond simply putting corporate spokespersons in charge of avowing or denying a particular action. One person acting in her corporate role can devise and carry out a plan alone, and still have it be a corporate act, if it fits into this structure. This is in line with the distinction drawn between the individual and the corporation in the one-person corporation, and also explains a feature of larger corporations, being that they act through individual agents as well as through groups deciding and executing decisions collectively. Teubner's theory is more extreme in its emphasis on how a collective entity can become a separate being, resisting influence from its members. Still, Teubner, French, List and Pettit, and Gilbert all explain aspects of what it means for many individuals to act together as a corporate entity. Their accounts are divergent but it seems to me that they might each offer a part of a complete picture of corporate agency. For instance, French's CID Structure remains an important one to explain when individual agents' actions are properly redescribed as corporate actions. Gilbert's we-intentions explain how groups of individuals within the corporation act jointly on behalf of the corporation. And List and Pettit explain how voting procedures create autonomy within the corporation at other times. Corporate action instantiates all of these ways of being and acting, though not necessarily all at the same time.

[42] ibid 145

[43] ibid 151

With this picture in mind of the corporate entity, we may turn to some of the problems associated with positing such an entity. One of these problems is that when no one person is conscious of every decision, the possibility arises that there will be composite decisions that the corporation makes without ***any*** single human employee being fully aware of the dimensions of the decision. By 'composite decisions', I refer to decisions that may be made in several parts by several different people, which could proceed in a variety of patterns: sometimes one employee might act unaware of where the decision will go next, then a manager might make a decision in ignorance of what happened previously, say in the case of a customer who was treated unfairly by another agent of the corporation. Many different kinds of coordinated or fragmented actions within multi-part institutions can create these composite corporate decisions. This is similar to the distancing of the decision-makers of the composite decision in the three-person case discussed above, but now the fragmentation can result in a compartmentalization of knowledge. This process results in a defect of large bureaucratic organizations, in which 'division of labor is equally a division of knowledge'[44] – tasks are compartmentalized so that managers might issue only vague orders, thus shielding themselves from specifics (which could be a conscious decision but could as easily be a side effect of an otherwise legitimate managerial style), and subordinates act without a complete picture of how their action fits in with a larger plan. This holds as much for large corporations as it does for governments.[45] It raises the problem that no individual may be as responsible for the action as the structure of the legal person itself.

---

[44] David Luban, Alan Strudler and David Wasserman, 'Moral Responsibility in the Age of Bureaucracy' (1992) 90 Michigan LRev 2348, 2355

[45] ibid 2355-56

The diffuse nature of decision making in these large corporations means that in addition to evidentiary problems with identifying a responsible individual when a corporation's act has resulted in wrongdoing, there may be a more intrinsic difficulty: no individual has all of the elements of responsibility because no individuals had the requisite knowledge to understand how their actions were contributing to the wrongdoing. The question of whether guilty individuals can always be found appears to be a central point in the debate between those who accept and those who deny corporate personality.[46] However, even if it is possible to identify guilty individuals and gather sufficient evidence against them to proceed to a trial, corporate criminal liability is still an important part of criminal law if it is true that corporations are themselves autonomous agents that participate in the moral life of human communities. The corporation will at times be better placed to change its criminal behaviour than selected individuals within the corporate structure are.

Though it seems that it is with this complex corporation that it is most desirable to talk about the corporate entity having its own intentions and agency, it is also where talk of the will and moral capacity of the corporation becomes most contentious. It can be hard to see a large organization where members are not in contact with one another, where information sharing is imperfect at best, as having the kind of self-awareness required to be a person-like agent. The complexity of the group dynamics that undergird this type of corporation is what makes it counterintuitive to think of the corporation as an entity 'with all the relevant features of personhood, including a method for forming intentions and a capacity to act.'[47] The corporation simply seems too disjointed to have a

[46] ibid 2372-73

[47] Larry May and Stacey Hoffman, 'Introduction', ***Collective Responsibility: Five Decades of Debate***

core with the unity required for self-awareness and moral judgment. There is no longer an individual or small group of individuals that can clearly be seen as the directing mind of the entity. But the contention of defenders of corporate and group agency is more radical than that: there is no human individual with the ultimate responsibility of being the mind of the corporation.

The corporate entity is an agent that is bigger than any individual. And it is an agent with its own intentions, desires, beliefs, and goals. As Peter French puts it, 'What needs to be shown is that there is sense in saying that corporations and not just the people who work in them, have reasons for doing what they do.'[48] While corporations' actions are constituted of the decisions and actions of multiple people who work for them, the existence of corporate agency means that corporate intentions must be understood as separate from the intentions of the people working for them. This is a significant problem because if there is no such thing as corporate agency, the criminal law's involvement with corporations becomes very conceptually muddled, even contrary to its conceptual foundations for dealing with individuals, when it comes to these large corporations without a small kernel of directing minds.

This discussion shows that even in the one-person case, there is an interaction between the individual and the corporation, such that the corporation exerts an influence on the individual when she acts as its agent. In the multi-person corporate entity, it is necessary to take into account corporate structure not just to see differences in how individuals make decisions, but how multi-individual structures create decisions beyond

in Theoretical and Applied Ethics, Larry May and Stacey Hoffman, eds. (Rowman & Littlefield 1991) 1, 3

[48] French (n 5) 212

the complete control of any one individual. For this reason we turn next to the ability of groups of humans organized in a corporate structure to form autonomous rational agents with self-awareness.

Objections and Responses to Corporate Agency

There are several forms that an attack on the existence of rational group agency can take. Most crudely, there is the idea that an agent of this sort must be made of human material, or of 'inherently mental material,'[49] on the theory that mental processes of this sort are inherently human. Philip Pettit dismisses this argument, pointing out that 'there appears to be nothing inherently mental about the biological material out of which our individual minds are fashioned'.[50] Yet there does seem to be something special that occurs when the biological material is organized into a human brain, and that fails to happen when human materials are organized into a group entity. The difference, though, is not in the materials used to create the entity (arguably they are in fact the same materials, just more of them), but of the way they are organized. This leads us to the next, and more sophisticated type of objection.

The most convincing objection to establishing collective agency is based on the fact that collective agents are made up of humans who are rational agents and moral agents themselves, obviating the need to identify a separate source of responsibility.[51] While a corporation or other organization may have a legal existence that is separate

---

[49] Pettit (n 1) 458

[50] ibid

[51] For a form of this argument see e.g. Kutz (n 36) 71; also Larry May, ***The Morality of Groups*** (University of Notre Dame 1987), 122-23

from any and all humans (and this existence is separate even though it requires at least some humans to be attached to it in order to exist), a corporation only acts through human agents.[52] Defenders of collective agency point out that this is not so unlike human individuals, who are not irreducibly individual, at least on some levels of description: 'the agency of individual human beings depends wholly on the configuration and functioning of biological subsystems.'[53] In this sense, humans are no more unitary than collectivities, the latter of which depend on the individual actions of human members, in the same way that a human being depends on the individual actions of his organs.[54] On its own, this is not a convincing rebuttal. There is a meaningful difference here between organs and individual human agents that it would be disingenuous to ignore: the biological subsystems that make up the human are not themselves agents. Since the humans who are the 'subsystems' of a corporation are rightly seen as responsible for their actions, many will find it superfluous and therefore illogical to accept the existence of another agent who shares in the moral responsibility for these same actions (while there might be practical reasons that could still be accepted for holding the collectivity responsible, this would be a pragmatic response, not one based on principle). Yet superfluity is not getting to the heart of the issue, which is whether there is indeed a separate entity, one for which individual actions considered individually cannot account.

Another objection to the existence of corporate entities is that in addition to being a fiction, theories of corporate existence are immoral. Positing a separate agent can be painted as pernicious, as a way of taking away responsibility from the humans with whom

[52] French (n 5). Arguably, a corporation can also act through the actions of an automated computer program, but this is a minor point and is also, arguably, human agency at a remove.

[53] List and Pettit (n 23) 4

[54] ibid

it should rightly rest.[55] Corporate personality could be just a red herring, and corporate criminal trials a distraction for the gullible masses while individuals walk away unharmed. Unlike a human's organs, the components of the corporation already provide us with one locus of authorship and responsibility. Also, unlike a human, an organization can form and re-form, disband and mutate constantly, at will, without any particular pain or resistance. And, of course, when major injustices occur as a result of malicious actions, most communities want to make sure that individuals pay, and this seems more important than pursuing collectivities. This topic is another rich field of inquiry within collective agency theory, namely, how to assign responsibility to individuals who commit minor culpable acts that contribute to major collective offence (for instance, multiple small polluters, or soldiers in an unjust war).[56] That is an important problem, and though it is not the one that I am addressing here, it is not at odds with it: there is no reason why responsibility cannot be assigned at both the collective and individual levels, and in fact, the two might bolster each other rather than working in opposition.

It is true that collectives are made up of individuals who are themselves loci of rationality and responsibility. And it is not simply because I want to manufacture additional rational agents in order to have additional persons to hold responsible that I argue that these individual rational agents are not the sole players. It is because there are compelling reasons to acknowledge groups as entities in their own right, and not simply as shorthand to designate multiple individuals.

We regularly interact with collectives in ways that lose most of their sense if we choose to interpret them as interactions with individuals. Consider someone, Charlene,

[55] subject is discussed more fully in chapter 3.

[56] This is the problem that Kutz addresses in his book ***Complicity*** (n 36)

going into Blackwell's to buy a book. Charlene picks up the book from the shelves, brings it to a cashier at the front, hands him some money for the book, for which the cashier gives Charlene a receipt and allows Charlene to leave the premises with the book. The cashier is the only human person Charlene has carried out the elements of the contract with. Yet it would be wrong to say that Charlene has entered into a contract with the cashier. Charlene cannot go to the cashier's house and demand a refund if Charlene finds that there are pages missing from the book she purchased. And the solution is not that the cashier is simply an agent and Charlene must look to another individual. My contractual relationship is not with any individual or individuals. People who shop in corporate stores understand this intuitively. As List and Pettit point out with regards to the BP oil spill in the Gulf of Mexico, 'the way in which everyone, from affected residents to criminal investigators, tends to relate to BP, would be impossible to make sense of without ascribing agency to BP.'[57] We relate to these entities as collective agents, not as the individuals who we might happen to encounter directly, nor as some individual people standing behind those people. We have an intuitive appreciation for the fact that corporations are more than their individuals — the structuring of the actions of many individuals who jointly intend to pursue a common goal in set ways create a separate entity with its own logic, goals, reasons and continuity.

Accepting the existence of a collective is not to accept some sort of invisible new matter that pops into the universe. As List and Pettit explain, the way that individual members organize themselves and behave together is sufficient to explain the workings of the collective person.[58] There are things that an organization of individuals can do that

[57] List and Pettit (n 23) 6

[58] ibid

individuals cannot do without the collective, such as win a football match, for that is an activity that requires a team. Individuals running around on the field by themselves, even if they recognize that others are running alongside them, cannot win a football match. Understanding the team does not require positing any animating force that acts on individuals and is separate from them.[59] The argument is not that there is some special spirit or soul that comes into being when individuals form a group, but that the group is nonetheless distinct, in the same way that a human being is distinct from the collection of organs in her body.

An agent must be able to act in some way autonomously, since agency (in the sense of agency1 as explained above) is the ability to be the author of actions. List and Pettit identify three main features for an autonomous agent: it should have representational states, meaning it forms views about the world around it, and motivational states, being desires; and it should be able, at least under good conditions, to act to satisfy its desires according to its understanding of the world.[60] This set of criteria for forming a basic agent is compelling: it shows how the entity has reasons for doing what it does, and how it acts according to those reasons. But a dog and an infant have reasons of this kind as well, reasons that can be described as acting to fulfill one's basic desires. Person-like agency is something more.

In order for a corporation itself to be considered a rational agent, it must be able to do more than act at a collective level. It must also be able to act in a manner that shows rational unity over time, which is what allows it to have what Pettit calls 'the

[59] List and Pettit (n 23) 4-5

[60] ibid 20

discipline of reason at the collective level.'[61] This is what makes the corporation more than just a transient or low-level intentional agent, but rather an entity with which it is sensible to interact as one would with a rational person. This occurs when corporations go beyond intending and acting but also 'avow those states and actions, acknowledging them as their own,' bringing about the possibility of criticizing the corporation if it does not act in a way that is consistent with what it said and did before.[62] While aggregates of individuals – such as an electorate – may hold views that are inconsistent with one another at a group level, if a political party holds such inconsistent views – for instance a platform that claims the party will lower taxes and also increase overall spending without any new source of revenue – we may rightly criticize it for the inconsistency of its position.[63] The ability to enter into a dialogue with others,[64] and the need to uphold and defend past actions, or to acknowledge that past actions were wrong and that one bears responsibility for them, are qualities that corporations exhibit all the time. A corporation is doing this when it apologizes to a customer for mixing up an order. It is in this way that corporations are more than bare intentional agents but are self-aware rational agents.

One of the obstacles to accepting the existence of group agents is the difficulty in determining where the group agent begins and ends. We would not want to extend the identity of the group so wide as to say that everything a human agent (with agency2) of a corporation does could be redescribed as an action of the corporation. On the other hand, there are good reasons not to construe the corporate person very narrowly, as only its boardroom- or stockholder-voted decisions. This would exclude much that the

---

[61] Pettit (n 1) 454

[62] ibid 461

[63] ibid 462

[64] McKenna (n 16), 22

corporation does through delegating authority to regional managers, plant supervisors, human resources personnel, and so on. It would make it too easy for the corporation to insulate itself from responsibility for what are truly its own acts.

How then do we determine when a corporate agent's act should properly be described as a corporate act? This will be a factual analysis, and will depend on whether the individual acted within the course of her employment or delegation of authority, and whether her act was at least in part for the benefit of the corporation. Though there is no bright line, it is clear that some acts are indeed corporate and others individual. For instance, when the cashier sells the book to Charlene, he is not acting in his own capacity, but in the corporate capacity. After the sale, when he goes outside into the alleyway to smoke a cigarette, he is acting in his own capacity and not as an agent for the corporation. There are many problem cases, of course, such as whether an employee acts as an agent of the corporation when she offers a bribe to an official in charge of issuing licences, when bribery is against the official corporate policy. The attribution of borderline states to corporations is covered at greater length in chapter four. In the context of this chapter, where what we want to do is conclude that there is such a thing as corporate agency, it is enough to find that some acts are individual and some are corporate, as the cashier case shows. Simply having a corporate spokesperson deny that a particular action was the action of the corporation is not determinative. We must look to the corporation's day-to-day procedures and its ways of being in order to determine whether an agent's act was corporate.

This way of thinking about the large-scale organization of a collective agent allows us also to begin to understand how the corporation can have a personality that is separate from the personality of its constituent members: it has goals that are set out in charters and mission statements, and relationships and hierarchies that are built up over time, and this is separate both from the current membership and from the original membership: ‘the melding of disparate interests and purposes gives rise to a corporate long range point of view that is distinct from the intents and purposes of the collection of incorporators viewed individually.’[65] In this way, the institutional group agent is quite different from the ephemeral group agent of joint intentions, such as a team formed at a pick-up baseball game. The members of a corporate entity will not always consciously hold in their minds that intention to act jointly with the other members of the group, but their intentions are held in place in the group by its institutional structure and their acceptance of their position within it. There is a continual interplay between how individuals shape the corporation and how the corporation shapes the thoughts and actions of individuals when they are occupying their roles in the corporate structure.

The group’s actions are not just the aggregate of individual actions. Corporations create identities, often called cultures, that persist through time despite changing membership. While group agents aren’t made of some kind of alternate substance, they are also different than the actions of individuals. The discursive dilemma points to this, and so does the idea of corporate culture. Corporate culture does derive from the contributions of members, but also comes to govern these, and can influence the course of a corporation, making it so that some corporations truly are more cautious than others and some more risk-taking, some greedier and some more altruistic. This might all seem nebulous, but it plays out in at least some very concrete ways. Enron, for instance, a famously criminal corporation,[66] created incentives for its traders to generate profits by

[65] ibid 214

[66] see for instance BBC News, ‘Enron Scandal at a Glance,’ http://news.bbc.co.uk/1/hi/business/

giving the best earners large bonuses, but also firing those whose profits were in the bottom 10-15 percent.[67] This created a real risk for those with mortgages or other heavy financial obligations that if they did not act in the greediest way possible, they would be left without income and without a way of meeting their responsibilities. This means that when they were at work, their work environment would have shaped their actions to a significant degree.

Even in less obvious cases, being at work shapes the outlook and conduct of employees.[68] We see this through a variety of phenomena, for instance where features of the organization stubbornly persist despite efforts to educate the members of the organization to work differently (such as in cases of trying to undo discriminatory practices in an organization).[69] There has been considerable empirical corroboration of the concept of organizational culture.[70] Corporate identity of this sort can be passed down through decades, often owing its original essence to members of the corporation who are no longer involved in the organization, giving persuasive evidence that it is the organization itself, as separate from its members, that possesses these traits.

Individuals contribute to corporate culture, and corporate culture shapes individuals, in a cyclical way. Whether the individual or the cultural context has more influence may change from time to time and organization to organization. Both are there, but that does not mean that they each have as much importance as the other. Some thinkers have taken quite an extreme view of the autonomy of the corporate entity as a

---

1780075.stm, last accessed 5 January, 2016

[67] Hasnas (n 2) 74

[68] Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 Crim L Forum 1, 23-24

[69] May (n 51) 67

[70] See e.g. Emmanuel Ogbonna and Lloyd C. Harris, 'Leadership style, organizational culture and performance: empirical evidence from UK companies' (2000) 11 Intl J Human Resource Management 766

shaper of desires and goals. For instance, Teubner, who sees the substratum of the legal person as the communicative process, in which individuals take part, but which they do not individually constitute[71] Though I find this view interesting in its emphasis on how the group perpetuates itself, I retain a moderately individualistic view when contrasted with the more radical collectivist views. In my account, the member agents retain power to control the group, as long as a large enough number of the members wills the corporation to act in a certain way. And yet, there is also a real sense in which the group influences the individuals — being part of a group changes their ways of thinking, as they become influenced by peers, but also as they begin to see themselves as belonging to that group, and in some cases having allegiance to it. The group itself is a result of strong social interactions, and because human beings are creatures for whom the social is important, forming groups is a natural and integral part of human activity. Business corporations are one instance of these social groups.

Conclusion

The joint intention of the members of the corporation create a group. The structures that the corporation adopts create its structure. Together, these two sources — the group intention and the corporate structure — create the corporate entity. That is the theory that I think best explains the corporation. It is a mix of group agency theory, taken from Margaret Gilbert, Michael Bratman, Christian List and Philip Pettit,[72] and of corporate structure and corporate culture theories, derived in part from Peter French,

[71] Teubner (n 40) 135

[72] Gilbert (n 33), Bratman (n 30), List and Pettit (n 23), Pettit (n 1)

Eric Colvin and Pamela Bucy and others.[73] Corporate structures are full of different types of participatory intentions, agential acts and members with different amounts of authority or power within the structure. Ordinary workers are not responsible for the existence of the corporation in the way that shareholders are, but they nonetheless act on behalf of the corporation, as its agents.[74] Because they are interacting with the structure of the legal person, they are part of a collective agent. The corporation may even be made up of only one member individual, but it is a collective because it includes the separate person of the corporate or other institutional entity. It is part of the social nature of humans to form groups, and those groups are an important part of how humans have always functioned. The group is as much a reality of human life as the individual is.

This chapter has used the many theories of group and corporate agency in order to explain how a corporation can be rational and self-aware over time in such a way that one can begin to talk about holding it responsible for its actions. One could reject all this, and continue to construct one's understanding of the corporation in a formal way, and think of it as being in no meaningful way different from the one-person corporation above, regardless of the possibly thousands of human beings acting as its agents. The innards of the corporation would be irrelevant, and only the formalities of legal personality would be given importance. But understanding the collective, or perhaps more accurately the multiple collectives, that pursue the purposes of the corporate person is necessary in order to understand how these corporations work, and how they sometimes come to commit criminal offences. When we talk about corporations as collective agents we are looking behind the corporate charter to the workings of the large

[73] French (n 5), Colvin (n 68), Bucy (n 19)

[74] List & Pettit (n 23), 36

subset of corporations that operate by means of many human agents performing a variety of functions. This is necessary in order to understand large corporations as agents under the criminal law.

Rational agency is necessary, but not sufficient, in order to be considered a person-like agent, with the attributes that the criminal law speaks to. Punishment is about moral responsibility, and the criminal law can only address a morally capable agent. If it is to be intelligible for the criminal law to count corporations as its subjects, then they must be moral agents. This is what the next chapter will address.

3. Corporations and Moral Judgment

> Can groups as such be morally responsible in the way individual people can? These seems to break down into three questions. First, can a group act or do things? Second, can a group act freely in the sense of being uncoerced? Third, can a group as such believe a certain act is wrong or immoral?[1]

Introduction

This chapter continues on directly from the subject of the last chapter, which was the nature of the corporate entity as a group agent, and its ability to be both rational and self-aware over time, as well as to form certain dispositions that differentiate its character from that of other organizations. But there is something else that human agents have beyond the ability to respond to reasons and take ownership of their past actions: they have the ability to make good and bad choices from a normative point of view. This is not the prudential ability to be law abiding, but to avoid hurting others because it is wrong, or to contribute to the public good because it is right. While humans have very different intuitions about what might be right or wrong in various circumstances, and while it is certainly true that human beings do not always (or maybe even mostly) do what their own moral judgment determines is the best moral action, the ability to understand the moral dimension of their actions is one of the attributes of human beings, and it is possibly the

[1] Margaret Gilbert, ***Sociality and Responsibility: New Essays in Plural Subject Theory*** (Rowman and Littlefield 2000), 144

central attribute that the criminal law concerns itself with. Therefore, to find that corporations are suitable for scrutiny by the criminal law, they must have, at the corporate level, that kind of moral judgment, or as I will refer to it more often, moral agency. By moral agency I mean the ability to act with an understanding of the moral dimensions of one's action.

The assertion that corporations possess moral agency, in addition to rational agency, is controversial in two distinct, even opposed, ways. On the one hand, many philosophers do not recognize the existence of some separate type of reasoning that is moral judgment. Rather, they find that moral agency is only an attribute of rational agency. To be rational is to understand and be able to properly evaluate moral matters. This is the line that several of the leading accounts of corporate agency have taken. Peter French's earlier work takes this line.[2] His more recent work shows that he has changed his mind on this, but his new views have not been extensively worked out.[3] Christian List and Philip Pettit do something similar, in that they put little emphasis on the possibility that moral reasoning is separate from self-interested reasoning.[4] This reduction of moral agency to a necessary by-product of rational agency has the advantage of not requiring separate argumentation to show that corporations are moral agents. But it does little to dispel the very strong intuition that many people have that corporations are self-interested

---

[2] Peter A. French, ***Collective and Corporate Responsibility*** (Columbia 1984)

[3] French has not yet published a long paper on his change in thinking on corporate affectivity. He explains the direction he believes he will go in in two places: Peter A. French, 'Responsibility with No Alternatives, in Loss of Innocence, and Collective Affecitivity: Some Thoughts on the Papers by Haji, McKenna, and Tollefsen,' (2008) 7 APA Newsletters: Newsletter on Philosophy and Law 13, 18, and Peter A. French, 'Corporate Affectivity and Membership in the Moral Community' powerpoint presentation for a talk delivered in the Shared Responsibility Workshop, Faculty of Law, University of Oxford, September 2012, online http://slidegur.com/doc/20938/corporate-affectivity-and-membership-in-the-moral-community, retrieved 1 March 2016

[4] Christian List and Philip Pettit, ***Group Agency: The Possibility, Design and Status of Corporate Agents*** (Oxford University Press 2011)

actors with no moral compass. Specifically in the area of corporate agency, the idea that the two faculties are separate becomes very powerful.[5] Also, writers who have a stake in finding that corporations are moral agents but do not address the content of moral agency specifically leave themselves open to easy dismissal by critics who accept rational agency but deny that it always implies moral agency. For these reasons, and without making a strong argument for the distinctness of moral from rational judgment, I address moral agency separately, as it is such a crucial concept for inclusion of a subject within criminal law theory.

The second controversy over moral agency is with people who find that there is such a thing as moral judgment, and that corporations are manifestly devoid of it. These two groups of thinkers are not in conflict with each other, but their positions are somewhat at odds. Often, among those who deny that corporations are moral agents, the attribute that is found lacking is emotional capacity. The relationship between emotions and morality is itself unclear, but in this chapter I will argue that corporations are indeed moral reasoners even if we set ourselves to analyze moral judgment as separate from rational thought. I will also argue that corporations do have emotional states, that these are derived from the emotional states of members but are separate from them, in the same way that their rational judgments are derived from those of members but are separate from them. In the final section of the chapter, I will draw some conclusions about the nature of the corporate person as a rational and moral agent, its worth and its relationship to human beings.

[5] See e.g. Joel Bakan, ***The Corporation: The Pathological Pursuit of Profit and Power*** (Viking, 2004)

Rational agency and moral agency

The case for corporate rational agency is compelling. Various writers, notably List and Pettit, and French,[6] provide analyses of how this agency operates. Both of these leading accounts also claim that their models are sufficient to explain moral agency for corporations. Their accounts reduce moral agency to a direct function of rational agency. This is plausible: as soon as one can respond to reasons, one could argue, one also has the ability to understand and respond to the normative or moral facts of the world and to shape one's actions accordingly. On the other hand, is it not possible to register facts about the world and adjust one's actions in response to them, and avow one's actions, without necessarily ever considering the moral aspect of those actions? In this section, I distinguish between two ways of understanding moral agency. The first is based almost entirely on the presence of rational action, defending the notion that if one acts rationally in morally charged situations, one exercises moral agency — this view also implies that morality is an extension of rationality, and that anyone who is rational will also be moral, in the sense of having moral judgment, though not necessarily in the sense of acting for the good. It does though imply that when one does not act for the good, that is a failure of reason. The second view incorporates agency and rational intent, but focuses more on the aspect of moral understanding, giving acting and agency a subsidiary position. The identity or non-identity of rational and moral thought is a philosophical debate that long predates the more recent interest in group agency. Hume, writing in the 18th century, wrote that 'Reason is wholly inactive, and can never be the source of so active a principle

[6] ibid, French (n 2)

as conscience, or a sense of morals.'[7] Kant, on the other hand, thought that morality was a product of the rational mind, based in the rationally deduced Categorical Imperative.[8] This debate takes on a particular edge when discussing non-human rational entities.

While the first concept makes it easier to move along with corporate agency, as it requires no separate defence of moral agency, it leaves open the possibility for anyone who does not accept the rational-implies-moral thesis to reject the moral agency of corporations. For that reason, I want to explore the special features of moral agency, including moral judgment's relationship with the emotions, and show that corporations possess the necessary features to be moral agents as distinct from rational agents. It is not my intention to take a strong position on the relationship between moral and rational thinking. But I have found that specifically in the case of corporations, people focus on the corporation's inability to be moral, on barriers to moral judgment that are not at the same time perceived as barriers to rational agency. For that reason, I choose to investigate the particular features of reasoning that are necessary for making appropriate moral decisions. Unsurprisingly, the theorists who argue for a separate, thicker conception of moral agency often find that corporations fail the test for moral agency.[9] In the remainder of this section, I will discuss the relationship between rational and moral

[7] David Hume, ***A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects*** (1739-40), 3.1.1.11

[8] Robert Johnson, 'Kant's Moral Philsoophy,' ***The Stanford Encyclopedia of Philosophy*** (Summer 2014 Edition), Edward N. Zalta, (ed.), online, URL = http://plato.stanford.edu/archives/sum2014/entries/kant-moral/, last accessed 6 January 2016

[9] Elizabeth Wolgast, ***Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations*** (Stanford Series in Philosophy, Stanford UP, 1992), Michael McKenna, 'Collective Responsibility and an Agent Meaning Theory' (2006) 30 Midwest Studies in Philosophy 16, David Luban, Alan Strudler and David Wasserman, 'Moral Responsibility in the Age of Bureaucracy' (1992) 90 Michigan LRev 2348, 2355. On the other hand, there are defenders of group emotion in a robust sense: see Margaret Gilbert's work, for instance, Gilbert (n 1), 135-135, and the work of Hans Emanuel Schmid, for instance: Hans Emanuel Schmid, 'The feeling of being a group: corporate emotions and collective consciousness' in ***Collective Emotions***, Christian von Scheve and Mikko Salmela, eds. (Oxford University Press 2014) 1

thought as it pertains to corporations. In the next section, I will problematize the intuition that emotions are the source of moral judgment.

The term 'moral agency' can lead in one of two directions: towards agency, the ability to act, with the intentionality that acting implies, or towards being moral, being an ability to judge actions with an appropriate sensitivity to the good involved not just for oneself, but for others also. Theorists who defend the existence of corporate moral agency often do so by focusing on rational agency, the ability to make rational decisions when moral matters are involved. Peter French explicitly endorses the view that there is nothing special about moral agency in his 1979 essay and 1984 book. French maintains that intentional agency is what creates personhood, and that personhood is also moral personhood.[10] He addresses, and rejects, the possibility that there is something more required for moral agency.[11] There is nothing more than intentional agency required, therefore, to be a moral agent on French's early account. Rationality is the only thing we can identify and point to, beyond volition, and so on this account there is nothing special about moral capacity, and no possibility that an entity could be a rational agent without being a moral one as well.

In his more recent work, French has indicated that he no longer agrees with his earlier view, and now believes that there is a separate functional capacity required to be moral, or to 'care about the moral quality' of one's actions, and that this quality is 'affectivity.'[12] He defines affectivity as the 'capacity to care … about the moral quality of

[10] French (n 2) 93

[11] ibid 91

[12] French 2012 (n 3) slide 7

one's actions.'[13] Because this new thesis is only present in a short newsletter article, workshop presentation and presentation slides, I do not want to hold French too strictly to the argument therein, as he may refine or alter it before publishing it as an article. It is interesting to note, however, that later reflection led French to the separation of rational and moral capacity. I will return to his more recent views in the next section.

While List and Pettit do not explicitly endorse the thesis of moral capacity as an attribute of reason, their way of dealing with the corporation's ability to be moral essentially flattens morality out into a feature of the ability to decide anything at all. List and Pettit tackle the issue of moral responsibility by looking at whether corporations have agency in situations where there are normative (ie moral) decisions to make, and conclude that if corporations make decisions and act as agents in these situations, then corporations have that moral agency.[14] They do include criteria that the agent must have judgmental capacity and the necessary control over the choice of normative significance. List and Pettit say very little about judgmental capacity, apparently finding it to be a fairly simple issue. The group votes on a morally (or normatively) charged proposition and endorses it according to its organizational structure, and thus it has made a normative choice, and so we see it has normative capacity.[15] Individual members have their own judgmental capacity, and are able to propose morally charged actions: as List and Pettit write, 'there is no principled reason why they should not be able to propose such propositions for group consideration and resolution'.[16] While the group itself may not directly share the individual's capacity, its vote proves that it has some kind of capacity to understand and

[13] ibid slide 12

[14] List and Pettit (n 4) 155

[15] ibid 159

[16] ibid

form moral judgments. No more internal gazing is required by any observers. This view is appealing in many respects. It strikes a balance between the inner and outer that might be welcomed by a discipline such as law that requires eventual practical outcome: looking at what somebody ***did*** as evidence of what they meant, or what their disposition or orientation was in relation to a particular issue, is efficient. And of course the intentional-action doctrine is not entirely external. It requires that agents make these decisions in ways that are directed by reason and are open to criticism in the same way that rational decisions always ought to be.

This way of quickly disposing of the moral agency issue leaves a major ambiguity in List and Pettit's position: are they saying that any rational decision on moral matters is evidence of judgmental capacity, essentially aligning themselves with French's early position? Or are they suggesting that if an individual member has a certain capacity, then the group has it as well? Yet they do not say that as long as individual members can feel it, the group can feel it; they say that as long as individual members can have a certain idea, then the members can propose that idea. Then the group votes on it. This seems to create a separation between individual capacity and group capacity. This then returns us to the idea that as long as the group can take a rational stand on an issue with a moral dimension, then the group has moral agency. This type of analysis does not explore whether the moral ***aspect*** of the moral decision is being taken into account in the decision. For List and Pettit, it is enough to understand that a vote has taken place, an action has been taken. The rest can be assumed. The argument that normative decision-making is enough to ground moral responsibility has some appeal: it is clear, and it does seem to tie in with the most important aspect of criminal responsibility: consciously choosing and carrying out a bad action is the heart of legal culpability. However, it seems to lack any ability to explain what it is that makes morality special. This account does not adequately address the intuition of so many people that corporations are devoid of moral agency. Therefore, this idea of normative decision-making seems more like a useful component of a broader theory of moral agency, rather than a full justification on its own.

In earlier articles, Philip Pettit took some greater interest in the need to consider the moral values at stake in a decision. In his 'Responsibility Incorporated,' Pettit explained how members who crafted the proposal to be voted on would be able to consider the values when crafting the proposal, using their individual judgment, and that based on this, it follows that the group itself would be able to make value judgments.[17] While Pettit's earlier formulation is not worlds away from the 2011 claim made by List and Pettit together, it is crucially different, in that it specifically addresses the group's ability to be a moral valuer, and does not reduce the corporation's abilities to making decisions on whatever basis, where those decisions have a moral value, without regard for whether anybody considered that moral value.

The voting-based conception in List and Pettit ignores the possibility that an agent might make a decision with moral implications without having morally judged the decision. Toys Ltd may choose to sacrifice safety when manufacturing children's toys to save money knowing that it is wrong, or Toys Ltd may choose to forgo certain safety measures because it is the most cost-effective choice taking into account lawsuits, and because Toys Ltd has no judgment on matters beyond their cost-effectiveness. The decision to forgo the safety features is a decision with a normative aspect either way. But

[17] Philip Pettit, 'Responsibility Incorporated' (2007) 117 Ethics 171, 187

to be a moral agent Toys Ltd must be able to appreciate the moral issue of putting children's safety at risk, not just the lawsuit cost. Compare this to the situation of an aggressive dog: if the dog chooses to bite someone's leg, this is an act with a moral dimension, but not with a moral dimension for the dog. While we might, for practical reasons, hold someone responsible whether or not they had the capacity to understand what they did wrong, this is more akin to taking a car off the road because it is unsafe, and does not carry the same sense of blame as when we blame a moral agent for acting wrongly.

It may be the case that there is no sharp division between moral and other types of reasons, so that any fully rational agent would also be a moral agent. Defenders of this line presumably rely on a concept of rationality that includes factual considerations. Harry Frankfurt argues that someone who would prefer to see the world destroyed than to cut off his own finger is not just immoral, but actually insane.[18] The basis for this is that whatever this agent's desires are, this cannot possibly be in line with them, and therefore even if the agent does not realize it, the agent cannot possibly rationally desire this outcome. Now, this does not mean that all morally incorrect choices are to be interpreted as instances of insanity. Even if we accept that some choices are so counter to what humans need to survive that they are insane, this is a far limit. As Frankfurt notes, 'Immorality is not, as such, abnormal. In many cases, it is only too easily recognizable as deriving in quite an ordinary way from human nature.'[19] In these simpler cases, there is no irrationality derived from the simple fact of immorality. Frankfurt's robust rationality

[18] Harry G. Frankfurt, ***The Importance of What we Care About: Philosophical Essays*** (Cambridge University Press 1988), 185

[19] ibid

only leads to the exclusion of very egregious immoral results. Rationality on this view does not make murder a necessarily bad choice. It does not, therefore, allow the reduction of the moral to the rational.

There are two other reasons why one might want to be particularly careful not to say that moral agency is subsumed by rational agency in the case of corporations. Firstly, robust rationality owes much of its content to the idea of what it is to be human. Frankfurt writes, 'Rationality belongs distinctively to the essential nature of a human being.'[20] This is the tenet that allows us to then call something irrational if it goes counter to human nature. But in the case of organizations, even if understood as groups of humans, it is not as clear that we can rely on this precept. Would group rationality belong to the essential nature of humans, or of groups? Allowing that this might not be such a great difference, it still requires some argumentation to build up this more robust, non-instrumental view of rationality in the case of groups. This is especially so because organizations are often seen as suspect from an ethical, though not a rational, point of view. Gary Weaver reports that empirical work on organizations 'highlights the prominence of amoral thinking, in which organizational, group or individual self-interests are pursued' without contemplation of ethical issues.[21] Indeed, many people seem to subscribe to the understanding of corporations as psychopathic, pathologically unable to care for the wellbeing of others.[22] This is a second, and powerful, reason why anyone defending the notion that corporations are capable of moral judgment cannot persuasively rely purely on their ability to be rational. Even if there are moral standards

[20] ibid 186

[21] Gary R. Weaver, 'Virtue in Organizations: Moral Identity as a Foundation for Moral Agency' (2006) 27 Organization Studies 341, 350

[22] This explains the popularity of a book arguing that the corporation is a psychopath: Bakan (n 5)

embedded in rational thinking, any ability to judge on moral considerations beyond these minimal moral standards (destruction of the whole world and all its inhabitants) must be argued for separately.

The non-identity of rational agency and moral agency becomes clear when we contextualize corporate morality, as this dissertation does, in legal theory. As mentioned above, several other areas of law, notably contract law, give agency and subjectivity to corporations all the time, without this being controversial. This ease with positing corporate reality includes intentionality, with its attendant rational agency. It would not be possible to enter into a contract if one could not intend to fulfill the contract. Corporations must be rational agents if they are to participate in contract law and appear in court. But the criminal law leaves theorists and legislators uncertain as to what the corporation is and when it is an agent. This is because criminal law addresses moral reasoners. It is not rational agency that causes the law to exhibit discomfort when dealing with corporations but moral agency. This means that collapsing moral and rational agency (as French does in his early work, and as List and Pettit come close to doing), fails to bring out some element of moral agency that our intuitions recognize the existence of, and that the criminal law's awkwardness in addressing corporate defendants makes manifest.

Rational agency is part of the picture of moral agency. While animal instincts might be consistent with morality, the way in which the animal behaves is not thereby morally conscious action. An agent must have some ability to deliberate in order to be a full-fledged moral agent.[23] Martha Nussbaum argues that while compassion is an

---

[23] John Gardner and Timothy Macklem, 'Reasons', in ***The Oxford Handbook of Jurisprudence and Philosophy of Law***, Jules L. Coleman, Kenneth Einar Himma and Scott J. Shapiro, eds. (Oxford

important part of moral reasoning, it is not 'an intuitive or nonreasoned alternative to judgments based on principle.'[24] Speaking in the individual-centred context, Joseph Raz describes those actions for which we are responsible (with the moral dimension that responsibility implies) as 'our engagement with the world as rational agents, for we are responsible for actions in virtue of their relationship to our capacities of rational agency.'[25] Rationality is what makes us eligible to be moral agents. This shows that rationality is required, but not that rational agency is ***all*** that is required. A rational being could make a decision with a moral dimension on grounds that are rational but take no account of moral values, right up to the limit cases that Frankfurt writes about. This would not be the type of moral agency that we would hope to find in a neighbor. If morality in a corporation were so minimal as this, it would certainly count as a reason to seriously limit the power that corporations wield.

Moral agency and emotional sensibility

There are contemporary philosophers – Elizabeth Wolgast, Larry May, and Michael McKenna are all examples – who agree that there is more to moral agency than making decisions on normative matters, and they find that this moral capacity resides in emotional capacity. These defenders of a thicker conception of moral agency generally find that corporations fail to achieve this ability. This is for the obvious reasons that corporations cannot fall in love, experience fear, and so on. I part ways with these

---

University Press 2004), 16

[24] Martha Nussbaum, 'Compassion: The basic social emotion' (1996) 13 ***Social Philosophy & Policy*** 27, 30

[25] Joseph Raz, ***From Normativity to Responsibility*** (OUP 2011) 287

thinkers on this issue, defending the position that corporations can indeed have full moral capacity and agency, including being sufficiently affected by emotions to have access to whatever necessary ingredient of moral decision-making these provide.

The argument that corporations or other institutional agents cannot be moral actors often simply equates human-beingness with moral ability. Corporations fail from the outset because they do not have faces, families, or friends,[26] cannot cry, and so on. It is true a corporation cannot cry, no matter what else it can do. This idea of humanity as necessary for moral personhood has historically been a prevalent one.[27] Framing personhood as membership in the human community simply negates the concept of personhood, substituting human-beingness. It precludes the possibility not only of corporations, but of any other entities being persons, as though no other being could even conceivably have human moral capacity even if it were found to be both rational and emotional. This is not an argument, it is a decree: only humans are persons. The concept of moral agency can and should be analytically separate from the concept of humanity. If personhood is to be distinguished from humanity, then it would seem reasonable to consider the criteria of personality, intentions, relationships, responsibility and susceptibility to punishment on their own terms, rather than merely by attaching them to the human attributes they are most often associated with (faces, family, friends, love and pain).[28] In order to persuade us, an argument against corporate moral agency would have

[26] Wolgast (n 9) 86

[27] French (n 2) vii

[28] Perhaps those who make this argument are confusing what it means to make a moral judgment and what it is to be a holder of moral value. It is important to make the distinction that Michael McDonald makes, that when speaking about moral agents, we are not speaking about 'what makes something or someone an object of concern', which may well be human emotions; Michael McDonald, 'The Personless Paradigm' (1987) 37 U Toronto LJ 212, 220. This can be separated out from the ability to act in the manner of a human moral agent. This depends on the ability to think and value, and this ability may be part of what

to engage with these characteristics rather than simply saying, whatever humans are is what is needed, case closed.

But we may take up the intuition of the need for 'humanlike' qualities and look for a genuine theory that embodies it. What comes through in all of these theories is that what differentiates moral from amoral thinking is the existence of emotions, and that emotions create the incentive to act in morally correct ways. I defend two divergent, yet complementary, positions. Firstly, I show that corporations have as much access to emotions in their decision-making processes as individuals do. Secondly, I argue that there is nothing about heightened emotionality, or emotionality at all, that makes one more prone to being a good moral reasoner, even if we find that being moral and being rational are not co-extensive. Therefore, whether or not one accepts that corporations are emotional, they are indeed moral agents, drawing moral knowledge from humans and incorporating it into the group structure. I have separated these two arguments into two subsections for ease of reading.

Emotional sensibility and corporate entities

Moral judgment requires an understanding of the concerns of others and worth of others, a mode of valuing that goes beyond self-interest. This quality, or ability, is what is generally thought to be missing from rational corporate decision-making. Often, philosophers connect moral agency with emotional sensibility, arguing that it is because of a lack of emotions that corporations lack moral agency.[29] Against this, I will argue in this

makes us value humans, but it is certainly not the whole reason we value them (if it were, we would not value those who lose this ability as a result of illness, among other things).

[29] Deborah Tollefsen, 'Affectivity, Moral Agency, and Corporate-Human Relations' (2008) 7 APA

section that emotions are transferred from individuals to the corporation using the ordinary processes of group action when it is concordant with the corporation's structure and purpose. There is nothing about emotions that makes them inaccessible to the processes of group formation and attribution.

Corporations can, few would object, possess financial knowledge, and the understanding of how to interpret and act on that knowledge. Where does that understanding come from? The various human members of the corporate agent contribute elements to the understanding. They do this in a way similar to members performing actions to contribute elements to a corporate action.[30] Corporations do not have distinct capacities of perception or memory, yet they are, as Pettit points out in his explanation of rational agency, able to 'register and endorse' information that their member agents perceive or remember.[31] If this is true of the mental states of knowledge, then there is some basis for inquiring whether it might be the same for the mental states that require feeling as well.

I should stop and make clear here that to call an emotion a mental state is itself perhaps controversial. There are those who believe that the emotions are not cognitive, are more to do with physical sensation. This is akin to what Dan Kahan and Martha Nussbaum have termed the mechanistic conception of emotions.[32] They contrast this with what they call the evaluative conception. The evaluative conception, in Kahan and Nussbaum's view, holds that emotions are the result of beliefs and ways of understanding

---

Newsletters: Newsletter on Philosophy and Law 9, 11

[30] Cf. ibid 98

[31] Philip Pettit, 'Collective Persons and Powers' (2002) 8 Legal Theory 443, 458

[32] Dan M. Kahan and Martha C. Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 Columbia LRev 269

the world and appraising the importance of objects, people and events.[33] While the mechanistic conception sees emotions as external to the rational self,[34] the evaluative holds them to be at least in part results of our way of understanding the world around us. This evaluative conception is importantly cognitivist, and finds that while pangs, twinges, tears and other bodily sensations may often accompany these emotions, those bodily sensations are not the central feature of the emotion, and an emotion could be experienced without these physical twinges. Margaret Gilbert cites this evaluative theory approvingly in finding that emotions may exist in minds that have no physical twinges.[35] The evaluative theory seems in important respects the right one, leaving aside the issue of whether or not it applies better to corporations. It accords with the idea that emotions have different weights in different cultures, for one thing. It also explains how someone's emotions might change as they learn more about the world around them and their place in it, although a person's emotions may still often be at odds with how they think they "should" be feeling. But it is much more in line with our understanding of and intuitions about emotions to find them to be a mental state rather than a more directly bodily one.

To argue for the evaluative conception of the emotions is not necessary for my argument that corporations have emotional states, since the way that I am arguing for these states is rather more individualistic than the way that someone like Gilbert argues for them. This is because I am arguing for the corporate case, while Gilbert is also concerned with groups that do not have a defined structure holding them together. In the case of a group with a defining structure, it can also have some bodily states. For instance,

[33] ibid 278

[34] ibid 289

[35] Margaret Gilbert, ***Joint Commitment: How We Make the Social World*** (Oxford University Press, 2013), 233

if a game dictated that to score a goal, the ball had to be kicked into the goal with the feet, it would still be true that the team wins the game when it scores the most goals. It uses members' feet, but the goals scored belong to the team, not the individual. And so, even if one finds that emotions are mechanistic, there are still arguments to be made that the emotions can be ascribed to the corporation. Nevertheless, I follow the evaluative conception, and the arguments that follow will be in line with a more cognitivist understanding of emotions.

Some criticisms of the corporation's ability to incorporate moral thinking go further in considering how individuals' emotions might work their way through the corporate structure, and find them lacking. Larry May concludes that the corporate structure cannot incorporate conscience as its design enables it only to comprehend business interests. The corporation can have knowledge, but not conscience. He begins by noting that because corporations are designed to look after business interests, the relevant corporate individuals judge corporate actions on their business efficacy rather than for their moral worth. As a result of this, though moral concerns may be considered and even subjected to a vote, these concerns are nevertheless only the concerns of 'each conscientious member of the board' rather than of the corporation.[36] May allows that members of the board of a corporation might be taking a vote on issues of conscience, but cuts off the ability of the members' conscience-oriented thinking to enter into the group's structure.

May argues that consciences cannot become part of a larger corporate 'institutionalized superconscience' because these organizations are goal-oriented.

---

[36] ibid 102

Therefore, for individual conscience to become part of the corporate conscience, it would have to be goal-oriented itself, and he concludes that 'such an orientation would not much resemble true conscientious reflection.'[37] In other words, the corporate structure is capable of incorporating financial decisions, but not moral decisions, because of the kind of group that it is. John Ladd advances a similar idea when he writes that, 'the only relevant principles in rational decision-making are those relating to the objectives of the organization,' and concludes that this means that moral integrity is an unintelligible concept for an organization.[38] Now, it is not clear to me whether this would apply to other groups as well. Are churches and governments also task-oriented, and similarly unable to reflect conscientiously under this analysis? One would have to put the state in the same grouping. While there are differences in terms of the types of goals a state ought to have and a corporation ought to have, they are both goal-oriented. A church might be a slightly different case. However, it seems clear that May was not thinking about either of these other types of organizations in his argumentation about business companies — though he was explicitly considering the university, another organization that we might think really ought to behave conscientiously.

May's argument relies on the idea that conscientious reflection is incompatible with goal- or task-oriented activity. Yet this is lacking in support and seems entirely wrong: much of our conscientious reflection is about how to accomplish our goals in a morally good way, or at least without transgressing moral norms. May has begged the question: he has assumed that corporate goals cannot be moral, and from there has found that corporations cannot take notice of moral reasons. If one allows, as May does, that a

[37] ibid

[38] John Ladd, 'Morality and the Ideal of Rationality in Formal Organizations' (1970) 54 ***Monist*** 47, 53

corporate board may make a decision on explicitly ethical grounds,[39] then it is inconsistent to also claim that the decisions, ***qua*** corporate decisions, can have no ethical dimension. The votes engendering the decision are created in minds that contain moral judgment, and this judgment is part of the reflection that goes into the vote, and through this mechanism it enters the corporation's structure.

Notice that while I have been talking about emotions in this section, May is not talking specifically about emotions. He is in fact talking about conscientious reflection more broadly, whether or not that relies on emotions. My reason for including the discussion of his argument in this section is that his more detailed explanation of why conscientious reflection exists in members of the organization when they act within their roles as members of the organization, but does not exist in the organization itself, reveals what I see as a flaw in this kind of argumentation, and it is the same flaw that exists in the critiques of corporations that insist that they have no access to emotions. Essentially, they are making corporations more special than they really are. Groups of people are changed when they come together for a business purpose rather than coming together for a social, athletic, charitable, or artistic purpose. But they are not changed to the extent that emotions become less accessible to them, or to them as a group.

Margaret Gilbert argues that groups can hold emotional states at the collective level. She asserts that it is consonant with normal intuitions to ascribe a range of emotions to groups, and singles out remorse as one of the emotions that people would ascribe to a group. The basis is the same as that for joint action. To have a goal as a group (that kind of mental state that May was willing to accept as consonant with the nature of the

[39] Larry May, ***The Morality of Groups*** (U Notre Dame, 1987), endnote 44

organization), 'group members must be ***jointly committed*** to accept the relevant goal ***as a body***.'[40] The same goes for emotions: where an individual feels remorse over the group action, not because of her personal involvement in the action but because of her association with the group that acted in a shameful way, she feels individual-level membership remorse.[41] When the members of a group come together and jointly commit to feeling remorse over the action as a body, then the group itself feels remorse.[42] In Gilbert's contention, this remorse has no pangs or twinges, but it is an emotional state nonetheless. Indeed, Gilbert questions whether emotions need to be associated with twinges or pangs in the individual case either.[43] One may be resentful, or sad, without a particular sensation being definitional of that emotion for us as individuals.

While I believe that Gilbert is correct that a group can hold an emotion through joint commitment, in the case of a corporate group, there may be an even simpler way to find that corporations have emotions. This method is built on French's work, though it is a line that he himself does not take. As I mentioned earlier, in more recent work French has seen fit to go back on his earlier stance that corporations did not need to hold affective states in order to be members of the moral community. He now believes that they do. French finds that the alteration he needs to make for his theory to work is that 'a corporation's decision structure may contain conversion rules for descriptions of certain types of utterances by appropriate employees into descriptions of corporate reactive

[40] Gilbert (n 1) 130; emphasis in the original

[41] ibid 129

[42] ibid 135

[43] Margaret Gilbert, 'How we feel: understanding everyday collective emotion ascription' in ***Collective Emotions***, Christian von Scheve and Mikko Salmela, eds. (Oxford University Press 2014) 17, 20

attitudes.'[44] In other words, when an employee apologizes for double billing a client's credit card, the apology can be redescribed as a corporate apology. This happens without the employee feeling personal regret, or any other member of the corporation feeling regret. The conversion into regret happens purely through the policy structure, the CID Structure. French claims that this is similar to presidential apologies, where for instance the President of the US apologizes to Hawaiians for historical military 'actions' on Hawaii. According to French, it is not necessary for the president personally or for any other member of the state to feel remorse.[45] But this seems odd: surely if it were known that the president herself had no sense of remorse (in the sense of membership remorse for the group's past bad action, not personal remorse) then we would find her apology to be counterfeit, even if she acted in accordance with it.

French acknowledges the objection that when we talk about regret, we usually mean to include some internal sensation, with twinges, pangs or other sensations associated with regret. French deals with this by saying that even in the case of humans, we should not look for sensations attendant to affect, but take expressions of affect 'at face value', so long as they accord with subsequent behaviour.[46] French states that what he is referring to as affect is not quite the same as an emotion, which latter he defines as being an 'inner neuro-psychological state.'[47] But what is the difference between regret as a 'self-referential reactive attitude'[48] and regret as an emotion? French invokes Wittgenstein in support of a behaviourist analysis of the latter. The Wittgensteinian thought experiment

[44] French 2008, 18

[45] ibid

[46] ibid 35

[47] ibid 37

[48] ibid

to which he is referring, the beetle in the box, is the allegory that our inner thoughts and emotions are equivalent to a hidden beetle each individual carries around inside an opaque box, where nobody can ever see someone else's beetle, but we all tell each other that we carry a beetle inside our box. Wittgenstein's intimation is that the actual beetle is irrelevant to our shared reality, since nobody can access anyone else's, and that communication might as well be as though there's a beetle even when there's just an empty box.[49] The beetle in the box applies just as much to emotion as to self-referential reactive attitudes. Attitudes and emotions are, indeed, roughly similar in being parts of an individual's makeup that we generally consider to be internal, that could be either authentic or put on, and that are susceptible to a behaviourist theory. Therefore, to the extent that French's theory applies to affect (whatever that might be as separate from emotion), it must also apply to emotions.

French's position that people (individual or corporate) do not need to have internal feelings associated with regret in order to truly regret something strikes me very much as a pragmatic move to efficiently arrive at the conclusion he seeks to arrive at, that corporations can experience regret. There was another solution open to French, one that is equally in line with his original work, and that offers a suitable, non-mystical and realistic way of attributing emotions to corporate entities. Following on from French's explanation of the CID Structure, if an individual acts out of fear in a corporate matter, then that fear becomes part of the corporate agent, for that period of time. It need only take one individual, as long as that individual is acting in a sphere where her agency is attributed to the corporation according to its usual rules and Corporate Internal Decision

[49] Ludwig Wittgenstein, ***Philosophical Investigations*** (G.E.M. Anscrombe trans. Blackwell, 1958), 100 (or sections 293 to 295)

(CID) Structure.[50] French recognizes that not everything an individual does in the context of her job would incorporated into the corporation. He writes, 'If there is a difference between corporate goals and desires and those of human beings it is probably that the corporate ones are relatively stable and not very wide ranging' as corporations are 'confined in action predominantly to a limited socio-economic sphere.'[51] What this implies, I conclude, is that under a CID Structure theory of corporate agency, the appropriate individual's anger and fear might become incorporated in the corporate person, but only if that anger and fear related to the socio-economic sphere of action of the corporation. A CEO who found out that one of her managers was sleeping with her husband might punch that manager, but this would not be an act of the corporation (even though the corporation could be held liable for it under a ***respondeat superior*** rule). And this seems like the right result. On the other hand a CEO who angrily berated an employee for failure to perform according to corporate standards likely would be incorporating that anger into the corporate agent. This also seems like the right result.

A corporate emotion can arise in several ways: through the operation of one person's emotions becoming the corporation's emotions as a result of the CID Structure incorporating that emotion (for instance, refusing to sign a contract out of malice), it can also arise through the operation of CID Structure if a number of people hold the emotion individually, and their combined individual emotions become attributable to the corporation through the workings of the CID Structure, or it can evolve through a joint commitment to hold an emotion at the group level. Most of the time, for an emotion to

[50] For more on French's theory of corporate personhood based on CID Structure see French (n 2) 53 ff, and also above chapter 2 section XY.

[51] Peter A. French, 'The Corporation as a Moral Person' (1979) 16 Am Phil Q 207, 214

be ascribable with any degree of intensity, and therefore being more than negligibly present within the corporation, it will need to be felt by several members of the corporation, but their intentions to feel the emotion need not be interlocking, the emotion will play out through them and become part of the corporate ethos. This is in the same way that our own emotions do not always require us to form an intention to feel them (indeed, this is extremely rare in the case of emotion formation). The emotion can either become prevalent in the corporate membership through emotional contagion,[52] or because a number of like-minded people have come together, and they react with the same emotion to some outside event, and therefore they, as a group, put their emotions into the corporate intention. For instance, the directors of a corporation all live in a small town. In that town, a young scholarship student from the town is murdered. In collective sadness at the murder, the directors decide to create a scholarship for university students from their town. Their sadness has become part of the corporate ethos, and has resulted in a corporate action. Where a disparate group of people come together to form a corporation, their individual emotions will often be at odds — for instance, some are joyful risk-takers, others are more subdued, pessimistic and also cautious individuals. In these cases, the emotions will all be present, and sometimes some of them will have more sway within the corporate entity than others.

Corporations are not independent originators of emotions (or of any knowledge, belief, intention or action), but they may acquire certain emotional states – those that are compatible with their natures – in the way they acquire other mental states, such as

[52] This is a well-documented phenomenon by which people's emotions spread to those around them, see Elaine Hatfield, Megan Carpenter and Richard L. Rapson, 'Emotional contagion as a precursor to collective emotions' in ***Collective Emotions***, Christian von Scheve and Mikko Salmela, eds. (Oxford University Press 2014) 108

financial knowledge. Relying on this picture of the corporate agent, we can see that the individual employee or agent brings certain parts of himself to the corporate structure. The attribution of acts to the corporation is not restricted to physical acts. The mental acts of individuals can clearly also be imputed to the corporation.[53] In the same way that not all physical acts of an employee are imputed to the corporation, so not all mental acts become corporate acts either. Board members or other decision-makers will be able to transfer to the corporation such business-related mental states as a wish to protect the environment, to minimize the risk of harm to consumers, and to act out of certain fears: not the fear of dying alone, but the fear of losing its good reputation, or of becoming bankrupt. The range of topics on which corporations think and make judgments is narrower than that of human individuals, since it is restricted to thoughts and judgments of members when they are acting in pursuit of corporate goals.[54] But when members act in ways that make up corporate action, then their perceptions and memories become institutional perceptions and memories.

Not all individual members' moral judgments while at work become corporate. The operation here is analogous to Wittgenstein's theory of private language.[55] Wittgenstein proposed that a truly private subjective state can have no reality outside of oneself, as only the aspect of it that can be explained and shared with others can have a social reality. Anything that cannot be shared may as well not exist.[56] To adapt this theory to the corporation, if one individual member of the corporate group agent has an

[53] Hans Kelsen, ***General Theory of Law and State*** (Anders Wedberg trans., Russell and Russell 1961), 104

[54] May (n 39)

[55] Ludwig Wittgenstein, ***Philosophical Investigations***, G.E.M. Anscombe, trans. (Basil Blackwell 1958), 100 (section 293)

[56] ibid

emotion and never mentions it or acts on it in a corporate-relevant way, then that emotion is not part of the corporate entity, even if the individual was feeling that emotion as she carried out corporate acts (consider an employee in an advertising company privately feeling revulsion as she created a sleazy advertisement for a brand of beer). However, if she expressed her revulsion in a meeting and it was discussed, but ultimately the team decided it was worth making the sleazy ad anyhow, then this revulsion would form some part of the corporation's moral sense. This solution also incorporates the relevant considerations about an emotion only applying to the corporation if it is within its socio-economic sphere of activity, for a member could only instantiate an emotional state in the relevant way if it were in accordance with the purposes and operations of the corporation.

We should remember the social nature of corporate activity. It is in this social nature that we can find both why corporations are different in their decision-making than individuals, and also how it is that they are endowed with moral judgment. When humans come together to form a group, the group changes their individual natures during the time they are acting as members of the group, as indeed it does with anyone who is acting in the role of employee or agent rather than in her private life. Some of the qualities that inhere in the individuals separately diminish and others increase when they become part of the corporate person.[57] Far fewer emotions become part of the corporate entity than are felt by employees or other members of the corporation during a relevant time period. Anything that is private to an individual does not exist at the corporate level. But if something is the product of an interaction that also exists in the correct form for the

[57] This line of thinking is indebted to Wolgast (n 9)

structure of the organization – either the discussion over whether to make a sleazy ad, or, by a more direct path, the board members voting out of their anger at a murder in the neighbourhood – then that emotion does become part of the corporation's understanding and experience. The emotion does not have to be explicitly discussed. When a sufficient number of individuals feel a certain emotion, they will sway the entire corporate entity in that direction, and the emotion will be prevalent enough to be attributed to the corporation by regular attribution rules. Where the corporate board votes out of anger, that anger becomes part of the corporate makeup.

Anything that is private to an individual does not exist at the corporate level. But if something is the product of an interaction that also exists in the correct form for the structure of the organization – either the discussion over whether to make a sleazy ad, or, say, board members voting not to put cigarette ads anywhere children might see them because of a joint concern that children should not be encouraged to unhealthy behaviour – then that moral consideration becomes part of the corporation's understanding and experience.[58] Not every interaction will qualify. Water-cooler talk of board members' positive disposition towards a political candidate does not render that support part of the corporation, but a memo asking employees to support a candidate on the basis of a disposition would make that disposition part of the corporation's views. A corporation that consistently advocated political beliefs to employees and customers would have corporate political views.

The emotional nature of human thinking pervades everything that humans do, and that includes forming groups, even where the humans who form the group hold cold,

[58] Note that again, this can hold for a one-person corporation.

calculating agency as their ideal for that corporate entity. I agree that while corporations do indeed experience emotions, they experience them in a narrower sphere — because they can only experience the emotions that are related to their social and economic sphere of action. On the other hand, they do experience all the emotions that are related to that sphere, and so presumably have enough emotional information to go on, if indeed emotions are able to drive moral action.

Emotional Natures and Moral Judgments

Despite having now found that corporations do indeed have emotions, I would like to dispute the theory that a more emotional nature is more moral. I put it in this way, rather than saying, an emotional nature is moral whereas a nature devoid of emotions is amoral, because it is my view that there is no such thing in the world as a nature devoid of emotions.[59] Certainly, in the world of agents who are groups of individuals, emotions can and must come to exist in the group in the same supervenient way that other cognitive states exist in the group.

Luban, Strudler and Wasserman view guilt and shame as 'suitable moral emotions' without which an entity could not 'appreciate the significance of moral criticism.'[60] McKenna argues that resentment, indignation and guilt 'involve attendant emotions that have their own phenomenal peculiarities.'[61] For this reason, McKenna

[59] We might imagine natures of this sort, such as the Vulcans from Gene Rodenberry's ***Star Trek*** (television show first aired in 1966 on NBC Network in the United States), but there are none anywhere in the reality of rational agents that humans have discovered so far.

[60] Luban, Strudler, Wasserman (n 9) 2369

[61] McKenna (n 9) 26-27

concludes that corporations are intentional/rational actors, but not moral actors.[62] These thinkers do not seem to give weight to the idea that emotions can as easily cloud moral reasoning as they can elucidate its requirements. Anger, greed and fear, for instance, are not necessarily immoral emotions, but one can imagine they often would lead to selfish or immoral action. Even such positive emotions as joy or happiness can also lead to immoral intentions, such as looking away from the suffering of others. In some ways, being a dispassionate thinker makes one much more suited to being a good moral reasoner. This isn't to say that emotions necessarily lead to bad moral thinking, but that greater access to more emotions is not necessarily going to make one a better moral judge. Thus, while corporations have a narrower access to emotions, this faculty does not make them less apt to be good moral agents.

An organization's dispassionate thinking may make it a more optimal moral valuer at times than humans, who are swayed by more passionate modes of valuing. Even more than a regular, individual moral agent, such as a human being who often acts rashly and regrets it later, an agent that can appreciate moral values but does not experience them in passionate form could in fact be a superior moral decision-maker. Moral judgment is the judgment to do what is correct overall, rather than what is in one's own self-interest. Brent Fisse and John Braithwaite argue that 'the lack of emotions and feelings promote rather than hinder considered rational choice and in this respect the corporation may indeed be a paradigm responsible actor.'[63] They suggest that emotions — or at least some emotions — may not be helpful in making the best decisions. Fisse

[62] ibid 21

[63] Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 Sydney Lrev 468, 487

and Braithwaite may have in mind a specific subset of emotions, passionate thinking rather than dispassionate thinking. McDonald uses this more precise terminology, and calls the lack of subjectivity 'dispassionateness.'[64] Because of the slower way that corporate knowledge gets amalgamated, and because of the many different attitudes that go into a corporate mental state, it seems very likely to be correct that corporations, while they may be as emotional as individuals, are less passionate in their emotions. What this means is that feelings-based thinking does influence the corporation: fear, anger, happiness, and so on, but that these emotions will play out in a dampened way. Therefore it might be fair to say that while a corporation is an emotional entity, it is less subject to emotional shifts than an individual is.

A lessened access to emotional shifts does not make an actor less moral, however. The emotions that are morally uplifting are not different emotions than the emotions that lead to moral weakness. There are no 'good' emotions or 'bad' emotions, but rather it seems that greater receptiveness to emotional reactions may lead to good or bad results, depending on the circumstances and the extremes to which one may be swayed by them. Perhaps the capacity for sadness, and a concern for others, or empathy, that while not in itself a discrete emotion, seems to rely on other emotions for its functioning. But many emotions are ambiguous as to whether they would lead someone to commit more or fewer other-regarding acts. Consider sadness: sadness at the pain of another could be a good motivator for helping others, a seemingly moral outcome. On the other hand, sadness at one person's misery (whether one's own or another's) might lead one to act unfairly towards others in order to make that one happier. Fear is similarly ambiguous.

[64] McDonald (n 28) 220

While in the domain of excuses fear arises as a state that leads people to make wrongful choices (such as, for instance, helping a bank robber out of fear that she will kill your wife), fear of bad consequences could also be a guide to morally better choices (fear of having one's corporate actions put children in danger, for instance). Luban, Strudler and Wasserman point to guilt and shame as important drivers of moral understanding. And it is true that we generally think that someone who has no feelings of guilt when she does something bad is somehow missing the moral import of her actions. Nevertheless, the guilt feeling is backward looking, and can often compound a desire to stay away from morally charged situations or to keep clear of any future setting in which the guilt or shame may arise again. It is not at all clear that guilt and shame are predictors of better moral action, and Luban, Strudler and Wasserman do not argue for their claim. Certainly in the case of most emotions, the emotion itself seems to be able to turn towards more selfish action sometimes, and more selfless actions at others. An emotion is not in itself moral or immoral. Sometimes the cold assessment is harsh and lacking in mercy, and yet sometimes the hotheaded action can be cruel or vicious. This also shows that the level of passionateness in a person's emotion is also not directly relevant to how moral he will be.

In some cases, the way that a group agent highlights certain individual traits and dissuades others may make it a better moral agent than its individual members are. Even if emotions are one of the drivers of moral action, knowledge is certainly also necessary. A person who wants to do good will often wind up doing bad if she proceeds on mistaken assumptions. Understanding medical evidence, social science evidence and other facts about the world are important in making the right choices to respect others and foster social good, and this factual information is important even when someone's heart is in the right place. Groups are better than individuals at tracking the truth, empirical studies show.[65] But would this be relevant to a group agent's moral judgment or is it only relevant to making it a better rational agent, with any influence on moral agency being merely side effects? To some extent this might depend on one's view of moral judgment: are values an issue of knowledge or of some kind of direct line to judgment? If we understand moral agency as a cognitive process, then we might well find that it too can be made better through concentration in a group. Richard Ekins makes a similar argument in ***The Nature of Legislative Intent*** when he writes that if voters choose the candidate who is best at legislating, "where competence includes moral probity and sound judgment," then the legislature itself will be a place where virtue is concentrated.[66] So you might find that as long as the individuals have the motivation to make right moral choices, joining together with other such individuals to form a group would make them even better at tracking the right moral choice, with the components of finding the right factual information to rely on, and the right moral views to take into account when deciding how to act on those empirical facts.

Because it is made up of a melding of individual mental states and subject to their deliberations as a group, the corporation's resultant mental makeup is less passionate than that of an individual. Passionateness is related to a type of emotional sensation, the "hot" emotion of an immediate reaction, but some emotions are more "cold," and unfold more slowly, and these would be as likely to be part of a corporation's mental makeup as they would of an individual's. French writes that corporate goals and desires are different from those of humans because corporate desires are "relatively stable and not very wide

[65] List and Pettit (n 4), 86-88

[66] Richard Ekins, ***The Nature of Legislative Intent*** (Oxford University Press 2012), 150

ranging, but that is only because corporations can do relatively fewer things than human beings.'[67] It is also the case that definitionally, the sort of corporations that I am mainly considering in this thesis are created with a narrower range of goals in mind: they are all for-profit businesses. They might also have a goal to bring theatrical arts to a broader audience, or to give children high-quality educational toys, or some other non-profit-directed goal, but they are looking to create a product or provide a service, and to generate profits at the same time. This narrower set of goals will generally make the corporation less passionate.

It is not a radical departure from other intuitions to conclude that less passionate natures may lead non-natural persons to be more reliable moral agents than natural persons in some types of cases. At any rate, it seems unlikely to make it a worse moral judge. John Gardner puts forward the theory that being rather cold and detached, seemingly unemotional, is just another type of emotional makeup, and that neither a more nor a less emotional nature is more rational.[68] By extension, neither a more nor a less emotional nature is necessarily more moral, at least in the case of individuals.

There are cases in which people have tended to find it preferable for groups to make decisions than for individuals to make them. For instance, it seems wiser and more fair to have the state (dispassionately) decide how much to punish wrongdoers, rather than leaving it up to their victims or victims' families to decide on the quantum of punishment.[69] Both recognize the wrong, but the state recognizes it dispassionately, while we worry that the individual's response will be disproportionate because of the passionate

---

[67] French (n 51) 214

[68] John Gardner, 'The Logic of Excuses and the Rationality of Emotions' (2009) 43 J Value Inquiry 315, 326

[69] French (n 51) 214, 216

nature of her response to the wrongdoing. Indeed, individual psychology may allow for easy shortcuts around feelings of compassion when these involve personal sacrifice, and group-based decisions are required to safeguard these in those circumstances.[70]

To recap, the way a corporation knows and acts does not preclude it making any moral judgment about any issues within its social and economic sphere of action, even if one takes the position that these must be guided by emotion. The argument in fact highlights how this understanding will be different than that of individuals, and suggests that at least part of this difference will be that it is dispassionate rather than passionate in its moral evaluations. These differences mean that the corporation's judgments are not identical to individual human judgments, but of course, there is a great diversity in what individual humans value and hold as good, and this may be true of corporations as well.

What this section has argued is that a less passionate nature may make for a better moral reasoner. And yet, corporations are often seen as being poor moral reasoners, or are at least blamed for their poor moral reasoning when it crops up. Maybe this has less to do with the fact that their moral judgment is worse than that of individuals, and more to do with the fact that we are less sympathetic towards their failings than we are towards those of humans. This is because we find humans to be objects of value, whereas corporations are only questionably so. The sources of value in human beings and other entities is the subject of the next section.

[70] Albert Bandura, 'Selective Moral Disengagement in the Exercise of Moral Agency' (2002) 31 J Moral Education 101, 116

The nature of the corporate entity

The previous chapter and the first part of this chapter have sought to make a convincing argument that corporations are moral reasoners, full moral and rational agents in the same way that adult humans of full capacity are. What does this mean for the corporation? Does it, for instance, mean that we ought to value corporations in the same way that we do individual humans? This result would certainly seem very counterintuitive, and if it followed directly from their nature as moral reasoners, would likely be a reason to revisit the prior arguments with a fine-toothed comb to discover any flaws that we could use to reject the thesis. The final part of this chapter is devoted instead to showing what moral agency does and does not confer upon its bearer. The argument contained herein is that while human worth is often described as deriving from human reason and morality, this is not the bulk of what gives humans their value.

Philosophers have traditionally given heavy priority to rationality as grounding personhood rights and obligations.[71] Rationality is certainly important, even glorious. It is what makes humans distinct from other animals, and because of it many humans have prioritized humans over animals (possibly more than they should have). But reason does not provide the whole explanation of why we owe respect to human persons. Christine Korsgaard argues that the 'legal bifurcation' of the world into persons on the one hand, and property on the other, is a false dichotomy, and suggests that animals have a separate

[71] For instance, of Immanuel Kant, Robert Johnson writes, 'it is the presence of this self-governing reason in each person that Kant thought offered decisive grounds for viewing each as possessed of equal worth and deserving of equal respect.' Johnson (n 8). For another classical philosophical example see, John Locke, ***An Essay Concerning Human Understanding*** (1690) book 2, chapter xxvii, paragraph 9. Among contemporary philosophers see for instance Daniel Dennett, 'Conditions of Personhood,' ***The Identities of Persons***, Amelie Oksenberg Rorty, ed. (University of California Press 1976) 175, 175. But these are just a few examples among many.

normative status from either.[72] Rationality, Korsgaard agrees, is important. As she states: 'we face a problem that the other animals presumably do not face: we have to decide whether to believe and act as our perceptions and desires suggest.'[73] From this, according to Korsgaard, comes our obligation to make normative or moral claims. She argues that while animals do not have this, they do have something else important, some value that makes them worthy of our respect in a way that objects are not. The aim of her argument is to explain the distinct nature of the respect we owe each other as persons, but still finding that there is a special status for animals.[74] While Korsgaard acknowledges that collectives exist,[75] she nevertheless concludes that there are three normative categories: persons (who are owed respect as free and autonomous beings), animals, and property.

Corporations are neither human persons of this sort, nor are they purely property, either in law or in fact, if they are understood as the kinds of group entities endowed with moral agency. The argument that grounds the separation of animals from property also grounds the separation of corporations from humans, as it posits that there are two separate bases from which we derive the need to respect all humans. The first, the one that Western philosophy has prioritized, is rationality, which humans share with corporations. The second is something we may term the inherent worth of living beings, which humans share with other animals. And so we may see that these two important value-creating attributes may intersect, justifying the normative status we accord to humans, or they may exist separately, as the following diagram illustrates:

[72] Christine M. Korsgaard, 'Kantian Ethics, Animals, and the Law' (2013) 33 OJLS 629, 629-630

[73] ibid 638

[74] ibid 648

[75] ibid 643 fn 16

Source of value:	***Inherent worth of living beings***	***Rational and moral capacity***
Inherent worth of living beings	Dogs, whales and analogous others	Humans
Rational and moral capacity	Humans	Corporations

A reader might object that this division is somewhat arbitrary: instead of separating out the values that make humans worthy of respect in this way, I could separate them out in a different way. There are a variety of values that make human individuals worth preserving — one could cite the beauty of human creations, for instance, and have that as a reason for prioritizing the life of a potential Shakespeare over other lives (this is a theory that has traction with some people, for instance Nietzsche).[76] The answer is that other values may be important, but they are not what grounds respect for all living persons. It is in the special and fragile quality of being alive that we value animals and humans as animals. And it is in the normative quality of being able to formulate intentions and respond to reasons and deliberate morally that we value humans and groups as agents.

This argument shows that if a corporation is properly structured and acts in the manner of a full rational and moral agent, then it has a certain amount of value, and that other people must respect the corporation as a holder of that value. There are two bases of value here, but it does not mean that they are equally valued. It is possible that there is a synergy between the two bases, and so humans have a combined worth that is properly

[76] Friedrich Nietzsche, ***Thus Spoke Zarathustra*** (Walter Kaufmann trans., Penguin 1978) II.7

more than the sum of the worth of animals and corporations together. I think it is likely that there is a greater amount of value inherent in being a living being than in being a moral reasoner, though both have some inherent value. However, allocating amounts of value is thankfully not a necessary part of the argument that I make here. It is enough to show that moral agency is not the entire source of the value of human persons, though it is what separates them from other animals.

This partial status of corporations — worthy of the respect due to rational and moral capacity but not of the respect due to living beings — creates a separate nature for it in our ontology and in law. It might, for instance, ground an intuition that some have that it should be the bearer of responsibilities without all of the corollary rights that responsibilities imply in the case of individuals. This is an intuition that many (if not all) people have and that theorists have tried to ground in a variety of ways. List and Pettit argue that natural rights should not be accorded to group persons because 'we can create an unlimited number of them.'[77] I happened to be pregnant when I first read this argument, and in such a state it did strike me as odd, though it is true that I cannot go through an unlimited number of pregnancies. If there were a 12-month waiting period on the creation of each new corporation or group, this would mean an adult could produce them roughly as fast as she could produce human persons, but this would not be a reason to give corporations greater rights. The fact that we can create them is not the reason why we do not want to accord the same rights to corporations as we do to human beings. Drawing on Korsgaard's argument about the normative status of animals, I defend the idea that the explanation of the normative status of corporations is best explained by the

[77] List and Pettit (n 4) 182

division I identify here. The reason we do not accord them the type of rights that we accord humans is because they are not imbued with that special value that living beings have. But they might still have some rights independently of the value of those rights to individuals, such as due process rights in law, or the right to defend themselves against accusations or false claims, for instance. These rights are granted in recognition of the status of an agent as a rational and moral reasoner, and this is why those rights are plausible as corporate or group rights. In this regard it is worth noting that while we might have a lot of sympathy for a crocodile who caused human death, we would not accord it most due process rights, although we might want to at least make some inquiry into its tendency to cause such a death again before acting to limit its liberty. The rights of due process can be accorded to a corporation, though not a crocodile, because a corporation is the type of entity that can exercise those rights.

The middle status of corporations might also be due to the fact that as humans, we value what is most human. This would explain the possible synergy between reason and being alive — that we value the combination more than the sum of its parts (so, one human is worth more than a crocodile and a corporation together) because that is the most distinctively human. As Justin D'Arms and Daniel Jacobson write in their essay on sentiment and value,

> values depend in some way on the existence of beings to whom things matter. Perhaps, then, human values depend on human valuing, which is inextricably tied to affect, sentiment, and emotion.[78]

[78] Justin D'Arms and Daniel Jacobson, 'Sentiment and Value' (2000) ***Ethics*** 722, 723

And this gives us a satisfying conclusion to offer to those who protest that emotion is more important than my account has made it seem: it is not that emotion creates moral agency, but that emotion is in itself valuable to us as humans. This does not, however, mean that it is necessary for moral evaluation.

Conclusion

In this chapter, I have shown that corporations are holders of moral agency, in addition to rational agency and self-awareness. Though critics say that moral agency requires emotionality, I overcome this criticism by showing that group agents such as corporations have the required access. Though it may sound strange to say that corporations experience emotions, it is not so strange when we consider that the corporation is made up of individuals, and that they contribute a whole variety of mental states to the group. It is not incongruous to think of an organization as being compassionate. Some mental states are fully available to the corporate structure, and some of them less so, but enough of the emotions that ground regard for others are available within the structure of formal organizations that it is nonsensical to say that corporations cannot be influenced by them. I conclude that whether or not you believe a heightened emotional sensibility is conducive to better moral choices, corporations are full moral agents. This is a central argument in this thesis: that a corporation can understand right from wrong, and hold itself to a standard of behaviour (such as the standard set by the criminal law) not simply because the law requires it, but because it is morally right for it to do so, and the corporation itself should recognize that this is so.

I draw a further conclusion from the status of corporations as moral reasoners, and argue that this gives them some degree of inherent worth, but that human worth is not derived entirely from human rational and moral agency. Group agents, of which well-run business corporations are a type, have worth as moral and rational reasoners, but lack the worth of living beings, thus being in a halfway position normatively, between human persons and property. This gives us a good basis on which to understand the status of corporations as fully responsible, but without the full complement of rights that humans possess.

A reader may be inclined to object to this entire chapter on the basis that, while it holds together theoretically, it does not accord with the behaviour of actual corporations out in the world. The answer to this objection is that the ability to make moral evaluations is not the same as the tendency to make good moral choices. Neither all humans nor all corporations steer the right course when it comes to making decisions for the social good or decisions that respect the dignity of all humans. But in the case of the corporation, it is possible that, while its moral faculties exist, the structure tends to allow member individuals to get together and engage in attractive bad behaviour that they would not engage in alone. Whether the corporation is inclined to make good moral decisions, or whether its design leads it instead towards bad moral choices, is the subject of the next chapter.

4. Moral Accountability and the Trouble with Agents

> [M]any conglomerates are organized just so that they will shoulder responsibility for the failure of their projects without adversely reflecting on the individuals who are associated in them.[1]

Introduction

While corporations may have the ability to behave according to moral standards, there is a generalized suspicion of corporate performance in the moral arena. In writing on the moral agency of corporations, a question that arises repeatedly is, 'why do corporations seem so often to transgress widely accepted moral standards?' One need not look far to find examples of corporate malfeasance.[2] Conversely, there are relatively few stories of business corporations doing the right thing without it seeming that there is a self-interested ulterior motive. For instance, many corporations now make claims about corporate social responsibility, but these seem to be widely understood as being acts in the

[1] Peter A French, ***Collective and Corporate Responsibility*** (Columbia University Press 1984), 15

[2] See for instance the many cases described in Brandon L. Garrett, ***Too Big to Jail: How Prosecutors Compromise with Corporations*** (Harvard University Press 2014) and William S. Laufer, ***Corporate Bodies and Guilty Minds*** (University of Chicago Press 2006)

service of financial performance, rather than important objectives in their own right.[3] Corporate social responsibility claims are not only made with ulterior motives, but in fact often seem to be made up of lies to fool consumers and investors into believing companies are better than they are, a practice called 'greenwashing' as it relates to environmental claims.[4] Corporations are almost universally understood to be selfish, profit-motivated and always on the lookout for a way to take the best for themselves. After admitting to this context, it is hard to argue that they are also full moral agents.

Moral agency, of course, does not mean judgment that always tends towards the good. A moral agent is one whose judgment, like human moral judgment on average, will sometimes be good and sometimes be bad, but who will at any rate understand that it is doing wrong when it does wrong. Maybe, while they are moral agents, there is something about corporations that makes them particularly prone to making immoral decisions, with full knowledge of doing so. There might be something about becoming a group agent (through interlocking intentions and within the corporate structure) with a business purpose that leads the group to make morally worse choices than its members would make, on average, individually. On this reasoning, it is plausible that other entities designed quite similarly to business corporations, such as governments, charities, churches

---

[3] There is an extensive literature on how much of an impact corporate social responsibility claims have on performance, much of it written under the assumption that financial performance is the point of corporate social responsibility; see e.g. Abigail McWilliams and Donald Siegel, 'Corporate Social Responsibility and Financial Performance: Correlation or Misspecification?' (2000) 21 Strategic Management Journal 603, Pieter van Beurden and Tobias Gössling, 'The Worth of Values — A Literature Review on the Relation Between Corporate Social and Financial Performance' (2008) 82 Journal of Business Ethics 407. Note that of course there is also literature that sees corporate social responsibility and financial performance as twin goals, which is not the same thing; on this latter see e.g. Joshua Daniel Margolis and James P. Walsh, ***People and Profits?: The Search for a Link Between a Company's Social and Financial Performance*** (Psychology Press 2001)

[4] William S. Laufer, 'Social Accountability and Corporate Greenwashing' (2003) 43 J Bus Ethics 253, at 255-256 describes some of the deceptions companies have engaged in when trying to create more ethically responsible images for themselves

and other non-governmental organizations, are capable of moral agency but that corporations, because of design features specific to them, are not.

There is a popular and scholarly view that the corporate form can make people involved in it act worse than they would otherwise. Joel Bakan puts forward the opinion that the people who work in and even those who are in charge of their operations 'are, for the most part, good people, moral people.'[5] He claims that they cannot use the corporation's money to do good works, since it is not their money to use. Bakan paints a picture of individuals who are immoral at work, yet moral at home. And the corporation itself, Bakan finds, 'is ***singularly*** self-interested and unable to feel genuine concern for others in any context.'[6] For this reason, Bakan diagnoses the corporation as a psychopath.[7] Indeed, Bakan gets even more specific and opines that the corporation is specifically designed to 'invalidate moral concern.'[8] Is this true? Is there something about the corporate form that makes it easier for people to behave immorally? This chapter will seek to answer that question, with particular emphasis on bureaucratization and also on addressing Elizabeth Wolgast's arguments that agency arrangements create a moral deficit.[9]

Limitation of liability is a central feature of the corporation that gives people a means to get out of paying debts that they would otherwise incur by entering into contracts or exposing themselves to tortious liability. This in itself might be morally

---

[5] Joel Bakan, ***The Corporation: The Pathological Pursuit of Profit and Power*** (Viking 2004), 50

[6] ibid 56

[7] ibid

[8] ibid 28

[9] Elizabeth Wolgast, ***Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations*** (Stanford Series in Philosophy, Stanford University Press, 1992)

wrong.[10] And perhaps, in addition to creating distance between stakeholders and the financial outcome of their decisions, the corporation also creates distance between these stakeholders and the moral import of the decisions that they make as part of the corporation. This would make these stakeholders less aware of their own moral responsibilities while acting within the corporate structure, potentially causing them to systematically act less morally when they acted for the corporation than when they acted in their own names. This would make corporate acts, overall, less morally justifiable than acts undertaken by individuals.

The way that the corporation has been structured as its own legal person with enterprise liability and limited member liability makes it unclear how much we, as a culture for whom corporate life is a reality, are willing to hold individual members accountable for group decisions. Though we can still hold the corporation responsible, this may be a weak second best, if it goes along with the result that the prime movers of the action are all insulated from blame. This may seem like a morally undesirable result, especially if the insulation is one of the main reasons why people come together to form a corporation. I argue in this chapter that most of the criticisms leveled at the corporate entity are really criticisms that would be more properly directed at 20th- and 21st-century business culture more generally. While business culture may be riddled with problems, and while the corporate form is one of the vehicles of choice for businesses, it is not the corporate entity that is creating a tendency for individuals to embrace worse choices. That being said, there are specific features of incorporation that allow those who want to perform bad acts to accomplish them more easily, because they have help from others.

[10] See, among others, Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 Yale LJ 1879; Christopher Kutz, ***Complicity: Ethics and law for a collective age*** (Cambridge University Press 2000) 253

So, in that sense corporations tend towards harmfulness in some cases. But they can also help to accomplish good acts. There is nothing about the form that makes them more likely to accomplish bad or good acts, and so on balance the form itself is neutral. Charges leveled against corporate practice are usually really charges leveled against current capitalist business ethics. This is important both to understand the nature and potential of the corporate form, and also because precision about where the harms emanate from will allow people to better focus their reform efforts.

Incorporation and limiting liability

Limited liability, a defining feature of the corporation,[11] was created as a way to allow investors to shield themselves from some of the results of actions that they undertook or that were undertaken on their behalf and for their profit. What corporate limited liability does is put distance between the shareholder and the financial ramifications of the decisions that are made with her money and for her benefit.[12] That is by design, and the fairness of that design is questionable. Why should individuals acting outside of the corporation incur full liability for all their actions but individuals acting within a corporate structure be shielded from those?

The financial distancing that the corporation allows between individuals and the liabilities they incur as a group can be understood as the great bargain that explains the existence of the corporate form.[13] Historically, the corporate form has been used as a way

[11] Frank H. Easterbrook and Daniel R. Fischel, 'Limited Liability and the Corporation' (1985) 52 UChiLRev 89, 89

[12] ibid 93-94

[13] See Larry E. Ribstein, 'Limited Liability and Theories of the Corporation' (1991) 50 Md L Rev 80, 81

to attract investment for socially desirable projects.[14] Large corporations, including those whose ways of acting we are suspicious of, make products most of us think should exist, like clothes, toothpastes, medication, cars, and so much else that we rely on in our everyday lives. These products would be harder to produce as efficiently and as cheaply without large corporations running the many operations required to make these products (especially products that require a great initial investment, such as cars or innovative pharmaceuticals). Thus, the bargain is between the interests of businesspeople and the interests of society: it allows people who are not vastly wealthy (or at least not so vastly wealthy that they could cover the potential losses of huge risky operations, though the vastly wealthy also benefit from the bargain) to give their money over to projects that could be considered socially worthwhile and over which they will often have little oversight (though again, people with a lot of oversight are also allowed to benefit from the bargain), in exchange for limiting their monetary liability for losses to their monetary investment in the corporation. The projects are often too risky for many to want to invest in if liability remains unlimited. Of course it is true that many of the products that large corporations make are not socially worthwhile, but the fact that corporate entities benefit from the bargain even while they do not fulfill their side of it, does not mean that the bargain isn't in some way beneficial to society as a whole. Nevertheless, the idea here is that there is some justification for the existence of limited liability.

There are critics of limited liability. For instance, some scholars argue that the limitation of liability for shareholders is unjustifiable when the damage is to third parties

[14] Stephen B. Presser, 'The Bogalusa Explosion, "Single Business Enterprise," "Alter Ego," and Other Errors: Academics, Economics, Democracy, and Shareholder Limited Liability: Back Towards a Unitary "Abuse" Theory of Piercing the Corporate Veil' (2006) 100 Nw U L Rev 405, 408

rather than contracting parties.[15] A contracting party knows what it is getting into, but someone who is tortiously harmed did not agree to the corporation's limitation of liability. It is not a given that the costs are worth bearing for many of those on the non-shareholder side of the bargain, especially when those others are bystanders rather than contracting parties, nor does shareholders' limited involvement in the decision necessarily tip the balance of fairness towards limiting liability. Christopher Kutz argues that shareholders' responsibilities ought to mirror their potential benefits.[16] The shareholders have made a choice to become members of a venture that could foreseeably cause great harm, and thus there is no unfairness to saying that these group members have involved themselves in an obligation to make good their company's wrongs.[17] It is certainly difficult to see why victims of serious injury should be limited in their recovery when they did not agree to the corporate bargain beforehand. Though, as Stephen Presser points out, this might not be as big an issue, at least practically speaking, as it appears, since state regulation of corporate capitalization and insurance might do just as much to ensure that those harmed get compensated as unlimited liability would.[18]

In order for it to make sense that the state allow civil limitations of liability, that premise about the projects being socially worthwhile has to be in there, otherwise it is a compact with benefit only to one side (the people carrying on and profiting from business). Finding that the products that the corporation produces are socially useful is not the only way to bring truth to that premise. One could also maintain that bringing

---

[15] See e.g. Hansmann and Kraakman (n 10) 1879; and Christopher Kutz, ***Complicity: Ethics and law for a collective age*** (Cambridge University Press 2000) 253

[16] Kutz ibid 200

[17] ibid

[18] Presser (n 14) 401-11

profitability and wealth to shareholders is itself a social good. There are people who believe that, especially if one sees it as a way of spreading wealth from the very rich to include also the more moderately wealthy. Regardless, in order to make sense of why we should collectively allow this financial liability to pass onto accident victims and others, there has to be some positive reason for the corporation to be doing what it does. It is outside the scope of this doctorate to determine whether the projects undertaken by businesses tend on balance to be more beneficial or more harmful for the majority of people. As Kenneth Goodpaster notes, 'issues of corporate responsibility are of smaller scope than the ethical foundations of capitalism.'[19] This must be true: while corporate form is an important tool of capitalism, the ethos of capitalist consumerism encompasses much more than incorporation and limited liability. Anglo-American governments proceed on the basis that business is beneficial for their societies: this is a product of the capitalist ethos, but it is one that validates the corporate form and limited liability as tools for the advancement of the particular social goals that these states have taken on. There are reasons why shareholders should be given some degree of financial distance: many shareholders give up control over decisions about their money, and so it is reasonable that in exchange they should be protected from total liability for those decisions. Kutz has an answer for this, which is that even without control, shareholders knew there was a foreseeable risk (where the risk is truly unforeseeable to the shareholders, Kutz concludes that their liability ends).[20] An answer to Kutz would be to say that the bargain is fair because there is not just a beneficial purpose to concerted action but also to shareholders agreeing to give up control over what happens with their investment. This concession

[19] Kenneth E. Goodpaster, 'The Concept of Corporate Responsibility' (1983) 2 J Bus Ethics 1, 3

[20] Kutz (n 10) 155

requires a trade-off benefit to the conceder. This benefit is that we are able to achieve the coordinated efforts it requires to bring about big projects. The large size of some of these projects does require investors to give up control in order to have enough investors without having that same large number of people involved in each decision. There could also be an objection based on the idea that while the projects require investment, they do not require that the investments be made in return for profit. However, the issue that concerns us here is not the profit-making motivation or profit-making activities, but the organization of people into corporations for that purpose. One important way in which this argument is attenuated is that the financial liability of shareholders in corporate activity is not completely limited, there are cases where the courts will find that it goes beyond the corporation to the shareholders, though generally only in closely held corporations and not public corporations.[21] Nevertheless, in cases of abuse of the corporate form, it is open to courts to extend liability to reach the assets of members of the corporation.

The limitation of financial liability is controversial, and it is not my purpose here to defend it. It has some benefits, but those benefits may not be worth the large power to act that the state confers on corporations. That debate, fruitful as it might be, is not my interest here. My interest in financial limitation of liability is that it is the more well-known form of distancing individuals from their obligations. We know and accept that individuals are shielded from personal financial liability when they act through a corporate entity. Would we accept that the same was true of moral responsibility? The limitation of liability creates a basis for a different kind of distance between individual

[21] Robert B. Thompson, 'Piercing the Corporate Veil: an Empirical Study' (1991) 76 Cornell L Rev 1036, 1039

members in the group that is the corporation, and the actions of the corporation itself. This is the limitation of moral responsibility for an action. The issue of apportioning moral responsibility becomes complicated any time there are multiple authors of an action, but it becomes acute in the case of contributing parts to the actions of a corporate entity. That issue is the subject of the next section.

Moral Distance

In the preceding chapters, I have argued that the corporation is a separate agent from the individuals who work and act for it. To argue for that separateness, though, is not to argue that the individuals are absolved of responsibility when they act as agents. There are some people who argue that one of the reasons why it is important for a legal system to have corporate criminal responsibility is that there are both practical and theoretical difficulties in locating individuals responsible for criminal acts (especially acts of criminal negligence) and so the corporation is the only target left.[22] Yet this position misplaces the emphasis in two ways: for one thing, even in cases of negligence it is possible to find co-responsibility of individuals involved in animating the corporation, alongside the responsibility of the corporation itself. For another, the reason to find that corporations are liable is not because of a pragmatic difficulty, but is because they are indeed agents with a separate reality from that of their individual members. So, the trouble as I see it is not that we need corporations to shoulder responsibility for individuals. But it still would be very troubling, from the point of view of ethics, if it were

[22] French (n 1) 145-150; Susanna K. Ripken, "Corporations are People Too: A multi-dimensional approach to the corporate personhood puzzle" (2009-2010) 15 Fordham JCorp&FinL 97, 125

to be found that acting as part of a corporation actually makes people behave in more morally wrongful ways than those people would when they were outside the corporate structure. Yet, this is just what some serious criticisms allege. Elizabeth Wolgast, for instance, finds that in cases where agents act on behalf of principals, 'A framework is thus created where moral considerations are blocked from view, where people allow themselves to do what they might otherwise shrink from.'[23] If it is the case that corporations make it easier for individuals to accomplish morally dubious tasks, then that is a reason to consider radically reworking the corporate structure. It is a serious bar to considering it as a moral agent, and to considering that it ought to be a subject of criminal law on a par with other subjects, who the law deems to be capable of making morally right decisions, which is why they are blameworthy when they make wrong ones.

Corporations were not designed with the idea of moral agency as a focus. They were designed to carry on business, and while the moral status of business can fluctuate, business has never been primarily concerned with moral actions. It is true that corporations are expected to comply with the law,[24] which is a form of moral accountability, if we allow that the law guides its subjects towards compliance with moral norms through such institutions as punitive damages in tort.[25] Perhaps then moral accountability is one of the central features of the corporation. But law-abidingness is a particularly thin form of moral responsibility. There are many facets of morality that are not captured by legal norms, but that we nonetheless expect moral agents to act

---

[23] Wolgast (n 9) 88

[24] Jonathan R. Macey, 'A Close Read of an Excellent Commentary on ***Dodge v. Ford***' (2008) 3 VaL&BusRev 177, 179

[25] See for instance Thomas Koenig and Michael Rustad, 'The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers' (1993) 42 AmULRev 1270, 1303

according to (broad principles of fairness towards employees, for instance). And even worse, sometimes the law itself is morally wrongful, and we expect that moral agents will react against it, whether by disobeying or agitating for change. While it might, in the usual course of things, be part of a morally capable agent's role to act in accordance with legal norms, being law abiding does not make one a proper moral agent. Therefore, if we found that corporations by and large were acting in accordance with the law, but in every other respect acting in ways that were the most selfish and the most likely to cause harm to others, this would be cause to find something wrong with corporations as moral agents.

There are three distinct, but related, lines of critique that present ways in which corporate entities allow individuals to commit more wrongful acts, with less accountability, than those individuals would otherwise. The first argument is that when the corporation acts in a way that is not entirely reducible to the composite views of the majority of members, all members of the corporation may excuse themselves by saying that their views were not the ones that governed the corporate action. This argument is one that I have drawn out myself from Philip Pettit's discursive dilemma discussions.[26] The second argument is that when an act is separated into two parts performed by two people, a responsibility deficit occurs, and that this problem is particularly acute when it comes to corporations. This is Elizabeth Wolgast's line of thinking in her book on artificial agency.[27] The third argument is that where organizations become large and diffuse, bureaucratization can take over, a kind of problem where all responsibility has become so diffuse that nobody can locate its ultimate source. This argument is rooted in

[26] Philip Pettit, 'Responsibility Incorporated' (2007) 117 Ethics 171, 181; see also chapters 2 and 3
[27] Wolgast (n 9)

Hannah Arendt's work,[28] but also found in Luban, Strudler and Wasserman's article[29] and with some variation in Christopher Kutz's work.[30] All three of these arguments are discussed in what follows. They all reveal some truths about the corporation, but I do not believe that they are as dire as some of the critics of corporate agency do.

The first potential source of moral distancing brings us back to the discussion of the discursive dilemma in chapter 2, where I showed how Philip Pettit's discussion of how corporations can be autonomous from any of their members might also lead any member to think of herself as distant from the resulting decision, since it does not match what she would have done had she been the sole decision-maker. Corporations can make composite decisions that no single member supported all elements of. As in chapter two, the setting for this problem is a board vote with three members who are voting on three propositions (and it applies, again, to any number of voters and issues greater than three). Member A votes for propositions 1 and 2, but against 3. Member B votes for 2 and 3, but against 1, while Member C votes for 1 and 3 but against 2. The group passes the composite decision 1&2&3 and each member leaves believing that the corporate position is not really a reflection of her own views. This story illustrates how each member might leave the meeting feeling quite dissociated from what happened. More moral distance is created as managers step in to implement the decision. Two years later, when the corporation's panel of cost-cutting measures leads to an environmental disaster, each board member may feel that she played an insignificant part in the negligent actions of

[28] Hannah Arendt, ***Eichmann in Jerusalem: A Report on the Banality of Evil*** (rev. ed., Penguin, 1976), 289

[29] David Luban, Alan Strudler and David Wasserman, 'Moral Responsibility in the Age of Bureaucracy' (1992) 90 Michigan LRev 2348

[30] Kutz (n 15)

the corporation. The corporation allows members to distance themselves from accountability for the decision by the simple process of group decision-making.

Certainly we will want to insist that each person is still responsible for the decisions they vote on. A person would, in advance, still have to vote in a way that would hold up morally, since she would never be able to count in advance on the idea that the majority vote would follow the kind of pattern that would allow her to get out of being an author of the entire composite decision. So, in a way, being part of a group makes us responsible for more than just our own actions. And this is an important counter to the idea that acting together creates moral distance. It is possible that acting as a group creates moral engagement, or at least that it does so in the best circumstances.

As the corporation's membership grows and the corporation becomes larger, this distancing is likely to become ever greater. A smaller corporation would have the basic structure that Pettit points to, but imagine then going from those three members to 500 members who vote rarely and leave many major decisions to professional managers.[31] Large modern corporations rely heavily on professional managers, whose function effectively removes regular shareholders from all decisions except whether to continue investing in the corporation or not, and even removes board members from the many day-to-day operational decisions that the busy corporation makes. And even for those managers, it becomes less and less feasible, with such large corporations, for any one human being to understand all its workings, investments, balance sheets, and so on. This makes the possibility of moral distancing, the possibility of someone credibly saying, 'I was in charge but I am not responsible,' much greater.

---

[31] Ramón Mullerat, ***International Corporate Social Responsibility: The Role of Corporations in the Economic Order of the 21st Century*** (Kluwer 2010), 112

For the shareholders the distance can be particularly great: the shareholder is the person for whose benefit these decisions are made but he may find it hard to get access to a lot of information about how the corporation operates day to day, and certainly if the shareholder wants a passive kind of moral distance, it is there for the taking: the shareholder is not ***required*** to know anything at all about the money-making vehicle he employs.[32] As a sort of retort, we might say that the shareholders are so distant as to drop out of the equation altogether, and that it is simply looking in the wrong place to attempt to find moral responsibility there. But even if the real interest is in looking at the moral features of the professional decision makers and the decision-making mechanisms within the corporation, the corporation still appears to be a moral-distancing mechanism. The professional managers who make moral decisions are also insulated by the fact that they are not making them on their own behalf but on behalf of these others and under constraint to make profits for the shareholders.[33] There is some controversy over whether corporate managers really have an obligation to always act in the financial best interests of shareholders.[34] It is nevertheless, a very widespread view, with at least some roots in jurisprudence.[35] And so, it could be the case that even where managers act in full knowledge of the moral dubiousness of their position they would go ahead because of their supposed responsibility to maximize the profitability of the company for the shareholders. And with each level of decision-making that is added every actor at every

[32] Bernard S. Black, 'Shareholder Passivity Reexamined' (1990) 89 Michigan L Rev 520, 524

[33] See Julian Velasco, 'How Many Fiduciary Duties are there in Corporate Law?' (2010) 83 S Cal L Rev 1232, 1246 ff.

[34] Lynn A. Stout, 'Why We Should Stop Teaching ***Dodge v. Ford***' (2008) 3 Va L & Bus Rev 163, Jonathan R. Macey, 'A Close Read of an Excellent Commentary on *Dodge v. Ford*' (2008) 3 Va L & Bus Rev 177

[35] Macey ibid 178-79

level gets to feel less and less like the moral weight of corporate actions rests on her shoulders.

I want to acknowledge that to some extent, this critique has it right. When you act within a group, you do make compromises, and you do feel that you are not entirely in control of the decision, and therefore will have some sense of remove if things go wrong. Especially if an employee is in charge of a small task that must combine with many other tasks in order to achieve a bad result, he is in some sense less responsible, even though he understands that the bigger picture is this bad result. Keep in mind that at the moment I am still talking about cases of full knowledge, but fragmented authorship of the decision. Cases of diminished knowledge are considered below.

While there is something right about the argument about compromise and the nature of group decisions, I think there is also something there that actually strengthens the opposite idea, the idea that there is greater moral responsibility in a group than in disparate individuals acting towards an end. In this way: suppose Roberta's neighbour Sean is digging a well on his land that will pollute the water around and potentially lead to some moderate health problems for the children living nearby. Roberta could decide to intervene, but since she is not in any way involved in Sean's project, she does not have a strong moral responsibility as regards it. On the other hand, if Roberta and Sean are part of a group, and the group decides to dig a well in a way that will pollute the water all around, even if Roberta has disagreed and said she will not participate, her involvement in the group gives her responsibility for the group's actions in a way that simply being Sean's neighbour did not. Becoming a member of the group engages you in some way to be responsible. This is related to Kutz's point, mentioned above, that shareholders take on the responsibility for the actions of the group as a corollary to their engaging themselves in order to receive a personal benefit from the actions of the group. Becoming a group member — even if one only becomes a member because of economic constraints and the need for employment — makes one involved, no longer a bystander.

A distinct but related way in which acting as part of a group may help to insulate an individual from the moral content of his actions is the principal-agent moral disconnect that Wolgast writes about at length in her book ***Ethics of an Artificial Person***.[36] When an action is carried out by the combined efforts of a principal, who makes the decision, and an agent who carries out the act according to the principal's directions, the moral responsibility for 'decision plus action' diminishes ***overall*** on Wolgast's view, which makes assigning blame for a bad action problematic. When a person takes on the role of agent for another, she agrees to carry out actions that someone else decides on. The way this very common relationship of agency has developed in our legal systems is that, at least within a broad scope (often within limits prescribed by law, as when lawyers act for clients), the agent allows the worth of decisions to be weighed by someone else, and simply carries them out without taking on the burden of moral accountability for those decisions. While as a culture we reject the 'just following orders' defence of the Nuremberg trials for the types of atrocities committed in genocides, we typically accept precisely that defence for more mundane acts such as a corporate lawyer drawing up a contract that gives less benefit to the other side than they might have gotten, on behalf of a business. When they execute actions on behalf of others, agents lose some of the moral judgment that they exercise when speaking in their own voice and acting on

[36] Wolgast (n 9)

their own account, because splitting up the decision and the action allows each part to be performed with less moral accountability, according to Wolgast:

> the author and the actor are each missing part of the paradigm. The actor is missing the process of reasoning and choice; the author is missing what Thomas Nagel calls the 'moral phenomenology' of the action. By this he means the experience of actually doing the thing, one's felt response to the action he has reasoned about.[37]

Neither one nor the other must face all the implications of making a morally reprehensible choice. When broken down into parts in this way, the bad act is easier to accomplish. Thus, blame can be assigned but less of it than can be assigned when an individual conceives and executes an act alone, or so goes Wolgast's critique. The same act seems to have less blame to assign overall, leaving a moral deficit.

This is a problem of agency generally but corporations compound the problem. A corporate person requires many different agential relationships to function: the corporation is itself the agent of the shareholders and of the directors, and the directors are also agents, as are managers and employees. Given this, if Wolgast is right, there is a great deal of moral deficit being created when the corporation acts in a morally wrongful way. This is why this particular argument is a serious one to resolve in order to show that corporations aren't inherently enablers of morally wrongful conduct.

Is it correct that the visceral experience of performing a bad act is instrumental in keeping moral agents from becoming immoral actors? Answering this question re-engages the debate of chapter three on the relationship between emotions and moral judgment. Wolgast's argument about the moral deficit in principal-agent coordinated actions centres

[37] Wolgast (n 9) 67

around the idea that where one does not expose oneself to the revulsion that committing the act would elicit – a distinctly emotional state – one cannot feel the full moral impact of what one does. This is in line with Wolgast's view that it is implausible to treat corporations as members of 'the human community' because of their lack of emotions and family ties. If the experience of performing the bad acts that one has decided should be performed in one's name is a necessary component for full moral accountability, then there is no way that the corporation can ever be properly morally accountable (since the corporation can only act through agents), and if it is impossible to hold the corporation fully to account then it follows quite clearly that the corporation is not a full moral agent – moral agency being the ability to act in a moral way, which could not be possible in the fullest sense if the agent is incapable of experiencing the consequences of moral or immoral action.

Wolgast's Nagelian position implicates a view of ethics in which moral emotions not only help us carry through on our moral beliefs but also play an important part in forming those moral beliefs and judgments. This, however, is controversial. Emotions may be constitutive of moral beliefs, or they may be facilitative in understanding moral beliefs, or merely facilitative in getting people to act on the moral beliefs they know themselves to have. Nussbaum argues that while compassion is an important part of moral reasoning, it is not 'an intuitive or nonreasoned alternative to judgments based on principle.'[38] It is true that emotionality is closely linked to our understanding of personhood. It is not always present, of course, and people experience more and less heightened emotions. The import of emotions might not be for the agent's ability to form

[38] Martha Nussbaum, 'Compassion: The basic social emotion' (1996) 13 Social Philosophy & Policy 27, 30

judgments but for others' ability to judge that agent's judgments: we like to see the distress of someone in a morally troubling situation; it makes us think that he really understands the magnitude of the situation he is in. If that person has no emotional affect, is he better equipped to be bad, because we will not be able to read his motivations as easily? Or is that just prejudice on our part, judging people by how they seem rather than what they do? Whether prejudice or not, it may be one reason why we are suspicious of the corporation's ability to make decisions that put proper emphasis on values such as human dignity.

Another argument against Wolgast's critique of agential action in the context of corporate action is that the experience of moral phenomenology is not as central to the kinds of crimes corporations usually commit, which are not the paradigmatic moral-phenomenological crimes such as assault or murder, which tend to inspire a more visceral reaction in one who contemplates committing them. Many of the wrongful acts of corporations will fall into the categories of financial or negligent wrongdoing. It is true that many people who are tempted to commit financial crimes or be negligent are stopped by their sense of what is right. What does not seem true, though, is that what stops them is the kind of revulsion in the act that Nagel refers to. There is no shuddering fear of blood on one's hands when one is about to commit tax fraud. Instead, it is moral judgment of a fairly dispassionate and removed kind. Neither the original author nor the agent who acts on the author's behalf hears victims' pleas for mercy when committing these crimes. Even when an individual both devises and carries out a plan to sit at a computer and steal two cents from each of a million bank accounts, she will be at best subject to a very weak form of emotional counteraction. If she is stopped from going through with her plan, it is more likely on the basis of that kind of dispassionate reasoning that corporations are perhaps equally capable of. For instance, the person considering tax evasion might consider what kind of person she wants to be, in the long run. A corporation is also capable of this kind of long-term planning and shaping of character. Moral revulsion in the act is also highly unlikely to play any role in crimes of negligence that are a large segment of corporate crimes, though for different reasons: someone who designs safety mechanisms that are not fit for the job, or who drives while texting and causes an accident, may have to look at the results of her wrongdoing after the fact, but since there was no subjective intent in her crime, she almost certainly did not contemplate the harm she was about to cause before doing it. Nagelian moral phenomenology only operates as a prior ethical constraint, and so does not apply to all of those corporate crimes where there was no prior consideration of the harm that was to be caused. It is not clear to what extent the issue of the evaporation of moral agency plays in the crimes that do not have a direct interaction with the victim or crimes that do not come about as a result of intention, and so in very many cases of the kinds of crimes that corporations commit, Wolgast's main argument seems not to be relevant enough to be truly damning.

Wolgast argues that divorcing the decision making from the moral revulsion that is attendant on committing the act results in two acts that, while both morally blameworthy, add up to less than 100% of the moral blameworthiness of the act if committed alone. The author lacks that Nagelian revulsion — she can sit in an office and contemplate an act and order it to be done, where possibly she is just moral enough that if she had to do it herself she would stop at the last moment, reconsider, put away the knife and go home. The agent, on the author hand, has to deal with the moral revulsion of the act but is spurred on by his thought that he is not acting for himself, but merely as the hands of another, and therefore feels relieved of the full moral weight of what he does, as he is not the author of the act. In the quote above, Wolgast refers to the agent as missing the process of reasoning and choice. But I am not certain that this accords at all with our intuitions on what it is to be responsible, either for the principal or the agent. The person who orders a killing is blameworthy both because of her poor moral choice of valuing her own happiness or benefit above the life of another human being, ***but she is also guilty for insulating herself from the act***. In the round, the author of the killing is at least nearly as culpable, if not entirely as culpable, as if she had decided to do the deed herself rather than keeping her distance from it. While the contract killer may be seen as slightly less morally blameworthy because she did not decide to kill someone but merely executed someone else's decision, she is probably still viewed as more than 50% as blameworthy as someone who initiates and carries out his own killing. In opposition to Wolgast's view, then, the reality appears to be that there is in fact more blame in the group case than in the individual case. This accords with what I found earlier about the difference between choosing not to interfere when a neighbour does something morally reprehensible, and choosing to go along with a group acting wrongly when one is a member of that group.

In the same way, while a crime which someone commits sitting at a computer often seems less morally repugnant than a crime a person would commit with a knife, there seems to be a special type of blame that we visit on the computer or other financial crimes because of their very removedness – they are more callous. This may be specifically because the actor has figured out a way to cause great harm without having to see the consequences. There is blameworthiness in bringing about horrible consequences while shielding oneself from them. In some way, one might feel that although the violent assaulter is evil, she is more honest or straightforward than the billionaire who steals people's life savings without ever meeting her victims. It seems as though this peculiar kind of blameworthiness may come from the fact that in these crimes of distance, the actor has found a way to circumvent the moral phenomenology effect. And he has circumvented it more fully than the person who circumvents the phenomenology of killing by hiring a contract killer; the person who orders a killing still is called upon to imagine the corpse of her victim, but stealing from pension funds is so removed from its effects that the wrongdoer in that case may not have to contend with even a mental image of the harm he causes. Therefore, there is some decrease in blameworthiness, but there is a concomitant increase.

The overall amount of responsibility swells to encompass both of these bad contributions to the killing. This conclusion cuts against ethical dilutionism, the idea that there is a fixed responsibility for a certain offence, which is neither increased nor decreased by the number of participants, but merely apportioned out.[39] Wolgast is not an ethical dilutionist, since her position is that there can be a deficit created, and so she is not in the camp of those who believe that each act has a certain amount of moral culpability associated with it. Here I am defending an anti-dilutionist line in the other direction, that there can be an overall increase in responsibility based on the number of participants involved in the wrongdoing. This is also Gregory Mellema's position. He argues that while it is true that a participant in a group that robs a bank does not have the same moral culpability as if she robbed the bank entirely on her own, all members together can plausibly have more moral culpability than one person would if she did rob the bank on

[39] Gregory Mellema, 'Shared Responsibility and Ethical Dilutionism' (1985) 63 ***Australiasian Journal of Philosophy*** 177, 177

her own.[40] My intuition is that moral accountability can stretch so that even in cases with hundreds of participants, each participant has more than negligible blame.

But the foregoing does not give Wolgast her due. In the cases Wolgast envisions, of lawyers and of soldiers carrying out tasks for clients or states, it does seem like the agent, if not the principal, is judged by people and courts to have a very diminished level of responsibility for carrying out the act as part of his generally legitimate employment. This seems to be consonant with the corporate case, for at least some of the agents involved in knowingly bringing about a morally undesirable outcome — maybe not the board members of executives, but perhaps lower level employees who are aware of a bad practice (keep in mind that we are not yet discussing illegalities, but legal acts that are morally faulty) but who need to keep their jobs in order to support their families. And, in the corporate case, even principals are treated to a great reduction in moral blame: as already discussed, the amount of the moral accountability that comes to rest on the only pure principals, the shareholders, does seem to come to much less than 50% of the original culpability: shareholders are routinely excused, totally or almost totally, for morally dubious acts that happen for their profit. Of course the fact that they are excused by themselves or others does not mean that they are rightly excused, but it certainly has a bearing on the question of whether the corporate form encourages people to act in morally wrongful ways or shields them from accountability when they do so. Often, shareholders are more than excused, they are re-cast as victims. But again, shareholders are a strange kind of principal, since they do not actually order the bad acts or even always have the means to know that they are occurring.

[40] ibid 181-183

Thus, the moral deficit would seem to remain a problem even if we accord ***any*** non-trivial diminution in responsibility for someone on the basis that they act as agent. This could perhaps be fixed by changing our conception of the role of senior managers or directors, but this would not accord with the reality that there is a mandate on corporations to make profits for shareholders, therefore directors and senior managers would find it difficult to act as though they were making decisions freely in the manner that pure principals are able to. The real sticking point appears to be that if as a society — or at any rate as a legal system — we are telling corporate directors, lawyers, soldiers and others in agential roles that they must behave in ways that will sometimes lead to morally wrongful results, then it is difficult to find that they are at the same time wrong in doing so. It would be placing them in a moral Catch-22. And thus, the only way out appears to be to say that there is indeed some diminution in moral blame for the agent, if not for the principal.

Having considered it from all these angles, I am left with the result that in the corporate case at least, some type of moral deficit of the type Wolgast describes is likely to occur at times for agents of the corporation, because each person acting on behalf of the corporation feels in some way that their actions are constrained by the need to make profits (because of the shareholder wealth principle explained above), which narrow goal will often lead to unethical actions if it is pursued single-mindedly. But the reason for this is that we have arranged the system so that in some sense we bar people from using their full moral compass when making decisions, even the group itself is barred from using its moral compass because of the shareholder maximization principle. Yet as Macey points out, a corporation's existence is shaped by contracts, and shareholders could of course opt to use a different guiding principle or principles than shareholder wealth maximization.[41] Macey follows this up by saying that shareholders have 'indicated very little, if any, propensity to alter the application of the default rule.'[42] But this is not entirely true, and indeed writing that without qualification in 2008 is selective seeing on Macey's part. By 2008 there had been both popular and scholarly interest in ethical investing.[43] Though these investors (individual and group initiatives) may not have specifically called for the revocation of the shareholder wealth maximization principle, they can surely be counted as shareholders who do not put profits before all other considerations. But Macey's rather acerbic comment is grounded in the true fact that very many investors, big and small, individual and collective, are happy to invest in dubious areas such as weapons manufacture, tobacco, and highly polluting activities, if it means increasing their wealth. This is due to a capitalist mindset that prioritizes wealth, not just in corporate agents, but in individuals' goals as well. And it is certainly not all people, but a significant enough number of them that they can validate their own and each other's morally wrong practices. This is an issue of culture more broadly, not of incorporation.

Much of what is considered to be criticism against corporations could also be reframed, and more accurately, as criticism of business culture. Christopher Kutz paints a picture of group members who are personally responsible for bad acts but who 'inhabit a micro-culture of covert support' and therefore see their being held accountable as a kind of cost of group membership, rather than as a warranted blaming response.[44] Similarly,

---

[41] Macey (n 34) 179

[42] ibid

[43] Alan Lewis and Craig Mackenzie, 'Morals, money, ethical investing and economic psychology' (2000) 53 Human Relations 179, 180 show that ethical investing has been a force in the financial world since 1984.

[44] Kutz (n 10) 6

Susanna Ripken finds that loyalty to a group can lead members to act against their own conscience.[45] If this is correct, then it means that even when blame has been placed on a culpable agent by an outside authority, the group dynamic of being a member of a corporation and having committed one's culpable act within the corporation allows the person who committed the morally wrongful act to disown blame for it. But what is the distancing mechanism here? Kutz refers to an 'institutional role' but this could be any kind of smaller community with its own standards. Some of it can be accounted for simply by the idea of changing community standards: when one is surrounded by a group of people who regularly perform a certain act, for instance littering, that act ceases to seem wrongful and becomes routine and unremarkable. But this is not specific to actions performed as parts of groups (let alone the highly organized environment offered by corporations), and is merely what happens in any specific community, which is that some rules are highlighted and others are sidelined. Kutz acknowledges this, writing 'My point is not that this psychological distancing is particular to … collective activity, but only that collective activity often provides a framework hospitable to it.'[46] These arguments are about the social nature of humans, and the ways in which we influence each others' actions when we compare ourselves to other members of our communities, and so on. Again, the issue transcends highly organized groups and exists in loose aggregations of people such as neighbourhoods or other communities.

I turn now to the last of the three problams of moral distancing in corporations, the well-known and complex problem of bureaucratization. Bureaucracy is the idea of rule by offices, in which jobs and powers are parceled out between various office-holders

---

[45] Ripken (n 22) 132

[46] ibid 150

— it is thus depersonalized, so that there is no one holder of all authority who has a face and a name. The power is associated with the position, and thus if a new person is appointed to that position, the power transfers to them. The individual official or employee becomes, as Max Weber put it, 'a small cog in a ceaselessly moving mechanism.'[47] This picture typically applies to governments, but has become quite paradigmatic of large corporations as well.[48] Bureaucratic forms of organization are seen as efficient,[49] and can also add fairness and predictability to government, and yet bureaucracies have serious downsides. The greatest vice of bureaucracy is another problem of fragmentation, similar to that which Wolgast found in the separation of authorship and execution of an act. In a large organization, as Christopher Kutz writes, 'it becomes easy to inhabit an essentially bureaucratic frame of mind, in which ultimate ends are less salient than the instrumental procedures used to affect those ends.'[50] This is the association with bureaucracy, that one plays one's small part, unconcerned with the bigger whole one's part will be contributing to.

The problems of bureaucracy are similar to Wolgast's agency problem but with two differences: some of the bad acts committed within a bureaucracy are the result of no bad intention on the part of anybody, but simply a kind of apathy that means that nobody takes ownership of a problem, and so nobody solves it. Then there is a problem of a lack of knowledge, so that bad results can come about because the organization got so large that nobody could see all the parts of a system to see that it was creating bad results. Still,

---

[47] Max Weber, ***Economy and Society: An Outline of Interpretive Sociology*** (trans. Ephraim Fischoff et al., University of California Press, 1978) vol. 1, 988

[48] Luban, Strudler and Wasserman (n 29) 2353

[49] Kieran Allen, ***Max Weber: A Critical Introduction*** (Pluto Press 2004) 113-14

[50] Kutz (n 10) 150

most of the time the result will involve knowledge at least at some level. For instance, the bureaucratization and banalization of evil is often discussed in reference to the way the Nazis conducted their operations during the Holocaust.[51] But many people within the system were aware that the group was torturing and murdering people. To the extent that some people were swept along who perhaps were not homicidal themselves, it was in that way that Kutz describes, where the goal of the project became less important than being a successful cog in one's tiny spot. As Arendt writes, 'perhaps the nature of every bureaucracy, is to make functionaries and mere cogs in the administrative machinery out of men, and thus to dehumanize them.'[52] This is again, quite similar to Wolgast's point, only more severely so: that becoming embedded in a huge organization is dehumanizing, it makes people cease to access their own moral judgment.

As with the principal-agent divide, here the problem seems to come about through the fragmentation of what would have been unitary action outside of an organization. Luban, Strudler and Wasserman paint a bleak portrait of an organization in which supervisors issue vague orders in order not to know what bad moral deeds will follow from their orders, and subordinates execute acts, seeing the bad results, but believing that they have 'no discretion and no alternatives.'[53] In Luban, Strudler and Wasserman's estimation, this results in the possibility of 'organizational wrongdoing that will never trouble the conscience of anyone within the organization.'[54] And yet, again,

---

[51] In addition to Arendt (n 28), see Raul Hillberg, 'The Nazi Holocaust: Using Bureaucracies and Overcoming Psychological Barriers to Genocide' in M. David Ermann and Richard J. Lundman (eds), ***Corporate and Governmental Deviance: Problems of Organizational Behavior in Contemporary Society*** (6th ed. Oxford University Press 2002) 167

[52] Arendt (n 28) 289

[53] Luban, Strudler and Wasserman (n 29) 2355

[54] ibid

this estimation of it troubling no-one might be overstating the case. There are, even in large organizations, people in positions to understand what is happening, just as there were people in the Nazi regime who knew at least enough of what was going on to be complicit in genocide. Franz Kafka famously imagined the possibilities of a world in which no ultimate authority can be reached.[55] Its powerful impact comes from its explanation of the experience of the citizen who confronts all the cogs in the machine of bureaucracy. But the system has higher-ups, inaccessible as they may be. And if one didn't, if the system was automated to such an extent that the higher-ups dropped out, then the accountability would be to those who set the system up, and to those who allowed it to keep functioning. So the situation is not as extreme as it can be painted. Nevertheless, it is true that people can become to some extent inured to the suffering that they may cause because they are simply going through the motions of doing their jobs.[56] This problem is real, though in my estimation it is not a fatal argument for the moral agency of the corporation.

Despite all of the negative images, and negative realities, that have been associated with bureaucracy, it does have certain advantages over other, more personalized, systems of operation. Because of its focus on regularity and formality, bureaucracy can be more predictable and fair than a system in which a capricious and unfettered authority makes snap decisions on individual cases. And the psychological distancing Kutz describes could also have quite an opposite effect to the one he identifies, depending on circumstances. Holding an office might encourage someone to act from better motivations than they

---

[55] Franz Kafka, ***Der Process*** (Verlag Die Schmiede 1925)

[56] The issue of system-building and blameworthiness is taken up again in chapter 5 under the guise of ***mens rea*** and recklessness in corporate entities

would on their own. Consider the judiciary: we expect better reasoning from judges when they act as judges than the reasoning they might employ in their private lives. Judges are committed to improving on their personal prejudices and whims, and to act impartially and according to public reason, as part of their institutional roles. This is also true of people who act, not necessarily in the name of an office, but as part of a larger entity that they believe in, even an entity as large as society. Luban, Strudler and Wasserman, for all their pessimism about the bureaucratic age, also find that peer pressure can encourage people to become better moral actors.[57] Consider taxation: a taxpayer may not give as much money to a social cause on her own, and might use her disposable income to satisfy personal desires, but she might vote in favour of a political party that pledges to give public funds to the social cause, because here she feels that she is acting as part of a greater whole, and can have more of an impact. She is given the assurance that everyone else will also do their share, and that together they might accomplish something. That assurance that she is not just a sucker[58] giving away her money to no great effect is what motivates her to vote for socially-conscious expenditures. In this way, being part of a larger whole, including in a bureaucratic environment, may foster moral betterment.

It is not difficult to imagine this applying in a corporate scenario either, though the two examples given above of courts and tax expenditures may seem more familiar to most readers. A corporate boardroom could cause someone to switch their ideas in the same way: while in her own life, a person might be more inclined to save money and employ a cheaper solution to a building problem, when the cost of putting in safety

[57] Luban, Strudler and Wasserman (n 29) 2362

[58] Steven Kuhn, 'Prisoner's Dilemma,' ***The Stanford Encyclopedia of Philosophy (Spring 2009 Edition)***, Edward N. Zalta, ed., URL = <http://plato.stanford.edu/archives/spr2009/entries/prisoner-dilemma/>, last accessed 1 March, 2016

equipment is to be borne by 30 people, she might be more inclined to vote for the more expensive solution that is also safer for employees working in the factory. While an individual acting for herself might be tempted to be selfish, she has less motivation to let her own concerns cloud her judgment if she is making a decision as part of a large collective, meaning that psychological distancing could be beneficial as often as it is harmful.

While this opens the possibility of more positive outcomes of the distance that collective action creates for decision makers, it still leaves some of the disturbing qualities that Kutz writes about. There seems to be a potential for loss of humanity in large organizations through these kinds of psychological distancing mechanisms, which may allow people acting in institutions to be more callous at work than they are at home. All of this leaves us with reasons for concern about corporate moral distancing but not an entirely pessimistic view. And while this discussion has looked at bureaucratization as it would occur both in governments and in businesses, business bureaucracies might be even more prone to that dehumanization. In cases less extreme than a manifestly murderous regime such as Nazi Germany, people in government are likely to see at least part of their role to be to make life better for the citizens in their jurisdiction. They may not focus on this aspect of the job in a day-to-day way, but it is at least there in the background. In most businesses, no such beneficial end goal is there to tip the balance in favour of acting for the public good, or to help a vulnerable client, or to be more environmentally responsible. The goal is usually profits, whether or not we take the shareholder wealth maximization principle into account.

The interlocking intentions of the members of the group are to make profits (at least in the paradigmatic business corporation). These intentions, while they start out individual, become part of the culture and general framework of the corporation, and each new employee becomes inculcated in that profit-making culture. Groups influence individuals. Which individual qualities are emphasized and which are diminished depends on the role and on the type of group the individuals are becoming part of. Despite the problems of bureaucratization and agency existing as much in governments and in business, it is a lot easier to think of the government itself as having moral agency — sometimes a government is a deeply bad moral agent, sometimes a good one, but it is always an entity that concerns itself with normative issues in a normatively sensitive way, not in an incidental or instrumentalized way. This is probably even more true in the case of corporate entities that are charities, non-profit organizations, or religious institutions. Corporate cultures often teach employees to think callously and place little emphasis on right action.[59] This again, though, is an issue not of the form, but of the purpose of these corporations, and that is due to the larger culture that they are a part of, being current-day business culture.

But this leaves us with the question why, in a culture steeped in reverence for the capitalist ethos, do people still find corporations so contemptible, so horribly selfish and immoral? I want to make a suggestion that will seem counterintuitive at first: it may be precisely because we expect corporate entities, group entities, to be morally good that we are upset when they are not. We expect this in two ways; firstly, there is an expectation based on the fact that we do understand that corporate entities are moral agents, and this expectation is the same one that we have of any moral agent, that it conform to moral standards. This is a normative expectation, the same as the criminal law has of all people

[59] Geraldine Szott Moohr, 'Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation' (2007) AmCrimLRev 1343, 1349

not to steal or assault: it expects it while knowing that the expectation will not always be met. But there is a second sense in which people expect corporations to be good moral agents — they expect that empirically corporate entities should act better than individuals, because of the group interaction, the entanglement of individuals, who should be keeping each other to better moral standards. List and Pettit describe how groups are likely to be smarter (in the narrow sense of arriving at correct answers to questions with knowable right and wrong answers, like a math test) than their component individuals.[60] Maybe the same is supposed to be true of moral judgment. And so, individuals who get into groups and aggregate their moral judgments would get better moral judgments as a group, than they do as individuals.

However, the boost in getting right answers only occurs when the individuals in the group are likely to get the right answer more than half the time. If you aggregate individuals who are all more likely to get wrong answers than right answers, then the resulting group gets it even more wrong than the average individual within the group.[61] If this were true of finding right moral answers in the same way that it is true of finding answers to more concrete questions such as math questions, then a group of individuals who had more than 50% good moral intentions, would get even better when they acted as a group. When groups act badly, it means that the individuals composing them might just be pretty bad moral actors on the whole (of course this has to be weighted to account for the fact that some individuals within the organization have a much greater say in what the organization does, but the model can account for that). This might account for our

[60] Christian List and Philip Pettit, ***Group Agency: The Possibility, Design and Status of Corporate Agents*** (Oxford University Press 2011) 92-95

[61] ibid 98-99

shock when companies act badly — that there were not enough morally sound individuals involved in the corporation to bring its collective moral judgment up to a level where it would have stopped itself from acting that badly. Thus, our sense that corporations seem so bad is not because of corporate structure, but because of what it reveals about individuals. I think this idea, once it is explained in this way, is less counterintuitive than it might have seemed at first. It explains, for instance, why many people find prosecutions of corporate entities unsatisfying when they are not accompanied by prosecutions of individual managers or executives: people believe that there are guilty individuals within the corporation, and their anger is at those individuals at least as much as it is at the corporation. And this is perfectly consonant with accepting the social reality of the corporate entity.

Conclusion

In this chapter, I've argued that while there are distinct worries about moral decision-making that arise when people act in corporations rather than act singly, there is no definite tendency towards bad moral decision-making that arises when people act within a corporation instead of outside it. Incorporation results in limited financial liability, which creates distance between the risks individuals take and the responsibility for those risky acts if things go wrong, and that in itself carries some moral problems, especially with regards to non-contract parties who are harmed by the corporation's activities. A second source of concern is the possibility that joining people together in an organization results in some fragmentation of the unity of individual decision-making. Variants of this argument are found in the work of Wolgast, Kutz, and critics of bureaucratization. They find that acting together creates a moral disunity. And yet I have countered their arguments to some extent by showing that when people are involved in a group, it gives them a greater moral responsibility to watch out for and put a stop to bad acts going on in an organization, a kind of responsibility they would not have if they were not members of the group involved in committing the bad act. This is a different type of unity than the unity of individual decision and action, but it goes some way towards compensating for the diffuse nature of decision-making and acting in groups.

When corporations do act badly, their bad acts have large consequences. That is in the nature of them being large entities that take on large projects. They have more power to affect the world around them than individuals do, and that includes affecting the world in bad ways. And it is true that there are ways of structuring corporations — ways that fragment knowledge and power to act as some large bureaucracies do — that make it easier for people to create worse moral outcomes than they would on their own. But it is also true that group membership can help people behave better than they would on their own. Perhaps if there is something rotten in the way that business corporations operate, it is about the business ethos that pervades our culture generally, and less about corporate structure. My concern here has not been to argue that business ethos is indeed morally bad. It may or may not be worse than other guiding social ideologies. It is simply to point out that many of the criticisms of corporate structure are criticisms of actions that are in line with a broader cultural business ethos. Recognizing corporations as moral agents might in fact have the effect of bringing some of the problems with business ethos to light, and thus tackling the moral weaknesses of that ethos more effectively than reforms of the corporate structure itself would do.

There is another reason to avoid a conclusion that says we must alter the nature of the corporation. Even in a philosophical work, it is better to argue for a solution to the world's problems that is more workable rather than one that is unlikely ever to come about. Arguing for a change in the way that the law approaches corporate crime is something that jurisdictions might take account of, especially as there is widespread acknowledgment that most legal systems have not yet perfected their approach towards corporate crime, as the next chapter will show. The following three chapters will discuss how treating corporations as moral agents would allow lawmakers to better incorporate corporate entities into the criminal law.

5. Corporate Intentionality and Mens Rea

> Corporations should be treated as corporate persons—persons who satisfy the conditions of criminal liability with distinctive attributes and features. Yet no court has successfully married the attributes and features of organizations with theories of liability and culpability.[1]

Introduction

In chapters two, three and four, we saw that corporations are suitable candidates for inclusion in the moral community, which for the present dissertation we construe as including all and only those persons that the criminal law is well suited to speak to. These next three chapters explain how corporations that have committed wrongs may be brought within the ambit of the criminal law without distorting the principles that allow the law to claim its legitimacy. This is, in part, a continuation of the process of refining our understanding of the corporation's moral agency. The focus now switches to the criminal law's doctrines in order to determine how moral agency functions in the criminal law, what light the criminal law's principles can shed on the corporation's agency, and to what extent the criminal law's own best theory of personality (which theory is construed

[1] William S. Laufer, ***Corporate Bodies and Guilty Minds*** (U Chicago 2006), 56-7

from its treatment of agency, moral responsibility and other related topics) can account for non-human persons. The present chapter explores how the criminal law can locate mens rea in corporations, chapter six will consider the availability of defences to corporations, and chapter seven will address sentencing principles. Together, these three chapters provide an exploration of the theoretical issues that criminal law must address as it continues to bring corporate persons into its ambit. But at the same time, the exploration of the criminal law's principles serve to deepen the conversation of chapters two, three and four on the nature of corporate moral agency, using criminal law theory's insights into responsibility, excuses and the bases of punishment to understand moral agency and the place of corporate entities.

The focus of this chapter is on the mens rea component of criminal liability, in which the task is to locate a mental element that belongs to the corporation and that fits in with the ways in which criminal offences unfold. This has been the subject of much academic writing, and locating mens rea for corporations in a way that is precise yet broad enough to capture most cases of culpability has proved difficult. The different Anglo-American jurisdictions, steeped in the same principles of mens rea, have crafted markedly different solutions to the problem of analogizing between individual knowledge and corporate knowledge. No single formulation has won significant approval among corporate-crime specialists or those interested in group agency and culpability either, or even among a subset of academics with similar commitments to corporate agency and the appropriateness of bringing corporate entities within the ambit of the criminal law. In this chapter, I will describe and critique the different tests that have been put forward by courts, legislatures and academics. I will then make my own proposal for a standard, which I call corporate structural recklessness, that I believe can be helpful in locating corporate mens rea in some complex cases of attribution. Corporate structural recklessness captures the idea that corporations create organizational structures with an awareness that these structures are liable to cause unjustified harms in the future and that the structure itself will obscure the relevant specific risk of harm until after the harm has occurred. This proposal solves some of the theoretical 'fit' issues between corporate liability and criminal theory that other proposals have created, and it provides a workable model for legal application by judges.

My focus is on the idea of subjective mens rea, as this is the more complex area for corporate agency. Showing that a corporation can have subjective mens rea necessarily implies that it can commit acts that only require showing negligence or less, and so for that reason this chapter omits consideration of negligence, strict and absolute liability offences. It is true that on at least one persuasive reading, the most serious corporate criminal acts are negligence offences.[2] These will include toxic spills that result in massive environmental devastation, and many other industrial disasters that result in deaths or injuries. Whether this interpretation is correct or not, certainly crimes of negligence are an important part of the account of corporate criminality. But in addition to the subjective being the harder to show, where the standard is an objective one, as is the case in negligence (the standard being a marked departure from reasonableness, rather than what the defendants themselves knew or understood) a corporate defendant's failures will be able to speak for themselves more clearly – having no locatable relevant mental state is not a bar to liability, assuming it is not considered to also be a capacity issue.[3] Therefore, significant as these offences may be, they do not require the kind of

---

[2] Peter A. French, ***Collective and Corporate Responsibility*** (Columbia 1984) 186

[3] The possibility that some closely-held corporations may lack capacity to be prosecuted as agents separate

justification that offences with a subjective mental element require when applied to the corporation.

Subjective mens rea requires understanding, to some extent, the workings of a mind. And so it really pushes those of us who defend the existence of a corporate mind to pin down how that mind works. As a result, a theory of corporate subjective mens rea further concretizes the relationship between corporations and the criminal law, and feeding back from that gives even more depth to a theory of the corporation as a moral agent. If this argument succeeds, a separate negligence argument is in any case unnecessary, as in any situation where one can make the argument that the subjective test is made out, one can all the more easily argue for the presence of the objective state. Therefore, this chapter more fruitfully focuses on subjective mens rea, and leaves aside what are certainly interesting questions of when a corporate entity is negligent or what the conditions are for a defence of due diligence against a strict liability offence.

It may appear strange both to insist on the importance of arguing for a subjective standard and also to focus in on recklessness rather than knowledge or intention. People disagree as to whether recklessness is objective (based on reasonableness) or subjective (requiring advertence to risk). The argument is based on my understanding that recklessness is a form of 'true' or subjective mens rea. This argument to some extent elides the debate in criminal law theory about which vices the criminal law aims at — whether it punishes only voluntary acts based on choice, or whether it punishes bad character or other undesirable characteristics[4] but does so because my interest is in showing that

from their owners has been raised, see Carlos Gómez-Jara Díez, 'Corporate Criminal Liability in the Twenty-First Century: Are all Corporations Equally Capable of Wrongdoing?' (2011) 41 Stetson L Rev 41Diez

[4] See Nicola Lacey, 'Denial and Responsibility' in David Downes et al. eds, ***Crime, Social Control and***

corporations do have the subjective awareness, under the proper description. However, I do engage in some of the literature that comes out of that debate in order to make an argument for a subjective understanding of recklessness below. I employ this understanding of recklessness to elaborate a doctrine of corporate structural recklessness that explains the mental state of corporate offenders in a manner that is sufficiently precise and can be adjusted to the needs of a judicial trier of fact.

Mens rea for corporations: problems with existing models

There is no consensus in legal theory or practice about which standard of fault attribution is most suitable in finding that a corporate entity had the requisite mental state for a mens rea offence. Attributing specific mental states to corporations in the criminal context is challenging. Private law attributes mental states to corporations without as many problems.[5] In non-criminal cases of contract formation, any agent of the corporation acting within the scope of her authority may bind the corporation to a contract. The corporation delegates authority to agents who then use it with a certain amount of discretion, depending on the kind of delegation.[6] This applies from CEOs all the way down to people working the till at a branch of a massive chain store. Where a

Human Rights: From Moral Panics to States of Denial, Essays in Honour of Stanley Cohen (Willan Publishing 2007) 255, R.A. Duff, 'Choice, Character, and Criminal Liability' (1993) 12 Law and Philosophy 345, Victor Tadros, 'Recklessness and the Duty to Take Care' in Stephen Shute and Andrew Simester eds, ***Criminal Law Theory: Doctrines of the General Part*** (OUP 2002) 227

[5] Although even the private lawyers may have their troubles in the area of attribution. See Donald C. Langevoort, 'Agency Law Inside the Corporation: Problems of Candor and Knowledge' (2002-03) 71 U Cin LRev 1187, 1213

[6] George L. Reinhard, ***A Treatise on the Law of Agency in Contract and Tort: including Special Chapters on Attorneys at Law, Auctioneers, Bank Officers, Brokers, Factors, Insurance Agents, Traveling Salesmen, Public Agents and Officers, Master and Servant*** (1902), s. 436

member agent of the corporate group entity acts within her role as employee, she acts for the corporation.

It is much less clear whether an employee or other member's acts constitute an act of the entity when things begin to go wrong. Consider, for instance, a senior manager who decides that political correctness has gone too far and that there is nothing wrong with male employees touching their female employees backs or arms, even if the female employees complain about it. Does this manager's opinion change corporate policy about harassment? This is not so simple a question. In chapter two, I described French's theory of corporate intentional agency as stating that, at the least, what agents do within the scope of their employment that is in pursuit of the company's goals is part of corporate agency. On a strict reading of the company's goals, the manager would not be committing a true corporate act in that case. As French points out, in the United States, most jurisdictions allow corporations to pursue business for 'any lawful purpose.'[7] This could be read as saying that any unlawful acts would be outside of the corporate charter, and not corporate acts.[8] However, another plausible reading of pursuing the corporation's goals includes all the decisions someone makes as part of their duties. If the manager's duties include giving directions to human resources on how to handle employee harassment claims, then on this second reading the manager could change corporate policy with respect to sexual harassment. This scenario shows that while delegation may be a simple and legitimate tool of corporate activity when all is as usual,

[7] French (n 2), 56

[8] Indeed, this argument was put forward by lawyers in early corporate crime case ***State v. Morris & Essex Railroad*** 23 N.J.L. 360 (1852), cited in Kathleen F. Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (1982) 60 Washington ULRev 393, 408

determining what is delegated and what counts as corporate activity quickly becomes complicated when we get into the realm of criminal offending.

The possibility is still open, though it is less attractive, to treat the criminal case as exactly the same as the civil case, and attribute criminal mens rea to the corporation every time any employee commits a criminal offence with the requisite mens rea while acting within the scope of her employment and with the intent at least partially to benefit the corporation (this tracks the idea of pursuing the corporation's goals). This is indeed the route that many U.S. jurisdictions have taken: as long as one employee had the requisite mens rea for the act, the entire corporation has committed the act.[9] The criminal law calls this vicarious liability, and it is problematic in that it seems to substitute individual agency for corporate agency, and not deal with the possibility of true corporate agency at all. It punishes the company without any concern for its own moral stance towards the offence in question, since it looks no further than the action of one employee, who could have been acting in defiance of every other element of the corporation (corporate policy, the positions of the other employees, and so on). Vicarious liability is easy to apply but distances criminality from blameworthiness, which is a perversion of the criminal law and also makes it easier for people to excuse the corporation from criminality and retreat back to the idea that corporations are not really the sorts of entities that are capable of morally blameworthy action. The entire corporation's criminal

---

[9] William S. Laufer and Alan Strudler, 'Corporate Intentionality, Desert, and Variants of Vicarious Liability' (2000) 37 Am Crim L Rev 1285, Laufer (n 1), 52. That being said, the U.S. Department of Justice has issued guidelines (or principles) stating that 'it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict ***respondeat superior*** theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.' U.S. Department of Justice, Title 9, Chapter 9-28.000, Principles of Federal Prosecution of Business Organizations, 9-28.500. Still, this language (even if it were binding) leaves it open to the prosecutor to charge even for the act of one rogue employee.

liability is engaged by a single employee who could be acting in defiance of every corporate policy and even of all the corporate culture and unofficial attitudes of all other members of the corporation, as long as her act partially benefits the corporation — for instance a salesperson who commits fraud to get customers to buy more, in order to increase her sales bonus. This method of liability attribution is much too broad for attributing liability if one is concerned with an overall project of explaining corporations as actual moral agents. Its goal seems rather to offer a direct route to punishment, eliminating barriers for the state should it seek to deter certain corporate practices, without weighing itself down with issues of corporate agency or the principles of fault that are deeply rooted in the criminal law.

Stretching the connection between criminality and morally culpable action even further is the doctrine of collective knowledge, which also has some purchase in U.S. doctrine.[10] The idea here is that if one employee of the corporation has part of the knowledge required, and another employee has another part – for instance, if the offence is of knowingly selling identical goods for different prices on the same day, and one employee sells the first batch of shirts at ten dollars and a second employee across town, not knowing about the first sale, sells an identical batch at twelve dollars – then the company is guilty of the offence, despite the fact that at no time did any component member of the company have all the knowledge required to see that they were committing an offence. In vicarious liability, at least one employee has to be found to have the required mens rea, but here, the mental element can be spread between various people, all of whom are totally innocent of understanding that they are, or even risk,

[10] Thomas A. Hagemann and Joseph Grinstein, 'The Mythology of Aggregate Corporate Knowledge: A Deconstruction' (1996-1997) 65 Geo Wash L Rev 210

committing the prohibited act. As Hagemann and Grinstein point out, this can have the effect of turning a crime of intent into a strict liability offence,[11] not requiring there to be a finding that even one agent of the corporation had any semblance of the mens rea for the offence. The way that both of these theories divorce culpability from blameworthiness means that they may be useful for deterrence (in the same way that creating strict liability offences is useful for deterrence) but are not suited to uphold the principles of the criminal law.

At the other extreme one could also take a restrictive approach and say that while it is possible for corporations to commit crimes, only where corporate policy is explicitly criminal is the mens rea for corporate wrongdoing made out. In other words, the corporation would have to have a criminal purpose in order to be able to delegate authority to commit crimes, and this would be the only way for the mens rea for true crimes to exist at the corporate level. This solution, though tidy, is descriptively incorrect: corporations can and do arrange themselves to facilitate the commission of certain types of acts even if they are not part of that company's stated purpose. This happens through the mechanisms outlined in chapter two, where groups act in various ways through votes or other procedures, and these acts occur whether or not they are part of the corporation's official line on what it does. The criminal law would fall into a trap of misunderstanding the nature of corporate acts if it were to take such a restrictive approach.

A theory that takes the reality of corporations and seems to accord with Peter French's theory of corporate attribution, at least to some extent, is the identification

[11] ibid 239

doctrine, or directing minds theory, of corporate attribution. The identification theory works by determining whether the actus reus can be linked up to a mens rea whose holder is also a source of discretionary corporate decisions in the sphere relevant to the actus reus. Any mens rea may be imputed to the company when that mens rea exists in one of its more responsibility-holding agents. This theory has been taken to liken the corporation to a human being, whose faculties are separated in a simplistic way, the lower-level workers being the hands and feet, while the directors or managers are its head. This is the image that Lord Denning gave life to in his description of the identification doctrine. He wrote,

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.[12]

Senior managers' corporate knowledge becomes part of the corporation's knowledge. This is partly based on a sound idea that a high-level agent's decisions are incorporated in a direct manner into the corporation, and follows from the explanation of corporate intentionality in chapter two. As Richard Ekins explains: 'the group intends the individual

---

[12] ***Bolton (Engineering) Co. Ltd. V. T.J. Graham & Sons Ltd.*** [1957] 1 QB 159 (CCA), 172. Note that this was not a criminal case, but the doctrine is the same doctrine used for identification of the directing minds in criminal cases.

act to be its act, the CEO acts intending to direct the group, and the other members of the group coordinate their further action as his act directs.'[13] Because the corporation is structured in such a way that the manager's acts affect corporate policy, the manager's intention (when acting in her guise as manager) is an intention of the company. Similarly, her work-related knowledge is the knowledge of the company. Therefore, when she knowingly commits a criminal act in the name of the company, the company can be said to have the mens rea of knowledge for that act. This follows from the theory laid out in chapter two that the corporation is an intentional agent that acts and knows when its agents act and know within their spheres of authority. To this extent, the identification is in keeping with the actual workings of the corporation.

The identification doctrine gives an unrealistically narrow view of who makes decisions, and creates intentions, for the corporation. Which employees have sufficient decision-making power to be able to be considered minds of the corporation? More employees make decisions than those that are specifically tasked with setting major policy such as what products the company will sell or which countries it will sell them in. Is the real issue really so simple as identifying someone as a manager or non-manager? Lord Denning in the above quote speaks about managers. The U.S. Model Penal Code version of the identification theory points to 'high managerial' employees and the board of directors.[14] The Australian Model Criminal Code (though it also has a much more interesting section on corporate culture, which I discuss below) similarly points to high managerial agents, defining a high managerial agent as 'an employee, agent or officer of

[13] Richard Ekins, ***The Nature of Legislative Intent*** (Oxford University Press 2012), 59

[14] Model Penal Code, American Legal Institute (1963) (U.S.) s. 207(1)(c); Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 CrimL Forum 1, 11

the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.'[15] But the whole difficulty is to determine when it is fair to make that assumption, and this gloss provides no help in that. Additionally, these doctrines tend to single out policy, as if that were somehow different than operational decisions, when operational decisions are often crucial in determining the way in which a corporate entity conducts its affairs.

To identify the will of the corporation from the mindset of employees who are not in charge of any aspect of corporate decision-making would pervert the theory of corporate agency, and to that extent the identification doctrine is sound. However, sometimes a middle-level employee will be put in charge of major decisions for a certain project. Is that enough to render her a directing mind while he works on that project? It is not clear who should be included and excluded.[16] This employee is not deciding policy, but is in charge of important decisions, that could potentially engage the corporate apparatus in recklessly harmful activities. So that for instance, a ship's captain with broad discretion over the boat's operations, but without power over corporate policy, is not a directing mind.[17] A directing mind must have more than discretion, but must be found to have 'executive authority to design and supervise the implementation of corporate policy.'[18] This is clearly a very high bar, and means that in a large corporation, even if hundreds of middle managers and employees were involved in falsifying the safety records of vehicles that the company was producing, the corporation would not be liable, if the policy setters were not found to be individually reckless as to that falsification.

[15] Australian Model Criminal Code (2009) s. 2.5.3(6)

[16] French (n 2), 182

[17] This is the result of the Canadian case of ***Rhône (The) v. Peter A.B. Widener (The)*** [1993] 1 SCR 497

[18] ibid 521

The identification theory does not accord with the reality of large modern corporations. Archibald, Jull and Roach point to the relatively recent evolution of 'organic corporate structures that have extended decision-making powers beyond the boardroom to diverse sectors'[19] in which the idea of individual minds being in charge of the core thinking of the corporation is less in line with the entity's real workings. Identification theory makes most sense in a very small corporation.[20] As Nicola Lacey has pointed out, it is unsurprising that England and Wales's first successful manslaughter prosecution of a corporation was of a very small company: in a small company it is much easier to apply the identification theory.[21] The identification theory does not capture the distinctive way that large corporations act, their group-ness or systemic nature. As Lacey says, it is ironic that while the identification theory (still the doctrine in force in England and Wales) works best with small companies, it is large companies that have the greatest capacity to cause harms.[22] While identification theory may correctly attribute mens rea to some (usually small or closely-held) corporations, it does not allow for the full range of ways in which a corporate entity might possess mens rea.

The discussion would be more fruitful if we shifted it from titles such as manager to issues of how much discretion a decision-maker has. Discretion in decision-making is what makes the difference between someone employed to be a 'corporate mind' or not. It

---

[19] Todd Archibald, Kenneth Jull and Kent Roach, 'The Changed Face of Corporate Criminal Liability' (2004) 48 Crim L Q 367, 380

[20] Colvin (n 14), 14

[21] Nicola Lacey, '"Philosophical Foundations of the Common Law": Social not Metaphysical' in Jeremy Horder, ed., ***Oxford Essays in Jurisprudence***, Fourth Series (Oxford University Press 2000) 17, 31. Indeed the company in question was 'effectively a one-man company' and so very small indeed, Celia Wells and Oliver Quick, ***Lacey, Wells and Quick: Reconstructing Criminal Law*** (4th ed., Cambridge University Press 2010), 683

[22] ibid

is true the theory focuses on 'directing minds', and it is clear to some extent why we would look at directors and high managers as imparting their states of mind to the corporation, yet it seems that the same rationale should lead us to identify all delegations of discretionary authority with the corporation's mind, as the corporation has decided to include this judgment in its overall functioning.

There are other possible objections to the theory that the identification theory, in my view, overcomes. Eric Colvin suggests that if we consider that the identification confers primary and not secondary responsibility on the corporation, the theory of directing minds does not provide a satisfactory rationale for holding both corporation and individual responsible for the same conduct.[23] This is because one individual intention is being attributed in two places. However, I do not think that this poses a particularly grave philosophical problem either for corporate theory or for criminal law theory. It is based on the core reality of what a corporate entity is and how it operates. It is helpful to think back to the theory laid out in chapters two and three again: the corporation and its human agents are separate but entangled. The corporation changes how the individual thinks, and the individual changes how the corporation thinks. One could well imagine finding primary liability in the individual but finding also that her culpability was mitigated by her being at work. In the same way, a corporation might be found primarily liable but its culpability could be mitigated by the fact that the morally dubious mindset was present only in some parts of its workings and did not pervade the whole corporation. The analogy is to co-conspirators, who are both primarily liable for the same act. This is not to say that the analogy is perfect, because the corporation is indeed different in its

[23] Colvin (n 14) 14

nature from an individual, but again, if actions can be imputed to the corporation, then it is not more conceptually problematic to impute thoughts, and in this way an individual and a corporation can both be primary actors in the same act, primary knowers in the same knowledge, and primary thinkers in the same thought.

The identification doctrine is too narrow to be true to the reality of large complex organizations. It is for this reason that the Canadian legislature replaced the identification doctrine with the doctrine of senior officers in 2003. This doctrine uses the term senior officers, which it defines as people in charge of policy but also 'a representative who … is responsible for managing an important aspect of the organization's activities.'[24] This means that those middle managers or ship's captains, if they have the mens rea for the offence, can engage the mental element of the act for the corporate entity itself, unlike in the identification doctrine. The senior officers must have been acting 'with intent at least in part to benefit the organization,'[25] so that an employee who steals from her corporation does not thereby turn the corporation into thief as well as victim. The key issue is who was in control of the operation in which the criminal act took place.[26] So, the doctrine of senior managers appears to take more seriously the concept of the large corporation whose acts are not all being controlled by a small group of people at the top who constitute its mind or ego.

The senior officers doctrine seems to pitch the attribution of agential acts to the corporate entity at a level that is more in line with the workings of large corporations, but it will also, necessarily, bring us into some difficult puzzles in borderline cases. Consider a

[24] Criminal Code (Canada) R.S.C. 1985, c. C-46, last amended 23 July 2015, s. 2

[25] ibid s. 22.2

[26] Archibald, Jull and Roach (n 19) 375

head janitor, Gary, who is in charge of organizing the janitorial staff and keeping offices and salesrooms clean and up to date. Gary is not a corporate directing mind by any stretch of the imagination. Not only is he not in charge of policy, nobody even informs him about corporate policy except perhaps in very select circumstances. That being said, he does have operational oversight and can make decisions with a large impact on workers and bystanders. Let's say Gary finds a teenager vandalizing the outside of the corporate headquarters where he is the head janitor. The company has had issues with vandals and has told Gary to make sure the building is clean and presentable at all times. Gary, in an effort to deter the teenage graffiti artist, grabs her arm very hard and breaks it. My strong suspicion is that nobody would think that the corporation should be found complicit in an assault here. While they may be civilly liable, and may even be negligent for hiring such an aggressive janitor, they are not criminally implicated. But I think that where Gary is acting more clearly in his sphere of authority, the situation might be different. Let us say that Gary is in charge of a building in which 700 people work every day, and that is also frequented by 300 visitors and guests, including children, on an average weekday. Gary is told that the building must be spotless at all times. This is very difficult, especially in winter months when people track in mud from outside. Gary buys a cleaning product that is known to have harmful effects on children's health. Gary himself knows of these harmful effects, but decides to use the product anyway as it is the best way to achieve his tasks within his budget. He instructs his staff of 75 to use this cleaner, and they all do. Several children develop serious and lifelong health problems as a result of their exposure. Is the corporation morally implicated in this decision in a manner that would be relevant for criminal attribution? Under the identification theory clearly not, and under the vicarious liability theory, clearly yes. Would Gary be a senior manager? It seems very likely he would. He is in charge of operations for a sector of the company, has broad discretion, and is in charge of a large number of employees as well. Does the senior officer theory get at the right result in this case? I confess I'm not quite sure. It seems like a borderline case. But then, in keeping with the principles of criminal law, a borderline case ought to be resolved in favour of the defendant. The company may well have been negligent here, ought certainly to be civilly liable, but I am not entirely convinced that this is one of the cases where the corporate entity itself was reckless or had foresight of a criminal act.

Archibald, Jull and Roach write that the doctrine of senior officers 'lies somewhere between vicarious liability and directing mind.'[27] Indeed they liken it more to vicarious liability than to directing minds.[28] This gives me reason to reflect, since my thinking up until now was that vicarious liability was a theory that gave no credence to the moral agency of corporations, while identification theory, though pitched too narrowly, was on the right track in attributing moral agency to the corporate entity by identifying that at least some members' acts are rightly attributed to the corporation as a whole, showing that it has a criminal intention in some cases. How can these two theories be on a continuum? And yet they are, as Archibald, Jull and Roach so rightly point out. The reason is that they are caught in a model of attributing individual mens rea to the corporation, without considering the group nature of the corporate entity in any way. In all three of these cases, the law has seen its task as finding mens rea in one individual and either saying yes or no to attributing that individual's mens rea to the corporation, without considering how intentionality works in a group, beyond the individualistic take

[27] ibid 378

[28] ibid 381

on groups that some people count as its head while others are only arms and legs. Nevertheless, the senior officers doctrine does have an advantage over the orthodox directing minds doctrine. As Celia Wells puts it, the 'rule should reflect actual responsibility rather than formal duty.'[29] The senior officer doctrine offers an improvement in that direction.

Many academics have advanced theories that attempt to grapple with the collective nature of corporations more seriously. It is a difficult task to shed light on where intentions are formed in the more diffuse cases (because while criticizing the identification theory I still maintain that it does point to true corporate intention in some of the more straightforward, orders-from-the-top cases). Many of these theories by academics are more in line with corporate intentionality, but they often run afoul of set principles of criminal law, principles that have been elaborated in relation to individuals as their paradigmatic actors. The theories of constructive corporate culpability, reactive corporate fault and corporate ethos liability all run serious risks in this regard. Now of course, it would be open to us to say that the principles of criminal law need not be the same in individual and corporate cases. And where there is no way to reconcile them, that might have to be the result. There are two important reasons to keep the idea of changing criminal-law principles as an option of last resort. The first is, it is questionable whether the result would even be criminal law anymore, and perhaps ought to be frankly called something else. While much of criminal law is indeed regulatory in nature, its distinctive power comes in the fact that it makes moral blame attributions. The seriousness of these moral blame attributions is what governs many of the criminal law's core principles. If we

[29] Celia Wells, ***Corporations and Criminal Responsibility*** (2nd ed., Oxford University Press 2001), 156

are going to keep treating corporations under criminal liability, there is good reason to pay a lot of respect to the principles that this rich branch of law has developed over centuries, and to at least seriously consider when and how they an be relevant to corporate criminal subjects. The second reason is a pragmatic one, which is that when corporations are within the criminal justice system, it is most effective and comprehensible for the users of that system if we can keep on with the same principles, such as the principle of concurrence or the rule against bad character evidence (on both of which see below). If we can craft doctrines that allow judges and lawyers to keep using the same doctrines rather than having to learn a whole new set of doctrines, it will be most efficient and also likely lead to the most thought-out and legitimate decisions. When these rules are being set aside, it would be best to think of the system we create as a kind of administrative or regulatory regime, and treat it separately from the criminal law.

William Laufer and Alan Strudler, identifying problems with other theories, propose a method that they call constructive corporate culpability. This transforms the mens rea requirement of the particular offence into an objective requirement, albeit a specifically tailored one, where the finding would turn on 'whether the average corporation of like size, complexity, functionality, and structure … would have the required state of mind.'[30] While Laufer and Strudler claim that this process would not 'ask corporations to conform to an external standard,' they say it also moves 'fact finders beyond subjective evidence proffered by the defendant.'[31] There is a difference between moving fact finders beyond evidence proffered by the defendant, and moving them beyond subjective intent. While increasing the conviction rate for corporations who have

[30] Laufer and Strudler (n 9), 1310

[31] ibid

committed crimes is a legitimate goal, it should not come at the expense of perverting the principles of the criminal law, which is what this does. The way of achieving that goal would be to create strict liability offences, not turn existing mens rea offences into negligence-standard offences. Proposals to 'give the concept of culpable ignorance a more central role,'[32] without more explanation, create a similar problem to the theories of vicarious liability and collective knowledge. It is hard to understand how this principle differentiates, in any principled way, between corporations and individuals. It seems to be purely a pragmatic move, originating in the frustrating difficulty with successfully prosecuting corporations for their wrongdoing.[33] There is no particular reason why anything to do with the corporation as a group makes it more reasonable that fault should be proved by reference to what its hypothetical peers would have done, in a context where such a method of discovery has been deemed unsuitable for individual defendants. Constructive fault is an objective standard, not suited to mens rea crimes.

The next type of theory, which uses corporate behaviour after the commission of the actus reus as a substitute for mens rea at the time of the offence, glaringly violates the criminal doctrine of concurrence. In criminal law, having the mental element that is necessary for criminal liability is not in itself sufficient to attract liability. It is having a culpable mental state and acting in accordance with it that are together criminalized, and so there must be a temporal link between the existence of the specific mental state and the act committed.[34] Peter French, whose influence in this field of corporate agency and

---

[32] David Luban, Alan Strudler and David Wasserman, 'Moral Responsibility in the Age of Bureaucracy' (1992) 90 Michigan Law Rev 2348, 2382

[33] On this difficulty, especially in relation to the legal resources at the disposal of corporate defendants, see Brandon L. Garrett, ***Too Big to Jail: How Prosecutors Compromise with Corporations*** (Harvard University Press 2014), ch. 1

[34] The central case that stands for this proposition is ***Fagan v Metropolitan Police Commissioner***

corporate ethics is considerable, originally proposed reactive corporate fault as a substitute for mens rea.[35] French is a moral philosopher, not a criminal law scholar, and so may have been unconcerned with fitting in his theory to the niceties of criminal law theory. Yet it should be a serious problem for anyone who takes criminal law seriously that this proposed doctrine very clearly contravenes concurrence. French describes a case in which a salesperson offers a buyer a bribe, and proposes that whether the bribe is attributed to the corporate entity is determined after the fact, depending on the corporation's reaction when it finds out about the bribe. [36] This is not simply evidence of the corporation's prior willingness to allow its sellers to offer bribes, but 'a second-level effect of associating oneself, morally speaking, with the earlier untoward event.'[37] In other words, this is not an evidentiary inference, but a doctrine in which the corporation's post-offence conduct can actually create the mens rea. Yet this could not be clearer in violating concurrence. Again, allowing this doctrine to stand for corporate mens rea would remove the regime of corporate crime so far outside the criminal law for individuals that we would do better not to call them the same regime at all. And again, the criminal law as it exists does have the ability to find liability in corporations, as I show below, and so creating a separate regime is unnecessary.

The third type of methodology for finding mens rea for corporations is the 'corporate ethos' or corporate-culture-reliant analysis. Pamela Bucy proposes that each corporation has an identifiable ethos and that the correct attribution of corporate liability depends on finding 'that the corporate ethos encouraged agents of the corporation to

[1969] 1 QB 439, [1968] 3 All ER 442

[35] While this principle was proposed by French (n 2) it has been taken up by others, see Laufer (n 1), 58

[36] French ibid 61

[37] ibid 156

commit the criminal act.'[38] Likewise, Eric Colvin proposes finding mens rea in 'criminogenic corporate cultures.'[39] In a similar vein, Luban, Strudler and Wasserman point to organizational culture as being 'a morally important cause of harm.'[40] Of these theories, Bucy's is the most developed. These theories represent a leap forward for corporate criminal liability in that they build on the kind of insights that the philosophers of action, such as Gilbert and List and Pettit, have provided us about the nature of group agents. Groups do things collectively, and not necessarily individually, though their acts are predicated on the acts of individuals. These corporate ethos theories, however, suffer from two problems: in Colvin's case there is a serious problem of vagueness, in the sense that he does not explain properly when a corporate culture will be strong enough to show that it fostered the specific criminal act under scrutiny, though he does point to general empirical evidence that many corporations have encouraged rule-avoiding behaviour.[41] Bucy's theory is quite detailed, and attempts to pin down, as much as is possible in the abstract, where a fact-finder ought to look for corporate culture. Still, Bucy's theory shares in the vagueness of not offering strong enough parameters for what would merit a finding that corporate culture encouraged a specific offence. Bucy's considerations for the trier of fact are, for instance in the area of employee education, that the doctrine will 'reward' a corporation (i.e. tend towards exculpation) if it educates its employees in compliance, in a case where an employee has committed a criminal act.[42] Similarly, she finds that corporate goals can be framed in a way that encourages or discourages illegal

[38] Pamela H. Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 Minn L Rev 1095, 1099

[39] Colvin (n 14) 4

[40] Luban, Strudler, Wasserman (n 32) 2374

[41] Colvin (n 14) 18-24

[42] Bucy (n 38) 1135

activity by employees. 'When an illegal activity is encouraged, such goals weigh in favour of imposing criminal liability on a corporation.'[43] These are plausible moral factors, but it seems to me that they open the door to an impermissible kind of bad-character evidence, the kind of evidence that the criminal law rightly finds not to be probative in the individual case. For instance, in the individual case, evidence that a person has committed thefts in the past should not be introduced as evidence that he committed a theft in this case, unless there are very special circumstances that tend to show that the thefts were likely to have been committed by the same person.[44] The reason is, while the law might be in the business of punishing people for acts that evince a bad character,[45] it does not punish people simply because they have bad characters. In instances where mens rea must be proved, the act must be tied to a subjective mental state, and showing that the corporation was generally uninclined to care about legality is not, ***in itself***, proof of that mental state.

Similarly, to find a mens rea of knowledge, Colvin suggests that 'corporate culture must favor the knowing commission of the offense.'[46] Yet does this not simply mean that the corporation has a generally lawless tendency? While we might condemn this morally, it is the kind of evidence that would be specifically excluded at trial for an individual, on the basis of being more prejudicial than probative. Bucy recommends finding the corporate ethos in elements such as corporate goals,[47] the extent to which corporations

---

[43] ibid 1134

[44] Ronald B. Sklar, 'Similar Fact Evidence — Catchwords and Cartwheels' (1977) McGill LJ 60, 61-62,

[45] on this issue see Tadros (n 4) and Lacey (n 4)

[46] Colvin (n 14) 18-24

[47] Bucy (n 38) 1133

teach about and monitor compliance,[48] and their reactions to past violations.[49] The trouble is, while these elements could provide information about the corporation's actual state of mind towards the particular offence at the time it was committed, they are more likely to, again, provide evidence merely of the corporation's general bad character, not the specific mens rea in question. This is because, without specific guidance to parts of the corporate setup that facilitated the offence in question, it becomes too easy to look at general regulation-avoiding behaviour, and even experienced judges and conscientious juries can be swayed by evidence of general lawless tendencies to convict for a specific offence that is not causally related to these. Or, on the other hand, a sophisticated judge might find that these criteria are unworkable, and therefore find that no crime was committed when the corporation really did encourage the specific act in question.

This group of theories is on the right track in identifying that there needs to be something beyond individual agents' mens rea to find corporate mens rea, and that that extra piece must be found in the workings of the corporation itself at the time of the offence. Another of these models can be found in the Australian Model Criminal Code. It recognizes, in Colvin description, 'a distinct corporate form of recklessness, based upon the presence of a corporate culture favoring the commission of offenses.'[50] The Code sets out four ways of proving that a corporation possessed the fault element, or mental element, of an offence. The first two encapsulate more or less the identification theory of corporate crime. The third one lays out that a prosecutor can prove that the corporation had the fault element by: 'proving that a corporate culture existed within the body

[48] ibid 1134-1136

[49] ibid 1138

[50] Colvin (n 14) 34

corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision.'[51] While this is promising, it seems to fall back into the same trouble as Bucy and Colvin's proposals, in that it does not explain how the bad corporate culture links up with the actus reus performed by an employee. How does a culture 'encourage … or lead to non-compliance with law'? More troublingly, the fourth method of proving mens rea (s. 2.5.3.(2)(d)) is 'proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.' This fourth path makes the third redundant, as it covers all of the same ground and more, and it will always be easier to prove that a corporation did not create a compliance-oriented culture than that it created one that encouraged non-compliance. Also it turns offences into strict liability offences under this branch. This would have the effect of turning the offences in question into either subjective mens rea offences or strict liability offences depending on which branch the prosecution chose to argue.

It is in order to supply some precision to these corporate ethos type doctrines that I turn now to a discussion of recklessness as a subjective mental state, and to discuss the issue of reckless structuring as a possible refinement on a corporate ethos doctrine. This doctrine does not solve issues for crimes that require intention or knowledge, but recklessness is a sufficiently high mens rea for the large majority of crimes.[52] This does not mean that it does all the work necessary in corporate mens rea, but it is offered as a useful piece of this very large puzzle.

[51] Australian Model Criminal Code (2009), s. 2.5.3(2).

[52] Nicola Lacey, 'A Clear Concept of Intention: Elusive or Illusory?' (1993) 56 Modern LRev 621, 622

The criminal standard of recklessness

There has been significant disagreement in criminal law theory about whether recklessness is subjective (requiring the offender to understand that she is running a risk) or objective (requiring only that a reasonable person would understand that the risk was present).[53] In this section, I take a position in this debate, arguing that recklessness is best understood as subjective advertence of the undertaking of a risk. I make an argument about the meaning of subjectivity for recklessness based on second-level advertence grounded in the Heideggerian concept of Being-in-the-world. It is true that it would be simpler in the context of corporate mens rea to take the position that recklessness is indeed objective. The evidential requirements for an objective finding of recklessness are lower. Nevertheless I choose the subjective interpretation for three reasons. Firstly, it is the best interpretation of the criminal law in general. Secondly, only as a subjective mens rea does recklessness advance the broader argument that corporations fit within traditional moral-culpability principles. If defined only objectively, then recklessness occupies a moral gray area. Thirdly, accepting a subjective understanding of recklessness allows the doctrine of structural recklessness to withstand changes in judicial interpretation: because subjective understanding of risk is the higher standard, once that is proved it is immaterial whether the doctrine that the courts accept is one of subjective or objective understanding, as the proof given of subjective recklessness will also satisfy for objective recklessness.[54] Rather than simply assuming that recklessness is subjective, this

[53] See e.g. R.A. Duff, '***Caldwell*** and ***Lawrence***: The Retreat from Subjectivism' (1983) Oxford Journal of Legal Studies 77, John Gardner and Heike Jung, 'Making Sense of Mens Rea: Antony Duff's Account' (1991) Oxford J L Studies 559, Tadros (n 4)

[54] In England and Wales in the 1980s recklessness was judicially interpreted to be objective, but in the 1990s and 2000s, the judicial interpretation changed and recklessness was firmly seen as subjective again. AP Simester and GR Sullivan, ***Criminal Law: Theory and Doctrine*** (3rd ed, Hart 2007), 135-149. This

section makes an argument for why that position is a normatively superior choice for the law. At the same time it elaborates an understanding of recklessness that will be used in the next section on corporate recklessness.

Recklessness is defined as the running of an 'unreasonable' risk of committing the actus reus.[55] Unlike intention and knowledge, recklessness has an internal balancing requirement that the risk taken be unreasonable,[56] meaning that there will be borderline cases in which the actus reus will be clear but the question of guilt or innocence will turn on how large a risk there was of that actus reus coming about. What does it mean for someone to take an 'unreasonable' risk? On what basis should a judge decide that a risk is reasonable? There seems to be a difference of kind, in at least some cases where recklessness occurs, between recklessness and intention or knowledge. In intention or knowledge, the offender sets out to commit a criminal act, and this will usually occur in cases where the law will condemn the entire situation — there is no lawful element to a murder or a bar fight. But unlike knowledge or intention, many legitimate actions involve taking a risk of harming others. Reckless driving provides an easily-graspable example. Driving is an acceptable and even encouraged activity, though every act of driving on public roads creates a risk of harm to others. Where driving becomes criminal is where the person begins to drive in a way that subjects others to an unjustifiably high risk of harm. What decides whether the risk is justifiable or not? This is a complicated question and yet it is done all the time: speed limits are set at levels which run more than a de minimis level of harm, based on a widespread belief that it is important for people to be

shows that the standard can shift in legal interpretation.

[55] ibid 135

[56] See e.g. Hans Oberdiek, 'Intention and Foresight in Criminal Law' (1972) 81 Mind 389, 396

able to get around in a time-efficient way, and that some risk of injury is an acceptable cost for this. Indeed, overall, we can say that as a society when we allow driving there will be some number of injuries and deaths that occur as a result, and we find this acceptable as long as it is kept low. Similarly, rules on whether it is acceptable to talk on the phone using hands-free devices such as earpieces determine how much injury is acceptable as a tradeoff for allowing people to talk on the phone without moving off the road. While we might like to think that we would not allow people talking on their phones to create ***any*** risk of harm to human life, this is not the position the law takes. The law allows tradeoffs of this sort. A minimal risk of harm is allowed in exchange for providing a small convenience to a large number of people.

While recklessness is often charged in cases where the underlying behaviour is not laudable — for instance, waving a gun around — I am interested in the fact that recklessness is a subjective mental state within the criminal law that will often occur in cases where the activity the accused engaged in was generally understood to be a 'good' or at least acceptable activity. Driving is not the only common activity that can become reckless. Possible reckless conduct often occurs in situations where the underlying activity can be described as socially useful conduct. This starts to look a lot like the kind of criminal conduct that often occurs in corporate contexts, where a company is doing something that should be good, for instance developing life-saving medications, but doing it in a way that unreasonably creates risk for others.[57] The overall project, be it developing medications or driving to work, may be laudable, but the risks taken turn it into the proper object of criminal sanctioning.

[57] See e.g. John Braithwaite, ***Corporate Crime in the Pharmaceutical Industry*** (Routledge 1984), O. Hayden Griffin III and Bryan Lee Miller, 'OxyContin and a Regulation Deficiency in the Pharmaceutical Industry: Rethinking State-Corporate Crime' (2011) 19 Critical Criminology 213

The balancing aspect of recklessness makes it a particularly fruitful area of mens rea to consider for corporate liability. Recklessness is not attractive or suitable merely because it is easier to prove. There are reasons beyond the epistemological or evidentiary advantages of discovering that an agent took risks rather than that the agent knew of or intended a result. Recklessness actually captures a great many of the cases in which corporations commit crimes. The difference between recklessness and negligence can be subtle, but the distinction is an important one. It is drawn as the difference between a harm that someone caused through a failure to pay attention to risks when that person knew of no need to pay attention (negligence) and a failure to heed potential harms that the person knew she was risking with her conduct (recklessness).

As a doctrine of how much risk is acceptable in otherwise legitimate activities, recklessness is well suited to differentiate between innocent and guilty corporate conduct. As Hans Oberdiek explains it, 'Only … harm regarded as unjustified in terms of social utility and social justice is reckless.'[58] It is about how 'reasonable' it was to expose others to that risk of harm, and reasonableness is both an objective standard and one more tied up with rationality than the 'softer' elements of mental judgment. It seems in fact to be exactly the type of balancing of justifiable and unjustifiable risks that individuals expect corporations to be able to engage in. This explains where we draw the line between intention and knowledge, on the one hand, and recklessness on the other. While the reckless person must be subjectively aware that they are taking a risk, they might ardently hope that it will not come about, even convince themselves that it will almost surely not happen: the chances are quite tiny, and that the risk is one that anyone would take, the

[58] Oberdiek (n 56) 396

reckless scientist might say to herself. On the other hand, the reckless person might understand that she is taking quite a substantial risk, but as long as she does not behave in a way that she is certain or almost certain will bring about the prohibited harm, then she has not acted knowingly or intentionally, though she has acted recklessly.

The balancing act may change where certain activities are inherently dangerous, in the sense that it might not be possible to minimize all risks in certain activities that we consider to be generally socially useful, such as creating medicines, treating patients in a hospital, or disposing of hazardous wastes. Consider the U.S.'s sub-prime mortgage crisis of 2008. The banks did not ***know*** that their lending practices would inevitably lead to a bubble bursting, which would endanger many people's livelihoods and take their homes away from them. But the bankers knew enough about their practice to call it risking that result.[59] The next step is to consider whether the risk was reasonable in the circumstances. This requires balancing the increased profits for the banks against the loss of people's homes. If one finds the risk outweighed the benefit, one can conclude that the implicated banks' conduct was reckless under the criminal law's definition.[60] Conversely, though some may want to convict corporations such as Bank of America of ***knowing*** that they were bringing about this result, that would be overstating their level of subjective awareness. Not only that, it would misunderstand the banks' mode of operation. Had they been completely clairvoyant, many of these banks would have avoided the 2008 crash, as it brought them embarrassment and financial losses. But without knowing that the crash was coming about, they were reckless in their way of dealing with mortgages

[59] Stephen Platt, ***Criminal Capital: How the Finance Industry Facilitates Crime*** (Palgrave MacMillan 2015), 3-5

[60] For a discussion of the difference between recklessness in ordinary (moral) language and in the criminal law, see Gardner and Jung (n 53) 574-75

and other financial instruments. They were playing with fire, and that is something that they did know. Between negligence and knowledge, there is recklessness.

Both academics and judges have long been uncertain as to whether recklessness is best understood as encapsulating a need for the offender to advert to the risk, or merely that there be an unjustifiable risk that a reasonable person would have adverted to. John Gardner and Heike Jung argue that those who insist that recklessness must have a subjective element have misunderstood the criminal law's standards:

> inadvertence only mitigates a reckless agent's moral culpability, as a rule, if she has attenuated cognitive capacities, and even then it does not normally entail that her fault is converted from recklessness to something else, like carelessness, but only that her recklessness is diminished in scale.[61]

Gardner and Jung are protesting, rightly, that law does indeed sanction based on objective tests of wrongfulness, as against those who say that the criminal law can only sanction subjectively understood risk-taking. Of course the law does punish behaviour that departs from the reasonable in an objective manner that need not be apprehended by the actor: it does so with respect to criminal negligence and strict liability offences. But why write that the defendant's fault could be contemplated as being reduced from recklessness to 'something else, like carelessness'? The term carelessness makes it sound like there is no criminal liability that captures fault less than recklessness, which of course there is. Negligence is criminalized for certain offences, and rightly so. It is also not available for the same offences that require recklessness for a finding of guilt, and again

[61] ibid 575

rightly so. Where the standard is only objective, the offence is seen by the law as being less blameworthy, and so both stigma and punishment are lower.

This explanation of the criminal law's definitions is in keeping with a fairly mainstream understanding of the relationship between recklessness and negligence. For instance, Glanville Williams writes, 'Negligence may be said to be of two kinds: negligence with conscious advertence to risk, i.e. recklessness, and negligence without advertence to risk.'[62] Some offences, ones that have a greater stigma and censure attached to them as being evidence of greater blameworthiness, require that the offender have subjectively appreciated the risk he took, whereas other offences only require that the offender acted in a way that was outside of what the law expects from its citizens, whether the actor appreciated that her actions departed from that standard or not.

Having a subjective standard of mens rea that falls below actual knowledge is in line with a graduated view of moral culpability that is entrenched in the law. Blameworthiness has many gradations, and these do not occur only at the sentencing stage, but also at the liability stage. That this difference happens with the levels of mens rea can be easily seen between the different offences of manslaughter and murder. To find that the criminal law should move all the way down from knowledge to an objective standard in one step is to deny that there is a difference in level of culpability between a person who puts others at risk knowingly and one who does so without realizing that he is acting in a potentially harmful way. To say this is so is not to argue that there is no moral culpability in objective-standard wrongs such as criminal negligence, but that advertence makes a difference to how much we blame someone if the harm risked does come to pass.

---

[62] Quoted in Oberdiek (n 56) at 397

The subjectivity required for a subjectivist recklessness has, on the other hand, often been overstated. It need not be a fully worked-out understanding of the risks posed by one's actions. There is a middle way between what the conventional formulation of recklessness requires (conscious appreciation of the risk one undertakes) and what the objectivists argue for. This reinterpretation is in important respects subjectivist, and should not be considered a hybrid. The argument is about second-level advertence, awareness that there is something more that one could or should pay attention to in order to understand what risks one is taking. This is a cognitive argument about the ways in which people acquire and store information: a person may know something without focusing on it in the explicit way that one might envision when thinking about conscious risk-taking.

This argument flows from an intuition that people really do attach greater culpability to cases where someone adverted to a risk, but that the advertence need not be direct, and may indeed be an impression that one is not paying attention to the elements of risk in one's actions, and that this is as culpable as more advertent risk-taking. To show that this is a plausible understanding of the recklessness that criminal law aims at I will rely on three sources: the first is Victor Tadros's chapter 'Recklessness and the Duty to Take Care'[63] in which he argues that there must be a vice on the part of the offender for her conduct to be the type of conduct that the criminal law seeks to prohibit, and that recklessness demonstrates this kind of vice. The second source is Antony Duff's article '***Caldwell*** and ***Lawrence***: The Retreat from Subjectivism'[64] where Duff distinguishes between explicit and tacit forms of advertence. In order to flesh out what might be the

[63] Tadros (n 53)

[64] Duff (n 53)

content of a tacit form of advertence, I use Martin Heidegger's ***Being and Time***[65] and subsequent interpretations of that text to give an account to the idea of tacit advertence, which Duff alludes to but does not flesh out. I explain how automatic action contains a form of knowledge, though one that is sometimes thin or 'transparent', meaning that the awareness of the fact is at the edge of a person's consciousness but that the person does not focus on it. The awareness nevertheless remains.

As a preliminary matter, it is important to note that even subjectivists do not require that an offender engage in the balancing of risks that the notion of recklessness requires triers of fact to balance. The offender need not believe that her behaviour is reckless rather than innocently or acceptably risk-taking, as long as she knows that she is engaging in risk-taking behaviour.[66] For instance, a scientist might know that other people think it is unreasonable to risk a human death for the sake of the advancement of a cure for cancer, but herself believe so strongly in her research that she would be willing to assume that risk, thinking that it passes any balancing test. This would not defeat a subjective charge of recklessness. The offender must have a subjective understanding that she is running a risk, but on the other hand the law does not need to go so far as to concern itself with her appraisal of that risk.[67] Balancing that risk against the importance of the activity is a normative issue, one for the law and not the individual to decide, and does not depend on the individual being able to correctly balance her own interests against the interests of others. Similarly, she need not know the exact nature of the risk:

---

[65] Martin Heidegger, ***Being and Time: a translation of Sein und Zeit*** Joan Stambaugh, trans. (State University of New York Press 1996)

[66] Eric Colvin, 'Recklessness and Criminal Negligence' (1982) 32 U Toronto LJ 345, 356

[67] Though for a contrasting, minority view on this issue see Larry Alexander, 'Insufficient Concern: A Unified Conception of Criminal Culpability' (2000) 88 California LRev 931, 936

for instance, she may know that she is risking others' health by releasing an untested chemical, but does not need to know that the risk is one of asthma and could affect 1% of children exposed. The subjective awareness required is only that a person know she is creating a risk of harm to others through her manner of carrying on an activity that may otherwise be legitimate. Colvin is mistaken when he finds that an offender was subjectively recklessness if she knows that other people think of what she is doing as risky but she herself believes that it does not contain any risk at all. Take a driver who believes that she is a good enough driver that there is absolutely no risk that she will crash her car when driving at a certain speed. She knows that there is a risk for less proficient drivers. This means, in Colvin's argument, that she is subjectively aware of an objectively defined risk. For Colvin this is enough.[68] I disagree that that is subjectively understood recklessness. It is instead merely demonstrating that the action – the driving – is voluntary, not that it is recklessly undertaken. To see this, it is enough to consider that the driver described in the example could have a complete abhorrence of risking anyone's safety, but still drive at that speed, since he is so certain that it is safe when he does it.

When does a person know she is creating a risk? One of the ways an actor can know she is being risky is through an awareness that she is choosing not to pay attention to a risk. Victor Tadros has a perceptive argument for why recklessness is criminalized and what its boundaries ought to be. While I agree with much of what he says on this subject, I disagree with the conclusion that he draws from his points. Tadros argues that criminal liability only attaches where 'the defendant's action is a manifestation of one of a narrow range of vices: primarily, vices that show that the defendant has insufficient

[68] Colvin (n 66) 356

regard for the interests of others.'[69] Tadros gives the example of someone driving to a football game, who would usually check carefully before driving into an intersection but because she's in a hurry this time she 'forms the belief' that the intersection is clear. Tadros calls this non-evidential belief formation, being the forming of a belief not because there is evidence for it, but the driver forms it anyways because she ***wants*** it to be true.[70] Where the incorrect belief is formed for selfish reasons (as opposed to, say, charitable reasons for believing something against the evidence), Tadros labels the belief-formation process willful blindness. He goes on to say that this is a vice correctly targeted by the criminal law, but also concludes that this type of non-evidential belief formation, or willful blindness, cannot be called a form of subjective awareness, and says that it is recklessness by an objective standard.

The fact that the agent closes her mind to the evidential reasons to form the opposite belief – for instance that it is dangerous to drive through the intersection without looking – shows that the agent has, at least, second-order advertence (advertence to the fact of his inadvertence) to the facts in question. This second-level advertence is why our intuition finds these states of mind more blameworthy than we find the negligent person's, who may have done something really bad but where the absence of identifiable selfishness or indifference to others causes us to class him as deserving of some correction but only a small amount of condemnation, if any. The selfish agent who acts on non-evidentiary 'belief' (really a kind of wish rather than a belief) is more blameable. Though it is true that the driver isn't actively thinking about how she puts others in danger, she knows on some level that this is the case. The subjective awareness of her selfish choices is what moves

[69] Tadros (n 53) 229

[70] ibid 252

this up on the ladder of morally blameworthy conduct. That is why I disagree with Tadros's conclusion.

Nevertheless, Tadros makes an interesting and perceptive point when he describes how people form beliefs about the outcome of their action based on desire rather than the evidence available to them. It aligns with the pre-2008 banking practices I adverted to above: the bankers went along on the assumption that everything would be fine for everybody, because this enabled them to do what they wanted to do, rather than acting according to the evidence they had about where they might be taking their corporations and the economy more generally. The insight about non-evidence-based belief formation would be strengthened if instead of concluding that it shows that there was no awareness of the opposing evidence, we supplement it with Antony Duff's distinction between explicit and tacit knowledge. In a 1983 essay, Duff described a tripartite framework of knowledge as latent, tacit or explicit, and wrote that tacit knowledge 'need not involve some conscious mental act of noting the existence of a risk' to remain as subjective knowledge.[71] This is contrasted with latent knowledge, which is merely knowledge of risks in general.[72] Duff does not however explain at what point tacit knowledge turns into latent knowledge, or how to locate the presence of tacit knowledge. Later on, Duff apparently reconsidered this tripartite split of latent, tacit and explicit knowledge. In ***Intention, Agency and Criminal Liability***, he presents a dual explanation of knowledge, as either latent or explicit.[73] Latent knowledge, Duff writes, is all of the knowledge that a person has at her disposal, for instance a driver's entire knowledge of

---

[71] Duff (n 53) 80

[72] ibid

[73] R.A. Duff, ***Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law*** (Blackwell 1990), 159

the rules of the road.[74] Actual knowledge occurs when the person consciously retrieves and considers one of these rules — something that does not happen often. But I think there is some value in Duff's middle category, that of tacit knowledge, even though he did not keep it in his view of mens rea.

I would like to locate the idea of tacit knowledge in the Heideggerian concept of Being-in-the-World. The theory is one about how people interact with the world around them, and is not specifically focused on recklessness or responsibility. As Michael Wheeler explains, Heidegger's theory is that we act in a way that only reveals itself when things go wrong. Heidegger explains this with a focus on instruments, as Wheeler illustrates:

> when I am absorbed in trouble-free typing, the computer and the role that it plays in my academic activity are transparent aspects of my experience. But if the computer crashes, I become aware of it as an entity with which I was working in the practical context of my office, in order to write an encyclopedia entry aimed towards presenting an introduction to Heidegger's philosophy. And I become aware of the fact that my behaviour is being organized for the sake of my being an academic. So disturbances have the effect of exposing totalities of involvements and, therefore, worlds.[75]

The idea that we are often not aware of what we are doing until something goes wrong fits in well with the kind of subjective knowledge that can be at play in situations of recklessness. People often perform routine activities such as walking to the mailbox or

---

[74] ibid

[75] Michael Wheeler, "Martin Heidegger", ***The Stanford Encyclopedia of Philosophy*** (Spring 2013 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/spr2013/entries/heidegger/>. Retrieved 2 July 2014

brushing their teeth without really thinking about what they are doing – this does not mean that they are not subjectively aware that they brush their teeth or get the mail. It just means that the knowledge exists without being the focus of one's thoughts.[76] It is not the same self-reflective knowledge as that involved in planning a vacation by buying guidebooks and planning out every part of one's travel and so on, in which one is really focusing on one's acts before they occur, but nor is it mere negligence. A person may be a reckless driver all his life and not really think about it until he hits someone. Like the computer in Wheeler's example, the car and the road are what Heidegger terms 'transparent' to the driver. But this does not mean that he was never aware of his choice to be selfish in his attitude towards others who might be in the vicinity of his car. What Heidegger's explanation uncovers is the truth that we do not necessarily turn our minds to every aspect of what we do, but have an understanding sufficient to know when we should be paying more attention.

Objects are transparent when one uses them in a familiar way for the accomplishment of a goal, on which goal one's direct attention remains. Stephen Mulhall explains that in the Heidegerrian philosophy of Being-in-the-World, action is goal-oriented: 'For anyone concentrating on the task at hand will be focusing her attention primarily on the goal of her labours, the correctness of the final product, and the tools she is employing to achieve this will of course be caught up in the production process, rendered invisible by their very handiness.'[77] While we reflect on our ultimate ends, we are not ignorant of the existence of our tools, but we use our tools unreflectively. The

[76] Some of this is indebted to a presentation at the Jurisprudence Discussion Group at the University of Oxford by Veronica Rodriguez-Blanco on 30th January 2014, entitled 'Understanding the Nature and Structure of Practical Reasoning: Excavating the Classical Tradition'

[77] Stephen Mulhall, ***Routledge Philosophy Guidebook to Heidegger and Being and Time*** (Routledge 2005) 49

Heidegerrian goal-oriented understanding of behaviour can shed light on why corporations may come to act recklessly.

Consider again the example of the pharmaceutical company. Its goal is to make a profit. Or maybe its original goal is to make medicines to improve people's lives, but in many cases, the pharmaceutical company's profit goal gains primacy.[78] The means to achieving that goal are various, and the pharmaceutical company chooses its own, the development and sale of medicines. The process from beginning of research and development to bringing a new drug on the market takes years, and in that time, the tools that the corporation uses become more and more ready-to-hand, and more and more transparent in that sense. I say they become more and more ready-to-hand because as they move along a process that was set up previously, the researchers and managers come to see it as a routine, and pay less attention to it consequently. Because the ultimate goal is profits, the company, through its agents, may focus on that more than on the means of achieving that goal, the drugs themselves (then again, it may focus equally on profits and safety, depending on how the corporation functions). If the company focuses on its goal of profits and lets its everyday operations of research into new compounds and testing at various levels become routine, the risks that the company takes will become part of the scenery – tacitly known but ignored on a day-to-day basis, because of their unimportance to the final goal. Only if and when the risk turns into an actual harm does the awareness go from being tacit to being explicit.[79] The focus on the goal explains why the means

[78] This is the only explanation for their high prices and many instances of questionable behaviour, see Richard Anderson, 'Pharmaceutical industry gets high on fat profits,' BBC News 6 November 2014

[79] ibid

employed become hazy. Yet, these subordinate elements do not disappear entirely from the actor's consciousness.

This appears to be in line with what Duff identifies as the tacit knowledge that is sufficient for a finding of recklessness. The Oxford English Dictionary definition of tacit includes 'emitting no sound; noiseless, wordless.'[80] The medium of the analogy is different, but transparency and noiselessness both involve the idea of something that is there without being overt. The question arises here of whether transparency or noiselessness are appropriate metaphors for advertence. While I agree with Duff that tacit knowledge is sufficient for subjective awareness, this is not an uncontroversial point. Transparency is close to invisibility, noiselessness to hiddenness. Joseph Raz uses the same term as Heidegger, that of Being in the World, with a different understanding, using it to draw out a conception of responsibility that goes beyond advertent risk-taking, and indeed shows that we can be responsible for harms that we had no awareness of.[81] Raz argues that Being in the World is a demarcation of a sphere of rational competence in which people lay claim to being able to act with some measure of success, and that this claim is what grounds our responsibility for both successes and failures in that sphere.[82] Thus, within that sphere of rational competence, our inadvertent or indeed unwanted failures become our responsibility.

Happily, I do not believe that I need to disagree with Raz's analysis in order for my own argument to operate. It is true that he uses the term Being in the World to explain inadvertent action, and that I want to use the same term to explain a type of

---

[80] Oxford English Dictionary, online edition, retrieved 9 April, 2014

[81] Joseph Raz, ***From Normativity to Responsibility*** (Oxford University Press 2011) ch 12

[82] ibid 244

advertent action. Raz argues that inadvertent/unwanted/negligent results are our responsibility. But finding a threshold responsibility at negligence doesn't mean that we can't also see how further levels of blameworthiness may be attributed to the agent when the agent crosses from unwanted failures to inadvertences, from inadvertent acts to advertent undertaking of risks, and from risk-taking to knowledge of the certain harmful results of one's actions. As Raz notes in this article about blame for inadvertence and omissions, 'Blameworthiness is a broad category. It ranges from the trivial to the serious.'[83] He uses his argument about inadvertence to ground an idea that the results of one's actions affect her blameworthiness, as against the argument that only one's intention can attract praise or blame.[84] But two things separate our arguments: one is that he is using a wider conception of Being in the World, not the specifically Heideggerian concept that I am employing here, and his is a conception that is less concerned with the use of instruments and the transparency of means to ends.[85] The second difference is that Raz is looking for a threshold argument, and that his conception does not foreclose finding other levels of culpability within the same sphere of activity that he demarcates.

An important concern does arise from a comparison between my use of Being-in-the-World and Raz's Being in the World: if transparency gets at the threshold of negligence, it does not distinguish between negligence and recklessness. The theory of second-level advertence would obviously be ridiculous if it painted a picture of cognition in which all action is advertent. It must plausibly draw a line between advertent and inadvertent behaviour. I believe the theory of second-level advertence does this in the

[83] ibid 251

[84] ibid 253

[85] Raz traces his arguments instead to Bernard Williams, who does not invoke Heidegger either, ibid and Bernard Williams, ***Moral Luck*** (Cambridge University Press 1982), 20–39

following way: one's use of instruments shows that one is aware of them to the extent that their usage is in line with one's goals, and that this is different from the carelessness that results when we or our instruments meet other objects that we were not aware of. On the advertence side, I may hammer a nail without explicitly forming conscious thoughts about picking up the hammer, but my setting out to hammer in the nail and accomplishing it using the hammer shows that on some level I adverted to the hammer. This is clearly delineated from the inadvertence situation in which I bump into a table and knock over a glass of wine. In this second case, nothing in my actions indicates that I had any level of awareness of the glass of wine or that my actions would result in knocking it over, and yet I might still be found careless for not adverting to what might have been around me when I walked. This is negligence.

The concept of transparency is helpful here to demonstrate that an agent can advert to a certain state of affairs in a hazy but real way, where the agent uses that object or acts in accordance with its existence. Again, transparency is not invisibility: I see through a window without falling prey to an illusion that the window does not exist. But I pay the window no mind. This is not the same as distraction, which is another conceptual problem for recklessness.[86] Distraction is a momentary condition; using objects transparently is about choosing to keep one's mind on something else, while knowingly performing an instrumental action. And back to the concept of second-level advertence: I know on some level (tacitly) that the window is there even though I look through it. If I throw a ball at the window and the pane of glass smashes, it is not open to me (as a person with full capacity and who has experience of windows) to say, but the window was

[86] Douglas Husak, 'Distraction and Negligence,' in Lucia Zedner and Julian V. Roberts (eds), ***Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*** (Oxford University Press 2012) 81

transparent, and so I did not know it would be there. I may not advert to my hammer while I am swinging it, but I am at least aware enough to be on notice that there is something to advert to, as long as I am in a normal state of consciousness when I go into my workshop to put a nail into a board. The concept of advertence to an area that requires further thinking in order to avoid committing a prohibited act is what allows recklessness to capture cases of risk, while also exculpating those who truly were not on notice that they were entering a zone of danger. The doctrine of structural recklessness builds on this type of advertence where large corporations are concerned.

Corporate structural recklessness: a form of corporate mens rea

In this section, I use the conception of recklessness as second-level advertence that I elaborated in section three to craft a doctrine that I believe solves many of the problems associated with the various theories, judicial, legislative and scholarly, that I described in section two, at least for recklessness. Corporate structural recklessness is a form of subjective mens rea for corporations. It does not resolve all of the problems associated with attributing mens rea to corporations: it will not be applicable in cases where the offence requires a fault element of knowledge or intention. It is however a useful individual doctrine, as the standard of recklessness does cover a large number of corporate offences and, in the corporate context, structural recklessness provides an insight into where the conduct of a corporation demonstrated an unjustifiable risk of committing an actus reus.

The doctrine considers what role the corporation may play in cases where: 1) lower-level employees have individually committed offending acts without senior managers or 'directing minds' being aware of the commission of the offence, 2) a number of agents have together committed a prohibited act, each individual intending her part but not knowing about the others, without any individual having the requisite mens rea for the entire prohibited act (the collective knowledge problem), or 3) an offence has been committed where no employee or member seems to be aware that the corporation was committing the act as it occurred. In any of these cases, while the corporation did not have knowledge of the prohibited act at the time of commission, it may be that the corporation was reckless as to its occurrence. Recklessness will have been present in the way that the corporation structured itself, such that it was subjectively aware (with enough members being aware that it would be routine to impute that knowledge to the corporation itself) that the poor flow of information increased the risk of the specific act that eventually occurred. The theory of corporate structural recklessness distinguishes between individual-member malfeasance and corporate-entity malfeasance without imposing positive duties on the corporation. There are cases of direct (non-structural) recklessness as well, but those are cases that would likely fall under the narrower directing minds rule, or a more sophisticated version thereof (one that kept in mind that policy-setters' acts are more central to corporate purpose, but attempted to take into account that even these policy setters are acting as a collective), and would not need this supplemental doctrine.

The root of the difficulty with establishing corporate mens rea is that the diffuse nature of decision-making in large corporations means that not all decisions can be traced back to some central 'brain' with the ability to make decisions and from whom blame could rightly be extrapolated to the whole entity.[87] The criminal law's principles are premised on minds that are unitary, not many-parted.[88] We are building up a conception of the corporation as a rational, self-reflective group agent. The central question of this chapter is, at what point is it fair to say that the group agent had an awareness of something. Is it only fair to find awareness when every single member of the group has the mindset?[89] Or on the other side of the spectrum is it fair to say it whenever any individual, who has been formally accepted into the group, has that mindset?[90] Since this is a point on which the law cannot usefully draw an analogy with humans to guide it, it has leeway in deciding what counts as reckless. I do not say that the law can shape corporate reality or the facts of group intention, but it can shape its response to these. The law therefore has the obligation to find the most appropriate boundaries for what will count as corporate recklessness, in between knowledge on one side and negligence on the other.

The legal person is a product of its members and the structures that govern their actions. The Corporate Internal Decision (CID) structure[91] determines whether an act is truly corporate – and this is appropriate in a criminal-law context, since it is fair to hold an agent responsible for actions that it acknowledges as its own, as the corporation

---

[87] The main issue here of course is simply attribution of fault to the entity; the extent to which it is fair to blame the corporation for acts taken by anything less than the entire membership of the group is more of a sentencing issue and is taken up in chapter 6

[88] In rare cases of individuals where minds are not unitary, such as multiple personality disorder, the individual also poses problems for criminal law: Walter Sinnott-Armstrong and Stephen Behnke, 'Criminal Law and Multiple Personality Disorder: The Vexing Problems of Personhood and Responsibility' (2001) 10 Southern California Interdisciplinary LJ 277

[89] J. Angelo Corlett, ***Responsibility and Punishment*** (3rd ed Springer, 2009) argues for this at 170

[90] This could be seen as the premise of vicarious liability, though more likely those who enact vicarious liability do so on pure deterrence grounds and do not bother themselves with theoretical justification.

[91] This is French's analysis of how corporations achieve intentionality, French (n 2); for a fuller explanation of the theory see chapter 2

acknowledges intentions and decisions made according to its own structures. The core rules of a corporation, such as the CID structure itself, can have greater or lesser information flow. If the corporation creates this structure in a way that takes an unjustifiable risk that individuals would commit prohibited acts without the corporation having to advert to the prohibited acts (thereby leaving it without subjective awareness at the time when its individual agents commit them) it can be said to have second-level advertence. This then, makes the corporation itself subjectively aware that its structure is unjustifiably taking risks of individual malfeasance, and hence it is being reckless in its structuring, or structurally reckless.

What does it mean for a corporation to structure itself? Someone could object that there is a problem of infinite regress here. The structures are what creates the corporation, and the corporation is what creates the structures, and round and round, and perhaps there is no way in which it would be possible to say that the corporation had control over its structures, if the structures were ultimately constraints on what the corporation could and could not do. It will perhaps be of help here to clarify the nature of the corporate-collective's relationship with its own structures. A corporation, as I have conceptualized it in this dissertation, is composed of human individuals, sometimes one but more often a group that form a rational unity, and the structures that constrain the actions of that group. The two relate in this way: at first (in Time 1), there are a group of people bound by a joint intention to create a corporate entity. At Time 2, they incorporate, bringing into being the first structure of the corporation, in the form of the corporate charter and whatever other decision-making apparatus is put in place initially. From then, in Time 3, the corporate structure will grow and change through the actions of the corporation itself, being that combination of the group of people in the corporation and the structures that already exist and create procedures for change. Therefore, when I say that the corporation is in charge of creating and maintaining its own structures, I mean the corporation at Time 3, that has been put into place through the initial joint intention of a group that was not a legal person or corporation (I'm specifying legal person here because in some philosophy of action literature, for instance in List and Pettit's work, the term corporate is used more loosely to refer to group actors generally). The Time-3 corporation is made up of individuals and structures, both of which have a part in maintaining or changing the structure of the corporation. This is why it is not circular to say that the corporation is in charge of its own structure.

Large-scale organizations have the possibility of structuring themselves in ways that hinder the exposure of morally problematic facts to any member individual. The corporation can run in such a way that supervisors issue vague yet difficult orders, and subordinates feel pressed into fulfilling them.[92] This might be done by design. It might not start out as the policy of the corporation, but supervisors might find that they get the results they want and sleep with untroubled consciences when they operate in this way. Or, they might do it for unrelated reasons, because they are in a hurry or out of a sense that their employees are highly competent. Whatever the motivation, they are aware that this is how they are operating, even if it becomes habitual and therefore somewhat transparent in the Heideggerian sense. In these organizations, knowledge is so fragmented that it can genuinely defeat all the elements required for knowledge of the criminal act from accruing in any one office. The compartmentalization is equally capable of resulting in criminal offences without the pieces of information that are required for the mens rea

[92] Luban Strudler Wasserman (n 32) at 2355

of the offence accruing in any one agent.[93] Even where the organization did not structure itself intentionally to divide the tasks so that crimes could be committed without mens rea, most large organizations will have enough people who understand the workings of a business well enough to see that this is happening and that it is risky.

Consider, for instance, an epidemic that results in the enactment of a law requiring nursery workers who have fevers to stay home from work. A large nursery, subject to many requirements, hands a binder to its new workers, telling them to familiarize themselves with all the rules and comply with them. A new employee, who is not a fast reader, takes the binder home and before getting to the end of the regulations, wakes up with a mild fever, and, not wanting to lose his job, goes to work. Has the nursery committed a crime? The worker has contravened the law, but the organization did not know about the fever, so did not know that it should have sent him home or not allowed him to come to work. Is this enough to say that the nursery has not committed a crime? On a directing minds or senior officers doctrine, the corporation has done nothing wrong. Under corporate structural recklessness, the answer turns on how you evaluate the nursery's attempt at lawfulness through handing a large binder of rules to its employees and expecting them to carry the burden of complying without any further help. If this is a legitimate practice, then the corporation itself has done nothing wrong. However, if we see this practice as creating an unjustified risk of bringing about the actus reus, then the corporation is reckless as to that offence, even though it had no specific awareness that it was being reckless in the case of that individual employee and his fever. Its recklessness was at the structural level, and though it started years before when the company decided

[93] Hagemann and Grinstein (n 10)

on its policy of compliance through handing out binders to new employees, the reckless state persisted through time to the moment covering the actus reus, when the worker clocked in at work.

Had the company knowingly created a policy that resulted in workers not reporting fevers, it would certainly have been guilty of the offence, even if its policy effected that result through stopping the information from reaching anyone in a management position. Hagemann and Grinstein, as part of an argument against the collective knowledge doctrine, agree that if the organization deliberately compartmentalizes information to escape knowledge, then the requisite knowledge may be attributed to it, in keeping with the culpability principles of criminal law.[94] The doctrine of structural recklessness takes this one logical step further and adds that if the company recklessly uses policies that insulate it from knowledge of criminal action, then it also commits the kind of culpable action to which criminal punishment rightly attaches.

We can apply this same reasoning to more common criminal acts of single employees, such as a salesperson offering a bribe to a buyer to use her company's product rather than a competitor's. The individual salesperson is guilty of bribery, but what of the corporation? A traditional analysis would say that since the corporation was not involved in the decision, and the salesperson is not a senior manager, then the corporation cannot be said to have done anything wrong. However, an analysis that focuses on how the corporate structure rewards salespeople and what directives it gives them, and whether it gives these directives seriously or with a 'winking' attitude, will show that sometimes the

[94] ibid 225

corporate employer of the salesperson was structurally reckless as to this instance of bribery.

This is not an argument for constructive fault. It does not add positive duties beyond whatever duties are in the laws as written. It is saying that in many cases, the company has an awareness that its policies are not allowing information to flow through in a way that minimizes the risk of criminal offending. This is already a requirement for corporate agents, in any case, arising from corporate law. The corporate agent has an obligation when a superior blocks information from going up to those who ought to know it, even to the board of directors if the information is important enough.[95] It is fair to assume that information about the corporation committing crimes is important enough. The group entanglement theory from chapter four brings this into greater light: becoming part of a group creates its own positive duties of awareness and cooperation. These are the positive duties of group agency, not positive criminal law duties. The criminal law is entitled to acknowledge them as part of its understanding of the distinct nature of corporate agents. And yet, there is a line here between this acknowledgment and imposing new positive duties on the corporation in terms of its obligations to enact compliance programs and similar measures.

In the nursery example the information is being blocked in two places: one, the information about the crime is not being properly conveyed to the worker, and two, the information about the worker's fever is not being conveyed to the company, though it ought to be. What structural recklessness highlights is that in these corporations, there are individual agents who understand the risks associated with bad information flow and poor

---

[95] Donald C. Langevoort, 'Agency Law Inside the Corporation: Problems of Candor and Knowledge' (2002-03) 71 U Cin LRev 1187, 1211

training, and these individuals' understanding of the risk is in keeping with the proper imputation of knowledge to the corporation, through its CID Structure and because of their management positions.

Corporate structural recklessness also does not encounter problems with concurrence that I identified in French's solution (above in s. 2). Though the fault may be prior in the sense that the mental state began at a time much earlier than the act, it is not a prior fault in the problematic sense that intoxication is a prior fault, i.e. that the fault begins and ends prior to the act.[96] The way that the doctrine of intoxication functions, at the time of the actus reus the mens rea need no longer be present, and sheer inadvertence can ground liability.[97] The law relies on the prior fault to provide the recklessness that then imbues the later act with the effects of recklessness. In intoxication the fault begins and ends before the actus reus. With structural recklessness, the fault begins earlier, possibly even years earlier, but continues while the structure of the corporation is in place, again assuming that there are corporate agents placed to know what the risks are and to change them, and whose knowledge is itself properly imputed to the corporation. The corporation's executives, directors and employees, constantly use the corporate structure as it is set up, thereby reaffirming its practices and its structures. This way, they are second-level advertent to the possibility of risks being created by this structure, and their advertence is transferred to the corporation because it is widespread and goes up to high levels of management.

[96] Susan Dimock, 'What are Intoxicated Offenders Responsible for? The "Intoxication Defense" Re-examined (2011) 5 CrimL and Philosophy 1, 3

[97] ibid

Corporate structural recklessness defeats arguments of vagueness leveled against corporate ethos theories, though it creates a recklessness which may seem insufficiently specific to the crime committed. Mens rea must be specifically connected to the prohibited act, and not just a general state of selfishness or lawlessness. Recklessness, as Susan Dimock points out with reference to intoxication, 'implies foresight of specific consequences or an awareness of or adverting to risks with respect to a prohibited act or result, and a decision to assume that risk.'[98] Does corporate structural recklessness similarly cast its net too wide to achieve the requisite specificity? It does not. It is specific enough in that it points to the type of risk, that is the risk that information does not flow through the corporate chain of command effectively enough to bring the elements of a specific criminal act (the one charged) to the attention of someone in charge of corporate policy. While the same type of structuring would make the agent reckless as to a variety of different acts occurring, there is still one type of risk-taking activity being envisioned. The recklessness has to connect up to the actus reus. This is in contrast to the problematic nature of the mens rea related to intoxication, which encompasses risks from arson to manslaughter, and does not have the specificity to connect the specific recklessness (getting intoxicated) with the act that eventually occurs — there is arguably no second-level advertence if it is truly the case that the person would never have done such a thing sober and had no reason to believe he would change so much when drinking. In cases of corporate structural recklessness, the Crown would still be required to prove that in its reckless structuring, the corporation was reckless as to bringing about the specific type of harm that actually occurred. Consider the nursery example again: while the nursery

[98] ibid 12

risked a variety of harms through handing out its binder and not making sure that its workers actually understood the large number of rules therein, in doing so it ran the risk of the specific rule being broken, along with all the other specific rules. It knew, among other things, that the crime of non-reporting of fever was one of the crimes that it risked not knowing about. This maintains enough of a tie between the mens rea and the actus reus to be in keeping with criminal law principles.

It comes down to this: the corporate nature of the mental element means that, in corporate structural recklessness it is possible for one individual to be reckless as to another individual's committing the offence. This does not mean that the individual would be individually liable, since she had only the mental element, and did not commit the fault. But the principle of group agency would mean that the more senior person's recklessness as to the more junior person's offending would engage the mens rea of the group itself. This is different from the collective knowledge problem, since there, nobody had the mental element of recklessness, and it just does not seem possible to create a mental state of recklessness, knowledge or intention out of innocent actions.[99] Corporate structural recklessness treats the group as a real entity, but only finds a fault element where a corporate fault was present. In this way, corporate structural recklessness incorporates the insights about corporate structure that are found in corporate culture-based theories into a more theoretically satisfying and also more workable doctrine of criminal liability. The doctrine of corporate structural recklessness turns these questions into questions that judges are used to dealing with already, but applied to the corporate person. Structural recklessness would not preclude a corporation from having a

[99] Hagemann and Grinstein (n 10)

decentralized structure, allowing pods to make their own decisions, but would open it up to liability if it did not in some way ensure that these separate pods knew their obligations and were well set up to meet them.

Conclusion

This chapter has considered the strengths and weaknesses of various theories of corporate mens rea, and has made its own addition to this literature. In cases where a mens rea of recklessness is sufficient, the doctrine of corporate structural recklessness provides a theoretically sound model for attributing liability to corporations. In this, it achieves what numerous theories of corporate criminal liability have failed to do. This theory of corporate structural recklessness builds on the significant insights of corporate ethos theories such as Pamela Bucy's. However, it attempts to bring some extra degree of specificity and to tie in the corporate case to more central criminal law principles, specifically the principle of recklessness. The corporate structural recklessness doctrine allows our understanding of the workings of corporations to fit in with the criminal law in a way that does not distort the principles of criminality, moral accountability and liability. It circumvents the problems of identifying who can stand as a mind of the corporation, does not negate moral culpability at the corporate level, is temporally related to the prohibited act, is not reducible to judging based on bad character and is precise enough to be in line with good criminal-law practice. While an objection could be made that corporate structural recklessness catches an overly broad range of offences in one mental state, I overcome this objection by showing that there is an onus on prosecution to connect the reckless structuring with the specific offence in question within this doctrine.

The importance of maintaining these principles has been a guiding element of the analysis, which has suggested reforms to the criminal law to keep it in line with its own best practices. While my analysis has been normative as to the law, it has sought to take corporations as they are, and not suggest treating them as being otherwise. The purpose of this analysis is to tie existing criminal law principles with existing corporate realities. The fact that these legal principles are often strained or broken in judicial and legislative practice is not relevant; this work maintains both that these principles should be preserved and strengthened, and also that they do not preclude attributing liability to corporations as those corporations currently exist.

6. Excuses, emotional states, and corporate entities

Introduction

As subjects in criminal law, it is open to corporations to argue that they should benefit from available defences if they are found to have committed a prohibited act. It seems unlikely that a corporate entity could benefit from such human-type defences as insanity or lack of capacity.[1] But other defences, such as epistemic mistake, might seem more plausibly applicable to corporations.[2] This chapter considers the applicability of excuses in criminal law to corporations, with particular emphasis on the excuse of duress.

One of the complicating features of excuses, as they might apply to corporations, is that at least two of them are very tied up with emotional states. Duress legitimizes wrongful actions people commit out of fear for the safety of a loved one or for their own safety, and provocation, a partial excuse to the crime of murder, is the law's expression of understanding that humans will experience anger and that in some circumstances that

[1] Though for an argument on diminished capacity of certain corporate entities, see Carlos Gómez-Jara Díez, 'Corporate Criminal Liability in the Twenty-First Century: Are all Corporations Equally Capable of Wrongdoing?' (2011) 41 Stetson L Rev 41

[2] François Tanguay-Renaud, 'Puzzling about State Excuses as an Instance of Group Excuses' in R.A. Duff and others (eds), ***The Constitution of the Criminal Law*** (Oxford University Press 2013) 119, 131

anger should partially exculpate them for their wrongdoing.[3] These emotion-based excuses bring us back to the issue of whether corporations can experience emotions, which I first broached in chapter 2, on the moral agency of corporations. The earlier discussion addressed critics who make an argument that corporations have no capacity for moral judgment because they lack access to emotional states. Here, the discussion is to some extent flipped, as the question is whether corporations can benefit from our understanding that emotions have caused them to do wrongful things. In both discussions, if we do not accept that corporations have emotional states, then we are likely to analyze their moral status as being quite different from that of individuals. If we take the converse view, and can show that corporations do have emotions, then we may start drawing some closer comparisons between corporations and humans, though other different features of corporations may still mean that important distinctions between how we understand human and group moralities, and, in the context of this chapter, when we are willing to make excuses for moral failings in individuals and in corporations. Very little has been written about whether criminal-law defences apply to corporations.[4] And yet there is a practical dimension to this question, since it is open to corporate defendants to claim a defence, and it would be useful if, when they do, there is some prior theoretical consideration of the issue for judges to consult.

[3] The existence of the partial defence of provocation, and its contours, are very controversial, see e.g. R.A. Duff 'Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion?' (2015) 58 Inquiry 189, 203-207, and Jeremy Horder and Kate Fitz-Gibbon, 'When Sexual Infidelity Triggers Murder: Examining the Impact of Homicide Law Reform on Judicial Attitudes in Sentencing' (2015) 74 Cambridge LJ 307. I am not going to concern myself here with the arguments for or against, but with the question of similarities or differences between how the law should treat individuals and corporations.

[4] Tanguay-Renaud (n 2), 124 fn 13: 'The question of the availability of excuses to non-state organizations, such as private corporations, is also notoriously under-theorized.'

The criminal law of defences is generally understood to be comprised of two categories of reasons for non-culpability: justifications and excuses. While justifications cover cases in which conduct that might otherwise have been wrongful is in fact not wrongful because of circumstances (for instance many cases of self-defence), excuses serve to exculpate an actor who has committed an act that is wrongful on the basis of an explanation of her reasons for acting wrongfully. Duress, for instance, is an excuse in which the defendant claims that his action should not lead to a conviction because, though wrongful, it was done in legitimate fear of some serious consequence to himself or someone close to him. The partial defence of provocation applies when a defendant has committed murder while in immediate response to a serious provocation by the victim. While there is no doubt much to be said about how and when justifications would apply to corporations, I focus on excuses, as these address some particularly vexing questions of when to offer understanding to a wrongdoer, and the question of whether this understanding should be extended to corporations probes the relationship between individuals and corporate groups within the normative framework of the law.

This chapter will consider these issues in the following way. In section one, I explain more fully the relationship between the emotions and excuses to criminal culpability. Also in this section, I elaborate on the theory of corporate emotions that I began to describe in chapter two. I apply this theory to hypothetical and historical scenarios, arguing that this could give rise to corporate fear or corporate anger, in ways that descriptively resemble individual fear and anger. This leaves untouched the issue of how the law should respond when corporations act from an emotional motivation. In section two, I address the normative question of whether there are specific features of the corporation that would lead the law to conclude that the parameters of emotion-based excuses ought to be different for corporations, even if the same occur in the corporation as in the individual, and those intentions are formed as a result of the intender being under the sway of a particular emotion. I explore, and ultimately endorse, the idea that because of their distinct features as artificial entities, corporations ought to have restricted access to excuses for criminal action. Corporations are entities that persist because of the choice of individuals to act together as a group agent. That choice creates an extra layer of responsibility. Nevertheless, there may be cases where the emotion is so pervasive within the corporation, and so strong, that it does warrant an excuse for the corporation as a whole. Overall, this chapter shows that corporations ought to have access to excuses even in cases where it might not seem intuitive, but that these excuses will come to bear even more rarely than they do for individuals.

Excuses and emotions: the ontological question

Excuses to crime are generally understood as being special provisions in the criminal law where a person is exculpated despite having done something wrongful. It is the criminal law's version of saying, 'You shouldn't have done that, but I understand why you did it, and your actions were reasonable.' This understanding does not necessarily mean that you are completely excused: provocation, for instance, is a partial excuse, which downgrades a charge of murder to a charge of manslaughter. But the law judges that it was right for that person to be thus emotionally affected by the situation they found themselves in, or in other words (as John Gardner has argued), the law of excuses exculpates when a person has shown as much resilience in a situation as to be expected from anyone.[5] The emotion-based excuses are not saying that it was right to act as the defendant acted, but that the law is willing to accept that the defendant was in some way understandably moved to a faulty assessment of her reasons for action at the moment she committed the crime. Duress allows a defendant to plead that she acted out of fear (for herself or others close to her) and thus did something criminally wrongful, but should by virtue of her reasonable fear not be found blameworthy for her actions. Duress succeeds only where the threat of death or serious injury is to either the defendant herself, or a close family member. This is because it is only where the threat is to someone closely related to the wrongdoer that it is deemed reasonable for the fear to become destabilising in the way that excuses acting wrongfully.[6] The basis of both excuses is that the law allows an exception for people who act wrongly when under the sway of some very powerful emotion.

Does this kind of emotion-based excuse make sense only in the individual context? The previous discussion in this dissertation on corporate emotions occurred in the context of emotions as necessary for an agent to properly appreciate moral issues and properly exercise moral agency. There, the human being's access to emotional states was raised as a source of superior moral knowledge, with writers such as Wolgast pointing to the corporate entity's supposed lack of emotional states as a reason why it could not be as ***good*** a person as a human being.[7] While Wolgast, May and others highlight the emotional nature of human judgment as a contrast to some other type of thinking faculty — whether we call that rational, more controlled, calculating, cold — because they are

[5] John Gardner, ***Offences and Defences*** (Oxfod University Press 2007) 124

[6] Duff (n 3) 200

[7] The prior discussion of this topic can be found in chapter 3

specifically trying to highlight a difference between human and corporate behaviour, legal writers on excuses highlight emotionality as a separate source of human behaviour even though they generally don't address corporate defendants at all. However, while Wolgast and others talk about emotions as a source of strength or extra ability, in the case of duress, we accept emotion as a source of weakness, a reason why humans get things wrong. The emotional capacity of humans is offered up (and often accepted) as a reason why we should not blame someone for doing something wrong, often a very violent and harmful wrong too. This is so in the case of provocation, which is in itself a controversial defence, but also in excuses such as duress and excessive self-defence.

The emotion of fear, and its destabilizing effect on the individual, really is the object of the excuse of duress. The case of ***R v Martin***[8] shows that the law is merely extending the excuse because someone acts in response to a criminal wrong by another party, for instance to prevent kidnappers murdering someone. In ***Martin***, the Court of Appeal held that an accused would be excused for driving with a suspended licence if the accused's wife threatened to commit suicide if their son did not get to work on time, and the accused reasonably believed that she would. The judges appeared not to believe Mr. Martin's version of the events, but nonetheless, the fact that one's wife would commit suicide was taken, as a matter of law, to be sufficient cause for fear that it would excuse breaking the law.[9] The excuse also the covers more classic scenarios such as the person who robs a bank because her parents are kidnapped and held until she does. But it covers more than just cases in which someone is threatening greater harm to an innocent third

[8] ***R v Martin*** [1989] 1 All ER 652 (court of appeal criminal division)

[9] ibid

party, as the ***Martin*** case shows. It is truly, as Duff noted, about the destabilizing effect of a great fear.

The threat to a loved one destabilizes in the sense that it makes a person no longer able to consider the issue properly using all his rational faculties. How could it be that a corporation acted under duress? There would have to be a threat to someone (or several someones) close enough to the corporate entity for the connection to count as the kind of close emotional bond that the law accepts as grounding a duress claim. The corporation would also have to be in the grips of a fear so great that it was destabilizing to the corporation's ability to act in its usual rational way. It would have to be this destabilizing fear, and not some other motivation, that caused the corporation to perform the act in question, in other words that the threat coerced it into committing the action in question. Finally, a court would also need to find that this was a reasonable fear and that the commission of the crime in question was a reasonable expression of that fear.

An adaptation of a historical case from Nazi Germany provides a compelling example of when a group might feel the fear necessary to ground a duress claim. IG Farben was a German company that was tried for aiding the Nazis in committing atrocities.[10] It was a large company that was already in the business of manufacturing chemicals, and some of these chemicals could be used in death camps and in the war. The company tested out poisons on live subjects in concentration camps. It used slave labour from the camps, and even purpose-built a factory next to Auscwhitz so that it could more efficiently make use of the slave labour contained therein. It produced synthetic fuel and rubber that were important in the Nazis' war of aggression. The

[10] Florian Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial' (2010) 8 JInt'lCrim Justice 783

company also held the patent for Zyklon B, the poison used to kill victims in gas chambers in extermination camps, in addition to being a major owner of the Zyklon B licensee company that actually manufactured and provided the poison to the camps. After World War II was over, the directors of IG Farben were tried criminally as part of a series of trials called the Subsequent Nuremberg Trials. At trial, the executives of IG Farben claimed that they acted out of fear that if they did not do as the Nazi officials wanted, they and their families would be harmed. The court deemed this to be a reasonable fear and a sufficient excuse (they called the excuse 'necessity' but it is equivalent to what we call duress, and quite distinct from the defence we now name necessity). On several of the counts that they were tried on, the excuse was accepted as exculpating the executives of IG Farben for their acts.[11] While it might seem like an easy thing for these directors to claim after the fact, it is likely true that if they had not cooperated with Nazi directives, they would have been in danger of reprisals. Leaving aside whether that was really true in the case of those directors, what if a corporation, in wartime, was asked to commit criminal acts, with a strong and reasonable suspicion that if it refused, directors or employees would be murdered? Executives who could show that their fear was reasonable would be excused. What about the corporation itself?

Firstly, I want to show how the corporation can experience the requisite fear. In writing on the availability of the excuses to states, Andrew Simester cites List & Pettit's ***Group Agency: The Possibility, Design, and Status of Corporate Agents***[12] for the proposition that group agents such as states are (or at least may be) corporate agents, and

---

[11] They were not acquitted, however, on their decision to build a factory adjacent to Auschwitz so that they could make most efficient use of the slave labour therein. For that initiative it was found they had no excuse, ibid 791-93

[12] Christian List and Philip Pettit, ***Group Agency: The Possibility, Design and Status of Corporate Agents*** (OUP 2011)

asserts, following List & Pettit's account, that while a corporate agent has moral agency, it is incapable of having emotions.[13] François Tanguay-Renaud, writing on the same topic, espouses the same opinion as to the corporate entity's lack of emotional capacity, citing Pettit.[14] As will be amply clear to someone who has already read chapter three, I disagree with this assertion as a general statement. But there is more to be said when it comes to the role of emotions in criminal excuses. There may be corporate emotions, but they may not relate to a theory of excuses in the same way that individual emotions do. My aim in this section is to challenge Simester and Tanguay-Renaud's, and by extension List and Pettit's, denial of the possibility of emotional weakness in corporations. Nevertheless, I will argue that in the course of things, corporations experience emotional weakness to a much lesser extent than individuals do, and so for that reason, while the defences are applicable, they will much less frequently be successful. This difference in emotional makeup is something that a trier of fact would want to take into account when presented with an excusatory argument

Both Tanguay-Renaud and Simester, writing about state actors, conclude quite summarily that group agents do not experience emotions and so cannot benefit from emotion-based excuses. Simester writes that even if one accepts List and Pettit's account of the corporate agent, 'the irreducible upshots that mark out the organization are essentially cognitive rather than affective.'[15] For Simester, this means that the organization does not include a group-held experience of fear, and so the organization

[13] Andrew Simester, 'On Justifications and Excuses' in Lucia Zedner and Julian V. Roberts, (eds), ***Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*** (Oxford University Press 2012) 95, 109

[14] François Tanguay-Renaud (n 2),129

[15] Simester (n 13), 109

itself cannot benefit from an excuse that it acted out of fear. Simester also states that duress cannot excuse vicarious fear, whatever that may be.[16] Tanguay-Renaud relies on some of Pettit's earlier work, but that work is similar to List and Pettit's in that it also finds the source of the organization's intentionality in the irreducibility of group intentions, based on the discursive dilemma.[17] Because Tanguay-Renaud gives somewhat more thought to what it means for a group to act based on the votes of individuals who act out of fear, he finds a compromise position: organizations cannot benefit from emotion-based excuses, but can benefit from cognition-based excuses such as mistake of fact, and the factual mistakes in question may rest on the emotional disturbances of their members.[18] Therefore, he gives some space to the role that emotions might play in informing a group decision, despite leaving emotional states firmly in the individual terrain.

Tanguay-Renaud's solution is innovative, and is to be preferred to Simester's. Groups can act based on emotional states, and that if members' emotional states change, this can affect the decisions of the group. But even Tanguay-Renaud's formulation gives too little credence to the ability of an emotional state to become a group emotion. A consideration of the phenomenon of the angry mob should make this clear. Banding together with other angry people can cause an individual's anger to increase,[19] and conversely, one angry individual's emotion can cause the group's overall level of anger to increase, affecting the group's intentions and actions. This is true both for simple mobs and for voting groups. This limitation in Tanguay-Renaud's and Simester's theorizing

---

[16] ibid

[17] See chapter 2 for a fuller explanation of the discursive dilemma

[18] Tanguay-Renaud (n 2) 130-132

[19] Elaine Hatfield, Megan Carpenter and Richard L. Rapson, in Christian von Scheve and Mikko Salmela, (eds), 'Emotional contagion as a precursor to collective emotions' in ***Collective Emotions***, (Oxford University Press 2014) 108

derives from List and Pettit's (and Pettit's in his individual writing) excessive focus on voting as a means of creating corporate intention-forming. This focus excludes equally plausible grounds of attribution based, for instance, on commonly held beliefs that all the members of a corporation act from, despite not taking votes on them.

The difficulty with many solutions that are predicated on List and Pettit's account of group agency is that they are too narrowly focused on the way in which voting can express group agency. List and Pettit focus on the discursive dilemma because it is, for them, the best way of showing how group agency can be separate from aggregated individual agency, despite supervening on that agency. While List and Pettit take note of Peter French's more flexible formulation of how an individual state may become a group state, and of Michael Bratman and Margaret Gilbert and others on joint intentionality, they configure their entire analysis around the discursive dilemma and so around voting procedures, seeing all of group agency as responsive to yes-no questions and eliminating affect.[20] But the influence of List and Pettit's 'neat' thesis on other writers (and possibly on themselves) has been an overly narrow focus on cases of group agency that proceed by vote. Even if a vote does not create a group-level emotion, other processes of corporate attitude formation might.

The result for someone who follows Tanguay-Renaud or Simester in their reliance on List and Pettit and their extrapolations of group theory from the discursive dilemma, is that while the individuals acted out of fear, the group did not. It seems implausible that the actions of the group should supervene on the actions of the individuals, and that the individuals acted out of fear but the group did not, when the

[20] List and Pettit (n 12), chapters 2 and 3, but especially at 42-58

actions are the very same actions. This is explicitly Simester's position, and it does not seem that Tanguay-Renaud's thesis has any help to offer the corporate entity that acted from fear: there was no epistemic mistake on the part of IG Farben. In cases of duress the issue is not what the offender understood, but why she did what she did. It seems that Tanguay-Renaud wants to square the results of individual and corporate excuse-making by saying that where a corporate body makes a decision based on the fear of its members, that decision will be imperfect and therefore will likely have made an epistemic mistake in its assessment of the situation (for instance, using excessive force instead of justified self-defence). But there is no such resulting epistemic mistake in IG Farben's case. It is not what the company did but why it did it that is at issue, as it is in all duress cases. And so under Tanguay-Renaud's analysis we would similarly have the result that the self-same action by the self-same agents would constitute an excuse at the individual level ***for all individuals involved***, but not at the group level. There might be good reasons to achieve this result, but I do not think that those reasons take the form of saying, the individuals were motivated by fear, but the group was not. For one thing, if the group wasn't motivated by fear in its intentions, then what was it motivated by? Perhaps the idea is that the group intends, but does not have motivations behind its intentions, if those motivations would be emotional. This seems like a perverse conclusion for any proponent of the reality of joint intentionality to come to. This is especially so given that List and Pettit allow that a corporation can have desires and beliefs.[21] If the corporation has desires, then it should have the content of those desires to their emotional motivation.

[21] ibid 29-32

There are several theories of group agency that can help us get beyond this limitation, this cutting off of the group's motives for intending to act as it does. To begin, let us think again about Peter French's method of attribution of individual action to a corporation. His theory is explicitly one of corporate action and of the reality of the corporate entity, but it is by contemporary standards quite individualistic, in the sense that it does not argue for group autonomy in the way that List and Pettit do. French's thesis is that an act, belief or desire becomes corporate when it is taken or held in accordance with the Corporate Internal Decision (CID) Structure of the corporation. In other words, if the rules by which the corporation operates say that a manager working in this area can, on her own, act for the corporation in signing certain documents, then her act becomes corporate when she signs those documents. As I outlined in chapter three, in recent work, French has conceded that some kind of affectivity (emotion) must be part of the picture for a moral agent, and sketched out his own solution for identifying affectivity in the corporate person.[22] French's solution is to say that corporate regret is found in corporate speech and action. So, a corporate employee who expresses corporate regret is expressing some actual corporate affect even if no individual anywhere holds that affective state at the individual level, as long as the regret 'arose from a corporate assessment of the moral quality of its actions in accord with its CID Structure.'[23] This is a very thin understanding of affect, and what is more, French claims that this is all that individual regret is also, simply a willingness to behave consistently with a judgment that

[22] Peter A. French, presentation in Shared Responsibility Workshop, Faculty of Law, University of Oxford, September 2012; presentation available online at http://documents.mx/documents/corporate-affectivity-and-membership-in-the-moral-community-peter-a-french-phd-lhd-lincoln-chair-in-ethics-arizona-state-university.html, last retrieved 1 March 2016

[23] ibid slide 32

one has done something wrong.[24] What matters to French is that the corporation then act in accordance with regret, mainly by taking steps to ensure that the regrettable occurrence is not repeated. French's theory of corporate personhood predates a lot of the contemporary interest in collective agency (of Bratman, Gilbert, Rovane, Tuomela, List and Pettit, and others)[25] and while it was groundbreaking when it appeared, it can now be enriched with some of that theoretical work that has extended our understanding of how groups intend and act as groups. Two theories on collectively held emotions, that of Margaret Gilbert and of Hans Schmid, draw pictures of more substantial and meaningful form of collective emotion. While neither of these formulations is the one that properly describes how fear can become a corporate emotion in particularly the way that grounds a claim of duress, for the purposes of the possibility of attributing emotions to collectives, they help to understand the challenges a theory of corporate emotions must meet.

Gilbert's formulation depends on the existence of a joint commitment. For Gilbert, a group of people who enter into a joint commitment to be excited for their friend need not feel personal excitement in order for their collective excitement to be genuine.[26] They only need to commit to acting in accordance with the collective's

[24] ibid

[25] Michael Bratman, 'Shared Intention' (1993) 104 Ethics 97, Margaret Gilbert, ***Sociality and Responsibility: New Essays in Plural Subject Theory*** (Rowman and Littlefield 2000), Carol A. Rovane, ***Boundaries of Agency: An Essay in Revisionary Metaphysics*** (Princeton University Press 1997), Raimo Tuomela, ***The Philosophy of Social Practices: A Collective Acceptance View*** (Cambridge University Press 2002), Raimo Tuomela, ***Social Ontology: Collective Intentionality and Group Agents*** (Oxford University Press 2013), List and Pettit (n 12). This is a non-exhaustive list of influential works by this non-exhaustive list of influential thinkers in the area. As Elisabeth Pacherie notes, 'In the last decade, there has been an explosion of interest among philosophers and cognitive scientists alike in the topic of joint action.' Elisabeth Pacherie, 'How does it feel to act together?' (2014) 13 Phenom Cogn Sci 25, 25

[26] Margaret Gilbert, 'How we feel: understanding everyday collective emotion ascription' in Christian von Scheve and Mikko Salmela (eds), ***Collective Emotions*** (Oxford University Press 2014) 17, 28

emotion.[27] In the case of a large group, each member need not subjectively commit to each emotion, but might make a 'background basic joint comitment' allowing for an appropriate person to jointly commit them to further emotional states.[28] But importantly, Gilbert holds that no individual need feel any pangs, twinges, flutters of emotion. Indeed, Gilbert insists that the emotion is not 'fake' even if no individual member holds it.[29] And this makes emotion into something one holds simply by deciding to, which seems at odds with what most of us would understand by emotion, even if we were to accept a cognitivist theory of emotions. Hans Bernhard Schmid shares my dissatisfaction with Gilbert's theory of joint feelings, writing, 'Insofar as the guilt feeling is really collective, it is no feeling at all. Gilbert's account of collective emotion is really a combination of a joint evaluative attitude with some individual feelings.'[30] Note that Schmid misunderstands Gilbert's theory slightly and attributes more to her than she claims, for Gilbert is explicit that no individual feelings are necessary, and so indeed all that is required is the joint evaluative attitude. For this reason, I take it to be an insufficient account of corporate emotions for the purposes of grounding an excuse, regardless of what its merits would be otherwise. The trouble is, with such an excessively behaviouristic account of what it means to be in an emotional state at the group level, the emotion does not rise to the level needed for the court's understanding of either duress or provocation. I would be interested to know whether a strong proponent of Gilbert's account would agree (Gilbert does not write about the criminal law context, so does not directly answer this

[27] ibid 25

[28] ibid 23 fn 10

[29] ibid 28

[30] Hans Bernhard Schmid, 'The feeling of being a group: corporate emotions and collective consciousness' in Christian von Scheve and Mikko Salmela (eds), ***Collective Emotions*** (Oxford University Press 2014) 1, 9

question), and it seems possible they would not. One could take quite a behaviourist or positivist line on emotions, and hold that acting in accordance with fear is all we can mean by saying that someone is fearful.

Gilbert's explanation of group emotion may well be applicable in other cases, but it will not do for the criminal law. A case in which each and every member of the corporation took the stand and said, 'I personally was not scared,' would not be a case in which any judge would think that the appropriate response would be to exonerate the corporation on the basis of its collectively-held fear. It would also lead to an odd result in an IG Farben-type case, the diametrically opposed result to the one under a Tanguay-Renaud or Simester analysis in which the individuals would be excused but the corporation would not be excused for the self-same conduct. In a Gilbertian analysis, one would have to countenance a possible result in which the corporation was excused on the basis of jointly-held fear leading to duress, but the individual members were convicted.

There has to be something more rooted about the emotion that feeds the action in order for the resulting action to be characterized as motivated by that emotion, at least for the purposes of excusing a wrongful action taken because of the destabilizing effect of that powerful emotion. If we took a Gilbertian case of people committing to group joy even if none individually felt joy, then their joyful actions would be motivated by the joint evaluative attitude, and not by the emotion itself. It cannot be the case that although none of us was truly afraid, we as a group acted afraid and that is enough to exonerate us for having made poisons for the Nazis to use in killing people. This kind of group attitude would have nothing destabilizing about it.

Schmid's account is decidedly more robust than Gilbert's. For him, a group can participate in 'one feeling episode, one phenomenal experience,' involving a 'phenomenological fusion,' of their experiences.[31] It is not necessary to the task at hand to evaluate Schmid's theory in too much detail, for even Schmid finds it is likely that corporate groups as they currently exist do not experience this type of phenomenological fusion.[32] Yet it is useful to note that some philosophers do advocate for a much richer understanding of the experience of group emotion. Even if it does not exist in this way in its fullest form, some aspect of the sharing of emotionality could be at play in the corporate context.

Again, keeping in mind our task of identifying fear at the corporate level that would make it true that the corporation acted out of duress, what we are looking for is something far weaker than a group phenomenological experience. We are looking for an emotion that can be ascribed to the corporation because it informed the corporate ethos or actions in the way that an individual emotion informs an individual's ethos or actions. To start simply, take a case where a single individual has power to bind the corporation to a contract with the government to produce chemical weapons but this individual, for reasons of conscience, is going to reject the contract. The night before she is to decide whether to agree, government-hired criminals enter her house and kidnap her child, giving her instructions that she will only see the child alive if she signs the contract. Out of fear, she signs. She has acted under duress. Has the corporation similarly acted under duress? If we follow a theory of attribution of emotion to the corporation in cases where the corporate-individual is acting for the corporation in a way that involves emotion, then yes. Under a theory of joint commitment such as Gilbert's we ***might*** also say yes, and whether we did or not would depend on our understanding of the kind of prior

[31] ibid

[32] ibid 15

agreement the members of the corporation had entered into, the question being whether or not they had jointly committed to have a member in this individual's position commit them to emotional states in the future. In Schmid's theory we would have no corporate emotion in this instance, which might then lead us to conclude that we have no corporate duress. No group phenomenal affect occurs in this instance. On the other hand, all members of the corporation who were involved in this decision were under the relevant emotion, and I think the case for saying the corporation acted under duress in this case is quite strong, assuming that it was within the normal operation of the corporation to delegate a decision with serious normative implications to one person.

A further case might get me into more trouble, though. Suppose the board of directors of a company, called Guns Ltd., had scheduled a vote on whether to enter into a contract to sell weapons to a criminal gang. Out of five members of the board, three of them plan to vote no for ethical reasons, and two plan to vote yes. However, the night before the vote, members of the criminal organization kidnap the child of one of those who planned to vote no, threatening to kill the child if the member doesn't change his vote. The member changes his vote, and the corporation decides to sell the weapons to the criminals, by a 3-2 vote. Has the company acted under duress in this case? There is an argument that it has, but in my opinion the better answer is that there is still no duress here. There was no phenomenal fusion or experience of fear that pervaded the corporate culture. And a majority of those who voted yes (two of the three yes voters) did not vote out of fear, so there was at least a significant corporate trend towards voting yes without any element of fear. There is an argument to make that the corporation did indeed act under duress. Compare it to the previous hypothetical, in which one person held the corporation's authority to bind it by her own decision. There, we had a corporate structure in which all of the decision-making authority was being influenced by fear, and because of that I concluded that the corporate decision was primarily motivated by fear, and should be understood as such (again, we are only describing the corporate affect here, not judging whether that should be enough to afford it an excuse, which will be considered separately below). In the multiple voters case, it is not nearly as straightforward to determine whether or not the corporate decision was dominantly motivated by fear.

There is a but-for argument to be made in favour of finding that the corporation acted under duress: without the board member's fear that his child would be killed, the decision would have gone the other way, and the corporation would not have committed the criminal act. Writing in a different context, Gilbert proposes that it is intelligible and relevant to question whether a collective has been 'subject to external pressure.'[33] Here, one member of the group was subject to external pressure. Given that pressure is a matter of degrees and not an all-or-nothing concept, it is fair to say that if one member with sway within the collective is under pressure then the whole collective is under at least some degree of pressure. But given that the question at issue here is whether it is fair to describe the corporate entity as having acted under duress, the answer has to be no. When a corporation was so close to the line on entering into a criminal activity as this, and when the majority of those who voted yes did so out of greed rather than fear, it is unpersuasive to say that the corporation as a whole might be excused on the basis that it was fear that drove its action. Fear was a minority component of the action, not the main motivator.

[33] Margaret Gilbert, 'Who's to Blame? Collective Moral Responsibility and Its Implications for Group Members' (2006) 30 Midwest Studies in Philosophy 94, 108

This resolution in the negative, however, immediately prompts a question as to a further scenario where the answer might be that duress did drive the decision, and the scenario is not very different from the last one. Suppose there is a similar company, The Right Guns, with the same offer before it, and a similar voting set-up: five directors must vote on whether a corporation will sell weapons to a criminal organization. In this case, however, the criminal organization finds out that the corporation, being mostly made up of law-abiding members, is not even close to voting yes. Of the five, only one member is greedy enough to want to make the deal to put weapons in the hands of criminal killers. The criminal organization therefore kidnaps family members of two out of the four remaining board members of the Right Guns. Both members change their votes, giving the contract a three-member majority. Here, not only is it true that the company would not have signed the contract without pressure of duress (as was also true in the previous example), it is also the case that duress was the dominant contributing reason why the contract was signed. This makes a crucial difference. In this case, it is descriptively correct to say that the corporate entity was put under sufficient duress that it acted from fear rather than other motives.

A possible objection to this argument is that it makes overly fine distinctions: there is insufficient difference between the scenario of Guns Incorporated and the scenario of The Right Guns to make one a punishable crime and the other a case of duress. It is uncomfortable to have a 50%+1 type rule for whether fear is dominant and an excuse to crime is made out. But note here the word ‘dominant.’ It doesn’t mean that in a situation in which 30% of the members of the corporation are experiencing destabilizing fear that fear is not at work in the group; it merely means that it is not dominant. To make out the descriptive element of duress, this dominance is a meaningful, if nuanced, difference. It is also a distinction that can be replicated in the individual case. Let's say Anne offers Judy the possibility of participating in an armed robbery. Judy has always wanted to participate in a robbery, but she says she'll think about it. Anne then offers an extra incentive to Judy, that she will give Judy guitar lessons. Judy is now almost certain she's going to say yes. But Anne, not knowing this, gets worried that Judy isn't going to participate, and tells Judy she will stab her in the stomach with a knife if Judy doesn't help. Judy finds this scary, and believes Anne would stab her. Judy says yes. In this case, it seems to me that it would be wrong to say that Judy acted under duress. There was some duress there, and it's possible that she might ultimately have backed out without it, but it wasn't her dominant motivation for agreeing to join in the robbery. The guiding principle is the same for a corporation: we have cases in which an emotion, while present, is not the dominant reason for action, and cases in which it is. We also have borderline cases, or cases in which we will be reluctant to say with certainty which motivator was dominant.

One difference in the individual case is that we cannot apportion percentages to each motivation as neatly. In the group case, five members each with a dominant motivation means five equal parts of motivation. In the individual case, it is possible that Annie has five motivations to act in a certain way, but one of them is so strong as to eclipse all the others. This is different than in the five-member vote in a corporate body. Nevertheless, the guiding principle is the same: we have cases in which an emotion, while present, is not the dominant reason for action, and cases in which it is. We also have borderline cases, or cases in which we will be reluctant to say with certainty which motivator was dominant. Still, on the issue of whether duress is made out as far as the objective or normative element is concerned, I will have more to say about the Right Guns in the next section: that while the Right Guns is descriptively a case of fear being dominant, it does not meet the objective test for duress, because of the principle of group entanglement.

Another objection to my solution on corporately-held fear is that the fear cannot become part of the corporation if it is never publicly communicated. In an IG Farben-type case, it would have been commonly understood that the members of the company would put themselves and their families at risk if they disobeyed Nazi requests for assistance. Even if they did not speak of their fear, that fear would likely be common knowledge, and would pervade group meetings and other interactions. In the case I am describing, external forces have put pressure on members of the corporation individually, and the response of the members would almost necessarily be not to tell anyone of their fear. Given that I have argued that sometimes individual emotions stay individual rather than becoming corporate, how can I say that these privately guarded fears are transformed into corporate fears? There are good reasons to do so. Firstly, an emotion might come to pervade the culture of the corporation even if it is not openly spoken about, and so the secret nature of the fear does not preclude it becoming widely felt in the corporation. Consider greed as a corollary here. Greed is an emotion that is often attributed to corporations, and is experienced by members as part of the corporate culture in certain organizations.[34] This is despite the fact that nobody needs to express out loud, I am greedy and I act out of greed when I make corporate decisions. The same is true of other emotional states: they have their effects, whether they are said out loud or

[34] William James was also of the opinion that greed is an emotion: William James, 'What is an Emotion?' (1884) Mind 188. This assertion might strike the reader as controversial. I agree that it is not as clearly within the centre of what we mean by emotion as fear or anger, but it definitely has similarities: it is characterized by feeling, it can come and go from one's mind, it can often be triggered by external stimuli (such as seeing something one desires), and it changes one's dispositions and attitudes when we are under its sway. As such, I think it has enough claim to be emotion-like that it is a useful element to discuss in this conversation.

not. One might also think of these as akin to a felt but unacknowledged emotion in an individual, for instance when a person is in denial about being scared of something, but experiences and acts from this fear nonetheless. Secondly, what we are looking for here is emotions that explain corporate actions, rather than those that reside exclusively in the private domain. This brings us back to the intention-driving side of emotions, which is present when they are spoken as well as when they are unspoken. Both the individual members who are under duress and the corporation as a whole intend to vote yes to deal arms to the criminal organization. The individuals intend to do this variously because of greed and because of fear. Would it make more sense to say that the corporation intends it because of … nothing? It seems much more descriptively accurate to acknowledge the reality of the emotion, with its individual source, as the motivating spur to the creation of the intention, than to acknowledge that cognitive mental states can be attributed to the group but cut off the same method of attribution for affective or emotional states.

This account I am putting forward is not as collectivist as some accounts, such as Schmid's. In some way, it is more individualistic than Gilbert's account as well, in that it does not require a joint commitment to holding the emotional state, and it does require that emotion exists individually. What is collectivist in this account is that it allows for the possibility that social relations within a corporation might enhance or diminish corporate-individual emotional states. It is a collectivist argument based on the social relations between individuals. This is not the same as saying that the collective is acting ***as if*** it were afraid. No, the collective really ***is*** afraid, but its fear does not reside in some mind that is separate from the minds of its members. The fear that motivates the decision arises in some individuals, and may spread to others through emotional contagion,[35] and become part of the corporate culture.

My account explains how an emotion like fear can become part of the corporate mindset. Finding suitable examples of corporate provocation proves much more difficult.[36] This is especially so because the law requires that provocation be in the heat of the moment, to be a "hot" or "fast" emotion. But the more flexible method of corporate attribution via a similar route to French's CID Structure might allow us to build some plausible examples. For instance, here is a case in which a corporate entity acts out of anger and murders someone as a result of that anger. Imagine a protest outside the doors of a large cosmetics company that does animal testing. The protesters decide to do a pantomime with people wearing the brand's logo committing acts of sexual violence against dolls representing small children — their message being that the corporation and its customers should have as much compassion for the rabbits used in cosmetics testing as they do for human children. The resulting scene is a gruesome play of child sexual abuse on the steps of the company. The CEO and senior managers, meeting upstairs, look out the window and are collectively outraged and humiliated to have themselves depicted as violent child rapists. Enraged, they call down to their security guards to shoot the person in charge of the pantomime. The security guard, under great stress from the crowd and

[35] For a very interesting discussion on the extreme contagiousness of emotions, see Hatfield, Carpenter and Rapson (n 19) 108 and following

[36] Provocation, now called 'loss of control' in England and Wales, reduces murder to manslaughter where the murder was committed directly in response to a 'qualifying trigger,' which would be actions by the victim that 'caused D to have a justifiable sense of being seriously wronged.' Coroners and Justice Act 2009 (c. 25) ss 54 and 55(4)(b). In Canada, the partial defence of provocation applies if the murder was committed after a provocation sufficient to 'deprive an ordinary person of control,' see Criminal Code (Canada) R.S.C. 1985, c. C-46, last amended 23 July 2015, s. 232

hearing the direct order, does so, and the protester is killed. The law agrees that — absent a suitable defence — the corporation is guilty of murder.

Should the corporation be able to avail itself of a partial defence of provocation? One issue to be considered is that provocation has traditionally only been available where the anger was sudden, or 'hot,' an immediate reaction with no cooling off period available.[37] The immediate hotness of the emotion runs its course, gives your thinking self time to reassert control over your actions. So, for instance, it has been held in at least one case that the time it takes to reload a gun was sufficient to negate provocation.[38] In our hypothetical, maybe the time to punch in the phone number could be enough to bar a provocation excuse. But the security guards were on the phone already, and the CEO had only to say, 'shoot at the crowd now!' So, there was no cooling off time.[39] This is possibly as convincing as many provocation cases that have been accepted at law.

Provocation applies only if there is no 'cooling off' period. In the case of individuals, this is temporal. In the case of groups, we might find they benefit from a different kind of cooling off, having to do with their access to various individual minds to temper the hot emotions. In relation to this argument, it is interesting to note that even that most extreme collectivist, Schmid, contends that corporations can only exhibit slow thinking, and not the fast thinking sometimes associated with a hotheaded emotional

[37] Note that in the U.K., suddenness is no longer a requirement for loss of control (which is an updated version of provocation): Coroners and Justice Act 2009 (c. 25) s. 54(2): 'it does not matter whether the loss of control was sudden.' Nonetheless, the defence arose at common law with that limiting factor, and it is interesting to consider its effect on corporate provocation.

[38] ***R. v. McPherson*** (1957) 41 Cr. App. Rep. 213; on this issue see also Jeremy Horder, ***Provocation and Responsibility*** (Clarendon Press 1992), 70

[39] I am not suggesting that we should be moved to compassion by this fact scenario. But many successful cases of provocation defence are not particularly easy for our moral intuitions (many of them for instance involve violent men being partially excused for murdering their wives: Horder and Fitz-Gibbon (n 3) 316 ff) and for this reason provocation itself is controversial. For now, the question is whether it makes sense to say that the corporation acted from anger.

reaction.[40] For the present, it may be sufficient to say that it is highly unlikely that a corporation would ever be able to present facts that would accord with corporate-entity anger in a case of retaliatory murder, it remains, based on the analysis of corporate emotion, a possibility.

While corporations have emotions and those emotions influence their intentions and actions, that does not mean that the criminal law must treat those emotionally informed decisions in the same way as it does those of individuals who are in the grips of a destabilizing emotion. We move now to consider what the law's response to a corporation's emotion-informed decision to commit a crime should be. The next section will consider the objective part of the tests for duress and provocation in the case of the corporate entity, using the description in this section to consider normative questions of when the law ought to excuse bad action that was influenced by extreme emotion.

Corporate excuses: the normative element

The second element to a defence either of duress or of provocation is that the person who acted under the sway of that emotion did so in a way that a reasonable person also would have. In offering an excuse for criminal acts committed in fear, the law is making an authoritative statement that society finds this to be a reasonable response to fear stimulus: that, in the words of R.A. Duff, 'this is how appropriate emotions are properly expressed.'[41] In the IG Farben case, descriptively, the corporation acted out of fear. This does not automatically ensure exoneration. The law makes choices about when

[40] Schmid (n 30) 8

[41] Duff (n 3) 196

to provide an excuse, and its boundaries (between excuse and non-excuse but also in other areas) are drawn, hopefully, in a manner that makes the law most internally consistent and responsive to moral considerations. For these reasons, we might want to make a different set of arguments about what the law's response ought to be when a corporation claims an excuse. It is open to the law to say that the proper expression of the emotions of fear or anger is different in the case of a corporate entity, so that the self-same action by the self-same hands might give an excuse to all individuals involved but not to the corporation, despite my having highlighted the oddity of that earlier. Here the question is not whether they are descriptively the same, but whether the normative question should be altered in the case of corporations, for reasons having to do with their structure and their group nature. I conclude that while excuses will be available to corporations in very extreme cases, the voluntary nature of a corporate entity (its existence being due to the choice of individuals to come together in pursuit of an economic goal) and its nature as a joining of many minds, specifically the fact that many rational agents take part in most corporate acts, tend towards the conclusion that corporations should be given less leeway to act in breach of criminal norms even when they are under the same kind of emotional pressures that afford excuses to individuals.

The objective or normative question of the reasonableness of the emotion has (at least) two interesting issues at it relates to corporations. The first of these is whether the law has any room for affording an excuse of duress when a corporation acts in fear for the safety of a corporate entity rather than a natural person. The second question is whether all descriptive cases of destabilizing fear for the lives and safety of closely-related natural persons (such as in the Right Guns hypothetical above) also meet the objective test, and if not, whether there are special features of the corporation that differentiate between individual and corporate duress.

The law requires that the emotion of fear in duress be appropriate and appropriately expressed in order to ground an excuse. What does it mean for an emotion to be appropriate, and appropriately expressed? In the previous section, I talked about duress for personal reasons percolating up to the group level (i.e. the fear was for the personal safety of kidnapped family of members of the group). That is an appropriate time to experience fear at the personal level says the law, and also to express that fear in ways that breach the criminal law, so long as they do not extend to murder and certain other serious offences that cannot be excused by duress in most jurisdictions.[42] In a scenario where the family of a group member is threatened, it seems also appropriate for the fear to be present at the group level, for if the group does not care about the wellbeing of the family of its group members, then it is a pretty impoverished group. Therefore it seems healthy and correct that the group should sometimes stand in a similar relation to the child of a member of the group as the child's parent does, in terms of protectiveness and care for the child's wellbeing. But what about a more businesslike or corporation-centred fear? What if the corporation was in fear of its own continued existence? Is fear an appropriate emotion if the corporation's existence is threatened? A certain amount of

[42] In the U.K., the Law Commission summarized the law as providing a defence of duress for all crimes except for murder where the defendant was the one who committed the actual murder, as opposed to aiding and abetting, and also possibly for some forms of treason: Law Commission, (Law Com 83, 1977), ***Report on Defences of General Application***, paras 2.1-2.2. and also ***R v Howe*** [1987] AC 417, 2 WLR 268 (HoL). Subsequently the House of Lords has decided that the defence is also not open for attempted murder: ***R v Gotts*** [1992] 2 AC 412, 2 WLR 284. In Canada, compulsion by threats does not apply to a number of serious offences, including attempted murder, sexual assault, or abduction and detention of young persons, Criminal Code (Canada) R.S.C. 1985, c. C-46, last amended 23 July 2015, s. 17 (this is the statutory defence of duress, though it is only one half of the defence of duress in Canada, the other half being the common law defenc, when the defendant was a party and not a principal to the offence, as the Supreme Court of Canada explained in ***R v Hibbert*** [1995] 2 SCR 973).

fear would be unsurprising, especially for an organization that holds a lot of meaning for members, or for an organization that supports many employees. This is the natural corollary of good stewardship, after all, in which a corporation wants to protect employees, shareholders and other stakeholders, and maybe also its customers, depending on how necessary its services are. However, that rational and measured fear associated with good stewardship is very different from the destabilizing extreme fear that the law accepts as creating an excuse for acting wrongfully.

There is something very different about a corporation claiming duress because it acted in fear for the life of a natural person, and because it feared for its own existence or that of a subsidiary or 'child' corporation. Would it ever be acceptable for a corporation to commit a crime in order to save itself? Let's imagine the corporation is facing a takeover by a private equity firm that it knows will strip its assets and sell them, laying off most of the 3000 employees in the company. It's worth remembering that not all of the crimes to which duress is applicable rise to the level of bank robbery or selling guns to criminals. Mr. Martin, after all, argued it in response to a charge of driving with a suspended licence. Is it possible that there is a proportionality aspect inherent in duress, that the corporation could argue it committed just a tiny crime in response to its fear of the corporation surviving? And in practice, where a criminal violation is very minor prosecutors are unlikely to pursue it.[43] This proposal cannot work. The size of the crime and the level of culpability the corporation demonstrated in its commission will be taken into account at sentencing. The finding of guilt does not occur on a sliding scale, even if

[43] This may be true of very minor offences, but in the case of corporate offences it may also be true for offences that are not pervasive. So in the U.S., where vicarious liability is the rule, federal guidelines nevertheless set out the principle that where wrongdoing is not pervasive, prosecutors should decline to prosecute. U.S. Department of Justice, Title 9, Chapter 9-28.000, Principles of Federal Prosecution of Business Organizations, 9-28.500

prosecutorial discretion and sentencing do. The question cannot be sidestepped in that way. It remains that it is a possibility that a corporate entity, accused for instance of falsifying its financial reports would claim that it acted under duress because its creditors threatened to call in all their loans at once and force the company into bankruptcy. The threat of its own demise would plausibly cause the corporate entity to react with fear, and form criminal intentions that it would not normally form.

Could the corporation argue that it has a right to life, and that this right grounds its ability to protect itself, even if the cost is committing a crime? Moderate anti-corporate personhood critics sometimes bring up arguments of a corporate 'right to life' that would be grounded in the rights of personhood.[44] I find that discussion a bit puzzling, however, since even if we posit the most robust theory of corporate personhood, corporations are still not alive, and so the right would not even be applicable. A right to continued existence or self-preservation could be substituted, but this would then give us the freedom to tailor that right much more to the existence of artificial entities, and come up with a more intuitively plausible solution, something along the lines of a less absolute right than the right to life, a right that can be abrogated by an entity's serious breaches of its responsibilities, for instance. Would this affect the corporation's ability to argue that it acted under duress if the entity that was being threatened was itself rather than a natural person? If the corporation has no right to life, perhaps this indicates that it has no standing as the object of a threat for a defence of duress, on the analogy that it is the life of a living being that must be threatened. But a person's safety can also engage duress, so

[44] See for instance Tracy Isaacs, 'Corporate Agency and Corporate Wrongdoing' (2013) 16 New Crim LR 241, 244-45

that for instance threatening to cut off the banker's son's arm might ground a defence of duress. It would be open for the corporate entity to substitute a right to safety.

Duress must relate to a threat of physical harm,[45] and it would be hard for the corporation to make this out. Employees might go hungry if they are laid off in great numbers, but they will not be maimed or killed in the process. The fear for the loss of one's organization can be very real. Let us suppose that the corporation in question is a charity that does life-saving work and is threatened with a lawsuit that will certainly end its existence, halting all of its good work and resulting in deaths of the people it would have saved. That could ground a physical harm element (though it would not have the close connection to an individual, one could argue that the people the charity is set up to benefit are in a very close relation to the charity itself). Let us say further the charity knows it can avoid dissolution by offering someone a bribe. If it offers the bribe, could it later argue duress?[46] The charity could make out that it had a destabilizing fear and that that fear was based on a reasonable understanding of the situation. Is it an appropriate emotion to be frightened for the corporation with a charitable purpose? Some fear is appropriate, and in this case it is likely that more fear than the fear that goes along with good stewardship is appropriate, given the important work the charity is doing. Still, most of us would only consider fear of the loss of an organization to be appropriate up to a point and that point would be nowhere near the destabilization required for an excuse of duress to be made out. The blinding, mind-altering fear, the sort of fear one might have if

[45] Celia Wells and Oliver Quick, ***Lacey, Wells and Quick: Reconstructing Criminal Law, Text and Materials*** (4th ed., Cambridge University Press 2010), 424

[46] Possibly it could even claim a justification, that of necessity, grounded in an argument that the harm avoided was much greater than the harm committed, but this would only work if it could prove that the lawsuit would definitely have occurred and that the charity would have been destroyed by it, had it not made the bribe, and that its work effectively battled harms.

someone pointed a loaded gun at one's child, would not be appropriate. And this is the level that one needs to find for duress to be applicable.

Is committing a criminal act an appropriate expression of the fear that one's organization may not continue its existence? Would it ever be a reasonable response to the fear of the loss of a corporation to act in a way that violates the criminal law? As a normative question, this is essentially a question of how we wish to fashion the legal system, a question of our legal values. It seems to me that it would be bending the law too far to allow either an individual or a corporation to excuse criminal action on the basis that she or it feared for the corporation itself. Yet the idea that an excuse would be available is not entirely implausible. Consider for instance the fact that Anglo-American legal systems typically allow people to commit certain acts that would otherwise be crimes if they are in defence of their property.[47] This shows that the legal tradition that created these defences is also one that places a great value on property. Would it be possible to combine the two, the law's valuing of property, and the excuse that it affords to those who act under fear, and say if one has a subjectively felt extremely intense fear that one is about to lose a beloved corporation (with its dual status as person and property), that it would excuse committing a criminal wrong?[48] Though one could try and push this argument, I think it would be to distort what most people understand to be the motivating spirit of the law in the area of excuses. The extreme kind of fear that the law

[47] In Canada, a person is entitled to use some proportionate amount of force to stop someone from destroying their property: Criminal Code (Canada) R.S.C. 1985, c. C-46, last amended 23 July 2015, s. 35. Many U.S. jurisdictions have defence of habitation laws that include the right to use lethal force on an intruder, see Benjamin Levin, 'A Defensible Defense?: Reexamining Castle Doctrine Statutes' (2010) Harvard Journal on Legislation 523, 530-536; this is also true in the U.K., see Joshua Getzler, 'Use of Force in Protecting Property,' (2006) 7 Theoretical Inquiries in Law 131

[48] Wells and Quick are definitive in the answer in the negative on this question (Wells and Quick (n 45) 424), but they are not considering it in the context of a separate corporate person whose continued existence is being threatened, and in this context it is conceivable the argument would play out differently.

recognizes as being a reasonable motivator when someone acts under duress is of a very limited kind, and were someone to say, but I felt the same kind of fear I would have felt if a family member were threatened, the law's best response would be to say no, we do not allow the same kind of fear-based response for a corporation as we do for a child or spouse. Even if the fear you experienced is indeed the same kind of fear you would have experienced over the death of a human loved one, the law does not accept that it is reasonable to the same extent for you to act from that fear. These are the types of impulse, on the contrary, that a person is supposed to resist. This allows us to form at least one relatively strong conclusion here, which is that no entity (corporate or individual) can ever claim an excuse of duress based on threats to the existence or security of a corporation, even if a corporation is classed as a person and is accorded certain rights in the legal system. Incidentally, this line of reasoning also applies to the justification of self-defence: a corporate entity could not be exculpated for a criminal offence on the basis that it acted to preserve its own existence.

Returning then to whether a corporation may be deemed to act appropriately if it breaks the law in response to fear for the wellbeing of a natural person, we come to the question of whether the distinct nature of the corporate agent means we should judge it differently when it acts on the basis of that destabilizing fear. Indeed, it might never be appropriate for a corporation to express an emotion in a way that leads it to fail in its moral obligations. Simester considers the question of the availability of excuses in the context of a different group actor, the state. In arguing that excuses should never be available to the state, Simester writes that the state must have 'respect for the complex web of rules by which the legal system is constituted.'[49] He finds that a direct consequence of this is that the state cannot claim an excuse, with its implication of reasonable wrongdoing, for any wrongful conduct.[50] It is outside the ambit of the current discussion to decide on the merits of Simester's argument as it applies to the position of states, but it brings out an interesting point about the position of different agents in relation to others, and how that might affect how the criminal law treats them.

Corporations obviously don't stand in the same relation to others that the state does, but they are also different than individuals. In chapter two, I highlighted Christine Korsgaard's theory that the source of humans' rights is that they just happen to exist. Corporations, on the other hand, do not just happen to exist. They are born out of the choice of individuals to come together and form a group agent. Similarly, one might argue that babies are often born from parents' choices, creating a responsibility in the parents. But this choice, once made, creates a new living being, who cannot be unmade. Corporations can be made, unmade and remade, without the loss of that value that is inherent in living beings. The choice to sustain a new and potentially powerful agent could be seen to create an extra layer of responsibility, as could the fact that the state accords it specific rights, and in some ways those rights are greater than the rights of individuals, such as providing limited liability to members of the group agent and possibly allowing for less moral choices to be made than individuals would make in their own names.[51] Do these privileges mean that the corporation ought to face different obstacles when raising the possibility of an excuse in criminal law? This argument is not limited to

[49] Simester (n 13), 110

[50] ibid

[51] For an extended version of this argument, see chapter 4

emotional excuses anymore, and would also apply to mistake of fact, which is an excuse that Tanguay-Renaud argues, ***contra*** Simester, should possibly be available to states.[52] Why do I find that the choice creates an extra layer of responsibility? As moral agents in their individual capacities, when individuals choose to bring into existence, or to perpetuate the existence of, a new agent, they must do so in a way that respects moral obligations. What this means is that they must take care to establish a new being with an appropriate moral capacity (this isn't to say that the new being would have to be the most moral it could be, but that it would at least have to meet minimal standards). This is in contrast to someone who decides to create a child, as they arguably have very limited control over what the child's moral sense will be, but the corporation's creators do have some control over what the corporation's moral abilities will be. A person with moral failings would have the responsibility to take care not to replicate or enhance those failings within an organization. This line of argument bears some resemblance to Philip Pettit's thesis of 'No incorporated agency without incorporated responsibility, and this, even when individual responsibility is diminished.'[53] Thus, this element of choice in the creation of the corporation means that we are rightly less sympathetic when the organization exhibits moral flaws than when an individual does so. This is an important point, and it reaches beyond the criminal law to explain why people often feel angry when corporations exhibit normal human failings such as greed, carelessness, and cowardice, in the sphere of organizational action. But I take it this does not mean that these failings would ***never*** be excused.

---

[52] Tanguay-Renaud (n 2) 132 and 149-50

[53] Philip Pettit, 'Responsibility Incorporated' (2007) 117 Ethics 171, 171

There are situations where it would be correct to say that the organization acted out of fear, but where we should withhold an excuse, even if we would exonerate every individual involved. These are not situations, however, in which every individual involved could claim an excuse. In the Right Guns case, the corporation acted under duress, descriptively speaking. There is, nonetheless, a strong reason to find that the hypothetical company would not meet the objective portion of the test. This comes back to the corporate entanglement principle that I began to elaborate in chapter four. The individuals who were not under duress form part of the company, and are quite unlike detached observers. The individuals who were not under duress could have done more to steer the corporation towards law-abiding behaviour (including acting outside of the corporation's voting procedures). This is where the principle of group entanglement comes up in the area of excuses. In the Right Guns, at least one member acted in an entirely criminal way, intending to enter into the unlawful and harmful contract. Two others acted out of fear. And the remaining two members voted to act lawfully, but then went along with the majority. Why are the three members of the board who aren't under duress not doing something to stop their organization from committing a crime? Specifically, why are the two without criminal intent not doing something to stop it? This isn't a situation in which two people are watching their friends do something wrongful and choosing not to intervene. Membership in the entity, especially voting membership at the highest level, means that those members are part of the entity and have a responsibility for shaping its acts. If these members stay quiet and go along, it is hard to see how, when the truth comes to light and charges are laid, the organization could say that it should be afforded an excuse for acting as it did.

The law expects that an individual, for instance Annie, who has several motivations for offending, should be swayed by her more pro-social, law-abiding self and not offend, unless the dominant reason for her offending is an overwhelming fear for her safety (in that case). A group has many law abiding selves, and these selves are implicated in the group's decisions. So, the Right Guns members who voted no are still involved in the yes vote, they remain members of the corporation even when it takes the criminally wrongful decision. Because they are a part of that group, and are not under any duress themselves, they would have a responsibility to the law to stop the group of which they are members from offending. For corporate duress to succeed, there would need to be a more pervasive social fear that swept up the members of the group, a more properly joint emotion. Normatively, a corporation would only be found to be under duress in very pervasive cases of fear.

The choice element of corporate structuring would have an effect on when it would be possible to argue provocation. The difference between the CEO who personally orders the shooting, and the corporation that orders the shooting because it acted through the CEO, is that the individual hotheaded CEO just is who he is. The corporate body chose to put that person in its leadership, that person who was more easily provoked than someone else would have been, and it is likely that this choice was not made in complete ignorance. In addition, a person acting in his capacity as agent for the corporation should in some way take the responsibility of acting as an agent, and not in his own name, as a reason to curb his behaviour, to act better than he might be tempted to act outside of work. It is also true of the corporate entity that it structured itself in such a way that it had a guard downstairs with a gun, and that it had a CEO who had the authority to order that guard to shoot, and so on. All these factors taken together mean that a corporation should have less room than an individual to fall below the minimal standards of behaviour that the criminal law sets for provocation.

Does this explanation compel us to accept these limitations in individuals but not in groups, or perhaps specifically not in groups whose purpose is economic? The fear of the death of a family member might excuse an individual, but it is still open to a legal system to find that the fear of the deaths of family members of all the members of a corporation might still not be enough to excuse the corporation from acting as it did. Though it would be very odd not to be moved to compassion in a case where every single member of the group was being put under pressure by kidnappers and fearing for the lives of their loved ones. I take it that extreme situation would be one in which an excuse would be warranted, even if we hold to the line that corporations should be judged more strictly than individuals.

Specifically, can we come up with a situation where the action that the group undertook is entirely explainable in terms that would ground an excuse to all the individuals involved, but where we would not extend the excuse to the corporate agent? Tanguay-Renaud and Simester would say yes. I find there is something puzzling about this result, though. Where does the attributable wrongfulness creep in? I understand Simester's position in the case of states, which is that if the agent — the state — is forcing others to uphold the law, then it must hold itself to the highest possible standard. But this is not the case with corporations, which are private groupings of private individuals, though Simester's other argument, about the lack of group-level emotions, would also deny an excuse for the business corporation. While the argument I stated above about their voluntary nature does mean that they have greater responsibility, this is an incremental shift, unlike the absolute standard Simester proposes for states.

This argument also applies as well to the non-emotional excuses that may be open to corporations, such as epistemic mistake. Tanguay-Renaud argues states can make epistemic mistakes as well as individuals, and mistake of fact might afford the state an excuse.[54] Here again, I would say that while epistemic mistake could be an available excuse in a very small number of cases, in general the standards will be tighter because of the corporation's choice to continue existing and to its group nature. The corporation isn't simply tasked by nature with the challenges of getting along in the world in the way that living beings are. It has a choice, and the choice to exist means that it can be held to a higher degree of moral responsibility, the responsibility to have mechanisms in place to fulfill its legal duties, to act both rationally and morally. Because of this, even where we understand that an epistemic mistake occurred, our evaluation of whether that mistake was reasonable ought to be quite different in the case of a corporation.

In the most severe of cases, even a corporate body makes a reasonable decision to give in to the fear of harm to natural persons closely connected to it. This is the case in which so much of the membership is under the sway of this fear that the emotion becomes pervasive in the organization, as it would be in a case like IG Farben. While the nature of the pressure that could be exerted on its membership could be extreme enough to ground an excuse, in general corporate groups should be judged more strictly than individuals.

[54] Tanguay-Renaud (n 2) 131-32

Conclusion

Though many theorists in this area have denied that groups can hold emotions, their intuition against corporate emotion does not bear scrutiny. Emotions inform how groups act just as they inform how individuals act, and it is illogical to deny their influence or their existence at the group level. We should instead acknowledge that, through a variety of mechanisms, a corporation can be under the sway of an emotion as much as an individual can.

Descriptively, a corporation can act from duress or provocation. However, this does not mean that the law should excuse it for doing so in every case where it would excuse an individual. Duress should never be an allowable defence where the threat is to a corporate person rather than a human person. Because of the voluntariness of the corporation's existence and its nature as a result of many individuals coming together to make decisions, the law is right to hold it to a higher standard. It is unlikely that in the general course of things corporations would be able to benefit from these excuses. Yet in the history of the law many things have come to pass that are not in the general run of things, such as businesspeople acting under pressure from the Nazis.

The overarching result of what I've argued for in this chapter is that sometimes individuals are more excused for holding (and acting from) an emotion in their individual capacity, than when they act as part of a group. Nevertheless, corporations do have emotions and these will sometimes need to be recognized by the law.

7. Sentencing Theory and the Corporate Entity

> The corporate form poses difficulties for traditional theories of punishment which more readily apply to traditionally 'guilty' offenders. In short, corporations have 'no soul to damn, no body to kick'. It is therefore difficult to apply theories based on 'just deserts' or rehabilitation and there are also practical limitations to sentences.[1]

Introduction

Theories of sentencing are best understood as theories of how we justify using the coercive power of the state to punish convicted persons, and so sentencing theories are generally also justifications of punishment. We may punish on the basis that it will deter the offender and other potential offenders from committing wrongs in the future or that it will incapacitate the offender from committing further crimes (at least during a period of incarceration). We may punish because we believe that in committing a crime the offender becomes deserving of some form of punishment and that it is therefore the state's responsibility to mete it out, and that a criminal sentence determined by a judge and carried out by the state's agents is necessary to communicate our collective disapprobation of the act. We may punish in order achieve an improvement in the

[1] Hazel Croall and Jenifer Ross, 'Sentencing the Corporate Offender: Legal and Social Issues' in Cyrus Tata and Neil Hutton (eds), ***Sentencing and Society*** (Ashgate, 2002) 535; internal citations omitted.

offender's character, a rehabilitation of the offender. Because sentencing theory is the part of criminal law theory that most distinctly interacts with why we punish, it is the area in which we have the clearest reasons to ask such questions as, what features of an offender make her worthy of punishment, and whether we consider one offence to be more or less blameworthy than another offence. Sentencing requires us to look squarely at the circumstances in which it is appropriate to deploy the heavy apparatus of the criminal law, and these justifications require separate elaboration when they apply to the corporation.

This chapter identifies and explores philosophical difficulties in sentencing theory as it applies to corporations. Punishment theory requires a separate analysis in the case of corporation because of the many distinct problems corporate punishment raises. There is the problem of whether corporate crime is truly wrongful in the way that a traditional crime such as assault is, or whether, as some argue, corporate criminal liability is merely used as an extra deterrent for infractions that are more properly seen as regulatory, and do not merit the stigma that normally accompanies a criminal conviction. Even if the action is wrong, a problem remains of whether we can assess the moral blameworthiness of the corporation itself, as desert theory requires, and that most people accept at least as a necessary component of crafting appropriate (ie proportional) sentences for crimes whether or not they are desert theorists. There is an important problem of whether it is possible to craft effective sentences for corporations, where none seem to be as effective as the sanction of imprisonment is for individuals.[2] There is a related fundamental problem

[2] While this chapter will not explore the alternative sanctions that are available for corporations, I draw the reader's attention to such possibilities as probation (with a court-appointed compliance officer), adverse publicity, corporate reorganization and others, discussed in these sources: Peter A. French et al., ***Corporations in the Moral Community*** (Harcourt Brace Jovanovich 1992) 103-104; Amitai Etzioni, 'The U.S. Sentencing Commission on Corporate Crime: A Critique' in Hazel Croall (ed), ***Corporate***

in sentencing, which is whether corporations can even be punished, whether the concept of punishment can apply at all to an artificial entity. There are also many more secondary questions, such as whether it is fair to blame the corporation for acts taken by anything other than its entire membership, and what responsibility of fairness the state has to identifiable collateral victims of the sentence. Thus, when it comes to sentencing and punishment, including corporations into the traditional justifications is challenging.

My argument in this chapter is that desert theory must be included as a component justification of corporate sentencing if we are to give meaning to the moral agency of corporations, at least in the context of a system that holds retributivism to be a sentencing goal for individual offenders, but that those principles must be applied in a manner that acknowledges the distinct nature of corporate entities. The distinct nature of corporate entities is fleshed out in the following way: I come to find, following several other legal philosophers and my own reasoning elaborated below, that suffering is a constituent of punishment, and that since corporations cannot suffer, they cannot be punished in the meaning of state punishment. Having found that corporations cannot be punished, I must then consider what this means for the rest of my project, of identifying ways in which the moral agency of corporations does indeed interact with criminal law norms. I explore the possibilities of simply abandoning the word 'punishment' and looking for some other content to sentencing. This, however, limits what the criminal law can accomplish when it comes to addressing corporate malfeasance. While criminal sentences may be crafted to accomplish deterrent or rehabilitative aims, the aims of desert theory require punishment. Having identified one of the ways in which corporations

Crime, (SAGE 2009) 207, 212-213; Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 Sydney LRev 468, 490-492; and Croall and Ross, (n 1) 536-543 cannot be understood as being identical to individuals, I look for an answer to the punishment problem in a theory of the corporate entity's distinct nature, which I locate in a middle area between human personhood and property status. As in chapter three, this distinct nature leads to the possibility of penal law differentiating between individual and corporate criminal sentences, and allowing a punishment-like response, based on desert principles, that gives effect to the corporate entity's ability to form moral judgments. I conclude by noting at least one practical difference this will make to a legislator or judge who crafts corporate sentences.

The chapter begins, in section 2, by considering two objections to corporate retributivism: firstly that corporations are not moral agents, and secondly that corporate crime is not morally blameworthy in the way that traditional crime is. I overcome both of these objections, showing that corporations should be understood as moral agents and corporate crime is often morally blameworthy. In section 3, I consider the nature of punishment and conclude that, because suffering is a constituent part of punishment and corporations cannot suffer in the relevant way, corporate punishment will always fail. Thus while retributivism is a persuasive justification for criminal punishment of corporations, the punishment itself is impossible. Because of this, I explore the possibility of criminal sentences that are not punishments per se. In section 4, I go on to explore what that could mean for corporate sentencing. Within this largely theoretical distinction based on non-suffering, I find that at least one practical consequence follows for corporate sentencing policy, namely that higher upper limits to sentences might be justified in corporate sentencing than would be justifiable in a sentence for an individual. I also argue that retributivist, deterrent and rehabilitative principles can all still govern corporate sentencing, though punishment is itself impossible.

Retributivism, deterrence and the corporate agent

In order to ground my arguments about punishment, it is necessary for me first to explain how traditional sentencing theories justify the sentencing of individuals. In this section, I make a preliminary argument that while deterrence is the theory that is most often invoked to justify our practice of imposing corporate criminal liability, desert should be given more prominence, in light of the corporate entity's ability to make moral choices and therefore to be morally culpable. I describe this argument as preliminary because I will have reason to add to it and complicate it in section 4 below.

To illustrate some of the points in this argument, I will refer to the facts of the well-known Ford Pinto case of the 1970s: according to standard accounts of the case, employees of the Ford Motor Company were under pressure to produce an inexpensive and compact vehicle. In order to do this, they put the car's fuel tank in the rear. They became aware that the car's design, including its fuel tank placement, meant that some number of car passengers would likely suffer extreme burns or death. The company created an internal report that calculated that paying out civil costs to burn victims would be less expensive than recalling and fixing all the extant Pintos. And so the car was left unsafe, and more deaths resulted before the company was forced to fix it.[3] According to a contemporaneous news exposé, at least 500 people died as a result of the exploding gas tank flaw, who would not have died had they been driving a different model of car. Ford paid out millions of dollars in out-of-court settlements, and did not fix the car until new

[3] David O Friedrichs, ***Trusted Criminals: White Collar Crime in Contemporary Society*** (4th ed, Wadsworth Cengage, 2010) at 72; for a slightly different account of what happened in the Ford Pinto case, see Matthew T Lee and M David Ermann, 'Pinto "Madness" as a Flawed Landmark Narrative: An Organizational and Network Analysis' (1999) 46 Social Problems 30

government regulations forced it to do so.[4] The cost-benefit analysis valued human life at $200,000 per human. Although many people died, it was the case of three teenage girls whose Pinto exploded, killing all of them, that brought the car's defects to widespread public attention. Let us assume, hypothetically, that the company had been found guilty of manslaughter due to its recklessness in not recalling the car after it failed safety tests (in fact, there was a criminal trial but Ford was not convicted). Under what theory would we want to set a punishment for the company's manslaughter of three young women? That is, assuming we believe that the decision to continue manufacturing and marketing a car that Ford knew was unsafe, and knew could be fixed with an inexpensive improvement (apparently a $5-dollar piece of rubber around the gas tank could have solved the problem) but chose not to fix, is indeed a criminal wrong and not a civil or regulatory issue.

Contrast this story with a more recent scandal in the same industry, Volkswagen's falsification of environmental emissions gauges. Volkswagen installed software in its cars that identified when the car was being tested for emissions and ran the car in a very different way during these tests. In other words, the software was designed to make the cars look like they were emitting very few nitrogen oxide particles when the cars were being tested, but to emit a much larger number during regular driving. An independent organization ran tests on the road (so, not in test conditions) and determined that Volkswagen's cars were in fact emitting nitrogen oxide pollutants at 40 times the legal rate for the United States, on the road. The large disparity between road tests and tests in usual testing conditions led the independent group to report their findings to the U.S.'s

[4] Mark Dow, 'Pinto Madness,' Mother Jones (Sept-Oct 1977) 18 at 20

Environmental Protection Agency. This cheating software was installed on approximately 11 million Volkswagen vehicles worldwide.[5] This was clearly not a negligence-based offence, as the software had to be designed and installed. Also, while it is not known whether senior officials knew about the cheating software before it was installed, it is clear at the least that Volkswagen's CEO was told about the software a year before the company publicly admitted to it (and while the cars were on the road, breaking environmental laws).[6] This was a widespread, intentional attempt to subvert important environmental legislation.

But the Volkswagen case is about environmental standards that were only introduced in 1971 and that have varied since then.[7] This must be less blameworthy than the Pinto case, where people were dying. It might be helpful to think of the Pinto case as a case in which a corporation was committing a true crime, and the Volkswagen case as a case of a very serious regulatory infraction. The idea that there are some business infractions that are regulatory and some that are criminal is often referred to as the criminal-regulatory distinction. It is clear that such a distinction exists, between failure to pay a fishing licence renewal on time and manslaughter, there is a great difference. On the other hand, where to draw the boundary is a large and complex question.[8] I've

[5] The Guardian, 'The Volkswagen emissions scandal explained' 23 September 2015 <http://www.theguardian.com/business/ng-interactive/2015/sep/23/volkswagen-emissions-scandal-explained-diesel-cars> accessed 10 March 2016, and Russell Hotten, 'Volkswagen: The scandal explained,' BBC News, 10 December 2015, online at <http://www.bbc.co.uk/news/business-34324772> accessed 10 March 2016

[6] Rupert Neate, 'VW CEO was told about emissions crisis a year before admitting to cheat scandal,' The Guardian, 2 March 2016, <http://www.theguardian.com/business/2016/mar/02/vw-ceo-martin-winterkorn-told-about-emissions-scandal> last retrieved on 10 March 2016

[7] Environmental Protection Agency, 'Reviewing National Ambient Air Quality Standards — Scientific and Technical Information' online at <http://www3.epa.gov/ttn/naaqs/standards/nox/s_nox_history.html> accessed 10 March 2016

[8] See Celia Wells, ***Corporations and Criminal Responsibility*** (2nd ed, Oxford University Press 2001), 3-11

already discussed how in the Pinto case, Ford was engaging in the kind of cost-benefit analysis that goes on all the time in the automotive industry and many others. And then it is not entirely clear that environmental standards are arbitrary or purely cautionary either. There may have been harm to individual lives in the Volkswagen case, though it could be hard to trace which lives. A study published in Environmental Research letters concluded that the excess emissions that Volkswagen's cheating cars let into the atmosphere will cause 59 early deaths in the U.S. And that if the cars were not returned to compliance, at least 130 more early deaths would occur.[9] But what does this all mean? Obviously Volkswagen is not causing these premature deaths on its own, but its emissions are joining with those of millions of other pollutants to create this condition. The harm is more diffuse than in a traditional street crime case of murder, and even than in the Ford Pinto deaths. The Volkswagen events demonstrate just how difficult it is to distinguish, in borderline cases, between a criminal, morally reprehensible act, and a regulatory infraction, where one runs afoul of one of the likely hundreds of thousands of different regulations that the state imposes on a business.

There are several rival theories that seek to justify the state imposition of punishments on individuals. Deterrence is the theory that justifies punishment on the basis that it creates disincentives for those contemplating committing crimes in the future. Indeed, those who defend corporate criminal liability most frequently do so on the basis that it will achieve some deterrent aim.[10] Desert theory (also known as retributivism or

[9] Steven RH Barrett et al, 'Impact of the Volkswagen emissions control defeat device on US public health' (2015) 10 Environmental Research Letters 114005

[10] See e.g. Assaf Hamdani and Alon Klement, 'Corporate Crime and Deterrence' (2008-09) 61 StanLRev 271, 273 (this article also indicates that this is as distinct from the justifications for other sorts of criminalization); Todd L Archibald, Kenneth E Jull, and Kent W Roach, ***Regulatory and Corporate Liability: From Due Diligence to Risk Management*** (Canada Law Book, 2005) at 369; Michael G.

proportionalism) holds, by contrast, that we punish not because we want to create a deterrent for future behaviour, but because the offender deserves the punishment, in direct proportion to her moral blameworthiness in committing the offence. There are many variants of desert theory, but for the present purposes, what is important to note is that it is a theory that requires a morally blameworthy actor, and that the person being sentenced deserves the sentence. The idea that people deserve to be sentenced for wrongdoing is one that is extremely influential in philosophical justifications of the punishment of individuals, having surpassed deterrence in its influence as the leading sentencing theory around the 1970s.[11] Both because of its influence in sentencing theory generally and because of its valuable insight that criminal punishment addresses offenders as moral agents, one might expect desert theory to play a large role in corporate sentencing theory as well.

Despite its being widely adopted as at least part of the justification for punishment in the individual context, the theory is not well rehearsed in the corporate-sentencing literature. Desert theory is rarely mentioned as a justification for corporate sentencing,[12] and indeed is often cited as a reason why corporate punishment is unjustifiable.[13] Where it is cited positively, it is often as a kind of folk justification: people are angry and they

Faure, 'Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Ship-source Pollution Directives: Questions and Challenges' (2010) ***European Energy and Environmental Law Review*** 256 at 259; Pamela H Bucy 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1990-91) 75 Minn L Rev 1095, 1096;

[11] R.A. Duff, 'Penal Communications: Recent Work in the Philosophy of Punishment' (1996) 20 Crime and Justice 1, 1

[12] There are exceptions to this, notably Kip Schlegel, ***Just Deserts for Corporate Criminals,*** (Northeastern University Press 1990), but also some other less in-depth discussions such as Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56 CalLRev 1141, 1183 and others cited below

[13] For instance, G.R. Sullivan writes that 'There is no conceptual basis for a retributivist response to corporate illegality,' G.R. Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55 Cambridge LJ 515, 516

need to see that entity is being blamed.[14] Note that this viewpoint takes the position that the lay population is to be placated rather than credited with having a valid intuition about the possibility of moral responsibility residing in the collective agent of the corporation. At the same time, the idea of desert theory and moral blameworthiness is quite often brought up by critics of corporate liability: the argument is made that it is foolish to punish corporations criminally when criminal punishment relies on ideas of moral blameworthiness and moral accountability that invest subjects with faculties that corporations do not possess.[15] So, we have the situation that in individual sentencing theory, moral blameworthiness is a feature that serves in at least partial justification of punishment, while in corporate sentencing theory it has been presented as an obstacle to the genuine, deterrent, aim of corporate criminal liability.

Yet the response to corporate crime is most effective if it has a strong desert justification. This is true for two reasons, one we could call a 'positive' reason, a justification for criminal punishment, and one we could call a 'negative' reason, or a way of analyzing when criminal law is being used wrongly, and where a regulatory response would serve better. First, the positive reason: desert theory allows us to use the criminal law to combat the cultural idea that corporations are merely profit calculators, incapable of acting for moral reasons. If corporations are amoral, in the sense of being incapable of taking ethical considerations into account when choosing their activities, then the best we

---

[14] For example, Amy J. Sepinwall writes, 'in the wake of the BP oil-rig explosion, which led to the deaths of eleven rig workers as well as untold damage to the Gulf of Mexico, the public has demanded not just that BP executives be prosecuted for involuntary manslaughter but also that the corporation itself receive a "death sentence."' Amy J. Sepinwall, 'Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime' (2011-12) 63 Hastings L J 411 at 418; also Samuel W. Buell, 'The Blaming Function of Entity Criminal Liability' (2006) 18 IndLJ 473, 519, on the 'popular taste for entity criminal liability'

[15] see e.g. Elizabeth Wolgast, ***Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations*** (Stanford Series in Philosophy, Stanford University Press 1992), 90

can hope for is a legal system that encourages them, through a system of incentives and disincentives, to conform to what society deems to be better behaviour (for instance, operating mines with safety standards rather than without). One of the things that went wrong in the Ford Pinto case may have been that members of the group believed that the only way to serve as agents of a corporation was to take decisions as amoral calculators, following the logic of their cost-benefit analysis as though there were no other option. But as group agents, corporations are in fact just as capable of making morally sensitive decisions as individuals are (as are their agents). It is to the person's ability to be a moral agent that retributivism speaks.

As Andrew von Hirsch and Andrew Ashworth explain, the disapprobation of criminal law's censuring response conveys, under a retributive (or proportionalism) rationale, the message that the offense was reprehensible and that, as a moral agent, the offender ought to have done better.[16] Deterrence-motivated punishment does not convey this message. Even if, as in Alan Brudner's variant of retributivism, retributivism does not punish moral wickedness but rather vindicates the legal relation of autonomy between individuals,[17] a retributivist theory acknowledges the choice that an agent makes to either contravene or respect the agency (and the autonomy, the choice of personal safety, and all that follows) of others. If we are hopeful that the criminal law can be part of a process of leading corporate agents to understanding the fullness of their responsibility to others, rather than viewing norms as rules to be followed only when necessary, we ought to care about applying desert theory to corporations.

[16] Andrew von Hirsch and Andrew Ashworth, ***Proportionate Sentencing: Exploring the Principles*** (Oxford University Press 2005) at 17

[17] Alan Brudner, ***Punishment and Freedom*** (Oxford University Press 2009) at 36-49

The negative reason retributivism is important as part of our understanding of punishment can also be seen in the work of von Hirsch and Ashworth. They point out that the censuring — blaming — part of criminal sanctioning creates a rationale for what should and should not be criminalized — where conduct 'cannot reasonably be accounted for as involving wrongdoing' it ought not to be treated under the criminal law.[18] This does not mean that such conduct cannot be regulated by the state, but it provides a way of distinguishing between conduct that infringes improperly on the dignity or autonomy of others and conduct that is merely undesirable in a specific social context. A strict focus on deterrence provides no way of keeping the regulatory-criminal distinction, and creates a tendency towards overcriminalization, which further allows business-minded individuals to disdain the criminal law as state overreaching.[19] Retributivism is often on the side of creating less criminalization, and so bolstering the legitimacy of the criminal liability that the proportional state does pursue.

There are three apparent reasons why theorists of corporate crime and punishment may have restricted themselves to deterrence and rehabilitation theories: the first is that the offender is the wrong kind of offender — that because the corporation is not a moral agent, it does not make sense to try and analyze it through the lens of moral accountability. The second is that the offence is the wrong kind of offence: that regardless of whether corporations are moral agents, the types of offences that they are going to be tried for are not ***really*** wrongful, they are merely a type of conduct that the state seeks to disincentivize. The third is that people place more reliance on the effectiveness of deterrence in corporate cases. This third, however, is not a bar to applying retributive

[18] von Hirsch and Ashworth (n 16) 19

[19] See arguments discussed in §2(b) below

theory, but merely a reason why thinkers have not stopped to consider the issue: even if deterrence were more effective for corporations (and there is some reason to suppose that it is not)[20] it would still be an independent good for sentencing theory to address the moral capacity of corporate entities (if such exists) and their moral blameworthiness when they knowingly commit bad acts, for the reasons given above.

As for the first charge, that corporations are not potential moral offenders, the counter-argument to this lies in the conclusions I came to in chapters three and four, that the corporation is a moral agent and that its particular design does allow it to create good (as well as bad) moral outcomes. These arguments return here in the lens of sentencing, as the challenge of showing that corporations are the kind of entity that can be morally blameworthy.[21] If we accept chapter three's argument for moral agency, then moral blameworthiness follows quite naturally. If an agent is capable of free moral judgment and makes the wrong moral choice, then we can blame that agent. Chapter four's conclusions, meanwhile, bolster the conclusion that there is reason to treat different corporations as distinct, rather than tarring them all with the same brush and concluding that they should be abolished rather than addressed for their wrongdoing.

The second issue, about the kind of crime that corporate crime is, is the regulatory-criminal distinction question. There is a view that most, if not all, corporate crime is not really crime, not 'true' crime, but is in fact the prohibition of certain acts that we would prefer to disincentivize, without necessarily naming them as morally culpable.

---

[20] Sally S Simpson and Christopher S Koper, 'Deterring Corporate Crime' (1992) 30 Criminology 347 at 349 find that 'the evidence in support of deterrence is equivocal.' Similarly, Dorothy Thornton et al, 'General Deterrence and Corporate Environmental Behavior' (2005) 27 Law & Pol'y 262 at 282, conclude that there is 'weak support' for corporate deterrence within the regulatory landscape.

[21] See argument in C.M.V. Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' (1996) Modern LRev 557, 556 fn 72

The criminal law is implicated merely because regulatory law does not provide enough deterrence, and criminal law is seen to have greater possibilities for achieving the desired result. The conduct that gets corporations implicated in criminal law is not especially morally blameworthy. Driving without a valid driver's licence, despite taking all road precautions, is an example of regulatory offending. Volkswagen's offence, described above, might be another, depending on your view of that offence.

If corporate crime were not really blameworthy in the same way that true crime is, then it would be desirable to focus on deterrence and rehabilitation and to exclude retributive sentencing goals. Deterrence is a theory that accounts for why we punish crime even if we conceive of the offence as not especially morally blameworthy, but merely as an action that we would prefer people not commit. As Laufer and Studler point out, 'Those who confine their analyses to deterrence do not feel that society conceives of corporate crime as morally reprehensible.'[22] Deterrence is the sentencing theory that is most compatible with a law-and-economics view of the world.[23] It is about incentivizing or disincentivizing conduct. Desert theory holds that the state has a legitimate interest in punishment in order to confront an offender with disapproval 'in virtue of the wrongfulness of his conduct,' and that the state does not have a legitimate interest in using the offender 'solely in order to produce preventive or other societal benefits that such censure might achieve.'[24] But an exclusive focus on deterrence dispenses with some of that conceptual apparatus and uses the criminal law to affect future behaviour.

[22] William S Laufer and Alan Strudler, 'Corporate Intentionality, Desert, and Variants of Vicarious Liability' (2000) 37 Am Crim L Rev 1285,1286, fn 10

[23] Richard A. Posner, ***Economic Analysis of Law*** (2nd ed, Little Brown and Company 1977), 170

[24] von Hirsch and Ashworth (n 16) 17

This takes us back to retributivism's negative advantage of being able to separate between legitimate and illegitimate cases of criminalization. While it may be true that monopolies and other such infractions should be dealt with under regulatory regimes, what of business decisions that lead to large numbers of avoidable deaths, as the Ford Pinto did? I do not ask this rhetorically, because it is not in fact a question with an easy answer. It seems clear that Ford put a monetary value on human life and decided that it was acceptable to make a less expensive car even though avoidable deaths would result. But this is something we do with human life all the time. As Michael Hoffman points out, they could have built a large armoured vehicle instead of a small car, but few people would have wanted to pay the price for it.[25] As a society, we not only allow but encourage car driving as an activity even though we know that it will result in some number of deaths each year. Nevertheless, we might think that at least some level of recklessness with human life when designing and marketing a car would be truly wrongful, falling within the core of criminalization principles. If that is the case, then the issue of whether or not Ford was criminally reckless becomes a question about the specific facts to be proved within the structure of a criminal trial.

There is a strong tendency among many business scholars and practitioners to dismiss corporate criminal law as only quasi-criminal. This view is in evidence in much of the literature, for instance when people talk about whether the costs of criminalization outweigh the benefits: 'even a high level of fraud could be optimal if costs of deterrence are high,' writes Antony Dnes, and without extending it as a particularly controversial

[25] W Michael Hoffman, 'Case Study: The Ford Pinto' in Al Gini (ed), ***Case Studies in Business Ethics***, 5th ed (Pearson 2004) 222 at 227.

statement.[26] The statement would only become controversial if you believed that the state had a separate justice-based reason to express its disapprobation of fraud (which is, after all, a close relative of theft).

This then transforms the criminal law into something much closer to civil or regulatory law, where rules are devised to influence behaviour, without necessarily expressing any particular judgment. As Katherine Beaty Chiste notes, this is not restricted to views on corporate-entity crime, but extends to many businesspeople's understanding of corporate-individual crime: that it is 'the result of bad judgement, bad luck, and unanticipated financial circumstances facing the moral agents—the outcome of 'risky business' rather than criminal intent.'[27] Whether for individual or collective agents, the view exists that prohibitions against business crime are not really in the same category as traditional crimes such as theft, assault or murder, but that for pragmatic reasons, governments have chosen to employ the greater deterrent of criminal sanctions, where civil penalties have not created a sufficient disincentive to conduct that we would prefer to limit.

Complicating the account is the fact that the state does use criminal enforcement methods as supplemental to regulatory regimes in some cases. But the fact that at least in some jurisdictions there has been overcriminalization should not confuse us into thinking that no corporate crime is wrongful. Knowingly endangering human life and thereby causing death is wrongful in the individual case, and must be just as wrongful when a corporation does it. This excusing mentality says more about a type of business culture

---

[26] Antony W Dnes, 'Enron, Corporate Governance and Deterrence,' (2005) 26 Managerial and Decision Economics 421, 422.

[27] Katherine Beaty Chiste, 'Retribution, Restoration, and White-Collar Crime' (2008) 31 Dalhousie LJ 86, 89

generally than it does about the corporate agent's capacity to feel censure. This is clear when it is at the individual level. The excusing becomes even stronger when the offender is a corporate entity rather than a human being, but it is in the same vein for both. Because it is the type of offence, rather than the offender, that is being absolved of true moral culpability, and possibly even of moral agency, in the sense that individual actions in the service of business are not even thought of as moral decisions. As Kip Schlegel notes, many corporate crimes have been viewed as morally neutral by virtue of the power of corporations to exclude any inference of morality from their actions. Their decisions are 'business decisions,' operating under constraints of economic laws rather than moral laws.[28] Thus, the question of whether an organization is a moral agent may never arise in this context, as the kind of organization that we are dealing with, the for-profit company, does not operate in a realm in which morality exists. This may be too baldly stated, but there are economists who espouse this kind of thinking.[29] Perhaps the reason people shift to a focus on deterrence rather than desert when thinking about corporate culpability is that the business culture that corporations inhabit has been allowed to set the terms on which the legal system sanctions corporate behaviour.

It is understandable that one would prioritize economic arguments for punishment if one conceived of the corporation as a primarily economic entity. And yet, if it is possible that there is a moral blameworthiness dimension to Ford's decision to keep marketing the unsafe Pinto (of a type similar to the moral blameworthiness dimension of comparable individual acts in non-business settings) then this again bolsters the rationale

[28] Schlegel (n 12) 71

[29] See e.g. Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' ***The New York Times Magazine*** September 13, 1970

for applying desert theory to corporations: it is necessary in order to fully expose the moral dimension of corporate criminal wrongdoing, where it occurs. A moral blameworthiness analysis would distinguish between the cases of corporate malfeasance that would more properly be considered regulatory in character (of which there are many), and actions that bear a closer resemblance to true crimes such as murder and assault.

So which logic is more at play in the dismissal of desert theory for corporations? Is it that corporations are not real agents (or at least not real moral agents), or is it that corporate crime is itself a fiction, being merely a harsher form of regulation? Both attitudes are present among different critics of corporate criminal punishment. Those who argue that the corporation is not a moral agent do so on the basis that they strongly mistrust the corporation and often argue it ought to be abolished entirely.[30] On the other hand, the rhetoric about corporate crime not being truly blameworthy emanates from a pro-business culture in which 'sharp practices' are well tolerated even if they occasionally lead to events such as the 2008 global financial crisis or the BP oil spill in the Gulf of Mexico, which killed BP employees and caused serious environmental, physical and economic harm to thousands of people living in the affected area.[31] While the results of such events are unfortunate or even tragic, they do not, the argument goes, trace back to a malicious or evil act that would properly be characterized as criminal. The truth supports the opposite of both conclusions: a corporation is an entity that can act from moral positions, and so when it acts wrongly, it is morally blameworthy as an entity.

[30] Wolgast (n 15), 86-87, Joel Bakan, ***The Corporation: The Pathological Pursuit of Profit and Power*** (Viking Canada 2004) at 68.

[31] New York Times, 'BP Will Plead Guilty and Pay Over $4 Billion' 15 November 2012, <http://www.nytimes.com/2012/11/16/business/global/16iht-bp16.html?_r=0> accessed 30 November 2015

Some of the acts that corporations commit are of the sort that are truly blameworthy, and not simply economic choices that society wishes to disincentivize, in the same way that it might place a tax on international trade.

I believe that the truth speaks to the opposite: corporate crimes are morally blameworthy, especially when we include those whose effects are much more than simply economic damage, such as the 2012 BP spill. And the corporation is a moral agent, capable of making true moral judgments on both rational and emotionally-informed grounds. This is my preliminary thinking on desert, deterrence and the corporation. It is somewhat pat and easy, and this should make the reader suspicious. Before complicating this story, though, we need to detour into a discussion of the mechanics of punishment. In the next section, I will endeavour to show that even though the corporation can be morally culpable, and therefore truly a candidate for desert-based punishments, there is a more serious bar to the imposition of sentences: it may simply be impossible to punish the corporation.

Punishment, suffering and the corporate entity

We turn now to consider the nature of punishment, and whether it is possible to criminally punish a corporation. In this section, I come to the rather pessimistic conclusion that it is in fact impossible for the state to punish corporations, despite there being good reasons (outlined in the previous section) for it to do so, if it could. The argument addressed in this section is in three parts: 1) suffering is a component of punishment; 2) corporations cannot suffer; 3) ergo, corporations cannot be punished. Corporations can experience emotions as collective entities, even those that we associate with wrongdoing and punishment, for instance an emotion such as remorse. They may even be able to suffer under some circumstances. But they cannot suffer as a direct result of the state imposing punishment on them. Therefore, if suffering is a constituent of successful punishment, no corporation can ever successfully be punished.

There is a related argument that corporations cannot be punished because the punishments will never be significant enough to hurt the corporation. That position may rest on an intuition that it is hard to make the corporation 'care', as it were, about the punishment. But it seems to me that we can say, at least, that a corporation can be harmed by punishment. If you take away all of its assets, the corporation is harmed. This is because the corporation is an agent with goals and interests.[32] This is in contrast to a car or other object, which can be damaged but not harmed. But harm and punishment are not equivalent. For instance, a plant or tree may be distinguished from a car in that it can be harmed, rather than just damaged.[33] But it does not suffer. If it is true that a plant can be harmed but cannot suffer as a result of the harm, then harm and suffering are not coextensive. It is therefore also plausible that punishment harms the corporation without directly causing it to suffer.

There is a strong case to be made that punishment must involve at least some suffering on the part of the person punished. H.L.A. Hart, along with other serious scholars of punishment, endorsed this view of the essence of punishment.[34] It seems hard

[32] This understanding of harm relies on the analysis in Joel Feinberg, ***The Moral Limits of the Criminal Law, Vol 1: Harm to Others*** (Oxford University Press 1987) at ch 1.

[33] Joel Feinberg disagrees, however, and says that the harm is to the owner of the plants; however, in finding that harms relate to entities having interests, Feinberg should also agree that corporations can be harmed, even if plants cannot be, ibid at 32-34.

[34] HLA Hart, ***Punishment & Responsibility: Essays in the Philosophy of Law*** (2nd ed Oxford University Press 2008), 4. It is important to note however that Hart found that central cases of punishment must involve 'pain or other consequences normally considered unpleasant,' and that this caveat could

to defend the opposite, that hard treatment is imposed without an intention to cause suffering. The opposite view is that punishment need only involve a deprivation, and that suffering is merely a frequent side effect of the deprivations imposed. But if not to make the offender feel the sting of her criminal conviction, it is very hard to see why hard treatment would be imposed at all (I refer to the motivation to impose hard treatment rather than the justification for it). This does not mean that every time the state metes out a sentence, the person sentenced suffers. It means that where punishment does not make someone suffer, but rather causes them enjoyment or indifference, then the state has failed in its attempt to punish them. The fact that sometimes punishments fail to cause suffering is not relevant to the analysis. If some people do not suffer it only shows that sometimes the state's attempt to punish is unsuccessful, which is an acceptable result for a state that must make rules of general application.

There are several opposing views to the position that the intention to impose suffering is a part of punishment. One is that deprivations constitute successful punishments, and that suffering is not involved in the deprivations that modern punishment imposes.[35] But if the deprivation is without suffering, in what way is it hard treatment at all? It begins to more closely resemble a tax or a penalty. Certainly criminal punishment is supposed to affect the offender in some way that is qualitatively different from taxation. Joel Feinberg famously opined in his essay 'The Expressive Function of Punishment' that what makes punishment distinctive among other kinds of penalties is its

---

afford us a technical way out, if we were only concerned with Hart's own definition of punishment. However, we are concerned with what punishment actually requires, and so must investigate the problem of suffering further.

[35] J.D. Mabbott, 'Professor Flew on Punishment' (1955) 30 Philosophy 256, 257-58. ; Alan Brudner similarly espouses the view that deprivation of liberty is an alternative form of punishment to the imposition of suffering, (n 17), 53.

'symbolic significance.'[36] Is it enough then to combine the stigma of condemnation with the deprivation of the sort that a tax imposes, to arrive at a punishment? This does not seem right, for the symbolic significance would then be divorced from the penalty itself, and conviction and sentence would not be related to each other anymore. A conviction followed by a deprivation that everyone acknowledged would be meaningless to the person on whom it was imposed, or which that person would even welcome, might be beneficial to society as a whole (ie it might improve that person as a citizen) but this would not be a ***punishment***.

Another alternative view to punishment as requiring suffering is that it instead requires a response that is objectively the kind of response that would be burdensome to most people, without considering whether it is burdensome to the individual being sentenced. Bill Wringe distinguishes between an intention to cause suffering and treatment that is normally found burdensome by individuals of the type being targeted.[37] David Gray sets up a distinction between subjective punishment theory, in which the state must consider such things as the offender's victimization in prison to be part of his prison sentence, and objectivism, in which punishment is justified without considering the subjective experience of distinct individuals.[38] Gray seems to take it that this move requires him to adopt a theory in which suffering is an incidental side-effect of punishment. Wringe, similarly, argues in a way that seems to turn on the idea that the state must not be seeking to be imposing hard treatment in a way that intends to cause

[36] Joel Feinberg, 'The Expressive Function of Punishment' (1965) 49 The Monist 397, 400

[37] Bill Wringe, 'Must Punishment Be Intended to Cause Suffering?' (2013) 16 Ethic Theory Moral Prac 863, 867. Note that Wringe is not trying to differentiate between suffering-inducing and burdensome, but argues there is something important in the fact that the treatment imposed is of a generally burdensome type rather than being specifically tailored to be burdensome to the individual before the court.

[38] David Gray, 'Punishment as Suffering' (2010) 63 VandLRev 1617, 1622

subjective suffering in the person being sentenced: if the goal were to cause suffering and suffering were not achieved, perhaps the state would need to try again, or would have a problematic failure on its hands.[39] But while we might want to frame the state's approach as objective rather than subjective, there is, I submit, no other purpose for the state's actions other than to cause suffering.

It is clear that the state intends to cause suffering because the opposite view, that the state imposes hard treatment without caring to cause suffering, leaves no rationale for imposing that hard treatment at all. Wringe argues, contra this, that on the expressivist view of punishment (a variant of desert theory in which the purpose of sentencing is to express the community's disapproval of the crime), the fact that punishment is objectively harsh is sufficient, even if it happens not to be harsh for the person sentenced, and that this demonstrates that the state does not intend to impose suffering.[40] I propose that we would do better to frankly acknowledge that some of the purpose of punishment is the infliction of suffering, and that there are countervailing reasons why we do not look too closely at the personal circumstances of the offender in tailoring her sentence. Without its attendant suffering, there is no particular justification for hard treatment on either of the leading sentencing theories: it neither deters nor communicates denunciation to the person targeted if that person does not thereby feel the sting of the punishment. Wringe and Gray both want to arrive at the conclusion that the state has no business personalizing sentences. I quite agree. But they do not need to argue that the sentences aren't intended to cause suffering.

The fact that we do not tailor sentences to ensure that each individual will suffer

[39] Wringe (n 37)

[40] ibid 868-874

by scrutinizing their inner desires and fears is not evidence that successful punishment need not include the imposition of some amount of suffering. The reasons we do not tailor sentences too closely to an offender's inner life are unconnected with issues of the effectiveness of punishment. It is, as Wringe himself points out, because 'there seems something worryingly illiberal about the idea that the state should be concerned with the state of my individual soul.'[41] And it is for that reason by itself that we do not ask judges to consider the level of suffering that hard treatment will impose upon each individual that they sentence. But consider the story of the old destitute man who commits a minor crime so that he can be housed and fed for some period of time at the state's expense. When the judge orders a period of incarceration (and thus a bed and three meals a day), the judge is not properly punishing the offender. If, as an audience, we had less sympathy for the convict (say that his choice of offence was punching a small child viciously in the face), we would feel that giving him exactly what he wants is a travesty. This is a failed punishment. Or one could imagine that an agoraphobic person who commits a violent crime for which she is sentenced to imprisonment in solitary confinement might feel at ease for the first time in her life, and publish books detailing her joy in her new situation. This is also probably a failed punishment. These failures do not mean that the state needs to radically rethink its practices; occasional failures are acceptable, as they are at the stage of detection and prosecution of crimes. In fact, having some failed punishments is quite preferable to the alternative, a kind of subjective calibration of the punishment, which would involve looking into the soul of the offender.

Consider another case of punishment: that of parents punishing children. Suppose

[41] ibid 875

Albert punishes his daughter Beatrice for hitting another child by making her mop the floors. The next day, Albert's son Carl steals candy from a friend. But Carl absolutely loves mopping. Albert ought not say, 'I will make Carl mop the floors as I did Beatrice, because it is generally considered burdensome treatment.' Here, because Albert is not the state but a parent, there is nothing illiberal in his looking into his son's personal tastes and using that to tailor his punishment, say by having Carl wash the dishes instead. Because Albert is not an agent of the state, Albert can ensure that he causes the correct amount of suffering (more or less) to address the wrong done by his child.[42] Albert could not correctly claim to have punished his child by imposing an activity that he knew his child enjoyed. In both the state punishment and parental punishment cases, we are willing to allow for some successes and some failures, since the goal of imposing justified punishment does not override all of our other interests. As a further reply to Wringe, it is not true that we do not tailor punishments to people's personal circumstances: we might for instance expect a judge to consider the size of an offender's personal wealth when setting a monetary penalty as a criminal punishment, and hope that the judge considers a mother's young children when deciding whether to set a custodial sentence.

I have said that punishments may fail in individual cases and that this is perfectly acceptable, but things start to look different if we know, a priori, that all punishments imposed on a particular group will be unsuccessful. Consider a state that is so weak that the only punishments it is capable of imposing on wrongdoers are punishments that no wrongdoer would even notice, say the state threw a grain of sand at them. We would

[42] It may seem unpalatable to the reader to think of parents wanting their children to suffer. But it does seem that if parents are acting punitively, then they are attempting at least to have their children feel some sort of sting of suffering in order to aid them in understanding how wrongful their conduct was. There are certainly other ways to parent, but those other ways do not include punishments.

think it best for the state to acknowledge that it is not punishing these individuals. It would in fact be detrimental to continue in the attempt, as it would strengthen the offenders' sense of impunity. The knowledge of systematic inability to punish would be a reason to abolish the punishment entirely for that class of persons. Similarly, if it is impossible to punish corporations we might have to rethink the practice of imposing corporate criminal liability on them. If suffering is necessary for punishment to be successful, and punishment must have the possibility of success to be justified, then in order to justify punishing corporations one would have to show corporations are capable of suffering.

Antony Duff writes that the goal of punishment is to convey to the offender the community's condemnation of his acts 'more forcefully than his conviction might have done.'[43] A deprivation without any sting for the deprived does not communicate much. It has no separate communicative force than the conviction itself. It seems that we need to have punishments that have an effect on the person punished, and not merely on their possessions. And it is no good to say that it is not really a deprivation if it is meaningless to the person deprived, as even taking $500 from a millionaire deprives her of some buying power. If the millionaire is fined $500 she is successfully deprived, but she is not successfully punished. This is because successful punishment really does require that the offender feel some sting of suffering, even if it is a small sting, as part of the state's expression of disapprobation.

I have stretched common intuitions about corporate personhood in this dissertation by asserting that corporations can possess emotional states, as a subset of

[43] R.A. Duff, 'In Defence of one Type of Retributivism: A Reply to Bagaric and Amarasekara' (2000) 24 Melb UL Rev 411, 412

mental states. Suffering is an emotional state, so one might think that there is no further problem to be solved, at least for someone who accepts my other arguments on corporate emotions. But the method of imputing emotional states to corporations will not work here. The key difference lies in the direction of imputation. We attribute mental states — knowledge of financial records, moral judgment, repugnance, and so on — to the corporation from the mental and emotional states that individual members of the corporation have turned into corporate mental states through their actions, such as writing reports, tabling motions, voting, and so on. But here we have a situation in which we contemplate punishing the corporate entity itself, punishing it directly, not punishing the members. The corporation can be deprived of assets and that deprivation might result in suffering for the individual members, but that effect would not be part of the punishment.[44] The suffering of individuals who are not named in the punishment cannot be used as evidence that the punishment worked. Corporate agents, entities created out of joint intentions[45] and Corporate Internal Decision (CID) structures[46] cannot be made to suffer directly, prior to the involvement of individual agents. Obviously it has no separate ability to feel or know, just as it has no separate ability to act. As with its actions, its mental states must be performed by an agent.

Can an agent absorb the suffering to make the corporate punishment meaningful? Larry May brings up the possibility of assigning the role of feeling shame for corporate past acts to a manager. He dismisses this idea on the basis that corporate decision-making

[44] Tracy Isaacs, 'Corporate Agency and Corporate Wrongdoing' (2013) 16 New Crim L Rev 241, 254: 'If we consider punishment to be a retributive response to an act of wrongdoing, then they are not being punished even if they are suffering negative consequences as a result of someone else's punishment.'

[45] See generally Christian List and Philip Pettit, ***Group Agency: The Possibility, Design and Status of Corporate Agents*** (Oxford University Press 2011), also chapter 2 above

[46] Peter A French, ***Collective and Corporate Responsibility*** (Columbia 1984)

structure 'is not at all set up for that type of backward-looking personal reflection.'[47] But May is too quick to dismiss the possibility that a corporation, as a group agent, could feel shame or remorse. It can act on the basis of a shared remorse, and can hold this feeling in the same way that it holds knowledge or other intentional states. Margaret Gilbert argues that group agents are indeed capable of remorse.[48] It is similar to their having the prospective moral judgments that I argued for in chapter three. Remorse occurs when individual members feel membership remorse for the collective's actions. It is distinct from remorse for members' own roles in the blameworthy actions. A member of a church group could feel remorse for the part she played in discriminating against same-sex marriage. But she could also feel remorse as a member of the group for negative effects of an anti-same-sex-marriage position that the church held only before she became a member, because her ties to the group give her a sense of identification that extends to feeling remorse for the group's prior actions. It is possible, on this account, for a corporation (as a group agent) to feel remorse for a wrongful corporate action and its resulting harms, through the interlocking remorse-intentions of its members. This would occur when members held the belief that it was shameful for the corporation to have acted in that way, and when those members further thought that it was part of their role to change the corporation into a more morally correct agent. Remorse is a mental state closely connected with having committed a wrongful act, and is indeed roughly

[47] Larry May, ***The Morality of Groups*** (University of Notre Dame Press 1987), 103

[48] Margaret Gilbert, 'Collective Remorse' in Aleksandar Jokić, ed, ***War Crimes and Collective Wrongdoing: A Reader*** (Blackwell 2001), 229

equivalent to repentance, one of the aims of Duff's communicative theory of punishment.[49]

So does the line of thinking from remorse work equally for suffering from punishment at the group level? It does, but not in the relevant sense for criminal punishment. This is because the punishment must be experienced directly, and not follow from the suffering of others. It would be impermissible for the state to directly punish individuals for their innocent membership in a corporation that committed wrongful acts. Perhaps this is the unspoken insight that causes J. Angelo Corlett to argue that corporate retributive punishment would be permissible but only if corporations were reorganized so that every member, every secretary and janitor, had meaningful decision-making authority within the corporation.[50] And yet, while this would make the flow-through of suffering more ethically permissible, which might then create a loop back to being corporate suffering itself through the institutionalized suffering of the members, requiring every single individual to be guilty in order for the corporation to be guilty has the effect of collapsing the corporation entirely, and negating its existence as separate from its individual members. Corlett's position really amounts to a denial of corporate-entity blameworthiness, though he does not identify it as such. Perhaps a similar effect could be achieved through bringing suffering to the corporation by imposing suffering only on its individually implicated members. Typically, when an individual agent of the corporation is found guilty of a crime, that agent ceases to be a member of the corporation, and so her suffering cannot be looped back into the corporation. But what if a particularly philosophically-inclined judge chose to punish the responsible individuals but also

[49] Duff (n 43) 412

[50] J. Angelo Corlett, ***Responsibility and Punishment*** (3rd ed, Springer 2009), 170

sentence the corporation itself to keep those individuals in their current jobs so that their suffering could be fed back into corporate intentions and decisions? Would this constitute successful corporate retributive punishment, complete with a requirement of suffering? The judge-imposed individual suffering would still not constitute what we mean by suffering. For one thing, remember that not all member emotions become group emotions, and it is likely that the individuals suffering from hard treatment would not use that suffering in a way that caused it to become group suffering. Additionally, it is not a permissible move by the state to create a punishment by causing suffering to those surrounding the offender.

Gilbert's explanation for how group remorse is possible may show us why suffering is dissimilar: it is very hard to imagine sincere members of a group joining together in their intention that the group itself should experience suffering. There could be no possible reason for them doing so. Perhaps this explanation serves to bolster our intuition that some emotions really are too personal to be held at the corporate or group level. It is hard to imagine that even if all the members of a corporation were individually in love with one person that we would say the corporation was in love with that person. This is different from the kind of 'love' that is spoken of colloquially as a kind of fervent approval, like when a website says 'We love Ryan Gosling,' which they seem to do all the time, and in which 'we' refers to the membership of the company that puts out the website.

For all these reasons, and even though it would make corporate sentencing theory simpler, there is no way to understand suffering as something imposed directly on the corporation itself. And even if hard treatment has the indirect effect of making members suffer, that is not in any way connected to the principle of punishing the corporation itself for its wrongdoing. Corporate punishment fails. This may mean that corporate criminal liability fails as well, and that its pursuit ought to be abandoned. If we cannot punish, then why prosecute? But I am going to argue, in the remainder of this chapter, that there are still meaningful ways to sentence corporations for criminal wrongdoing, though it weakens the specific arguments made above about the applicability of retributivism to corporations.

While the argument about the corporate inability to suffer may seem rather technical, it is helpful in that it allows us to identify a difference between corporate persons and individual persons, and that gives the opportunity to probe the differences between them in the context of criminal theory and personhood theory more generally. I turn now to investigate the possibility that the criminal law may have other reasons to seek corporate criminal convictions. Is it possible to have sentences without punishment? Are there reasons to mete out punishments knowing that they will, in some philosophical way, fail? And does the failure of punishment have larger implications for the nature of corporate personhood? These questions will be explored in the next two sections.

Sentences in the absence of punishment

If no criminal sentence has the possibility of being successful, then the project of imposing criminal liability on corporations ought to be abandoned. Perhaps the answer to the problem lies in the separation of the criminal sentence from the more human-centred (or living being-centred) concept of punishment. Without the possibility of a sentence for the convicted person, the criminal law seems weak to the point of being completely ineffective, despite the claims people make that even being indicted is a death sentence for a corporation.[51] In a society of perfect social cohesion and knowledge, the condemnation of conviction might be sufficient to give effect to the criminal law's norms, but this is far from what occurs in our world. Is a sentence always a punishment, or could it be something else? Maybe a sentence usually rests on a punishment, but the tie between the sentence and punishment (if there is punishment) may be tighter or looser depending on the justificatory theory we are using to ground the sentence.

Different sentencing theories have differing relations to punishment, making its existence as part of the sentence more or less central. For instance, incapacitation, the aim of physically barring criminals from committing more crimes during the period of the incarceration, places no reliance on the idea of punishment. Other things being equal, individual criminals could experience no diminution in quality of life (or even an increase), and the sentence would still effectively achieve the goal of incapacitation. Rehabilitation also requires no punishment, and in fact punishment could be seen to hinder sentencing on a rehabilitative view (on the argument that the more someone suffers the more they may behave antisocially and wrongfully). Rehabilitation also requires no punishment: if we were pure rehabilitationists, it should not trouble us to know that the sentence would not cause the offender to be punished in any way, assuming it were the most rehabilitative sentence available.

Deterrence finds the value of punishment instrumental, and so if a sentence can achieve the same instrumental value through a consequence that does not impose suffering, then that presumably would be even better according to the deterrence theorist, since it would take away the inherent ill of causing suffering without any attendant cost.

[51] See, as one instance among many of this oft-rehearsed idea, John Hasnas, 'Where is Felix Cohen When We Need Him?: Transcendental Nonsense and the Moral Responsibility of Corporations' (2010) 19 JL & Pol'y 55, 75

Even if the corporation cannot suffer as a result of hard treatment, it has a preference to avoid it: revisiting the law and economics view, it can be disincentivized. And so there is a certain affinity between treating an entity that is primarily economic and a sentencing theory that can be so easily translated into purely economic language.

Retributivism, on the other hand, seems to require that the sentence be a punishment — the idea that the offender receives a sentence in proportion to her desert seems to imply that the sentence punishes her, otherwise in what way would it answer to her blameworthiness? John Gardner explains, 'The special feature of the retributive view, rather, is that it finds some intrinsic—not merely instrumental—value in a certain type of suffering, namely in suffering that is deserved.'[52] The censure that desert theory finds central to criminal sanctions resides in the punishment aspect, and not merely in a deprivation that could be likened to a tax or other incentivization program. The censure that desert theory finds central to criminal sanctions resides in the punishment aspect, and not merely in a deprivation that could be likened to a tax or other incentivization program. One could object to the view of retributivism being presented here that the communicative theory of punishment, a type of retributivism that finds the value of punishing in its ability to communicate to the offender the community's disapprobation of the criminal act,[53] might not require suffering (and therefore punishment) as part of its rationale. And yet, its association with retributivism shows that it endorses actual punishment as the right response to acts of wrongdoing, even though it does not find intrinsic merit in suffering. Antony Duff defends the theory as an incorporation of hard

[52] John Gardner, Introduction, HLA Hart, ***Punishment & Responsibility: Essays in the Philosophy of Law*** (2nd ed. OUP 2008) xv

[53] See Duff (n 43)

treatment within 'the aim of moral communication.'[54] In other words, the communicative view is still a view of why the state is justified in imposing deserved punishment, with punishment still susceptible to the definition elaborated above.

This is where I must revisit the enthusiasm I evinced in section 2 for applying retributive theory to corporations. Pointedly, retributivism's most authoritative proponents often find the theory's appeal in the fact that it speaks to distinctly human attributes. Consider this quote by Andrew von Hirsch and Andrew Ashworth:

> A certain conception of human nature, and of reasons for action, underlies this account. Persons, it is assumed, are neither like angels for whom purely normative appeals would suffice, nor like brutes which could be influenced only by threats. Human beings, instead, are moral but fallible creatures – capable of being motivated by normative appeals, but sometimes strongly inclined to offend nevertheless. Human choice, Anthony Bottoms has recently suggested, should thus be seen as a 'complex interactive process' involving both a distinctively human capacity for moral reasoning, and strong instincts and inclinations – for example, of greed, aggression, and the like.[55]

But this is somewhat unclear, and particularly dissatisfying in the current discussion for its conflation of humans and persons. In addition to being legal persons, corporations are also persons who may act according to the tendencies of human nature that von Hirsch and Ashworth describe, particularly those they list, being moral reasoning, greed and

[54] Antony Duff, 'Punishment, Communication and Community' in Derek Matravers and Jon Pike (eds), ***Debates in Contemporary Political Philosophy: An Anthology***' (Routledge 2003) 387, 394.

[55] von Hirsch and Ashworth (n 16) 23

aggression. In a 1993 work, von Hirsch was more focused on retributivism's ability to recognize 'the status of the person as an agent capable of moral understanding.'[56] This makes it clear that it is morally-informed agency that retributivism addresses.

The human-centred language that is used to address moral agency is often frustratingly misleading. This question posed by Amy Sepinwall, in a passage in which she considers whether corporations are capable of experiencing feelings of guilt, exhibits some of the sloppiness that I find in this language: 'Where is the corporate heart that would swell with compassion at the misery of others?'[57] The thing is, the human heart that 'swells with compassion' is also not located anywhere. It's a metaphor. If a human heart really swelled with compassion when confronted with misery, it would be a medical emergency. And if we are talking about the location of a metaphorical heart, well, the corporation is just as good a repository of metaphors as is the individual. Corporations can and should feel compassion, as this is one of that set of emotions that it is perfectly plausible for a group of people to have a joint intention of holding at the corporate-group level.

This last point returns us to the reasons why it is important to recognize the desert-based rationale of sentencing for corporations, and not relegate them to being sentenced under purely deterrent or rehabilitative ideals (though those should also figure in the rationale for sentencing the corporation). If we lose the possibility of speaking in retributive terms, we lose many of the moral benefits of criminal sanctions. Instead we are

[56] Andrew von Hirsch, ***Censure and Sanctions*** (Clarendon 1993) 11

[57] Sepinwall (n 14) 429

reduced again to treating corporations 'as a dog', capable only of being trained to obey specific rules, rather than reasoning morally.[58]

Despite my misgivings, I cannot find a justification for saying that corporations can be sentenced in the same morally condemnatory way that humans can be, because they cannot be punished, and the moral condemnation aspect of sentencing must come through punishment. This asymmetry between humans and corporations in the criminal-law context has to be acknowledged, and its implications considered. This is the focus of the next section.

Corporate moral agency and the ends of criminal law

The question I want to address in this section is whether there are any implications of their inability to be punished for the status of corporations as agents and as subjects of the criminal law. If nothing else, it represents a crucial difference in the range of emotions of corporations and humans, and possibly goes some way towards explaining why corporations are more likely to engage in decision-making that prioritizes profits over moral concerns.[59] In this section, I will endeavour to explain how criminal norms are still relevant to corporations, while they are not full robust metaphysical persons in the way that humans are.

In chapter three, I used Korsgaard's work on the difference between humans (as rational beings) and animals (as valuable living creatures but not rational beings) to demarcate a half-status for the corporate entity, as rational and moral agent, but not

[58] Duff (n 11), 36, crediting Hegel for part of this insight

[59] The issue of the possibility of meaningful punishment as a criterion for moral agency is one that Wolgast returns to several times, (n 15), 85; 91

living being. This half-status of corporations, I concluded, creates a separate nature for it in law. This half-status can be re-raised here and may point towards an answer to the question of how to treat corporate offenders at the sentencing stage, acknowledging them as rational and moral beings, without potentially being able to treat them with the respect due to persons that retributivism describes.

The criminal law cannot communicate the community's disapproval to the corporation in the same way that it does to individuals, because of the absence of the possibility of punishment. But can it still accomplish some of the goals of desert theory? An argument of Bill Wringe's may be able to be adapted to fulfill this need. Though Wringe's idea is not based on the problem of suffering, he proposes that Duff's communicative theory of punishment does not work for corporations[60] and proposes that instead of communicating to the offending corporation, one might save the communicative theory by admitting that instead we are communicating to the community at large. While this would impermissibly treat an individual offender as a means rather than an end, Wringe argues that treating a corporation as a mere means is indeed permissible.[61] This is not an evasive or patched-together answer. Instead, as Wringe writes, it 'appropriately reflects obvious and important differences in moral standing between individuals and corporations,'[62] those same differences that I have just attempted to describe above. One need not get caught up in the distinction between ends and means to follow Wringe's thinking, but simply acknowledge that although groups may have intrinsic social value both for their members and for the surrounding

[60] Bill Wringe, 'Collective Agents and Communicative Theories of Punishment' (2012) 43 JSocPhil 436, 438

[61] ibid 444

[62] ibid 452

community, they do not need to be treated with the same respect as individuals, since groups can form and reform, but individuals are indivisible units.

Could this be applicable to the issue of suffering? Could we say that although suffering seemed prima facie to be a requisite for punishment, in the case of beings who cannot suffer but can be meaningfully deprived of goods that they value, we might instead accept as a form of punishment a deprivation that is serious enough to demonstrate to the surrounding community that the system strongly denounces the conduct that is being punished. Considering that the community also includes the members who contribute their individual moral capacities to make up the moral agency of the corporation, this would also have the effect of enhancing the moral abilities of the corporate entity itself. Therefore, we slightly alter the content of the punishment theory to suit the type of offender, without needing to say that the state replaces punishment for another kind of treatment altogether.

This solution, while workable, could be vulnerable to an objection that it substitutes a messy solution for a simpler one that is suddenly made available: if it is not necessary to respect corporations as persons, doesn't the objection to a purely deterrence-driven punishment justification disappear?[63] My answer is that the objection that it violates the rights of offenders does disappear. However, there are other positive aspects of retributivism that we might not want to drop from the state's relationship with corporations in the area of criminal offending, such as the moral education theory.[64] This positive effect of the law is found through the moral education feature of the criminal law,

[63] I owe this question to Bill Wringe, private correspondence, 4 March 2015

[64] Jean Hampton, 'The Moral Education Theory of Punishment' (1984) 13 Philosophy and Public Affairs 208, 212; John Gardner, ***Offences and Defences: Selected Essays in the Philosophy of Criminal Law*** (OUP 2007), 206

one which is much more present in retributivism, most especially the communicative theory of retributivism, which focuses on communication of the moral norms to the offender and others.[65] A pure focus on deterrence threatens to lead us back to the complacency-encouraging theory of corporations as amoral profit calculators, who can be incentivized but who cannot judge morally.

Retaining a modified retributivism, while acknowledging that the foundation of punishment on which it rests is ultimately unworkable for corporations, allows us to retain the feature of criminal law that ascribes moral responsibility, while remaining honest about its limitations in regards to corporations. Criminal punishment expresses the public's condemnation to observers and to the members of the corporate entity qua group members by imposing hard treatment. While the criminal law does not apply to the corporation in the same way that it applies to individuals, there is still a benefit to having corporate criminal liability, in terms of communication and enhancement of moral values for the corporate entity and a robust expression to surrounding individuals that the state denounces corporate offending.

This analysis also has at least one practical consequence: someone who is setting corporate sentences (whether legislatively or in a particular case) may have more upward flexibility if retributivism is attenuated due to the impossibility of punishment. While desert principles require that an upper limit be strictly adhered to (a person must be punished in direct proportion to her culpability, and no more), showing that punishment is not possible in the case of corporations means that deterrent aims can be allowed to have more sway, with the result that upper limits to sentences will be higher (generally, a

[65] Duff (n 43)

deterrence theory favours higher sentences, as these are supposed to create a greater disincentive to those considering engaging in the conduct). Because we are using the criminal law to enhance the moral agency relations of the corporation, it is undesirable to have completely deterrence-based sentences that took no account of the culpability of the corporation. But, in keeping with the modified duty of respect that is owed to corporations based on the analysis of their personhood, somewhat higher limits on sentences could be countenanced as being in line with the proper principles that govern corporate punishment for wrongdoing. It also explains why punishments such as the revocation of a corporation's charter (a corporate 'death penalty') could be an acceptable response to certain types of wrongdoing.

Conclusion

This chapter's conclusion could appear quite pessimistic in its denial of the possibility of corporate retributive punishment. However, this conclusion strikes me as being on the contrary positive, in that an in-depth analysis of the fundamentals of punishment have allowed us to discover one of the ways in which it is helpful to distinguish between individual and corporate persons. The chapter demonstrates that other sentencing theories can still do their work in the realm of corporate sentencing.

In addition, retributivism is still important, especially when considered within the larger project of showing that corporations are indeed moral agents who must be held to the same moral standards as individuals. I have highlighted the promise of desert-based principles that rely on the separate nature of corporations to justify a criminal sentence that expresses the community's moral condemnation, even though the corporation cannot suffer the consequences of that expression in the relevant way. And so locating corporations within the framework of moral agency still accomplishes some of the broader goals of creating moral accountability for corporations and members acting as agents of corporations, even while we recognize that corporate entities are relevantly different from human beings. This also results in an altered set of considerations when sentencing corporations and the permissibility of higher upper limits to sentences.

8. Conclusion: Corporate Moral Agents, Good and Bad

This dissertation has treated two subjects together: the nature of the corporate entity, and the adaptations that criminal law theory ought to make in order to accommodate that nature. In this conclusion, I will explore the relationships between the various arguments of chapters two, three and four (the chapters on corporate ontology) and the arguments of chapters five, six and seven (the chapters on corporate criminal law theory). In this way, I hope to highlight how much the two subjects speak to each other. It is clear that the nature of the corporate entity must inform how the criminal law structures its approach to corporations. While this relationship is less immediately apparent, I have shown through this analysis that a consideration of the criminal law's doctrines, individual-centred as they have been, provides a framework through which we can deepen our understanding of the structure of the corporation.

The picture of the corporation I have built up in this thesis, drawing on various sources mostly writing in the philosophy of action and the philosophy of groups, is roughly as follows: commercial corporations are instances of group agents, made up of the interlocking intentions of many types of members — shareholders, directors, and employees, in the usual case — who jointly intend to carry out actions in pursuit of the company's goals. Sometimes one of these agents, for instance a director or an employee, may act for the corporation alone to accomplish some tasks, in line with the corporation's operational policies. When this occurs, this agent's own intentions and actions are those of the company. Often, a corporation's act will depend on the intentions, votes, contributions, and participatory actions of many different members of the group. At that point, the corporate act may be a compromise act, not reflecting the intention of any single member. In this way, the corporation takes on a degree of autonomy, in that it is not a simple aggregation of the individual viewpoints of its members. The resulting entity is not identifiable with any particular member. Corporate entanglement means that individuals are changed when they act in their role as members of the corporation. They become influenced by the culture of the corporation itself, which may often be different from the wider community's culture, and they also become responsible for the corporation, including for the acts of other members within the corporation.

The autonomy of the corporation from any individual member is one of the realities of corporate group existence that, for instance, the identification theory of mens rea, currently in force in England and Wales and historically used in Canada and Australia, does not properly reflect. This is one of the areas in which the ontology of corporate groups has been out of step with the criminal law. This is unsurprising, since corporate criminal law is a late addition to the criminal law, and for most of its history, and even most of the time in the present day, the criminal law has one paradigmatic kind of offender: the adult human being with full mental capacity. The Australian legislature has made steps to incorporate the corporate nature of corporate offenders into its understanding of how corporate entities intend and offend, and perhaps other legislatures or judges will follow suit. Certainly, the corporate criminal is becoming more of an object of scrutiny.

A central tenet of this dissertation has been that corporations are moral agents and that their moral agency should have an effect on how the criminal law understands corporate entities that appear as potential accused, accused or convicted criminals to be sentenced. The philosophical legacy of individualism and liberalism of Anglo-American culture makes it particularly challenging for many people to see how groups are actors. The myth of the amorality of business agency (whether individual or group action) makes it even harder for many people to conceive of corporate groups as moral agents. In this dissertation I have tried to show how, despite this cultural learning to the contrary, our intuitions can be brought in line with corporate groups as moral agents. I have done this through examples of people acting together in business, and also by analogy to families, churches, charities and states. People are social and often band together to accomplish their goals. When they band together in certain ways, they form group agents. These agents benefit from the knowledge and emotional input of their members, and convert these into group knowledge, beliefs and attitudes. A business corporation is a goal-directed entity, and only the knowledge that affects how it goes about pursuing its goals will become part of itself. Even if every individual member of the corporation knows that ice cream is on sale at the local grocery store this week, that information will not become part of the corporate knowledge of a business unconnected to ice cream and grocery stores. And it is not only knowledge that will become part of the corporate mental state: mistaken beliefs can also form part of its makeup. For instance, an accounting error could become widespread within a corporation, leading to further errors down the line.

In addition to beliefs, the corporation has emotions that come from its members and become part of the corporation's mental state. This can happen either in the intentional manner that Margaret Gilbert describes, where a group of people jointly intend to exhibit a certain emotion, be it joy, remorse or any other. But I have argued that it can also happen in a more emergent manner. Where the members involved in a specific decision act from an emotional motivation, that emotion is part of the corporate makeup as well. This second type of emotional knowledge need not be verbalized. It is communicated through acts, such as the voters who vote out of fear in the hypotheticals I proposed in the discussion on excuses in chapter six. Corporations will, because of their purposiveness, be susceptible to a narrower range of emotional responses than individuals. This means that they may not be as subject to the emotional weaknesses and destabilization that creates excuses for individuals when under the sway of an extreme emotion. Their less emotionally varied nature also makes corporations better placed, in some instances, to respond with proper moral judgment. A heightened emotional makeup may make it harder to respond appropriately, taking into account both emotionally salient and less emotionally salient features of a situation. Thus, lack of emotional range cannot be the reason why corporations act badly.

Corporations have the ability to make moral judgments in the same way that they understand reasons and experience emotions. It is clear when one thinks of states or churches that group agents make moral judgments and act on them: churches condemn sinners, states act for moral reasons such as protecting minorities from the majority. The state may make bad moral choices as often as it makes good ones, but it certainly makes explicitly normative choices on a normatively debated basis. The state is not accidentally moral. The corporation, as a group agent, has this same capacity. As moral agents, though, commercial corporations have seemed particularly problematic. Corporations have caused many harms, and often have not reacted with genuine concern, but with a desire to move past the mess and get on with the business of making money. A corrupt corporate culture may lead individual members who might have stayed good otherwise towards offending, simply to keep in line with their group members. That seems to be the greatest worry that critics of the corporate organization express. The organization might tend towards a worse outcome if it takes in a variety of individuals, but lets the worse ones have more influence over the better than the better have over the worse. Still, we are left with the question of why it would be that the bad would have more influence. That is surely not a general feature of human social interactions. This brings me back to the hypothesis that maybe corporations do not act any worse than individuals acting alone, but that because we have less sympathy for corporations, since they are not objects of worth in the same way that human beings are, we exhibit more moral revulsion and harsh judgment when we find out about corporate offending than we do about individual offending. This may well be the right result, but it should not be confused with an idea that corporations are acting worse than individuals on average.

I have argued that any tendency towards bad outcomes is not necessarily about the nature of business corporations, which have both positives and negatives, and which could be capable of acting in a much more morally sensitive manner than many of them currently do. It may be that emotional contagion encourages certain strong emotions, for instance employees' fear of failure and unemployment, to become prevalent within an organization more quickly than they would be if individuals were simply working alone. Still, working together allows people to group together and accomplish more than they could on their own, and in doing so, it creates a web of responsibility of one for the other. Organization, even business organization, will sometimes push people to behave better than they would if they were acting alone, without a surrounding community.

Many of the harms that we attribute to corporations are not about group actor vs individual actor, as Wolgast, Kutz, or Luban, Strudler and Wasserman have tried to argue, but about a prevailing ethos of business culture in Anglo-American societies. This is a cultural ethos that privileges selfishness as a virtue and sees greed as strength.[446] But for a society to champion this ethos and at the same time to condemn the corporations that represent individuals who have banded together into groups that pursue one of their society's valued goals jointly, and therefore more powerfully, is to embody a contradiction. It is possible that the dangers are enhanced when people join together to form a corporation. This is because corporations have more acting power than individuals. Group agents have much more power than individuals, and this is true of all groups, not only businesses.[447] I also agree with Christian List and Philip Pettit that Anglo-American jurisdictions have been much less vigilant about guarding against the power of commercial group agents than they have against the power of states, churches, trade unions, and political parties.[448] This then, comes back around to the grip that business ethos has on our culture. It would seem perverse to many people to guard against business, since business is the quintessential good of our societies.

The simple point I tried to bring out about the tendencies towards good and bad in corporations is that corporations do behave in morally indefensible ways, but so do many individuals at various points in their lives. Corporations and individuals can also behave well. The organization increases the reach and ability of an agent, and so too it can increase the visibility of bad actions, by magnifying them within the corporation. This visibility in itself may be a good thing, allowing us to identify what is unacceptable to us at a social level. While corporate prosecutions are notoriously expensive and difficult,

---

[446] For a similar view see Gary M. Woller, 'Business ethics, society, and Adam Smith: Some observations on the liberal business ethos' (1996) 25 The Journal of Socio-Economics 311

[447] Christian List and Philip Pettit, ***Group Agency: The Possibility, Design and Status of Corporate Agents*** (Oxford University Press 2011), 183

[448] ibid

because of the corporation's ability to hire many expensive lawyers to defend it, so too are those prosecutions often bigger, with greater reach. People bemoan the fact that corporations cannot go to jail, but the symbolic value of a corporate prosecution may be larger than a jail sentence for an individual (especially if that individual is not high up in the corporate hierarchy). For this reason, corporate prosecutions might provide a particularly valuable opportunity for the state to reinforce the moral messages contained in its criminal norms.

The web of responsibility that individuals create when they form a jointly intentional group agent is useful to understand how an agent can adopt mens rea states, at the group level. I have argued in this thesis that this had particular explanatory power in the case of recklessness. One member who becomes conscious of the risks that another member of the same group is taking becomes reckless as to that risk-taking resulting in the commission of a criminal offence. This explains why good communication and chains of responsibility are necessary within groups with diffuse power. The poorly organized corporation creates unjustifiable risks of offending, risks that it is responsible for as a unified agent. This is the heart of the doctrine that I called corporate structural recklessness. Though many critics (notably Wolgast) of the corporation and of agency point to a resulting fragmentation, in fact joining together as a group creates unity, including unity of action. One might argue that this principle of unity could also ground an argument for a vicarious liability standard of corporate mens rea, but that standard does not allow for a differentiation between corporate structures and corporate cultures or corporate characters. The corporation does achieve a kind of unification, but it does so on a massive scale, and the responsibility of one for another is not the same as in a tight-knit group where members might have the opportunity to thoroughly review each others' characters before deciding to join together as one. Large corporations are neither many nor are they properly one, in that way. But this is unproblematic, and is captured in the idea of a group. And, as I suggested in the chapter on mens rea, the doctrine of corporate structural recklessness is in line with the principles of the criminal law as it applies to individuals, while making room for the distinct nature of the corporate group.

The entanglement of individuals within the group also explains why defences are more restricted. I focused within the dissertation on duress and provocation, for these are defences that create particular difficulties for corporations who claim them, because they are grounded in emotionality. What I concluded was that this emotional basis was not a bar to their application to corporate groups. But the idea that corporations have more willpower, and more sources of restraint and sources of knowledge, means that their ability to claim defences will be restricted compared to that of individuals, across a variety of defences.

In chapter seven, I returned to moral agency and the importance of having it recognized as part of the makeup of a corporate entity. The main way that the criminal law responds to moral agency is in punishment, especially where punishment treats the offender as a morally responsible agent, and yet one still worthy of respect, in other words in the theory of retributivism. I argued that the fact that retributivism has been comparatively neglected for corporations is evidence that popular and scholarly critics do not view corporations as moral agents. And yet they are, and much of the value of having them be subjects of criminal law, and not a separate regulatory regime, is the promotion of this understanding, that corporations are moral agents and should act accordingly. While corporations cannot suffer in the relevant way to be proper objects of punishment properly understood, the moral agency principles of retributivism are still an important consideration when sentencing corporate offenders.

This discussion of suffering and the worth of moral agents led back into the earlier analysis, in chapter three, of the sources of the worth of persons. I made a controversial statement there that corporate entities do not have merely instrumental value, but have some inherent value as holders of moral judgment and moral agency. In closing off this dissertation, I would like to focus on that contentious conclusion once more. In an article entitled 'Reasons for Teamwork,' John Gardner writes that 'when there are reasons for teamwork, teamwork has intrinsic value.'[449] He finds, however, that this intrinsic value is tied entirely to the value of the reasons being valuable. It is a kind of derivative intrinsic value. As is plainly apparent from the way that I have treated corporations throughout this work, as groups, teamwork is a closely connected concept to the corporation as I conceive it. The thought might carry over then to corporations in general. Corporations have some intrinsic value — though never as much as individual humans who have that special quality of being unitary living beings — when they are brought together to further the valuable goals of individuals.

And yet I want to go even further than this. While teamwork is ephemeral, the corporate entity is stable. Its value does not depend simply upon the goals that it sets up being valuable. Groups are valuable because they give expression to the social nature of humans. As Gerald Postema writes, 'The evidence suggests that there is in human beings a strong general disposition to view other human beings as potential partners in a cooperative joint activity.'[450] This is an intrinsic, rather than instrumental, value, in that it

[449] John Gardner, 'Reasons for Teamwork' (2002) 8 Legal Theory 495, 504

[450] Gerald J. Postema, 'Morality in the First Person Plural' (1995) 14 Law and Philosophy 35, 46

does not depend on the group being used to further some good end. And so, in its formal quality as a group of individuals working together to achieve goals greater than they can achieve on their own, the corporation has intrinsic value. This may seem to be an oddly bright note on which to end a thesis that is, after all, about criminality. Yet it is only because I find the intrinsic value in corporate groups that I feel it is important to hold them up to the standards of moral accountability and responsibility. If they were criminal entities without value, we'd be best to simply do away with them. As it is, they have this in common with humans: they have potential to act for the good of all and to act selfishly in a way that harms others, and so the criminal law performs both its educative function — hoping to guide the way towards better conduct — and its condemnatory function — drawing boundaries between good and bad conduct, and giving voice to the community's disapproval where a moral agent acts wrongly.

Bibliography

Alexander L, ‘Insufficient Concern: A Unified Conception of Criminal Culpability’ (2000) 88 California LRev 931
Allen K, ***Max Weber: A Critical Introduction*** (Pluto Press 2004)
Archibald T, Jull K and Roach K, ‘The Changed Face of Corporate Criminal Liability’ (2004) 48 Crim L Q 367
— —, ***Regulatory and Corporate Liability: From Due Diligence to Risk Management*** (Canada Law Book 2005)
Arendt H, ***Eichmann in Jerusalem: A Report on the Banality of Evil*** (rev. ed., Penguin, 1976)
Ashman I and Winstanley D, ‘For or against Corporate Identity? Personification and the Problem of Moral Agency’ (2007) 76 J Bus Ethics 83
Bakan J, ***The Corporation: The Pathological Pursuit of Profit and Power*** (Viking, 2004)
Bandura A, ‘Selective Moral Disengagement in the Exercise of Moral Agency’ (2002) 31 J Moral Education 101
Barrett SRH et al, ‘Impact of the Volkswagen emissions control defeat device on US public health’ (2015) 10 Environmental Research Letters 114005
BBC News, ‘Enron Scandal at a Glance,’ http://news.bbc.co.uk/1/hi/business/1780075.stm, last accessed 5 January, 2016
Black BS, ‘Shareholder Passivity Reexamined’ (1990) 89 Michigan L Rev 520
Braithwaite J, ***Corporate Crime in the Pharmaceutical Industry*** (Routledge 1984)
Bratman ME, ‘Shared Intention’ (1993) 104 Ethics 97
— — ***Shared Agency: A Planning Theory of Acting Together*** (Oxford University Press 2014),
Brickey KF, ‘Close Corporations and the Criminal Law: on “Mom and Pop” and a curious rule’ (1993) 71 Wash ULQ 189
— — ‘Corporate Criminal Accountability: A Brief History and an Observation’ (1982) 60 Washington ULRev 393
Brudner A, ***Punishment and Freedom*** (Oxford University Press 2009)
Bucy PH, ‘Corporate Ethos: A Standard for Imposing Corporate Criminal Liability’ (1990-91) 75 Minn L Rev 1095
Buell SW, ‘The Blaming Function of Entity Criminal Liability’ (2006) 18 IndLJ 473
Cassella SD, ‘Overview of asset forfeiture law in the United States’ (2004) 17 S Afr J Crim Just 347
Chiste KB, ‘Retribution, Restoration, and White-Collar Crime’ (2008) 31 Dalhousie LJ 86
Clarkson CMV, ‘Kicking Corporate Bodies and Damning Their Souls’ (1996) Modern LRev 557
Colvin E, ‘Recklessness and Criminal Negligence’ (1982) 32 U Toronto LJ 345
— — ‘Corporate Personality and Criminal Liability’ (1995) 6 CrimL Forum 1
Companies House, online, <https://ewf.companieshouse.gov.uk//

runpage?page=welcome> accessed 11/02/2013
Corlett JA, ***Responsibility and Punishment*** (3rd ed Springer, 2009)
Croall H and Ross J, 'Sentencing the Corporate Offender: Legal and Social Issues' in Tata C and Hutton N (eds), ***Sentencing and Society*** (Ashgate, 2002) 535
D'Arms J and Jacobson D, 'Sentiment and Value' (2000) ***Ethics*** 722, 723
Dennett D, 'Conditions of Personhood,' in Amelie Oksenberg Rorty, ed, ***The Identities of Persons*** (University of California Press 1976) 175
Dickens BM, 'Living Tissue and Organ Donors and Property Law: More on ***Moore***' (1992) 8 Journal of Contemporary Health Law and Policy 73
Dimock S, 'What are Intoxicated Offenders Responsible for? The "Intoxication Defense" Re-examined (2011) 5 ***Crim Law and Philos*** 1
Dnes AW, 'Enron, Corporate Governance and Deterrence,' (2005) 26 Managerial and Decision Economics 421
Dow M, 'Pinto Madness,' Mother Jones (Sept-Oct 1977) 18
Duff RA, '***Caldwell*** and ***Lawrence***: The Retreat from Subjectivism' (1983) Oxford Journal of Legal Studies 77
—— 'Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion?' (2015) 58 Inquiry 189
—— 'In Defence of one Type of Retributivism: A Reply to Bagaric and Amarasekara' (2000) 24 Melbourne UL Rev 411
—— 'Choice, Character, and Criminal Liability' (1993) 12 Law and Philosophy 345,
—— 'Penal Communications: Recent Work in the Philosophy of Punishment' (1996) 20 Crime and Justice 1
—— 'Punishment, Communication and Community' in Derek Matravers & Jon Pike (eds), ***Debates in Contemporary Political Philosophy: An Anthology***' (Routledge 2003) 387
—— ***Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law*** (Blackwell 1990)
Easterbrook FH and Fischel DF, 'Limited Liability and the Corporation' (1985) 52 UChiLRev 89
Ekins R, ***The Nature of Legislative Intent*** (Oxford University Press 2012)
Environmental Protection Agency, 'Reviewing National Ambient Air Quality Standards — Scientific and Technical Information' <http://www3.epa.gov/ttn/naaqs/standards/nox/s_nox_history.html> accessed 10 March 2016
Etzioni A, 'The U.S. Sentencing Commission on Corporate Crime: A Critique' in Croall H (ed), ***Corporate Crime***, (London: SAGE, 2009) 207
Faure MG, "Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Ship-source Pollution Directives: Questions and Challenges" (2010) European Energy and Environmental Law Review 256
Feinberg J, 'The Expressive Function of Punishment' (1965) 49 The Monist 397
—— ***The Moral Limits of the Criminal Law, Vol 1: Harm to Others*** (Oxford University Press 1987)
Finnis J, 'The Priority of Persons,' in Jeremy Horder, ed., ***Oxford Essays in Jurisprudence***, Fourth Series (Oxford University Press 2000) 1
Fisse B, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56 CalLRev 1141

—— and Braithwaite J, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 Sydney LRev 468
Frankfurt HG, ***The Importance of What we Care About: Philosophical Essays*** (Cambridge University Press 1988)
French PA, 'The Corporation as a Moral Person' (1979) 16 Am Phil Q 207

—— ***Collective and Corporate Responsibility*** (Columbia 1984)
—— 'Corporate Affectivity and Membership in the Moral Community' powerpoint presentation, online http://slidegur.com/doc/20938/corporate-affectivity-and-membership-in-the-moral-community, retrieved 1 March 2016
—— 'Responsibility with No Alternatives, in Loss of Innocence, and Collective Affecitivity: Some Thoughts on the Ppaers by Haji, McKenna, and Tollefsen,' (2008) 7 APA Newsletters: Newsletter on Philosophy and Law 13
—— et al., ***Corporations in the Moral Community*** (Harcourt Brace Jovanovich 1992)
Frenkel DA and Lurie Y, 'Culpability of Corporations—Legal and Ethical Perspectives' (2001-202) 45 ***Crim LQ*** 465
Friedman M, 'The Social Responsibility of Business is to Increase its Profits' ***The New York Times Magazine*** September 13, 1970
Friedrichs DO, ***Trusted Criminals: White Collar Crime in Contemporary Society*** (4th ed, Wadsworth Cengage, 2010)
G.R. Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55 Cambridge LJ 515
Gallant MM and King C, 'The Seizure of Illicit Assets: Patterns of Civil Forfeiture in Canada and Ireland' (2013) 42 Comm L World Rev 91
Gardner J, 'Reasons for Teamwork' (2002) 8 Legal Theory 495
—— ***Offences and Defences*** (Oxford University Press 2007)
—— Introduction, HLA Hart, ***Punishment & Responsibility: Essays in the Philosophy of Law*** (2nd ed. OUP 2008)
—— and Jung H, 'Making Sense of Mens Rea: Antony Duff's Account' (1991) Oxford J L Studies 559,
—— and Macklem T, 'Reasons', in ***The Oxford Handbook of Jurisprudence and Philosophy of Law***, Jules L. Coleman, Kenneth Einar Himma and Scott J. Shapiro, eds. (OUP 2004), online edition published 2012
Garrett BL, ***Too Big to Jail: How Prosecutors Compromise with Corporations*** (Harvard University Press 2014)
Gilbert M, ***Sociality and Responsibility: New Essays in Plural Subject Theory*** (Rowman and Littlefield 2000)
—— 'Collective Remorse' in Jokić A (ed), ***War Crimes and Collective Wrongdoing: A Reader*** (Blackwell 2001)
—— ***A Theory of Political Obligation: Membership, Commitment, and the Bonds of Society*** (Oxford University Press 2006)
—— 'Who's to Blame? Collective Moral Responsibility and Its Implications for Group Members' (2006) 30 Midwest Studies in Philosophy 94
—— ***Joint Commitment: How We Make the Social World*** (Oxford University Press, 2013)

— — 'How we feel: understanding everyday collective emotion ascription' in in von Scheve C and Salmela M (eds), ***Collective Emotions*** (Oxford University Press 2014)

Gómez-Jara Díez C, 'Corporate Criminal Liability in the Twenty-First Century: Are all Corporations Equally Capable of Wrongdoing?' (2011) 41 Stetson L Rev 41

Goodpaster KE, 'The Concept of Corporate Responsibility' (1983) 2 JBus Ethics 1

Gray D, 'Punishment as Suffering' (2010) 63 VandLRev 1617

Griffin OH III and Miller BL, 'OxyContin and a Regulation Deficiency in the Pharmaceutical Industry: Rethinking State-Corporate Crime' (2011) 19 Critical Criminology 213

Hagemann TA and Grinstein J, 'The Mythology of Aggregate Corporate Knowledge: A Deconstruction' (1996-1997) 65 Geo Wash L Rev 210

Hamdani A and Klement A, 'Corporate Crime and Deterrence' (2008-09) 61 StanLRev 271

Hamdorf K, 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law' (2007) 5 J Intl Crim Justice 208

Hampton J, 'The Moral Education Theory of Punishment' (1984) 13 Philosophy and Public Affairs 208

Hansmann H and Kraakman R, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 Yale LJ 1879

Hart HLA, ***Punishment & Responsibility: Essays in the Philosophy of Law*** (2nd ed OUP 2008)

Hasnas J, 'Where is Felix Cohen When We Need Him?: Transcendental Nonsense and the Moral Responsibility of Corporations' (2010) 19 JL & Pol'y 55

Hatfield E, Carpenter M, Rapson RL, 'Emotional contagion as a precursor to collective emotions' in von Scheve C and Salmela M, (eds), ***Collective Emotions*** (Oxford University Press 2014) 108

Heidegger M, ***Being and Time: a translation of Sein und Zeit*** Joan Stambaugh, trans. (State University of New York Press 1996)

Hillberg R, 'The Nazi Holocaust: Using Bureaucracies and Overcoming Psychological Barriers to Genocide' in M. David Ermann and Richard J. Lundman (eds), ***Corporate and Governmental Deviance: Problems of Organizational Behavior in Contemporary Society*** (6th ed. Oxford University Press 2002)

Hoffman WM, 'Case Study: The Ford Pinto' in Al Gini (ed), ***Case Studies in Business Ethics***, 5th ed (Pearson, 2004) 222

Horder J, ***Provocation and Responsibility*** (Clarendon Press 1992)

— — and Fitz-Gibbon K, 'When Sexual Infidelity Triggers Murder: Examining the Impact of Homicide Law Reform on Judicial Attitudes in Sentencing' (2015) 74 Cambridge LJ 307

Hotten R, 'Volkswagen: The scandal explained,' BBC News, 10 December 2015, <http://www.bbc.co.uk/news/business-34324772> accessed 10 March 2016

Hume D, ***A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects*** (1739-40)

Husak D, 'Distraction and Negligence,' in Zedner L and Roberts JV (eds), ***Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*** (Oxford University Press 2012) 81

Isaacs T, 'Corporate Agency and Corporate Wrongdoing' (2013) 16 New Crim LR 241
James W, 'What is an Emotion?' (1884) Mind 188
Jessberger F, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial' (2010) 8 JInt'lCrim Justice 783
Johnson R, 'Kant's Moral Philsoophy,' ***The Stanford Encyclopedia of Philosophy*** (Summer 2014 Edition), Edward N. Zalta, (ed.), online, URL = http://plato.stanford.edu/archives/sum2014/entries/kant-moral/, last accessed 6 January 2016
Kafka F, ***Der Process*** (Verlag Die Schmiede 1925)
Kahan DM and Nussbaum MC, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 Columbia LRev 269
Kelsen H, ***General Theory of Law and State*** (Anders Wedberg trans., Russell and Russell 1961)
Koenig T and Rustad M, 'The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers' (1993) 42 AmULRev 1270
Korsgaard M, 'Kantian Ethics, Animals, and the Law' (2013) 33 OJLS 629
Kuhn S, 'Prisoner's Dilemma,' ***The Stanford Encyclopedia of Philosophy (Spring 2009 Edition)***, Edward N. Zalta, ed., URL =<http://plato.stanford.edu/archives/spr2009/entries/prisoner-dilemma/>
Kutz C, ***Complicity: Ethics and Law for a Collective Age*** (CUP 2000)
Lacey N, 'A Clear Concept of Intention: Elusive or Illusory?' (1993) 56 Modern LRev 621
—— 'Denial and Responsibility' in David Downes et al. eds, ***Crime, Social Control and Human Rights: From Moral Panics to States of Denial, Essays in Honour of Stanley Cohen*** (Willan Publishing 2007) 255
—— '"Philosophical Foundations of the Common Law": Social not Metaphysical' in Jeremy Horder, ed., ***Oxford Essays in Jurisprudence, Fourth Series*** (Oxford University Press 2000) 17
—— 'Responsibility without Consciousness' (2015) Oxford Journal of Legal Studies 1, 10 and 21
Ladd J, 'Morality and the Ideal of Rationality in Formal Organizations' (1970) 54 ***Monist*** 47
Langevoort DC, 'Agency Law Inside the Corporation: Problems of Candor and Knowledge' (2002-03) 71 U Cin LRev 1187
Laufer WS, 'Social Accountability and Corporate Greenwashing' (2003) 43 J Bus Ethics 253
—— ***Corporate Bodies and Guilty Minds*** (U Chicago 2006)
Law Commission, (Law Com 83, 1977), ***Report on Defences of General Application***
—— and Strudler A, 'Corporate Intentionality, Desert, and Variants of Vicarious Liability' (2000) 37 Am Crim L Rev 1285
Lee MT and Ermann MD, 'Pinto "Madness" as a Flawed Landmark Narrative: An Organizational and Network Analysis' (1999) 46 Social Problems 30
Levin B, 'A Defensible Defense?: Reexamining Castle Doctrine Statutes' (2010) Harvard Journal on Legislation 523
Lewis A and Mackenzie C, 'Morals, money, ethical investing and economic psychology' (2000) 53 Human Relations 179

List C and Pettit P, ***Group Agency: The Possibility, Design and Status of Corporate Agents*** (OUP 2011)
Locke J, ***An Essay Concerning Human Understanding*** (1690)
Luban D, Strudler A and Wasserman D, 'Moral Responsibility in the Age of Bureaucracy' (1992) 90 Michigan LRev 2348
Mabbott JD, 'Professor Flew on Punishment' (1955) 30 Philosophy 256
MacDonald M, 'The Personless Paradigm' (1987) 37 U Toronto LJ 212
Macey JR, 'A Close Read of an Excellent Commentary on ***Dodge v. Ford***' (2008) 3 VaL&BusRev 177
Margolis JD and Walsh JP, ***People and Profits?: The Search for a Link Between a Company's Social and Financial Performance*** (Psychology Press 2001)
May L, ***The Morality of Groups*** (University of Notre Dame 1987)
— — and Hoffman S, 'Introduction', ***Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics***, Larry May and Stacey Hoffman, eds. (Rowman & Littlefield 1991) 1
McKenna M, 'Collective Responsibility and an Agent Meaning Theory' (2006) 30 Midwest Studies in Philosophy
McWilliams A and Siegel D, 'Corporate Social Responsibility and Financial Performance: Correlation or Misspecification?' (2000) 21 Strategic Management Journal 603
Mellema G, 'Shared Responsibility and Ethical Dilutionism' (1985) 63 ***Australiasian Journal of Philosophy*** 177
Mulhall S, ***Routledge Philosophy Guidebook to Heidegger and Being and Time*** (Routledge 2005)
Mullerat R***, International Corporate Social Responsibility: The Role of Corporations in the Economic Order of the 21st Century*** (Kluwer 2010)
Neate R, 'VW CEO was told about emissions crisis a year before admitting to cheat scandal,' The Guardian, 2 March 2016, <http://www.theguardian.com/business/2016/mar/02/vw-ceo-martin-winterkorn-told-about-emissions-scandal> accessed 10 March 2016
New York Times, 'BP Will Plead Guilty and Pay Over $4 Billion' 15 November 2012, <http://www.nytimes.com/2012/11/16/business/global/16iht-bp16.html?_r=0> accessed 30 November 2015
Nietzsche F, ***Thus Spoke Zarathustra*** (Walter Kaufmann trans., Penguin 1978) II.7
Nussbaum M, 'Compassion: The basic social emotion' (1996) 13 Social Philosophy & Policy 27
Oberdiek H, 'Intention and Foresight in Criminal Law' (1972) 81 Mind 389
Ogbonna E and Harris LC, 'Leadership style, organizational culture and performance: empirical evidence from UK companies' (2000) 11 Intl J Human Resource Management 766
Oxford English Dictionary, online edition, accessed 11/02/2013
Pettit 'Responsibility Incorporated' (2007) 117 Ethics 171
Pettit P, 'Collective Persons and Powers' (2002) 8 Legal Theory 443
Platt S, ***Criminal Capital: How the Finance Industry Facilitates Crime*** (Palgrave MacMillan 2015)
Posner RA, ***Economic Analysis of Law*** (2nd ed, Little Brown and Company 1977)
Postema GJ, 'Morality in the First Person Plural' (1995) 14 Law and Philosophy 35

Presser SB, 'The Bogalusa Explosion, "Single Business Enterprise," "Alter Ego," and Other Errors: Academics, Economics, Democracy, and Shareholder Limited Liability: Back Towards a Unitary "Abuse" Theory of Piercing the Corporate Veil' (2006) 100 Nw U L Rev 405

Raz J, ***From Normativity to Responsibility*** (Oxford University Press 2011)

Reinhard GL, ***A Treatise on the Law of Agency in Contract and Tort: including Special Chapters on Attorneys at Law, Auctioneers, Bank Officers, Brokers, Factors, Insurance Agents, Traveling Salesmen, Public Agents and Officers, Master and Servant*** (1902)

Ribstein LE , 'Limited Liability and Theories of the Corporation' (1991) 50 Md L Rev 80

Richard Anderson, 'Pharmaceutical industry gets high on fat profits,' BBC News 6 November 2014

Ripken SK, "Corporations are People Too: A multi-dimensional approach to the corporate personhood puzzle" (2009-2010) 15 Fordham JCorp&FinL 97

Rodenberry G, ***Star Trek*** (television show first aired in 1966 on NBC Network in the United States)

Rodriguez-Blanco V, 'Understanding the Nature and Structure of Practical Reasoning: Excavating the Classical Tradition,' Presentation at the Jurisprudence Discussion Group, University of Oxford, 30th January 2014

Rose P, 'Common Agency and the Public Corporation' (2010) 63 Vand LRev 1353

Rovane CA, ***Boundaries of Agency: An Essay in Revisionary Metaphysics*** (Princeton University Press 1997)

Schlegel K, ***Just Deserts for Corporate Criminals,*** (Northeastern University Press 1990)

Schmid HE, 'The feeling of being a group: corporate emotions and collective consciousness' in von Scheve C and Salmela M, (eds), ***Collective Emotions*** (Oxford University Press 2014) 1

Sepinwall AJ, 'Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime' (2011-12) 63 Hastings L J 411

Simester A, 'On Justifications and Excuses,' in Zedner L and Roberts JV (eds), ***Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*** (Oxford University Press 2012) 81

— — and Sullivan GR, ***Criminal Law: Theory and Doctrine*** (3rd ed, Hart 2007)

Simpson SS and Koper CS, 'Deterring Corporate Crime' (1992) 30 Criminology 347

Sinnott-Armstrong W and Behnke S, 'Criminal Law and Multiple Personality Disorder: The Vexing Problems of Personhood and Responsibility' (2001) 10 Southern California Interdisciplinary LJ 277

Sklar RB, 'Similar Fact Evidence — Catchwords and Cartwheels' (1977) McGill LJ 60

Smiley M, 'Collective Responsibility' ***The Stanford Encyclopedia of Philosophy (Fall 2011 Edition),*** Edward N. Zalta (ed.)

Stout LS, 'Why We Should Stop Teaching ***Dodge v. Ford***' (2008) 3 Va L & Bus Rev 163

Sullivan GR, 'The Attribution of Culpability to Limited Companies' (1996) 55 Cambridge LJ 515

Szott Moohr G, 'Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation' (2007) AmCrimLRev 1343, 1349

Tadros V, 'Recklessness and the Duty to Take Care' in Stephen Shute and Andrew Simester eds., ***Criminal Law Theory: Doctrines of the General Part*** (OUP 2002) 227

Tanguay-Renaud F, 'Puzzling about State Excuses as an Instance of Group Excuses' in R.A. Duff and others (eds), ***The Constitution of the Criminal Law*** (Oxford University Press 2013) 119

Teubner G, 'Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person' (1988) 36 Am J Comp L 130

The Guardian, 'The Volkswagen emissions scandal explained' 23 September 2015, <http://www.theguardian.com/business/ng-interactive/2015/sep/23/volkswagen-emissions-scandal-explained-diesel-cars> accessed 10 March 2016

The Huffington Post, 'Occupy DC Passes Corporate Personhood Resolution,'15 January 2012, <http://www.huffingtonpost.com/2012/01/15/occupy-dc-passes-corporate-personhood-resolution_n_1207041.html> accessed 28 March 2016

Thompson RB, 'Piercing the Corporate Veil: an Empirical Study' (1991) 76 Cornell LRev 1036

Thornton D et al, 'General Deterrence and Corporate Environmental Behavior' (2005) 27 Law & Pol'y 262

Tollefsen D, 'Affectivity, Moral Agency, and Corporate-Human Relations' (2008) 7 APA Newsletters: Newsletter on Philosophy and Law 9

Tooley M, 'Are Nonhuman Animals Persons?' in Tom L. Beahchamps and R.G. Frey, eds, ***The Oxford Handbook of Animal Ethics*** (Oxford University Press 2011)

Tuomela R, ***The Philosophy of Social Practices: A Collective Acceptance View*** (Cambridge University Press 2002)

— — ***Social Ontology: Collective Intentionality and Group Agents*** (Oxford University Press 2013)

U.S. Department of Justice, Title 9, Chapter 9-28.000, Principles of Federal Prosecution of Business Organizations

van Beurden P and Gössling T, 'The Worth of Values — A Literature Review on the Relation Between Corporate Social and Financial Performance' (2008) 82 Journal of Business Ethics 407

Velasco J, 'How Many Fiduciary Duties are there in Corporate Law?' (2010) 83 S Cal L Rev 1232

von Hirsch A, ***Censure and Sanctions*** (Clarendon 1993)

— — and Ashworth A, ***Proportionate Sentencing: Exploring the Principles*** (Oxford University Press 2005)

Weaver GR, 'Virtue in Organizations: Moral Identity as a Foundation for Moral Agency' (2006) 27 Organization Studies 341

Weber M, ***Economy and Society: An Outline of Interpretive Sociology*** (trans. Ephraim Fischoff et al., University of California Press, 1978)

Wells C, ***Corporations and Criminal Responsibility*** (2nd ed, Oxford University Press 2001)

— — and Quick O, ***Lacey, Wells and Quick: Reconstructing Criminal Law*** (4th ed., Cambridge University Press 2010)

Wheeler M, "Martin Heidegger", ***The Stanford Encyclopedia of Philosophy*** (Spring 2013 Edition), Edward N. Zalta (ed.), URL =

<http://plato.stanford.edu/archives/spr2013/entries/heidegger/>. Retrieved 2 July 2014
Williams B, ***Moral Luck*** (Cambridge University Press 1982)
Wittgenstein L, ***Philosophical Investigations***, G.E.M. Anscombe, trans. (Basil Blackwell 1958)
Wolgast E, ***Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations*** (Stanford Series in Philosophy, Stanford University Press, 1992)
Woller GM, 'Business ethics, society, and Adam Smith: Some observations on the liberal business ethos' (1996) 25 The Journal of Socio-Economics 311
Wringe B, 'Collective Agents and Communicative Theories of Punishment' (2012) 43 JSocPhil 436
— — 'Must Punishment Be Intended to Cause Suffering?' (2013) 16 Ethic Theory Moral Prac 863