

Corporate Moral Agency at the Convenience of Ethics and Law

MATTHEW CAULFIELD* AND WILLIAM S. LAUFER**

ABSTRACT

The construct of corporate moral agency in both ethics and law is far too often regarded as little more than a means to an end, reduced to subtle semantics, attenuated fictions, and poor analogies. Much scholarship on corporate moral agency is used instrumentally to reach certain ideological ends in business ethics. In this article, we also bemoan the criminal law's perennial search over personhood and agency—a search that takes a host of theoretical casualties and, ultimately, a reluctance to employ formal social controls in response to serious corporate wrongdoing. Jurists, legal theorists, business ethicists, and philosophers are all too eager to avoid any serious engagement with question of CMA.

TABLE OF CONTENTS

I. HOLDING RESPONSIBLE WITHOUT ARTICULATING RESPONSIBILITIES	956
II. SOCIAL PERFORMATIVITY, BUSINESS, AND THE CMA	957
III. FROM PHILOSOPHICAL DELIGHTS TO THE MORALIST APPROACH . . .	963
IV. <i>EX ANTE</i> MORAL PERFORMATIVITY: THE DUTIES AND PRIVILEGES OF CORPORATIONS	967
V. CORPORATE MORAL AGENCY AT THE LAW'S CONVENIENCE.	971
A. <i>Moral Agency at the Law's Convenience</i>	972
B. <i>The Apparent Irrelevance of Genuine Corporate Fault</i>	973
C. <i>Missed Opportunities, from Yates to Chapter Eight</i>	975
VI. CONCLUSION	977

* Doctoral Program, Department of Legal Studies & Business Ethics, The Wharton School, University of Pennsylvania. © 2019, Matthew Caulfield and William S. Laufer.

** Julien Aresty Professor, The Wharton School, University of Pennsylvania.

Conventional ideologies supporting business ethics and the corporate criminal law are united by a profound commitment to hold corporations responsible for their wrongdoing. In what has been described as a “tenacious pursuit” of corporate responsibility,¹ the construct of corporate moral agency (“CMA”), we contend, is far too often reduced to subtle semantics, attenuated fictions, poor analogies, and obvious instrumentalism. CMA is frequently regarded as little more than a means to an end.²

In this article, we offer regrets that much of the work on CMA has been used to reach certain ideological ends in business ethics. As we offer regrets, we also bemoan the criminal law’s steadfast requirement for what amounts to a corporate “soul.” The perennial search for corporate *mens rea*, corporate personhood, and CMA has encouraged a century-old scholarly joust—an intellectually ornate battle with no clear winner, a host of theoretical casualties and, ultimately, a reluctance to employ formal social controls in response to serious corporate wrongdoing.

While we reach more domain-specific conclusions in our treatment of both business ethics and corporate criminal law, the crux of our argument remains the same. Language, discourse, rhetoric, semantics, and a pragmatic instrumentalism substitute for analytically rich theories of CMA across these domains. Jurists, legal theorists, business ethicists, and philosophers are all too eager to avoid any serious engagement with questions of CMA. Instead, far too many employ evasive theorizing and justificatory discourses that are bewildering to outsiders of this debate, while at the same time claiming that the right answers are either obvious or justified simply by their desire to hold corporations responsible.³

We are not the first to point to the abuse of CMA. Some have more euphemistically referred to the “motivated viewpoints”⁴ that pervade the CMA debate. Others, such as Ian Maitland, more starkly warn that the confusion resulting from the ontological and jurisprudential debates is ripe for exploitation. Insiders are tempted to “deepen this confusion” for their own personal advantage,⁵ responding to what is essentially “an open invitation to abuses.”⁶ Maitland focuses on very

1. Kenneth E. Goodpaster, *Tenacity: The American Pursuit of Corporate Responsibility*, 118 BUS. & SOC’Y REV. 577–605 (2013).

2. We recently reflected worryingly on this phenomenon in corporate criminal law specifically. See Matthew Caulfield & William S. Laufer, *The Promise of Corporate Character Theory*, 103 IOWA L. REV. ONLINE 101 (2018), <https://ilr.law.uiowa.edu/online/volume-103/the-promise-of-corporate-character-theory> [<https://perma.cc/95K3-RCEZ>].

3. These efforts, we conclude, are designed to advance agendas of different stripes, using the concepts and language of CMA as a means to some desired end. To be clear, we are not contending that CMA is implausible—we only contend that it has been largely abused. See also Ian Maitland, *How Insiders Abuse the Idea of Corporate Personality*, in *THE MORAL RESPONSIBILITY OF FIRMS* (Eric W. Orts & N. Craig Smith eds., 2017).

4. Alan E. Singer, *Thinking Strategically about ‘Corporate Personhood’*, 36 HUM. SYS. MGMT 129, 136 (2017) (reflecting on “the diverse purposes and value-priorities of the observers and [CMA] debate participants themselves”).

5. Maitland, *supra* note 3, at 107.

6. *Id.* at 119.

specific abuses that he believes to have occurred, but we are less interested in the specific abuses that are occurring than in the fact such abuses are occurring *at all*.

The abuse itself is what concerns us here. Given the simplicity of our goal, we feel freer to transgress boundaries between otherwise distinct fields.⁷ Our basic goal, in both the domains of business ethics and corporate criminal law, is to gesture towards abuse as a long-lived malady and plead for engagement so that we may be rid of it. Failures to distinguish both the theoretical from the pragmatic and truth from the ideological have affected even the most respected business ethics and corporate criminal legal scholarship.

The first sections of our article concern CMA in business ethics. After discussing the theories underlying CMA, we describe two paradigms of business ethics CMA scholarship that leave us unsatisfied—one which is basely ideological and another which consists of exercises in amoral philosophical whimsy. We suggest a third approach—the moralist approach—and describe how a focus on what corporations are responsible for in the first place, *before* they do something wrong, can help clarify the moral-theoretical consequences of our metaphysical conclusions. While some theorists argue strongly against CMA's relevance for business ethics, not much has been said in support of its relevance.⁸ This is because there is no account that shows why certain formulations of CMA should matter. That such meta-justificatory work has not yet been done is itself extraordinary. So far, the most prominent discussions in business ethics are structured, implicitly or explicitly, to *justify or explain* holding corporations responsible while taking the need for such responsibility as a premise.⁹ This is a rather topsy-turvy way—or, more precisely, a question-begging way—of arguing about CMA.

The final sections of our article shift focus from CMA in business ethics to CMA in the corporate criminal law. We conclude that corporations are persons with respect to corporate criminal law only at the law's discretionary convenience. The most profound questions of morality and legal agency are raised in considering the normative implications of the prosecutorial and sentencing guidelines used to constrain the discretion of criminal justice functionaries. The substantive criminal law stands still, grounded in early twentieth-century principles.¹⁰ And there are distinct costs for this intransience.

7. For a recent call for such interdisciplinary work, see Samuel Mansell et al., *Rethinking Corporate Agency in Business, Philosophy, and Law*, 154 J. BUS. ETHICS 893 (2018), <https://doi.org/10.1007/s10551-018-3895-1> [<https://perma.cc/PU5A-JLVV>].

8. One exception is Michael J. Phillips, *Corporate Moral Responsibility: When It Might Matter*, 5 BUS. ETHICS Q. 555, 555–76 (1995).

9. The clearest instance of this is Pettit's "responsibility deficit." PETTIT, *infra* note 93, at 194.

10. And, even more remarkable, the ultimate concern of prosecutors and courts is rarely with the culpability from underlying offense. It is the post-offense behavior of the firm, as a firm, that moves prosecutors and regulators.

I. HOLDING RESPONSIBLE WITHOUT ARTICULATING RESPONSIBILITIES

We begin with a story that reflects the two paradigms of corporate moral agency arguments in the business ethics literature. This story characterizes the aims and goals of CMA theorists. In one of the earliest serious reflections on corporate moral agency in business ethics, Patricia Werhane offers a positive account of collective blameworthiness that extends beyond the blameworthiness of individuals, deeming corporations “collective secondary moral agents.”¹¹ In an important critique of Werhane’s work, Jan Edward Garrett takes issue with her claim that there is some corporate responsibility beyond that which could be attributed to individuals, what he calls “unredistributable corporate moral responsibility.”¹² Garrett observes:

Because the flawed actions of corporations in such cases flow not from vicious character and strictly intentional wrongdoing . . . juries may be reluctant to convict individual corporate managers of wrongdoing and to insist upon criminal sanctions. At the same time it may be fairly clear that corporately and collectively those same managers bear moral responsibility for their actions. . . . The metaphysical and legal solutions come apart—moral responsibility may still be redistributable in principle, while corporate liability may not always be redistributable in practice. But the difference is easily explained and the thesis of unredistributable corporate moral responsibility finds no support from it.¹³

Werhane’s response to Garrett is highly illustrative:

Let me begin with emphasizing a point upon which, I think, French, Garrett, and myself are all in agreement. The question of whether or not one can hold a corporation morally responsible . . . is important not merely for the philosophical delight of deciding whether or not a corporation is a full-fledged moral person, a collective, or merely an aggregate of individual actions. Somehow we need to determine who is responsible for business practices, both commendable and questionable ones. Because the law treats corporations as legal persons, these practices are commonly attributable to corporations. But if, as Garrett implies, corporations are not in any sense moral agents, they cannot be held morally liable. In that case one needs to find out who and how individuals are responsible for so-called corporate practices and how to distribute that responsibility accordingly and fairly. Otherwise individuals AND corporations are let off, and no individual or entity is held properly liable for his, her, or its actions.¹⁴

11. PATRICIA HOGUE WERHANE, *PERSONS, RIGHTS AND CORPORATIONS* (1985).

12. See Jan Edward Garrett, *Unredistributable Corporate Moral Responsibility*, 8 J. BUS. ETHICS 535, 536 (1989).

13. *Id.* at 535–45.

14. Patricia H. Werhane, *Corporate and Individual Moral Responsibility: A Reply to Jan Garrett*, 8 J. BUS. ETHICS 821–822 (1989).

In further defense of her view, Werhane argues: “One needs to ascribe moral responsibility and thus moral liability to corporations as well as individuals, particularly when an action or practice is no longer traceable to its creators. Otherwise corporations, and in particular, their practice and policies, are let off the moral hook.”¹⁵

While Werhane’s initial characterization turned on a purportedly metaphysical classification—that there is such a thing as a “collective secondary moral agent”—the classification is derived entirely from the belief that corporations need to be held responsible for acts that the law would not recognize without corporate moral agency. Garrett was therefore prescient in framing his discussion in terms of political ideologies, with “liberals and egalitarians on the one side, and conservatives and libertarians on the other.”¹⁶ While he did not say so explicitly, it seems Garrett believes that the conflict here is about how to craft terms, discourse, and justifications for ascribing responsibility under the assumption that such responsibility needs to be ascribed.

There are two dominant paradigms of research on CMA. The first is what Werhane refers to as matters of “philosophical delight”—efforts to understand corporate moral agency purely by reference to metaphysical schools of thought. Such efforts engage seriously with metaphysics but fail to identify the moral implications of their metaphysical conclusions (if any could be offered). The second is a socially-performative exercise that focuses on how the form and content of theory might affect society. In this article, we attempt to examine both, arguing that the latter corrupts honest theorizing, and the former does not merit the label of ‘business ethics’ or *moral* philosophical research. We advocate for a third option, one which preserves the metaphysical theorizing of the “philosophical delight” approach but explores its moral implications: what we call a ‘moralist approach.’ The meta-debate about CMA—the debate about whether CMA matters morally speaking—has its share of prominent detractors. We hope to persuade others to adopt a moralist approach, and defend the purported moral (not just social) ramifications of the theory in question.

In the next section, we discuss social performativity and CMA, followed by a consideration of the moralist approach as building upon the philosophical delight approach.

II. SOCIAL PERFORMATIVITY, BUSINESS, AND THE CMA

Discourse can affect how people act and influence society.¹⁷ In this section, we discuss the *Social Performative* stance, which views CMA theory as designed to elicit or coax certain behavior or social change. First, we will discuss more

15. *Id.*

16. Garrett, *supra* note 12, at 535.

17. Mats Alvesson & André Spicer, *Critical Leadership Studies: The Case for Critical Performativity*, 65 HUM. REL. 367, 367–90 (2012); Jean-Pascal Gond et al., *What Do We Mean by Performativity in Organizational and Management Theory? The Uses and Abuses of Performativity: Organizing Performativity*, 18 INT’L J. MGMT. REV. 440, 440–63 (2016).

popular examples of performative theories in business. Then, we pick out stakeholder theory as a primarily *performative* theory within business ethics, one which may be a useful model for how CMA may matter as one such theory.

That academic theory can affect the real world is an old idea. John Maynard Keynes noted that, “[t]he ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is run by little else. . . . It is ideas, not vested interests, which are dangerous for good or evil.”¹⁸ Similarly, Charles Perrow argued that “theories shape our world; they encourage us to see it a certain way, and then we exclude other visions that could direct our actions.”¹⁹

Perhaps the paradigmatic case of performative theory in business and economics is that of the Black-Scholes options pricing theory.²⁰ The basic story is that the theory only became helpful in predicting options pricing on the Chicago Board Options Exchange after it had been implemented by arbitrageurs and thus had changed the market to resemble its own predictions.²¹ In other words, the Black-Scholes model did not predict the options prices produced by the market, but rather the market produced what the Black-Scholes model predicted;²² it became a self-fulfilling prophecy.²³

The most widely acknowledged examples of performative theories in business that carry worrisome moral implications are those which, by assuming opportunistic or egoistic behavior, may have the effect of encouraging such opportunism or egoism.²⁴ Such theories include Williamsonian transaction cost economics theory²⁵ and Jensen and Meckling’s agency theory.²⁶ Ghoshal has famously argued that “by propagating ideologically inspired amoral theories, business schools have actively freed their students from any sense of moral

18. JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (2018).

19. CHARLES PERROW, *COMPLEX ORGANIZATIONS; A CRITICAL ESSAY* 235 (1972).

20. Fabrizio Ferraro, Jeffrey Pfeffer & Robert I. Sutton, *Economics Language and Assumptions: How Theories Can Become Self-Fulfilling*, 30 *ACAD. MGMT. REV.* 8–24 (2005); Donald MacKenzie & Yuval Millo, *Constructing A Market, Performing Theory: The Historical Sociology of a Financial Derivatives Exchange*, 109 *AM. J. SOC.* 107–45 (2003); DO ECONOMISTS MAKE MARKETS?: ON THE PERFORMATIVITY OF ECONOMICS, (Donald MacKenzie et al. eds., 2008).

21. MacKenzie & Millo, *supra* note 20.

22. *Id.*

23. Ferraro, Pfeffer, & Sutton, *supra* note 20.

24. *Id.*; Sumantra Ghoshal & Peter Moran, *Bad for Practice: A Critique of the Transaction Cost Theory*, 21 *ACAD. MGMT. REV.* 13, 13–47 (1996); JEFFREY PFEFFER, *COMPETITIVE ADVANTAGE THROUGH PEOPLE: UNLEASHING THE POWER OF THE WORK FORCE* (1994); Norman E. Bowie, *Challenging the Egoistic Paradigm*, 1 *BUS. ETHICS Q.* 1, 1–21 (1991).

25. Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 *J.L. & ECON.* 233, 233–62 (1979); Oliver E. Williamson, *Chapter 3 Transaction Cost Economics*, 1 *HANDBOOK INDUS. ORG.*, 135, 135–182 (1989), [<https://perma.cc/9KY8-SDPG>].

26. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305, 305–60 (1976); Øyvind Bøhren, *The Agent’s Ethics in the Principal-Agent Model*, 17 *J. BUS. ETHICS* 745, 745–55 (1998); Joan Fontrodona & Alejo José G. Sison, *The Nature of the Firm, Agency Theory and Shareholder Theory: A Critique from Philosophical Anthropology*, 66 *J. BUS. ETHICS* 33, 33–42 (2006).

responsibility.”²⁷ Donaldson describes the morphing of descriptive theories of the firm, which are supposed to take on the role of explanation or prediction, into normative, prescriptive theories of corporate governance as a “ubiquitous slight-of-hand.”²⁸ He argues that this transgressive translation relies on hidden normative commitments and neglects unaddressed normative concerns.²⁹

But while the performativity of any theories in business is often viewed as an unfortunate, unintended consequence of the theory,³⁰ some scholars view it as a potential force for good. For instance, “critical management” scholars have pursued a kind of “critical performativity” that involves management research which adopts critical, evaluative stances and a normative orientation towards changing the real world by entrenching itself within the discourses that economic theories have traditionally dominated.³¹

More squarely in the realm of business ethics, some prominent strains of stakeholder theory focus on how “narrative accounts” of business, including how “language, conceptual schemes, metaphors, and images that individuals have of business activity make a difference in how they think and act . . . [T]hese representations influence individual conceptions of what constitute ‘reasonable’ strategic action.”³²

Indeed, R. Edward Freeman, stakeholder theory’s leading exponent, has said that, “[t]here is no such thing as stakeholder theory”³³—rather, “[s]takeholder theory is . . . a genre of stories about how we could live.”³⁴ Just as classical visions of egoist markets provide us with some understanding of how we relate to one another,³⁵ stakeholder theory may provide another. Some defenders of the theory have pointed out that stakeholder theory’s pragmatic stance means that it “does not have to be consistent or remain truthful to a single uniform content.”³⁶ Some more critical of the theory have advanced a compelling argument that

27. Sumantra Ghoshal, *Bad Management Theories Are Destroying Good Management Practices*, 4 ACAD. MGMT. LEARNING & EDUC. 75, 76 (2005).

28. Thomas Donaldson, *The Epistemic Fault Line in Corporate Governance*, 37 ACAD. MGMT. REV. 256, 256–71 (2012).

29. *Id.* at 256–271.

30. Some prominent proponents, though, have held out these economic theories as purposefully normative. See, e.g., Scott E. Masten, *Transaction Costs, Mistakes, and Performance: Assessing the Importance of Governance*, 14 MANAGERIAL & DECISION ECON. 119, 119–29 (1993).

31. Alvesson & Spicer, *supra* note 17; André Spicer, Mats Alvesson & Dan Kärreman, *Critical Performativity: The Unfinished Business of Critical Management Studies*, 62 HUM. REL. 537, 537–60 (2009).

32. For an early review of this strain, see Thomas M. Jones & Andrew C. Wicks, *Convergent Stakeholder Theory*, 24 ACAD. MGMT. REV. 206, 209–10 (1999).

33. R. Edward Freeman, *The Politics of Stakeholder Theory: Some Future Directions*, 4 BUS. ETHICS Q. 409, 413 (1994).

34. *Id.* at 413.

35. See generally, Kendy Hess, *Metaphors Matter: Ethics and the Meme of the Market*, 13 GEO. J.L. & PUB. POL’Y 321–336 (2015).

36. Tommy Jensen & Johan Sandström, *In Defence of Stakeholder Pragmatism*, 114 J. BUS. ETHICS 225–237, 226 (2013).

stakeholder theory suffers from a dearth of non-trivial normative content altogether.³⁷

If we accept this characterization of stakeholder theory, the theory presents the prime model for how social performativity can be the main aim of a theory or of theorizing in business ethics. The aim of stakeholder theory is to alter discourse to change our understanding of business and how we conduct it rather than to establish moral or metaphysical truth. The relevant question is not whether stakeholder theory is *right* or *true*, but rather, “Is this story or metaphor *useful*?”³⁸

CMA arguments might be directed towards or effect similar ends. One of the more interesting aspects of social performativity of theory is that it can be disconnected from the underlying truth of the theory.³⁹ For instance, it may be that some theory is correct—say, Kant’s categorical imperative—but that it has little effect on society. On the other hand, a fallacious theory can have outsized effects.

Pettit, similar to Werhane, describes a “responsibility deficit” as a departure point for theorizing about corporate moral agency.⁴⁰ This deficit describes a supposed lack in responsibility ascriptions that results from a focus on individual natural persons as moral agents. This deficit must be remedied, Pettit thinks, by ascribing responsibility to group agents such as corporations.

While Pettit and Werhane more obviously take the need for responsibility ascriptions to corporations as a given, others have adopted more superficial bases for attributing responsibility to corporations. Goodpaster has defended a “principle of moral projection” in a prominent series of articles, arguing that analogical reasoning is sufficient to establish that corporations possess the kind of moral responsibility usually reserved for individual moral agents.⁴¹ He argues that we can understand the corporate conscience (merely) as a projection of the leader’s conscience and leave it at that. But this principle cannot withstand scrutiny. Goodpaster is uncritically trading on our psychological tendency to identify

37. John Hasnas, *Whither Stakeholder Theory? A Guide for the Perplexed Revisited*, 112 J. BUS. ETHICS 47, 47–57 (2013).

38. Jensen & Sandström, *supra* note 36 at 226 (emphasis original).

39. Fabrizio Ferraro, Jeffrey Pfeffer & Robert I. Sutton, *How and Why Theories Matter: A Comment on Felin and Foss* (2009), 20 ORG. SCI. 669–675, 670–672 (2009) (arguing against the idea that “the theories that succeed,” in society, “are the ones that are most veridical with the world as it exists.”).

40. PETTIT, *infra* note 93.

41. Kenneth E. Goodpaster, *The Concept of Corporate Responsibility*, 2 J. BUS. ETHICS 1, 1–22 (1983) (“It is appropriate not only to describe organizations [and their characteristics] by analogy with individuals, it is also appropriate normatively to look for and to foster moral attributes in organizations by analogy with those we look for and foster in individuals.” [emphasis omitted]); Kenneth E. Goodpaster & John B. Matthews, *Can a Corporation Have a Conscience*, 60 HARV. BUS. REV. 132, 132–41 (1982) [hereinafter Goodpaster & Matthews, *Corporation*]; Kenneth E. Goodpaster, *Tenacity: The American Pursuit of Corporate Responsibility*, 118 BUS. & SOC’Y REV. 577, 577–605 (2013); Kenneth E. Goodpaster, *The Principle of Moral Projection: A Reply to Professor Ranken*, 6 J. BUS. ETHICS 329, 329–32 (1987); KENNETH E. GOODPASTER, CONSCIENCE AND CORPORATE CULTURE (2006) [hereinafter GOODPASTER, CONSCIENCE].

corporations as people.⁴² This is most evident when Goodpaster says we can think of organizations as “human beings writ-large.”⁴³ That this theory has garnered such popularity may seem confusing given its lack of theoretical underpinnings.

But it is not confusing once we remind ourselves of the fact that the truth of a theory—or even its plausibility—has no necessary connection with its popularity. Indeed, we might think that it is again the criterion of “usefulness” that lends it its popularity. Goodpaster’s theory allows us to quickly and easily, with only a couple of citations, treat the corporation as a moral agent for our own purposes and theoretical ends, with minimal metaphysical commitments (or none at all) to boot. Indeed, Goodpaster’s initial formulation of the theory exhibits an explicit dedication to being “useful” (as opposed, for instance, to being true):

Goals, economic values, strategies and other such personal attributes are often usefully projected to the corporate level by managers and researchers. Why should we not project the function of conscience in the same way? As for holding corporations responsible, recent criminal prosecutions . . . suggest that society finds the idea both intelligible and useful.⁴⁴

There is, of course, a litany of literature consisting of overtly “pragmatist” approaches to corporate responsibility and metaphysics,⁴⁵ and more recently there has been work on more functionalist approaches.⁴⁶ We do not intend to question those here; insofar as pragmatists explicitly deny the coherence, meaningfulness, or usefulness of the traditional metaphysical inquiry, they are not guilty of the kind of abuses we investigate here. But where approaches are not overtly pragmatist, as in Goodpaster’s, Werhane’s, and Pettit’s cases, they are susceptible to being tailored to suit one’s preferences and thus rarely provide the kind of justificatory power they are intended or purported to offer. That we are committed to holding corporations responsible for their wrongdoing does not license us to shape metaphysical distinctions to fit our preferred conception of corporate responsibility.⁴⁷ We must avoid theorization in which truth takes a back seat to activism.

42. Patricia H. Werhane, *Book Review: Conscience and Corporate Culture by Kenneth Goodpaster*, 119 *ETHICS* 353, 354 (2009) (questioning how the analogical reasoning could be justified, focusing on “the danger of personifying organizations as moral persons.”).

43. GOODPASTER, *supra* note 41 at 19.

44. Goodpaster & Matthews, *Corporation*, *supra* note 41 at 110.

45. See, most famously, John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655 (1926).

46. Waheed Hussain and Joakim Sandberg, *Pluralistic Functionalism about Corporate Agency in THE MORAL RESPONSIBILITY OF FIRMS* (Eric W. Orts & N. Craig Smith eds., 2017).

47. Some have explicitly favored a semantic approach, enabling us to regard corporation actions as just being precisely “what we say they are,” if we understand the organization as a social construct. We do not mean to demean these approaches, since they at least engage seriously with the metaphysical premises before reaching such conclusions. Stephen Wilmot, *Corporate Moral Responsibility: What Can We Infer from Our Understanding of Organisations?*, 30 *J. BUS. ETHICS* 161, 161–69 (2001).

To provide another example, Soares employs a reductio argument against the claim that only individual, rather than corporate, responsibility exists. She argues that:

[T]he theory of individual responsibility, in spite of its strengths, is necessarily inadequate outside its limited domain of applicability. From its perspective, the notion of corporate responsibility is unintelligible. As a result, societies and legal systems . . . in which the theory holds sway, have great difficulties, both in theory and in practice, in understanding and accepting the notion of corporate responsibility in moral as well as legal contexts.⁴⁸

Soares uses the social effects of an individualist theory as a reductio of its “adequacy.” This is a familiar strategy—some have endeavored to reject entire ethical theories on the basis that they do not make room for CMA.⁴⁹

Our contention here is that the social effects of a theory are not the arbiter of whether the theory is true. This is not to say that socially performative factors are unimportant. Even critics of CMA have worried about the socially performative effects of theorizing. For instance, Manuel Velasquez has worried that if we adopt a pro-CMA theory, individual justice will be neglected in favor of corporate justice.⁵⁰ John Hasnas has suggested that CMA should be assessed solely in terms of its practical effects,⁵¹ lest we be led down the road of thinking about transcendental nonsense.⁵²

We do not go as far as Hasnas. We are not yet convinced that more traditional metaphysical inquiries amount to nonsense or are unimportant. On the other hand, we worry that too strong a focus on the *social effects* of theorizing has subjected and will continue to subject theorizing—even within academic journals and academic circles—to either motivated reasoning or (un)intentionally vague discourse. The ultimate manifestation of our worry would be a landscape of apparently sophisticated arguments all arguing for their own ideological ends.

48. C. Soares, *Corporate versus Individual Moral Responsibility*, 46 J. BUS. ETHICS 143, 148 (2003).

49. Matthew C. Altman, *The Decomposition of the Corporate Body: What Kant Cannot Contribute to Business Ethics*, 74 J. BUS. ETHICS 253, 253 (2007) (arguing that “the explanatory usefulness of collective responsibility may force business ethicists to abandon Kant’s moral philosophy.”). Tobey Scharding convincingly argues for “the alternative that Altman rejects: giving up the notion of corporate moral responsibility while continuing to use Kantian ethics.” Tobey Scharding, *Individual Actions and Corporate Moral Responsibility: A (Reconstituted) Kantian Approach*, J. BUS. ETHICS 929, 933 (2018).

50. Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS Q. 531, 537 (2003); Detractors of corporate moral agency often argue that a core commitment of theirs is the inalienability of individual responsibility. See, e.g., Tobey Scharding, *Individual Actions and Corporate Moral Responsibility: A (Reconstituted) Kantian Approach*, 154 J. BUS. ETHICS 929 (2018).

51. John Hasnas, *Reflections on Corporate Moral Responsibility and the Problem Solving Technique of Alexander the Great*, 107 J. BUS. ETHICS 183, 183–95 (2012).

52. John Hasnas, *Where is Flex Cohen When We Need Him: Transcendental Nonsense and the Moral Responsibility of Corporations*, 19 J.L. & POL’Y 55, 55–82 (2010).

III. FROM PHILOSOPHICAL DELIGHTS TO THE MORALIST APPROACH

Thomas Donaldson recently reminded us of the importance of asking the question, “So what?” when examining corporate moral agency.⁵³ In Section IV, we express concerns over metaphysical investigations in business ethics that fail to go far enough in their analysis of the moral (rather than merely social) consequences of their metaphysical conclusions. To use language more consistent with the previous section, one might say we think CMA arguments ought to incorporate how they would be *morally performative*. The considerations we will have identified—socially performative considerations and morally performative considerations—both invoke the concept of “performativity,” that originates in the work of J.L. Austin. In his “How to Do Things with Words,” Austin argued that utterances not only describe states of affairs but sometimes *perform* something themselves.⁵⁴ Morally performative utterances, for instance, affect rights and duties (or other moral relations⁵⁵) in the moral landscape. Saying “I promise you that I will do *x*” is not merely descriptive in nature, but serves to alter rights and duties between us; I would then have a duty to you to *x*, and you would have a right that I *x*. The utterance literally *does something* to the moral relations between us.

Thus, the question of the moral performativity of CMA is the question of whether the truth of a view on CMA would change anything in the moral relations between parties. ‘Rights’ talk is notoriously ambiguous. In an effort to offer a framework as a departure for the kind of moralist analysis we would like to see, in this section, we outline terminology introduced by Wesley Holcomb Hohfeld, now known as the “Hohfeldian incidents.” These incidents outline the different forms “rights” can take on.⁵⁶

Two types of relations (the “primary rules”⁵⁷) define comprehensively what is “permitted, required, or forbidden.”⁵⁸ These are *claims* and *privileges*:

Claim: A has a claim that B φ if and only if B has a duty to A to φ .

E.g.: You promised to give me \$6, so I have a right that you give me that \$6

Privilege: A has a privilege to φ if and only if A has no duty not to φ .

E.g.: I have a right to use my toothbrush.⁵⁹

53. Thomas Donaldson, *Preface*, in *THE MORAL RESPONSIBILITY OF FIRMS at v* (Eric W. Orts & N. Craig Smith eds., 2017).

54. J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS: SECOND EDITION* (J. O. Urmson & Marina Sbisa eds., 2d ed. 1975).

55. See *infra* for a discussion of the different varieties of “rights.” WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING: AND OTHER LEGAL ESSAYS* (1920); Leif Wenar, *The Nature of Rights*, 33 *PHILOSOPHY & PUBLIC AFFAIRS* 223, 223–52 (2005); Leif Wenar, *Rights*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Sep. 9, 2015), <https://plato.stanford.edu/archives/fall2015/entries/rights/> (last visited Nov 5, 2018) [<https://perma.cc/G8SQ-EQYX>].

56. HOHFELD, *supra* note 55.

57. H. L. A. HART, *THE CONCEPT OF LAW* (3d ed. 2012).

58. Wenar, *supra* note 55.

59. We draw these specific formulations from *id.*

Here, we will speak of “claims” as rights and define these rights as things which provide us with special reasons to act.⁶⁰ The “correlative” of a right is a duty. Correlatives express what parties on the other side of a relation have—if you have a duty to me not to φ , I have a right against you φ ’ing.

The opposite of a right is a no-right. The correlative of a no-right is a privilege; if I have a no-right that you X , you have to a privilege towards me to X . As free individuals with many privileges, most relations we share are no-rights. I have a no-right against you running a mile insofar you are not duty-bound to me to abstain from running a mile; you have the *privilege*⁶¹ of running a mile. But the most interesting cases are those in which what might be thought generally to be a right becomes a no-right—that is, where something which duty would typically forbid becomes a privilege. For instance, as an NFL lineman, under certain conditions I would have a no-right against you, the opposing lineman, tackling me. You would have a qualified privilege to tackle me.

What Hart calls “secondary rules”⁶² are those relations which define how the incidents which constitute the primary rules may be created or destroyed. These are *powers* and *immunities*:

Power: A has a power if and only if A has the ability to alter her own or another’s Hohfeldian incidents.

E.g.: I can waive my right to a speedy trial; I can abandon property and thereby waive my right to excluding others from it.

Immunity: B has an immunity if and only if A lacks the ability to alter B ’s Hohfeldian incidents.

E.g.: I have an immunity against self-incrimination.⁶³

Both of these delimit the boundaries within which we may alter the “primary rules”: we have the power to grant rights (quash privileges), subject to the limitations of immunities, or create privileges (quash rights) to the extent our powers allow. While the concept of a power is most easily seen through waiver and consent (for quashing rights) or promising (for generating them), powers are not limited to these relations.

One less obvious example of a power is a case of “reserving the right.” I may lend you money and say that “*for now*, it is a gift, but if I find myself in a terrible financial position in the near future, I reserve the right to demand repayment.” In this case, when I loan the money, I do not assume a right against you to repayment or correlatively impose a duty on you to pay; I merely assume a *power* to impose a duty on you to pay. I reserve the power—the discretion—to *create* a

60. Nicolas Cornell, *Wrongs, Rights, and Third Parties*, 43 PHIL. PUB. AFF. 109, 109–43 (2015).

61. A privilege has also been referred to as a “license” or “liberty.” See, Wenar, *supra* note 55; George W. Rainbolt, *Rights Theory*, 1 PHIL. COMPASS 11, 11–21 (2006).

62. HART, *supra* note 57.

63. Again, here we use Wenar’s summary and are indebted to him. Wenar, *supra* note 55.

duty that binds you.⁶⁴

The correlative of a power is a liability—if I have the power to impose a duty on you, for instance, you have a liability that I impose this duty on you. The opposite of a power is a disability—if I have no power to impose a duty on you, then I have a disability to impose that duty on you. The correlative of a disability is an immunity—if I have a disability to impose a duty on you, then you have an immunity against me imposing such a duty.

This is all meant to illustrate the varied types of relations we have with one another, which enables us to appreciate how CMA might be morally performative. The moral relations can be divided into forward-looking considerations—*ex ante* moral relations—and backward-looking considerations, typically termed “responsibility notions.” The proponents of CMA focus heavily on the latter.⁶⁵ They are typically concerned with “holding corporations responsible for their actions” rather than whether a “corporation is one that behaves well—wisely, prudently and morally.”⁶⁶ But focusing on the responsibility notion, which may be a worthwhile endeavor, nonetheless invites the kind of motivated theorizing we critique.

Instead, we want to encourage a focus on the “responsible” corporation—on what corporations are obligated to do to *avoid* wrongdoing. This is because if theorists can articulate the firm’s *ex ante* duties, the responsibility notions will follow. An *ex ante* focus takes seriously the duties we ascribe to corporations when we deem them agents and consider whether they are able to fulfill those duties.⁶⁷

As critics of CMA have pointed out, neither moral nor legal liability for consequences are necessarily connected to duty or responsibility.⁶⁸ In the interpersonal context, I may be required to make restitution for the property damage my children cause, even though I violated no duty and am not directly responsible for the damage, and even though the damage was not caused by a fully developed moral agent. In the tort context, vicarious liability attaches even when corporations

64. We do need to be careful in using this linguistic heuristic, since one might also use “reserving the right” in terms of assuming a privilege. For example, say we go to see a horror movie. I say beforehand that I “reserve a right to scream” because I want to establish that you have a no-right against me screaming if we see this movie. I am using the language to ensure that I may permissibly act in a certain way (i.e. assuming a privilege) rather than empowering myself to impose an action-guiding duty upon you. Nonetheless, I think we have reason to think that ‘reserving the right’ is in some cases used in the power sense.

65. Phillips, *supra* note 8; French, *infra* note 93.

66. Wilmot, *supra* note 47 at 161.

67. A prime example of scholarship which takes this kind of approach is Nien-hê Hsieh *Corporate Moral Agency, Positive Duties, and Purpose in THE MORAL RESPONSIBILITY OF FIRMS* (Eric W. Orts & N. Craig Smith eds., 2017).

68. Amy J. Sepinwall, *Denying corporate rights and punishing corporate wrongs*, 25 *BUS.ETHICS Q.* 517, 517–34 (2015); Amy J. Sepinwall, *Faultless Guilt: Toward a Relationship-Based Account of Criminal Liability*, 54 *AM. CRIM. L. REV.* 521, 521–70 (2017); Hasnas, *supra* note 51 (arguing “restitution does not require that the party making the payment be morally responsible for the harm suffered by the recipient.”); John Hasnas, *The Phantom Menace of the Responsibility Deficit*, in *THE MORAL RESPONSIBILITY OF FIRMS* (Eric W. Orts & N. Craig Smith eds., 2017) (pointing out the distinction between a deficit of moral responsibility and a deficit of practical responsibility).

exercise maximal care in training and monitoring employees. If an employee negligently mops a floor and a customer is injured, the company is liable for the customer's damages even though there is no direct moral connection between the employee's conduct and the corporation itself.⁶⁹ It is no surprise, then, that the employer is empowered to extract an indemnity from its employees in such cases.⁷⁰

The employers' vicarious liability for tort damages may be required by social policy,⁷¹ fairness,⁷² promissory commitments,⁷³ expressive duties,⁷⁴ or something else. The premise that employers should pay for their employees' wrongdoing requires neither CMA nor its supporting rationale.⁷⁵ Thus, we should reject an exclusive focus on backward-looking responsibility if we wish to engage in a

69. JOHN G. FLEMING, *THE LAW OF TORTS* 412 (1992) ("According to the generally accepted modern view, the master's liability is genuinely vicarious and not based on any 'constructive' fault of his own"); PAULA GILIKER, *VICARIOUS LIABILITY IN TORT: A COMPARATIVE PERSPECTIVE* (2013); T. BATY, *VICARIOUS LIABILITY: A SHORT HISTORY OF THE LIABILITY OF EMPLOYERS, PRINCIPALS, PARTNERS, ASSOCIATIONS AND TRADE-UNION MEMBERS, WITH A CHAPTER ON THE LAWS OF SCOTLAND AND FOREIGN STATES* (2016); Oliver Wendell Jr. Holmes, *Agency*, 5 HARV. L. REV. 1, (1891).

70. John C. Folkenroth, *The Employer's Indemnity Action*, 34 LA. L. REV. 79 (1973); John Anthony Jolowicz, *The Right to Indemnity Between Master and Servant*, 14 CAMBRIDGE L.J. 101, 101–11 (1956); Roscoe Steffen, *The Employer's Indemnity Action*, 25 U. CHI. L. REV. 465 (1957); Glanville Williams, *Vicarious Liability and the Master's Indemnity*, 20 MODERN L. REV. 220, 220–35 (1957); Jason W. Neyers, *A Theory of Vicarious Liability*, 43 ALTA. L. REV. 287 (2005).

71. FLEMING, *supra* note 69 at 367 ("the modern doctrine of vicarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognized as having its basis in a combination of policy considerations"); BATY, *supra* note 69; Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1975); Simon Deakin, *'Enterprise-Risk': The Juridical Nature of the Firm Revisited*, 32 INDUS. L.J. 97, 97–114 (2003); ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 139 (2013) (Orts contends that use of the terms 'master' and 'servant,' "highlight the fact that legal allocations of power and authority are involved in the formulation of principles regarding responsibility and liability in organizations. In turn, these principles reflect policy considerations of both fairness and economic efficiency.").

72. Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICHIGAN L. REV. 1266, 1266–1380 (1997); Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 FORDHAM L. REV. 1857, 1857 (2003); Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739 (1995); *Ira S. Bushey & Sons, Inc. v. United States*, 398 F. 2d, 171 (1968) (vicarious liability "... rests not so much on policy grounds ... as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents that may fairly be said to be characteristic of its activities.").

73. Neyers, *supra* note 70.

74. Alan Strudler, *Mass Torts and Moral Principles*, 11 L. & PHIL. 297, 297–330 (1992); Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, ONLINE J. TORT L. (Sep. 21 2017), <https://www.degruyter.com/view/j/jtl.ahead-of-print/jtl-2017-0004/jtl-2017-0004.xml> (last visited Feb 2, 2018) [<https://perma.cc/NUZ4-VHEL>].

75. Kevin Gibson makes the somewhat specious claim that tort liability demonstrates that blameworthiness does not require intent, and therefore that corporations could be construed as moral agents even if they cannot have intentional states. Kevin Gibson, *Fictitious Persons and Real Responsibilities*, 14 J. BUS. ETHICS 761, 761–67 (1995); More conventional corrective or distributive analyses of tort do not typically invoke "blameworthiness" as a necessary condition for liability. See, for an early review of work, Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 449–514 (1991).

productive discourse about the responsibilities of corporations as moral agents.

Here, we limit our analysis to *ex ante* duties and privileges as a mode of illustration, though certainly corporate moral powers (e.g. contracting), corporate moral or political rights,⁷⁶ and other relations deserve further scrutiny. In particular, corporate moral rights have already been a central concern of many theories of corporate moral agency, though most theorists have endeavored to carve out how corporations may be moral agents and still lack a claim to most rights we ascribe to natural (or moral) persons. There is, of course, reason to make such distinctions. But many treat the ascription of rights as a *reductio* of a view, and so demonstrate a deeply held commitment that corporate rights ought not be recognized. This discourse can also be seen in the light of advancing certain responsibility-centric ideologies, wherein theorists attempt to ascribe moral responsibilities to corporations without also ascribing any moral claims or rights to them.⁷⁷

IV. *EX ANTE* MORAL PERFORMATIVITY: THE DUTIES AND PRIVILEGES OF CORPORATIONS

The importance of specifying novel corporate rights or duties to establish CMA's moral relevance is evident if one accepts the theoretical orthodoxy that wrongs can only be committed by violating a right or, correlatively, failing to do one's duty.⁷⁸ That is, mainstream thought defines wrongs *in terms* of violations of rights and duties: B has been wronged *if and only if* A has a duty to B to φ and A does not φ . A corporate moral agent on this view can only commit a wrong if it violates a duty that it itself possesses.

Further, forward-looking or *ex ante* rights or duties are important to establish CMA's relevance if rights and their correlative duties must be action-guiding.

76. An example of excellent recent work on this topic is Kenneth Silver, *Can a Corporation be Worthy of Moral Consideration?* J. BUS. ETHICS (2018) (online only), <http://link.springer.com/10.1007/s10551-018-3787-4> [<https://perma.cc/VBF2-CD56>]; An examination of the moral implications of certain views can be used as a mode of argumentation about the view itself. For a *reductio* approach, see John Hasnas, *Should Corporations Have the Right to Vote? A Paradox in the Theory of Corporate Moral Agency*, 150 J. BUS. ETHICS 657, 657–70 (2018).

77. See generally WERHANE, *supra* note 11; THOMAS DONALDSON, *CORPORATIONS AND MORALITY* (1982); David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 139–58 (2013); cf. Sepinwall, *supra* note 68; cf. Hasnas, *supra* note 76; cf. Silver, *supra* note 76.

78. In disputing this orthodoxy, Nicolas Cornell offers us a useful smattering of philosophers who endorse it. Cornell, *supra* note 60 (citing *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 343–44 (1928) (“What the plaintiff must show is ‘a wrong’ to herself, i.e., a violation of her own right. . . . [T]he commission of a wrong imports the violation of a right. . . . Affront to personality is still the keynote of the wrong.”); JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 122 (1990) (“I will use ‘Y wronged X’ and ‘Y did X a wrong’ only where Y violated a claim of X’s. So on my use of these locations, they entail that Y acted wrongly; but they entail more than just Y acted wrongly—they entail that Y wrongly infringed a claim of X’s.”); G. E. M. Anscombe, *On the Source of the Authority of the State*, in *AUTHORITY* 152 (Joseph Raz ed., 1990) (“A wrong is an infringement of a right. What is wrong about an act that is wrong may be just this, that it is a wrong.”).

That is, they must provide reasons for action that may figure into our contemporaneous deliberation. As Nicolas Cornell outlines: “Duty is a normative notion—it describes what one ought to do. If you owe a duty, you have a certain kind of reason . . . [s]o rights, correlative to duties, play a role in our deliberations about what to do. They give us reasons, presumably reasons of a special kind.”⁷⁹

Indeed, as Ernest Weinrib tells us, “an intelligible conception of . . . duty” requires that duty “be operative at the time of the act that the duty is supposed to govern.”⁸⁰ These theoretical presuppositions support Thomas Donaldson’s early (and now, relatively uncontroversial⁸¹) assertion that CMA requires “[t]he capacity to use moral reasons in decision-making.”⁸² Donaldson puts this requirement in terms of moral accountability, arguing that this condition means that corporations must “be liable to give an account of their behavior. . . .”⁸³ The relevance of this condition becomes even more apparent in the *ex ante* context; if corporations could not use such reasons, the concept of duty would become unintelligible as applied to corporations. And without an applicable concept of duty, the idea of a corporate wrong would become unintelligible as well.

There are a variety of accounts of how reasons might be said to properly figure into corporate decision-making,⁸⁴ the most extreme of which countenance the idea that the corporation has a kind of phenomenal consciousness.⁸⁵ We do not mean to assess these accounts here, however. Instead, we consider the overarching view of Kendy Hess, one of the most prolific and insightful scholars writing on CMA today. She engages in serious, complex metaphysical theorizing, and often attempts to articulate its moral implications.

Hess rejects a *sole* focus on backwards-looking responsibility, stressing the role of forward-looking obligations. In her view, having moral obligations is part

79. Cornell, *supra* note 78 at 127.

80. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 179 (2012).

81. Kendy M. Hess, *Because They Can: The Basis for the Moral Obligations of (Certain) Collectives*, 38 *MIDWEST STUD. IN PHIL.* 203, 221 (2014) (noting that she takes it “that this much is uncontroversial: one must be an agent (capable of intentional action) before one can be a moral agent, and an agent somehow incapable of taking morally relevant information into account when it acted would be fatally incapacitated when it came to moral action.”).

82. THOMAS DONALDSON, *CORPORATIONS AND MORALITY* 30 (1982).

83. *Id.* at 30.

84. See Frank Hindriks, *How Autonomous Are Collective Agents? Corporate Rights and Normative Individualism*, 79 *ERKENN* 1565, 1565–85 (2014); Kendy M. Hess, *Does the Machine Need a Ghost? Corporate Agents as Nonconscious Kantian Moral Agents*, 4 *J. AM. PHIL. ASSOC.* 67, 67–86 (2018); David Copp, *The Collective Moral Autonomy Thesis*, 38 *J. SOC. PHIL.* 369, 369–388 (2007); CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* (2013).

85. See Silver, *supra* note 76; see also Eric Schwitzgebel, *If Materialism Is True, the United States Is Probably Conscious*, 172 *PHIL. STUD.* 1687, 1697–1721 (2015). For those who deny consciousness as a necessary precondition to acting intentionally, see DEBORAH PERRON TOLLEFSEN, *GROUPS AS AGENTS* (2015); Christian List, *What Is It Like to Be a Group Agent?*, 52 *NOMOS* 295, 295–319 (2018).

of what makes corporations moral agents;⁸⁶ indeed, moral obligations, moral responsibility, and moral agency are all “mutually entailed.”⁸⁷ She, therefore, is a natural ally of our approach. She offers that corporate moral agents:

[have] moral obligations in much the same way and for much the same reason that human agents have moral obligations, and [their] moral obligations can thus be understood in terms of the same theories . . . These corporate agents have forward-looking obligations to act in ways that avoid harm, respect rights, pursue excellences unique to their kind, or even bring the world closer to perfection for exactly the same reasons that human beings have them: because they can.⁸⁸

The skeptical question we raise is if it matters whether or not we can *say*, metaphysically, that corporations have *ex ante* forward-looking duties like the ones Hess mentions. In other words, Hess does not explain what these corporate-agential obligations tell us about how the corporation would respond differently if it lacked such agential capabilities.

We want to stipulate that CMA is obviously morally performative in a thin sense when it comes to *ex ante* duties. In this sense, insofar CMA establishes that corporate moral agents can and do have duties and that these duties can be intelligibly articulated, CMA is morally performative. Demonstrating the truth of CMA would, at its base, demonstrate that there are duties binding corporations (rather than simply its members) rooted in the rights of others. It would change the moral landscape at least rhetorically.

But there is a thicker sense of moral performativity which we take to be far more important. There is a question as to whether CMA would alter what agents deliberating about what to do (and whom are empowered to do things) ought to do.

To put it another way, consider Hess’s simple statement of what she takes to be at stake: “To deny that corporate entities are moral agents is to excuse them from compliance with moral obligations. Why would we do that?”⁸⁹ Essentially, her point is that corporations really do have these distinctive obligations, and to deny CMA is to do the foolish thing of relinquishing corporations from complying with those obligations. Although, in making this statement, Hess begins to move away from the “philosophical delight” approach toward the moralist approach, she does not quite get there. A moralist approach would more completely assess the moral stakes of the denial she describes.

86. Kendy M. Hess, *The Modern Corporation as Moral Agent: The Capacity for “Thought” and a “First-Person Perspective,”* 26 S.W. PHIL. REV. 61, 61 (2010) (“[corporate entities] have moral obligations, and that makes them moral agents.”).

87. Kendy Hess, *The Unrecognized Consensus about Firm Moral Responsibility*, in *THE MORAL RESPONSIBILITY OF FIRMS* 170, n.1 (Eric W. Orts & N. Craig Smith eds., 2017).

88. Hess, *supra* note 81 at 203–04.

89. Hess *supra* note 86 at 69.

If we take duties to be reasons for action, do the additional, distinctively corporate duties from CMA provide any additional moral reasons that weigh on agential deliberation?⁹⁰ The argument against CMA being morally performative in the thick sense can be found in Manuel Velasquez's work on CMA.⁹¹

Velasquez contests CMA proponents' theory of corporate intentional action. In particular, he argues that for any corporate act, only individuals act and only individuals act on reasons. Hence, corporations cannot qualify as moral agents. But we need not accept that here. Rather, we note that his account shows that rights which provide reasons to duty-holders may intercede at the individual level. That is, it could be platonically true that corporations are moral agents, but any duty-conferring 'reasons' properly ascribed to a corporation can also be incorporated into the decision-making of individuals, rendering the agency of the corporate body itself morally irrelevant.⁹²

When a Board, for instance, considers a proposition of moral salience, we might think that the Board members should not only be concerned for what they *personally* support, but also with strategic considerations of how the final vote will come out. This is similar to the way a voter in a federal presidential election not only may be obligated to assess what she is personally voting for, but also the larger effects of their vote—a progressive voter might think twice, for instance, about voting for a more progressive third-party candidate who is almost certain to lose.

Pettit describes a 'discursive dilemma' to justify group autonomy, which demonstrates that a group's decision does not have to correspond in any particular way with the decisions of the group's individuals.⁹³ Those sympathetic to Velasquez, however might respond that this results from the strategic voting of Board Members who do *not* vote in a vacuum; rather they vote in a way that takes account of the fact that group decisions are determined by the ultimate distribution of votes.

The focus on *ex ante* relations further demonstrates the need to specify to whom those duties apply. Accounts of corporate moral agency often focus on the management of corporations to establish moral agency.⁹⁴ It is not clear, then, why these arguments result in identifying the corporation wholly as a moral agent,

90. Of course, silence on this issue is Hess's right. Articles on CMA usually must begin with cabining the questions they ask and stipulating some assumptions they make, since the various elements necessary to establish CMA can lead to an unmanageably wide scope of critical inquiry. But this does not mean our question need not be answered.

91. Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS Q. 531–562 (2003); Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, 2 BUS. & PROF. ETHICS J. 1–18 (1983).

92. Even works which specifically seek to connect *ex ante* rights with corporate moral agency often fail to address this line of objection. *See, e.g.*, Denis G. Arnold, *Corporations and Human Rights Obligations*, 1 J. BUS. & HUM. RTS. 255, 255–76 (2016).

93. Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171–201 (2007).

94. Singer, *supra* note 4. *See, e.g.*, Pettit *supra* note 93; Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207–15 (1979).

rather than its management team. Without a more expansive notion of agency, several of the most prominent accounts fail to establish why the entire organization is accountable as a group rather than merely the relevant management layer—Executive Board, middle management, what have you.

We do not pursue the matter further here. Our goal is only to show how extant efforts to assess the moral implications of positive theories of CMA can be unsatisfying. The “philosophical delight” approaches cannot properly assume that the moral consequences of their theories (and the body of individuals to which they apply) are obvious. Nothing about corporate moral agency is so obvious or straightforward.

V. CORPORATE MORAL AGENCY AT THE LAW’S CONVENIENCE

So far, we offered some general critiques of the instantiation and use of CMA in business ethics. Jurists, lawyers, and legal academics suffer even more from the ailments identified in Parts II through IV. Below we argue that corporations are persons with respect to corporate criminal law only at the law’s discretionary convenience, i.e., this metaphysical leap is made only to facilitate the attribution of fault and liability, not in contemplation of the requirements of moral agency. Moreover, commentators who struggle mightily with extending the idea of personhood to corporate liability and blame often do not object when moral and legal agency are employed descriptively in prosecutorial policy and sentencing guidelines. Currently, regulators exercise vast discretion over entity-level standards of due diligence and good governance under frequently changing federal guidelines and policies.⁹⁵ At the same time, the substantive criminal law stands still, grounded in early 20th century principles of vicarious liability.⁹⁶

We argue that the proper place of moral agency in the corporate criminal law should be at the foundation of a coherent substantive law. That we would be satisfied with both an approach that took CMA as foundational and with an approach that considered CMA totally irrelevant illustrates the modesty of our claim. It states nothing more than that the general part of the criminal law should reflect some settled deliberation about moral agency. A list of important factors for prosecutors to consider in a set of guidelines is no substitute. Decisions of this importance should not be left to the discretion of functionaries exercised in the politicized world of charging and sentencing decisions. The time for legislatures to craft culpability and liability principles grounded in the moral agency of corporate wrongdoers is long overdue. The substantive law’s lack of coherence on this matter is now well over a century old, and there is no prospect of substantive law reform in sight.

95. See WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY* (2008).

96. See, e.g., William S. Laufer, *Integrity, Diligence, and the Limits of Good Corporate Citizenship*, 34 AM. BUS. L. J. 157 (1996); William S. Laufer and Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 44 AM. CRIM. L. REV. 1307 (2007).

In the absence of serious moral deliberation by legislatures and courts, clearly delivered constructions of agency are nowhere to be found. Prosecutors and judges can pick and choose which individual and organizational factors contribute to what is seen as an instrumentally desired outcome. There is no required transparency in the exercise of this discretion. There is no empirical assessment and measurement.⁹⁷ There is no careful inspection of the underlying constructs. And opacity in such discretionary decision making invite reasonable concerns about its fairness and proportionality. This is because whether or not one thinks the corporation itself is worthy of moral consideration,⁹⁸ or is vested with criminal, procedural, or substantive rights, the people who comprise the corporation and are affected by corporate punishment surely are.⁹⁹

Thus, we argue that these practical prosecutorial and sentencing guidelines be seen for what they are—a collection of ad hoc message-sending plays in a multi-stakeholder compliance game. And, we argue below, they will remain so until the hard legislative or judicial work is done.

A. *Moral Agency at the Law's Convenience*

For much of our early history, courts found the idea of a corporate soul or corporate personhood to be an unattainable requirement for entity liability, viewing corporations as nothing more than artificial beings—invisible, intangible, and existing only in contemplation of law.¹⁰⁰ In contrast, questions about the moral agency of corporations, groups, and associations were deemed important in the legal academy and among philosophers. For scholars of moral and legal philosophy, few questions are more difficult and yet more attractive to address. But incorporating philosophical insights regarding CMA into the general part of the criminal law was too steep a hill to climb for legislators and courts. The very idea of moral agency remained incidental to or generally irrelevant in the actual practice of corporate criminal law. Evidence of this may be seen in the reasoning supporting the landmark case of *New York Central & Hudson River Railroad Co.* (“*New York Central*”).¹⁰¹ Here the Supreme Court willingly and uncritically accepted the policy fiction of entity liability. As a matter of public policy—out of regulatory necessity—corporations are subject to the general part of the criminal law. There was no serious consideration of moral agency, no resort to far reaching moral principles. And, sadly, not much has changed.

Now in its second century, the substantive corporate criminal law has proceeded without substantive reform and without recognition of moral agency and

97. Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J. L. & BUS. 965 (2018).

98. See generally Silver *supra* note 85.

99. See Hasnas, *supra* note 68.

100. See WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY* (2008). See generally Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987).

101. See *New York Cent. & H.R. Co. v. United States*, 212 U.S. 481 (1909).

legal personhood. Liability rules and theories of culpability never matured to the point where aspects of the corporate person, arguably the very essence of personhood, play a role in determining liability, assessing culpability, or providing evidence at trial or at time of sentencing. There is no basis for courts to explore the characteristics and features of the organization (e.g., size, specialization, and delegation) that caused or contributed to the alleged crime. The diffusion of responsibility that comes from a firm's hierarchical structure, for example, is legally irrelevant. Federal criminal law has not even adopted the careful formulation of the Model Penal Code that requires the conduct of a high managerial agent for corporate criminal liability.¹⁰²

Courts are unwilling to go beyond a wink and a nod to moral agency and personhood in the substantive criminal law. And, as a practical matter, prosecutors have preferred to proceed against human rather than corporate defendants. Jurors generally fail to understand the idea of corporate personhood and that corporations with significant resources are deft at distancing themselves from wrongdoing.

B. The Apparent Irrelevance of Genuine Corporate Fault

Over the past century following *New York Central*, models of "genuine corporate fault" that derived from the nature of business organizations have been the subject of legal scholarship. From proactive and reactive fault, to constructive fault and corporate character and ethos, scholars sought a true nexus between organizations and culpability. Lawmakers, though, suffered from longstanding resistance to the recognition of entity-level conceptions of fault. We live with the result: culpability and liability rules that are entirely incompatible with the size, power, and reach of the largest corporations. As important, the substantive law is incompatible with the complexity, scale, and interconnectedness of the global economy. This may be attributable to the constraints imposed by any reasonable construction of the general part of the criminal law. The longstanding lag in substantive law reform is, in part, due to our lack of confidence in the very idea of corporate or entity fault.

One of us has argued that ambivalence toward attributing fault to a corporate entity largely explains the failure to abandon the strictness of vicarious corporate fault.¹⁰³ This ambivalence has many principled and practical origins. The most obvious includes a desire not to inhibit economic growth by imposing hard to measure externalities on the engines of prosperity. To this may be added the worry that we have taken the fiction of corporate fault far too seriously. Ambivalence of either kind could explain why several models of genuine fault that were proposed decades ago were met with limited recognition in law.¹⁰⁴

102. Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21 (1957).

103. WILLIAM S. LAUFER, *CORPORATE BODIES*, *supra* note 98.

104. William S. Laufer, *Integrity, Diligence, and the Limits of Good Corporate Citizenship*, 34 AM. BUS. L. J. 157 (1996).

Admittedly, some aspects of genuine fault models found their way into the prosecutorial and sentencing guidelines and serve as a justification for the exercise of prosecutorial and sentencing discretion. These aspects are available to fill the gaps left by the years of failed law reform. It is important to remember, though, that such gap-filling moves occupy a very special place in the law. They were neither debated and passed by legislatures nor derived from court opinions. In the century following *New York Central*, we only have guidelines for prosecutors and judges to restrain their charging and sentencing discretion.

Focusing on the bits and pieces of “principles” in these guidelines risks missing how this body of law is doled out to a white collar bar starved for controlling corporate criminal case and statutory law. Government functionaries hold these guidelines out as if they embody actual elements of liability of the corporate criminal law. Their case is supported by the importation of many corporate fault theories into both prosecutorial and sentencing guidelines—e.g., proactive and reactive fault, corporate character, corporate ethos, corporate culture theories, and the deft use of moral language that is intuitively associated with moral principle.

These apparent imports from genuine fault models are not derived from the general part of the corporate criminal law. The government’s discretion as to whether charges will be brought may turn on corporate culture, cooperation, disclosure, and expression of remorse. But such evidence of culpability comes in only at sentencing. Culpability in relation to liability is a narrow inquiry, generally tied to the burden on the state to prove each and every element of an offense. Prior offense history, failed cooperation, and an amoral corporate culture are not elements of an offense. It is only at sentencing where the entity-level characteristics, features, actions, and inactions found in the guidelines are considered.¹⁰⁵

Acting complicity with prosecutors, white collar criminal defense counsel are all too willing to inform clients about every change in wording in government guidelines and memoranda. Prescriptions for non-liability are prepared and sold to clients based not on the substantive law, but on the compliance calculus and prescriptions gleaned from these guidelines and memoranda. It is, alas, a game.

It is true that prosecutors who are guided by genuine corporate fault theories make threshold decisions about corporate moral agency by charging or declining to charge corporate entities. In theory, and quite idealistically, one could see prosecutors as assuming the role of moral agency gatekeepers on principles derived from theories of genuine fault.

We, however, reject this theory and maintain that these guidelines and memoranda are no more than decision making advisories for functionaries committed to satisfying the government’s steep burden of proof. Functionaries pick and choose factors so as to justify the exercise of their discretion. Proceeding against a human or corporate person is really a matter of evidence and intuitions about

105. William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049 (1992).

the prospects for a conviction. In this sense, these are not moral principles but rather factors of prosecutorial or judicial convenience. There is no calculus of corporate moral agency that moves prosecutors or judges in one direction or another. There is no normative commitment to corporate accountability for wrongdoing. These are strategic hooks that functionaries can throw their hat on to justify either proceeding forward with a case or, for judges, sentencing more leniently.

On reflection, the importance of *New York Central* was its deployment of a place holding fiction, a crude substitute for serious deliberation over moral agency. It was about finding a temporary fix for a large regulatory gap. It was about addressing the perils of interstate commerce as a matter of serious law enforcement inconvenience. A century later, with a host of formal and informal regulatory guidelines and memoranda, it is convenience, once again, and not moral theory that replaces normative deliberation. In the compliance game, the law's convenience trumps moral coherence.¹⁰⁶

C. Missed Opportunities, from Yates to Chapter Eight

Our critique is offered with some genuine regret. The case for a kind of moral agency gatekeeper would be far stronger if the substantive law from *New York Central* recognized the uniqueness of the corporate person as does the Principles of Federal Prosecution of Business Organizations (2018) or, alternatively, if these principles revealed how genuine and vicarious fault cohere. It would be stronger if greater priority were given to corporate prosecutions or if the Yates Memorandum (intended to shift discretion away from entity prosecutions to individual prosecutions) recognized the dearth of both corporate *and* individual prosecutions.¹⁰⁷

Instead, we are left to wonder how it could be that eight of the ten factors to be considered by prosecutors in bringing charges against corporations focus on the entity, separate and apart from any culpable agent. These factors include:

1. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
2. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
3. the corporation's willingness to cooperate, including as to potential wrongdoing by its agents;

106. William S. Laufer, *A Very Special Regulatory Milestone*, 20 J. BUS. LAW 392 (2018).

107. See Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys, on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download> [<https://perma.cc/FEG2-PCQC>] (establishing principles for the Department of Justice based on the premise that individual accountability is an effective method to combat corporate misconduct).

4. the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision;
5. the corporation's timely and voluntary disclosure of wrongdoing;
6. the corporation's remedial actions, including, but not limited to, any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution;
7. the adequacy of remedies such as civil or regulatory enforcement actions, including remedies resulting from the corporation's cooperation with relevant government agencies; and
8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.

These are consequentialist principles designed to achieve general and specific deterrence.¹⁰⁸ The strategy focuses on the corporation *qua* organization and is thus not based on considerations of vicarious corporate fault. Perhaps most remarkable, there is explicit recognition of the corporation as the culpable actor without any explanation and justification.¹⁰⁹ The Principles even recognize the uniqueness of a corporate prosecution when it comes to punishment: "In certain instances," the Principles dictate, "it may be appropriate to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation."¹¹⁰

These Principles, along with the Yates Memorandum (2015), fail to distinguish between the need for individual *and* corporate prosecution, and the importance that the former plays in balancing the scales of justice.¹¹¹ The shared focus of the

108. "Corporations are likely to take immediate remedial steps when one is indicted for criminal misconduct that is pervasive throughout a particular industry, and thus an indictment can provide a unique opportunity for deterrence on a broad scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees." U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-28.000 (2018), <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300> [<https://perma.cc/9T7T-ZZ8L>].

109. In general commentary, the Principles caution that: "Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes." *Id.* § 9-28.200.

110. *Id.* § 9-28.200 (B).

111. "Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Provable individual criminal culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution

Principles highlights the recognition of separate “persons” who may be deserving of blame and gives priority (post-Yates) to biological persons. Finally, nothing is done to fix the glaring disconnect between these Principles and the fictional account of vicarious fault found in extant law.

This disconnect is far from new. All of the factors to be considered in sentencing a corporation found in Chapter Eight of the Sentencing Guidelines for Organizations have organizational roots or clear correlates, e.g., the corporation must have established a corporate compliance program, exercised due care in delegating managerial authority, taken reasonable steps to ensure compliance, and responded reasonably to the discovery of any wrongdoing.¹¹² Amendments to the Guidelines in 2002 also recognize the importance of an organizational culture that promotes compliance with law.¹¹³

VI. CONCLUSION

Sissela Bok once noted that certain moral problems can “get short shrift” when conducted “strictly for the purposes of advocacy.”¹¹⁴ Our goal was to examine the approaches to CMA, both in ethics and in law, where the moral problem of CMA gets short shrift. In the domain of ethics, we offered a way forward—namely a focus on the *ex ante* responsibilities corporations might be assigned as a result of CMA. If it turns out that CMA is not really important morally, then even those committed to accountability in the corporate world should say so, as should those metaphysicians who are delighted by CMA as a philosophical problem. We ought not mix advocacy with theory, or metaphysical fascination with serious moral scholarship. On the other hand, if CMA is morally important, we need to show this to be the case in a way that answers the skeptics who have written on the topic.¹¹⁵

In many ways, legal theory around CMA can only advance so far as ethical theory does. Until this advance occurs, we are left with a handful of entrenched ideological camps, each failing to provide a coherent normative framework for those interested in corporate ethics and those who study or administer the corporate criminal law. One camp sees corporate moral agency as a matter of semantics. It contends that blaming artificial entities for the acts of their agents makes no sense. Human persons, not organizations such as corporations, intend and act.

agreement, or a civil resolution. In other words, regardless of the ultimate corporate disposition, a separate evaluation must be made with respect to potentially liable individuals” *Id.* § 9-28.210.

112. For a review of the Sentencing Commission’s construction of good citizenship, see Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About their Future*, 71 WASH. U. L. Q. 205 (1993) (analyzing the impact of the Sentencing Reform Act and the U.S. Sentencing Commission on corporations).

113. Paul Fiorelli, *Will U.S. Sentencing Commission Amendments Encourage a New Ethical Culture within Organizations?* 39 WAKE FOREST L. REV. 565 (2004).

114. SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* xvii (Repr. 1989).

115. See generally, the work of John Hasnas, Amy Sepinwall, Manuel Velasquez, Ian Maitland, and David Rönnegard.

Another camp thinks of agency as both instrumental and strategic; important as a matter of advancing organizational accountability.¹¹⁶ Some, for example, think of agency as a useful legal fiction that allows criminal law principles to be attributed to culpable, and thus deserving, entities.¹¹⁷ Others conceive of the corporation as a moral actor and strongly defend their allegiance to the foundation of the general part of the criminal law.

In this article, we do not offer an answer to the puzzle that is CMA. We only offer a critique that we hope is self-critical, earnest, and forthright in its moral implications.

116. Sanford A. Schane, *Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563–610, 595 (1986).

117. See Kent Greenfield, *Let Us Now Praise Corporate Persons*, WASHINGTON MONTHLY (January/February, 2015) <http://washingtonmonthly.com/magazine/janfeb-2015/let-us-now-praise-corporate-persons/> (“But the attack on corporate personhood is a mistake. And it may, ironically, be playing into the hands of the financial and managerial elite. What’s the best way to control corporate power? More corporate personhood, not less.”) [<https://perma.cc/8PZH-A2F6>].