

# Making Sense of Corporate Criminals: A Tentative Taxonomy

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## ABSTRACT

*This article proposes a taxonomy to delineate different strategies defending the extension of an ostensibly moralized practice (the criminal law) to ostensibly non-moral agents (corporations). The proposal is to classify strategies for justifying corporate criminal law into three groups: (1) Economic theories reject the unique moral character of criminal law, treating corporate criminal liability as no different than any other type of enforcement regime; (2) moral agency theories identify characteristics necessary for praise and blame and then consider whether corporate agents are capable of satisfying them; and (3) political theories take the criminal law to be a uniquely moralized legal institution, but then deny that corporate criminal liability thereby requires an account of corporate moral responsibility. While the focus of this article is to trace the contours of this conceptual distinction, I offer some tentative reasons to think that the third category—political theories—has gone undertheorized but nevertheless offers the most promising avenue for an ultimate justification of corporate criminal law.*

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#### INTRODUCTION

Criminal liability for corporations has existed for, depending on how one measures, either several decades or several centuries.<sup>1</sup> And for just as long, the doctrines for, the practices behind, and indeed the very idea of holding a corporation criminally responsible have all been met with steady controversy. One explanation for this is that criminal law strikes many as a uniquely moralized legal institution, while corporations seem at first blush incapable of attaining the sort of moral status that such an institution seems to require.<sup>2</sup> Call this the “extension puzzle of corporate criminal law”: how to justify extending an ostensibly moralized practice (criminal law) to presumptively non-moral agents (corporations). My ambition is not to solve this extension puzzle all at once; here, I am content

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1. Corporate criminal liability is, with surprising frequency, treated as originating with the Supreme Court’s decision in *New York Hudson River Railway v. United States*, 212 U.S. 481 (1909). But while the federal *doctrine* of corporate criminal law traces to 1909, in reality the Supreme Court had already recognized that a corporation could commit a crime. *See* *Hale v. Henkel*, 201 U.S. 43 (1906). Congress too had long since resolved that the criminal law could be so extended. *E.g.*, Sherman Antitrust Act of 1890, §§ 1–2, 15 U.S.C. §§ 1–2 (2012). Moreover, federal law in both corporate and criminal law flagged state-level innovations; by 1909, several states had already recognized that a corporation can commit a crime. *See* W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. L. REV. 479, 510–14 (2018) (collecting cases). Taking strict criminal liability into account, this principle was established even earlier. *E.g.*, *People v. Corp. of Albany*, 11 Wend. 539, 542–43 (N.Y. Sup. Ct. 1834). And this concerns the prosecution just of private, commercial corporations, which were themselves a rarity until at least the middle of the nineteenth century. *See* JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970*, at 14 (1970) (identifying 317 business corporations before 1801). Expanding attention to municipal corporations, the availability of criminal liability has existed for a considerably longer time. *See, e.g.*, JENNIFER LEVIN, *THE CHARTER CONTROVERSY IN THE CITY OF LONDON, 1660–1688, AND ITS CONSEQUENCES* (1969).

2. By “uniquely moralized” here, I do not mean that the criminal law is the only domain that derives some of its character from some further normative considerations, only that many understand there to be something peculiar or special about the grounding relationship between criminal law and morality as compared to other enforcement regimes. What that particular relationship is exceeds the scope of this project.

merely to propose a taxonomy for thinking about three distinct, preexisting approaches—economic, moral, and political—to solving the extension puzzle, and further, to recommend political approaches as the most promising approach of the three.

The first approach, drawing from the law-and-economics revolution, denies that criminal law (at least as applied to corporations) is in fact a uniquely moralized domain of law. That is, *economic theories* of corporate criminal law reject the idea that criminal law is unique from other civil or regulatory regimes; rather, a corporation's moral status has no more bearing for criminal law than for any other enforcement regime. The second approach reflects that the past thirty years have witnessed a reinvigorated interest in the normative and conceptual foundations of corporate criminal liability—and, as a result, an explosion of accounts defending or criticizing both the possibility and propriety of holding a corporation criminally responsible. Leveraging this burgeoning literature that concerns more fundamental questions about corporate moral responsibility in general, *moral agency theories* posit that criminal law is characterized by distinct normative commitments that are not captured by appeals to economic deterrence. More to the point, these theories take moral agency in some robust sense to be a necessary prerequisite for extending the institution of criminal law to corporations.

Both economic and moral agency theories are well-established strategies for responding to the extension puzzle. However, I think that a strand of recent efforts to defend corporate criminal liability suggests a fundamentally different approach which has gone underappreciated as a distinct effort to navigate these economic and moral shoals. *Political theories*, like moral agency theories, find the economic deterrence story of criminal law to be unsatisfying or somehow deficient with respect to criminal law's special status as a moralized institution. However, where political theories differ is that they do not accept corporate moral agency as a prerequisite for criminal responsibility. Instead, they seek to ground the normativity on the state's obligations to individuals as moral agents themselves. To date, efforts to articulate a political account have mostly failed to connect up the analysis to a deeper philosophical tradition from which it germinates—and, as a result, political accounts have been criticized for being advanced in an ad hoc, unprincipled manner. But, in fact, I take political theories to be leveraging a distinction—common to political philosophy—between the sorts of justifications that are internal to an institutional practice and those that are given for having the institution itself. Thus situated, I suggest that, of all the approaches mentioned above, political theories may be best positioned to provide justifications for corporate criminal law that are consistent both with our actual practices of criminal law and with broader normative commitments that the institution of criminal law is meant to vindicate. By contrast, the other two sets of theories offer compelling justifications—but only at one level, not both.

## I. DISTINGUISHING MORAL AGENCY FROM LEGAL PERSONHOOD

Discussions of moral agency and responsibility in general—to say nothing of their specific application to corporations—are awash in overlapping terms picking out overlapping concepts: agent, person, moral agent, moral person, etc. Thus, before getting started, let me define a few terms in a way that is broadly consonant with distinctions drawn across the various literatures. Most important for our purposes are three concepts: agency, legal personhood, and moral agency. By referring to an “agent” I mean any entity that can act independently to pursue its own interests.<sup>3</sup> Agency is a prerequisite for the latter concepts—moral agency and legal personhood—which are independent of each other.

A. *Legal Person*

By “legal person,” I have in mind an agent able to participate within a particular legal domain or practice without further regard for whether the domain should, all things considered, be extended.<sup>4</sup> On this formulation, eligibility for legal personhood means that, if a practice or domain were extended to it, the entity in question could reliably participate in that legal practice.<sup>5</sup> So, following John Dewey, to say that a corporation can be a legal person (or is eligible for legal personhood) for purposes of the criminal law is to say that a corporation is able to conform its conduct to the demands of the criminal law.<sup>6</sup> That is, it is to acknowledge that a legally relevant description exists under which a corporation can act in a proscribed manner (*actus reus*) concurrent with a proscribed attitude (*mens rea*)<sup>7</sup> and, more generally, can reliably conform itself to the prohibitions of criminal law.

Legal personhood is not a trivial requirement. For example, mere agency is insufficient to constitute legal personhood: Most non-human animals could not alter their conduct in response to the threat of criminal prosecution even if it were extended to them.<sup>8</sup> On the other hand, legal personhood is a comparatively thin attribution. First, to say that someone or something is a legal person is not to say that it has any other, more fundamental characteristics. For instance, some scholars talk about corporate intentions purely as a semantic shorthand for some

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3. This definition is meant to be capacious, covering a whole range of candidates: single entities, collective entities, entities that are biological in nature, as well as those that are mechanical, computational, or otherwise artificial. Moreover, while I will refer to agents as holding or expressing attitudes, the account here could be cashed out in terms of an entity’s having beliefs/desires, acting in accordance with plans, etc.

4. See, e.g., Daniel Dennett, *Conditions of Personhood*, in *THE IDENTITIES OF PERSONS* 175 (Amélie Oksenberg Rorty ed., 1976); see also John Locke, *Of Identity and Diversity* (1690), reprinted in *PERSONAL IDENTITY* 33, 50–51 (John Perry ed., 2d ed. 2008) (describing *person* as a “forensic term”).

5. T.M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME* 160–63 (2008) (considering whether collective agents can give rise to “expectation grounded in a supposed responsiveness to certain reasons”).

6. John Dewey, *The Historic Nature of Corporate Legal Personality*, 35 *YALE L.J.* 655, 661 (1925).

7. WAYNE R. LAFAVE, 1 *SUBSTANTIVE CRIMINAL LAW* § 1.2 (2d ed. 2003).

8. Dewey, *supra* note 6, at 659.

complicated, but predictable, set of interactions among individuals<sup>9</sup>—similar to how microeconomic models take households as the unit of analysis without implying that families are not ultimately reducible to individuals.<sup>10</sup> More generally, legal personhood does not entail metaphysical personhood or any other “ontologically suspect kind of ‘social spirit’ or ‘group mind.’”<sup>11</sup> As an upshot, then, it is correct to say that corporate personhood is a “legal fiction”—but only insofar as *individual* personhood is also a legal fiction.

Second, legal personhood is silent as to any deeper eligibility requirements for membership in a legal domain. For example, the somewhat sterilized appeal of *mens rea* to cognitive states might reasonably be understood to serve as an administrable proxy for moral culpability. Assuming that is true, saying an entity was a legal person in the sense described here would not be saying anything about the deeper question; it would speak only to the proxy. Thus, while eligibility for legal personhood is a prerequisite for extending a domain like criminal law to a class of entities, it is not sufficient to justify such an extension<sup>12</sup>; we need a further story, given that an entity *could* be held responsible through the criminal law, why we *should* want it to be.

### B. Moral Agents (and Moral Patients)

I use “moral agency” to pick out some considerably richer normative standing for which the sort of sophisticated agency envisioned by legal personhood, even if necessary, is not sufficient. These further requirements raise acute concerns about the legitimacy of criminal punishment on the one hand, and the moral status of non-human agents on the other. What exactly they consist of is a much larger controversy than this project can tackle. But for present purposes, we can divide approaches into two camps: a post-Kantian rationalist tradition and a more species-centric, Strawsonian tradition.<sup>13</sup>

The rationalist tradition in discussions of moral agency focuses on the cognitive requirements needed to qualify an entity as a moral

9. E.g., LARRY MAY, *THE MORALITY OF GROUPS* 65 (1987) (arguing that “collective intentions proper, that is, to say that the group can intend in just the same way that the individual persons can intend, is a fiction”).

10. See JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 13 (1989); Jon Elster, *The Case for Methodological Individualism*, 11 *THEORY & SOC.* 453, 453 (1982).

11. MARGARET GILBERT, *JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD* 3 (2014).

12. Cf. Michael McKenna, *Collective Responsibility and an Agent Meaning Theory*, 30 *MIDWEST STUD. PHIL.* 16, 23 (2006) (“Personhood is only a necessary condition for morally responsible agency; it is not sufficient.”).

13. This discussion is sometimes cashed out in terms of whether the space of moral agents consists of “persons” or instead just of “humans.” E.g., Michael Tooley, *Abortion and Infanticide*, 2 *PHIL. & PUB. AFF.* 37, 40–43 (1972) (characterizing personhood as an honorific referring to all and only the class of entities qualifying for moral agency); cf. David Plunkett & Tim Sundell, *Disagreement and the Semantics of Normative and Evaluate Terms*, 13 *PHIL. IMPRINT* 1, 3 (2013) (characterizing “metalinguistic negotiation”). To minimize further confusion, in this article I avoid using the term *person* to mean anything but the aforementioned legal sense.

agent.<sup>14</sup> Rationalist requirements are, in principle, independent of any particular species.<sup>15</sup> Thus, a heretofore undiscovered alien species could be expected to satisfy these requirements; in a more prosaic but more pressing scenario, animal rights groups have sought to establish the legal standing of certain primates in captivity by arguing that the species can satisfy these requirements.<sup>16</sup>

The humanistic approach prioritizes human capacities, such as certain emotional responses, as a vital additional component of moral agency that is qualitatively distinct from legal personhood's agency requirements. At an extreme, some philosophers defend a view that our notions of morality are a distinctly species-centric endeavor, such that all and only biological humans can qualify as moral agents.<sup>17</sup> But even stopping short of that, there is ample attention paid to the role that emotional, and particularly reactive, attitudes play in our moral practice. Following Strawson, participation as a moral agent on this view requires more than just cognitive sophistication; it also requires some form of affective reasoning and responsiveness.<sup>18</sup>

As a final clarification, it is worth further distinguishing moral agents from what some philosophers call "moral patients." We might disagree about whether children have developed the capacity for moral agency,<sup>19</sup> but no one disputes that they have an important moral status that full-fledged moral agents must take into account. Moral patients, then, are objects of moral solicitude irrespective of whether they are moral agents themselves.<sup>20</sup> Thus, all moral agents are moral patients, but not vice versa.

Equipped with a rough distinction between moral agency and legal personhood, we can turn now to a taxonomy of strategies for making sense of corporate criminal responsibility. Legal personhood, it seems, is a vital component of any account of corporate criminal liability—or, perhaps more accurately, legal personhood is presupposed by such accounts. More controversial, then, is the relevance and possibility of corporate moral agency.

14. E.g., PETER SINGER, PRACTICAL ETHICS 110–20 (2d ed. 1993) (self-consciousness); Harry Frankfurt, *Freedom of the Will and the Concept of Person*, 68 J. PHIL. 5 (1971) (second-order desires); see generally DEREK PARFIT, REASONS AND PERSONS (1984) (discussing psychological continuity). For an opinionated survey of various capacities considered, see Joseph Vukov, *Personhood and Natural Kinds: Why Cognitive Status Need Not Affect Moral Status*, 42 J. MED. & PHIL. 261 (2017).

15. See TOM REGAN, THE CASE FOR ANIMAL RIGHTS (2004).

16. Karin Brulliard, *Chimpanzees are Animals. But are They 'Persons'?*, WASH. POST, (Mar. 16, 2017), <https://www.washingtonpost.com/news/animalia/wp/2017/03/16/chimpanzees-are-animals-but-are-they-persons/> [<https://perma.cc/UB35-H2VR>].

17. S.F. Sapontzis, *A Critique of Personhood*, 91 ETHICS 608 (1981).

18. P.F. Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 187, 195 (1962).

19. See, e.g., Eva Feder Kittay, *At the Margins of Moral Personhood*, 116 ETHICS 100, 102–06 (2005).

20. Adam Kadlack, *Humanizing Personhood*, 13 ETHICAL THEORY & MORAL PRAC. 421 (2010).

## II. TAXONOMIZING THEORIES OF CORPORATE CRIMINAL RESPONSIBILITY

The ambition of this section is to provide a taxonomy for what I take to be different strategies for extending an ostensibly moralized practice (criminal law) to ostensibly non-moral agents (corporations). The goal in this section is one of rational reconstruction; I am more interested in situating prominent accounts of corporate criminal liability within this framework than I am in advancing any specific substantive account. For each strategy, then, I identify representative accounts to illustrate the broad contours of the group, and then I suggest some of the central benefits and shortcomings of each strategy.

I categorize theories, whether critical or apologetic, into three groups. Economic theories reject the unique moral character of criminal law. Moral agency theories work to identify the characteristics necessary for praise and blame before determining whether corporate agents are capable of satisfying them. Political theories split the baby: criminal law is a uniquely moralized practice, but the institution does not thereby require corporate moral responsibility.

### A. Economic Theories

Economic theories trace their provenance most directly to the law-and-economics revolution and, in particular, to a rational-actor model of criminal law advanced in the modern era most notably by Gary Becker and Richard Posner.<sup>21</sup> On this view, the decision to commit crime is a rational calculation made in the same way as any other decision. Thus, criminal law is just one more institution for deterring misconduct; although the criminal law may have special procedures and address different kinds of misconduct from other institutions, there is nothing uniquely moralized about criminal law that distinguishes it from any other preventative legal institutions.

Jennifer Arlen, Vic Khanna, and many others have adapted and refined this economic model of crime for application specifically to corporate criminal offenses.<sup>22</sup> These models of corporate criminal liability dismiss any notion that criminal law is unique from other civil or regulatory regimes; a corporation's moral status has no more relevance to criminal law than it does to any other enforcement regime.<sup>23</sup> Economic theories do not apply normatively fraught

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21. Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); see also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 7.1–2, 15.15 (9th ed. 2014); Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 417–18 (1980) (discussing corporate punishment).

22. E.g., Cindy Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, in *PROSECUTORS IN THE BOARDROOM* 11 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271 (2008); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1995).

23. A strong version of this story rejects the interesting status of criminal law in general. See, e.g., Steven Shavell, *A Model of the Optimal Use of Liability and Safety Regulation*, 15 RAND J. ECON. 271

justifications such as retribution to corporate crime; deterrence or prevention provides the central rationale for the institution.<sup>24</sup>

A non-moralized, deterrence-centric approach to criminal law has understandable appeal with respect to corporate crime insofar as it deflates the central tension behind extending the institution in the first instance. If there is nothing special about criminal law, then there is no need to bother with thorny normative and conceptual questions about corporate moral agency. After all, no one disputes that corporations can participate in other domains of law—corporations can have a “meeting of the minds” in contract law, for example. In such a case, corporate criminal law raises no special obstacles. Moreover, many economic theories embrace a deflationary approach to legal personhood, whereby personhood provides merely a convenient shorthand for modeling the behavior of a corporation’s constitutive individuals.<sup>25</sup> Thus, in addition to avoiding positing any deep sense of collective responsibility, economic theories are parsimonious in a further respect: They do not assert any irreducibly collective commitments, but instead fit comfortably within a larger, methodologically individualistic framework.

But virtues aside, the challenges for economic theories are twofold. First, the institution that Becker and Posner describe is foreign to many people’s deeply held intuitions about criminal law. One need not be a thoroughgoing retributivist to believe that desert plays an important, even ineliminable, role in the criminal law. Criminal law is certainly concerned with deterrence, but deterrence is not necessarily all with which the criminal law is concerned. Indeed, the fact that corporations fit so naturally into this economic vision of criminal law constitutes evidence for some critics that corporate criminal law is not *real* criminal law, but rather something masquerading under the label.<sup>26</sup>

Second, economic theories of corporate criminal law are self-defeating. If criminal law is like other enforcement regimes in some respects—i.e., there are neither special normative commitments nor uniquely harsh corporate sanctions<sup>27</sup>—it is disanalogous insofar as criminal law is harder to enforce. Unlike the civil alternatives, criminal law carries both a higher standard of proof and a panoply of constitutionalized procedural protections that make enforcement

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(1984). Others, like Khanna, seem to have in mind that criminal law has some further normative dimension that simply does not carry over to the specific context of corporate criminal liability.

24. Khanna, *supra* note 22, at 1494 n.91 (collecting sources); see also Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 121 (2010) (discussing the “virtual elimination of retribution as an acknowledged goal of [corporate] criminal sanctioning”).

25. Cf. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 12 (1991) (describing the term “corporation” as picking out the “complex arrangements of many sorts that those who associate voluntarily in the corporation will work out among themselves”).

26. This criticism is levied even by scholars who would otherwise be categorized as participating in the broader law-and-economics tradition with respect to commercial corporations. See, e.g., Richard Epstein, *Deferred Prosecution Agreements on Trial*, in PROSECUTORS IN THE BOARDROOM, *supra* note 22, at 38, 45; Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320 (1996).

27. See Samuel W. Buell, *The Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM, *supra* note 22, at 87, 93.



comparatively difficult.<sup>28</sup> But if there is nothing special about criminal enforcement per se, then there would be no reason to bother with these further constraints, which after all make the performance of undesirable conduct more likely to occur.<sup>29</sup> To be clear, economic theories are not *conceptually* self-defeating. It is an open empirical question whether, for example, a corporate conviction has salutary deterrent effects beyond those attainable by civil enforcement actions.<sup>30</sup> Likewise, certain corporate punishments may be better situated behind the criminal law's procedural protections for reasons of epistemic humility; we should be careful not to impose harsh sanctions, even if only for deterrence purposes, unless we are really certain they should apply.<sup>31</sup> Nevertheless, a purely economic theory of corporate criminal law puts strain on the idea that such an institution is necessary even while sidestepping some of the deeper moral challenges that maintaining such an institution might otherwise raise.

### B. Moral Agency Theories

Many people feel the economic theory of criminal law fails to capture a moral dimension that is both unique to and essential to the institution of criminal law; criminal law is characterized by distinctive normative commitments not captured by the economic deterrence story. Thus, whereas economic theories rebuff or just deflate the presumption that criminal law is a uniquely moralized institution, moral agency theories focus attention on the question of whether corporations can be moral agents as collective agencies. Questions about criminal responsibility here are derivative of a broader inquiry into corporate moral responsibility.<sup>32</sup> Under this approach, moral agency is a prerequisite for moral responsibility, which is in turn a prerequisite for criminal responsibility.<sup>33</sup>

The past thirty-five years have seen an explosion in interest surrounding corporate moral agency generally and its implication for criminal responsibility specifically.<sup>34</sup> The modern discussion of corporate moral responsibility is usually traced

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28. Khanna, *supra* note 22. On the flip side, if constitutional protections do not extend to corporations, then this is even further reason to think that corporate criminal law is not real criminal law.

29. Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 6 (2012) (“[C]arrots and sticks are not sufficient justification for the imposition of criminal liability on corporations.”).

30. Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 INDIANA L.J. 473 (2006) [hereinafter Buell, *Entity Criminal Liability*].

31. W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905 (2019).

32. John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1330 (2009) (“[M]oral responsibility is a necessary condition for the application of the criminal sanction.”).

33. See MODEL PENAL CODE § 1.02(1)(c) (AM. LAW INST. 1985) (identifying as a “general purpose[]” of the Code “to safeguard conduct that is without fault from condemnation as criminal”); MICHAEL MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 35 (2010) (“To serve retributive justice, criminal law must punish all and only those who are morally culpable in the doing of some morally wrongful action.”).

34. For a summary of the various positions within corporate moral responsibility, see Amy J. Sepinwall, *Corporate Moral Responsibility*, 11 PHIL. COMPASS 3 (2016).

to Peter French. French argued that collective responsibility was fitting for corporate agents because the function of well-designed institutional structures was to produce attitudes (and attendant actions) that could not be reduced to those of the corporation's constitutive individuals.<sup>35</sup> Since French, discussions around corporate moral agency have explored two questions: (1) What are the eligibility requirements for moral agency? and (2) Can corporations satisfy them?<sup>36</sup>

Mapping onto the prior discussion of moral agency, one prominent line of research seeks to develop models by which corporations can be credited with increasingly sophisticated intentional attitudes thought to be essential to making moral judgments. This includes French himself, who subsequently incorporated work by Michael Bratman on collective intentions and planning.<sup>37</sup> Christian List and Philip Pettit have recently proposed a similarly Bratman-esque account of intentional attitudes that seeks to move discussions of corporate capacities beyond simple agency and into the space of complex, sophisticated agents capable of reasoning and deliberation.<sup>38</sup> Meanwhile, Margaret Gilbert's research represents the vanguard of a similar project that relies on a wholly distinct model of collective agency.<sup>39</sup> Whereas others take as given that collective attitudes are at least in principle reducible down to the contributions of individual attitudes, Gilbert argues that collective attitudes themselves are in fact primitive; they are distinct from and not reducible to a concatenation of individual attitudes.<sup>40</sup> In this vein, John Searle, Tracy Isaacs, and Marion Smiley have separately offered similarly irreducible accounts of collective agency.<sup>41</sup>

Rather than prioritize intentional attitudes, a separate line of research has sought to develop accounts of emotional attitudes that could extend to corporations as well as individuals.<sup>42</sup> Here, too, French and Gilbert have explained why collectives can possess such attitudes. French, for example, has defended

35. *E.g.*, Peter French, *Punishing the Criminal Corporation*, in COLLECTIVE AND CORPORATE RESPONSIBILITY 190 (1984).

36. Thomas Donaldson, *Moral Agency and Corporations*, 10 PHIL. CONTEXT 54 (1980).

37. *See generally* MICHAEL E. BRATMAN, *FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* (1999).

38. CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* (2011).

39. *E.g.*, GILBERT, *supra* note 11; MARGARET GILBERT, *ON SOCIAL FACTS* (1989).

40. MARGARET GILBERT, *SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY* 3 (2000) (“[J]oint commitment . . . cannot be analyzed in terms of a sum or aggregate of personal commitments.”).

41. Tracy Isaacs, *Collective Moral Responsibility and Collective Intention*, 30 MIDWEST STUD. PHIL. 59 (2006); John Searle, *Collective Intentions and Actions*, in *INTENTIONS IN COMMUNICATION* 401 (J. Morgan Cohen & M.E. Pollack eds., 1990); Marion Smiley, *From Moral Agency to Collective Wrongs: Re-Thinking Collective Moral Responsibility*, 19 J.L. & POL'Y 171 (2010).

42. For an account that goes further than most to bridge the gap between the two strategies discussed here, see WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY* (2006).

corporate shame,<sup>43</sup> while Gilbert's recent work canvasses an array of collective attitudes.<sup>44</sup> Bryce Huebner, for another, has defended an account of collective fear.<sup>45</sup> Of particular interest are so-called reactive attitudes like blame, resentment, and indignation. These attitudes have come to occupy a central place in attempts to account for the nature and propriety of our moral judgments.<sup>46</sup>

A core strength of moral agency theories is the extent to which these theories take seriously the intuition that criminal law has a unique, ineliminable normative dimension. Lots of entities can satisfy the bare requirements of simple agency, but we do not thereby hold them criminally responsible. An adjacent virtue is moral agency theory's commitment to the idea that criminal law should be a single institution that applies equally to all the legal persons that it regulates. That is, if criminal law as an institution is to apply to corporations, then it must be that corporations are eligible for criminal liability in the same way that individuals are. On this view, an economic theory of corporate criminal liability that categorically excludes retribution as a purpose of punishment (or, more specifically, the normative impulse underwriting retributivism) is inherently deficient; it is no criminal law at all.

But of course, this too is a central challenge faced by moral agency theories: they presuppose a settled account of moral agency. Putting aside the technical impressiveness of many recent accounts of collective agencies, resolution ultimately turns on a much more fundamental question concerning conditions of moral agency generally, not just that of corporations.<sup>47</sup> Thus, much of the debate turns on how stringent these requirements turn out to be. If criminal law requires corporations to be responsive to only the sorts of normative considerations that arise in the criminal law, then the case in favor of corporate criminal liability is easy.<sup>48</sup> On the other hand, each further requirement added makes the task more onerous.<sup>49</sup> The downside of moral agency theories, then, is the enormity of the

43. Peter A. French et al., *The Hester Prynne Sanction*, 4 BUS. & PROF. ETHICS J.19, 19 (1985); see also Stephanie Collins, "The Government Should Be Ashamed" *On the Possibility of Organisations' Emotional Duties*, 66 POL. STUDS. 813 (2018).

44. E.g., Margaret Gilbert, *Who's to Blame? Collective Moral Responsibility and Its Implications for Group Members*, 30 MIDWEST STUD. PHIL. 94 (2006).

45. Bryce Huebner, *Genuinely Collective Emotions*, 1 EURO J. PHIL. SCI. 89, 95 (2011).

46. E.g., Gunnar Björnsson & Kendy Hess, *Corporate Crocodile Tears? On the Reactive Attitudes of Corporate Agents*, 94 PHIL. & PHENOMENOLOGICAL RES. 273 (2017); David Silver, *A Strawsonian Defense of Corporate Moral Responsibility*, 42 AM. PHIL. Q. 279 (2005); see generally MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 614–17 (1997). But see Mark LeBar, *Corporations, Reactive Attitudes, and the Moral Community* 17 GEO. J. L. PUB. POL'Y (SPECIAL ISSUE) 811 (2019).

47. See Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L. J. 411, 430 (2012).

48. E.g., Isaacs, *supra* note 41, at 61 ("To the extent that they have the capacity to act on the basis of intentions, corporations and other similarly structured organizations are moral persons."); Gilbert, *supra* note 44, at 99–100.

49. McKenna, *supra* note 12, at 21 ("Demonstrating each of these points in turn requires ratcheting the bar yet higher at each stage for the level of sophistication such agents must achieve. The higher the bar, the more credible is the skeptical thesis that all (or most) irreducible collective agents cannot rise to

task. It is not just that figuring out collective attitudes is a difficult enterprise—though that certainly seems to be the case; it is that moral agency itself remains a fraught concept.

### C. Political Theories

Finally, there is a set of accounts of corporate criminal liability that have traditionally been treated as a species of moral agency theories,<sup>50</sup> but that in fact should be seen as importantly distinct. For reasons made clear in Section III, I call these distinct accounts “political theories.” Political theories, like moral agency theories, find the economic deterrence story of criminal law to be deficient with respect to criminal law’s special status. Where political theories differ is that they do not accept corporate moral agency as a prerequisite for criminal responsibility; instead, they seek to ground the normativity elsewhere.

The recent proliferation of expressive accounts of corporate criminal law fits comfortably under this political banner.<sup>51</sup> The expressive insight in law is that state actions convey a message to and on behalf of the citizenry about the values and judgments that the state endorses.<sup>52</sup> Legal expressivists contend that the decision to impose criminal liability rather than civil liability conveys a message about what our society condemns or values, which cannot be reduced to a bare deterrence story.<sup>53</sup> But neither must that message be about a corporation’s failings *qua* moral agent. For example, Sam Buell has argued that a corporate conviction conveys that the organization “has arranged itself badly.”<sup>54</sup> David Uhlmann has focused on the role that conviction plays in demonstrating the state’s intolerance for certain incidences of massive harms.<sup>55</sup> And Gregory Gilchrist says that corporate criminal enforcement is necessary to avoid a message of “favoritism [that] undermine[s] its appearance of equal application of laws.”<sup>56</sup>

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meet it.”). Indeed, even if organizations in general can be irreducibly moral agents, there is yet a further question whether commercial corporations are capable of being the right sort of group agents to so qualify. See SCANLON, *supra* note 5, at 160–63 (suggesting that some groups agents, but just not commercial corporations, can participate in certain moral practices); accord NIKLAS LUHMANN, *SOCIAL SYSTEMS* 201 (John Bednarz, Jr. trans., 1995). My thanks to Turku Isiksel for pressing me to consider this point.

50. See, e.g., Sepinwall, *supra* note 34, at 10.

51. E.g., Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049 (2016); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL’Y 833 (2000).

52. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

53. Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

54. Buell, *Entity Criminal Liability*, *supra* note 30, at 502.

55. David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1259–71 (2016).

56. Gilchrist, *supra* note 29, at 51 (“It risks sending the signal that criminal conduct will be punished—except where it is committed by a corporation.”); see also Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417 (2009).

A related species of political accounts appeals to the fact of a “responsibility gap” or “deficit of responsibility” left by institutions that otherwise would restrict attention to individual wrongdoers.<sup>57</sup> The intuition driving these accounts is that, in cases of truly corporate wrongdoing, even a perfect enforcement system would fail to fully apportion blame for the harm done by attributing the requisite responsibility to individuals for their roles in bringing about the misconduct.<sup>58</sup> Corporate criminal responsibility, then, serves to fill that gap. To this point, recent work in cognitive science and social psychology suggests that we, in fact, have a hardwired tendency to blame certain types of well-structured collectives qualitatively the same way that we blame individuals, under circumstances in which we think the group agent a fitting target.<sup>59</sup> As a theory of moral agency, deficit accounts embrace a controversial metaethical stance about the nature of responsibility as a real property.<sup>60</sup> But, as a political theory, the intuition is more intuitively plausible: society would feel that justice could not be fully served if corporations were immune to criminal responsibility either because individual prosecutions were insufficient or because they would otherwise miss something important about our folk responsibility judgments.

Political theories tap into a powerful intuition that the state should *do something* when seemingly criminal harms occur. Moreover, political accounts promise to sidestep the particular controversies attendant to corporate moral agency; criminal law’s normative significance is grounded on the state’s duty to act in the interest of its citizens (who themselves are uncontroversially moral agents), which here includes a duty to maintain the institution of criminal law. But political theories invite their own challenges. Particularly, expressive defenses of corporate criminal liability are often presented in an ad hoc manner; they appeal to a powerful intuition without a full exploration of the underlying normative and conceptual machinery that grounds the intuition.<sup>61</sup> Descriptively, these accounts

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57. Phillip Pettit, *Responsibility Incorporated*, 117 ETHICS 171, 184 (2007); Alexander Sarch, *Who Cares What You Think? The Irrelevance of Unmanifested Mental States*, 36 LAW & PHIL. 707 (2017).

58. For an argument that the state has a duty to hold corporations criminally responsible to offset its role, via corporate law, for preventing even adequate enforcement of individual responsibility, see W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 601 (2017).

59. Diamantis *supra* note 51, at 2077–80 (collecting sources).

60. For my part, I think using accounting as a metaphor for corporate responsibility confuses more than it elucidates. First, it asserts without justification an additive quality to responsibility judgments. *Cf.* SCANLON, *supra* note 5, at 146, 161 (noting that moral responsibility judgments are not about assigning “pointless grad[es]”). Second, this would have the effect of making collective responsibility judgments vary in response to individual responsibility. This seems wrong. As Gilbert summarizes the point generally: “What does the blameworthiness of the collective’s act imply about the personal blameworthiness of any one member of that collective? From a logical point of view, the short answer is: *nothing*.” Gilbert, *supra* note 44, at 109. In particular, there is no reason to expect that a collective agent’s degree of responsibility will exactly match, or even track, the concatenation of members’ individual responsibilities. Thinking of corporate responsibility as the leftover of individual responsibility, then, leads to a mistaken understanding of the nature of corporate responsibility.

61. *Cf.* Susan A. Bandes, *All Bathwater, No Baby: Expressive Theories of Punishment and the Death Penalty*, 116 MICH. L. REV. 905, 916–18 (2018) (defending the view that “[e]xpressive punishment”

advance controversial claims about how to understand what our social practices are. Prescriptively, there is a further question about what our institutions should be.

Descriptively, it is a contested point what the state is expressing through corporate convictions and whether that expression is vindicating actual normative judgments that individuals within society deeply hold. Manuel Velasquez and Amy Sepinwall have argued separately that our folk judgments about collective responsibility, if pressed, could turn out to be a semantic shorthand for some complicated, open-textured set of judgments about the individuals inside the corporation who are “really” responsible.<sup>62</sup> This skepticism about collective responsibility judgments gives rise to concerns over the expressive dimension of corporate crime. *That* criminal law expresses a message is obvious; *what* message it expresses is not.<sup>63</sup> The examples above are just a handful of the views purportedly conveyed by a corporate conviction; many others exist, to say nothing of alternative messages delivered by the criminal law that do not appeal to, and may be inconsistent with, the interpretation favored by advocates of corporate criminal liability. Thus, to the extent that they assume that corporate convictions send a message that society needs sent (and needs to be sent specifically through the criminal law), expressive theories of corporate criminal law risk begging the question they purport to settle.

Prescriptively, even if political theories accurately capture our folk judgments, it is a separate and further question whether the state should indulge these sentiments. Albert Alschuler, for example, has argued that corporate criminal liability is a modern counterpart to the ancient practice of *deodand*, whereby an inanimate object would be destroyed to purge feelings of resentment in circumstances where there was no one who could properly be punished.<sup>64</sup> Convicting a corporation, says Alschuler, is akin to “punish[ing] the wheel of a cart that had run someone over . . . or the sword that a murderer had used.”<sup>65</sup> If this is an apt comparison, then we might hesitate to embrace an irrational practice, one tantamount to bloodletting, merely to appease our unreflective rage.<sup>66</sup> That is

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has become a grab bag of poorly differentiated concepts that too often obfuscate rather than illuminate”).

62. Sepinwall, *supra* note 34; Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS Q. 531 (2003).

63. Buell, *Entity Criminal Liability*, *supra* note 30, at 522 (arguing that an expressive defense of corporate criminal liability must connect the “social practice of blaming institutions for individuals’ wrongdoing and the reality of institutional influence on individuals”); *see generally* Matthew D. Adler, *Expressive Theories: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

64. Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307 (1991).

65. *Id.* at 312; *see also* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359 (2009). *But see* K.E. Goodpaster, *The Concept of Corporate Responsibility*, 2 J. BUS. ETHICS 1, 15 (1983) (arguing the significance of the fact that “corporations are much more like persons than not only automobiles but even animals”).

66. *See* David Lewis, *The Punishment that Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 53 (1989).

especially true where bloodletting is not harmless; corporate conviction means corporate punishment, which distributes harm to individuals. Even if the magnitude and propriety of that harm is itself a contested issue, its existence is the very reason to hesitate in endorsing institutions that could be seen as indulging the whims of the mob. In other words, it remains an open question whether, viewed from a political perspective, an institution of corporate criminal law is worth the political cost.

In summary, there are an array of accounts advocating for, or challenging the propriety of, the institution of corporate criminal law. The list here is meant to be representative rather than exhaustive; even then, plenty of nuances associated with particular accounts are absent. Nevertheless, I hope this taxonomy can help to illuminate at least one dimension by which drastically different strategies have proceeded towards the same question. Next, I want to focus on what distinguishes these three strategies and argue that political accounts present, to my mind, the most promising avenue for making sense of corporate criminal law.

### III. POLITICAL THEORIES OF CORPORATE CRIMINAL LAW: A CLOSER LOOK & FUTURE PATH

Having offered a taxonomy, I would like to provide some reasons to view the approach taken by the political theories of corporate criminal law as a viable alternative to economic and moral agency theories. Thus, in this section, I sketch how these accounts draw from a deeper tradition in political philosophy, which is working in the background. Specifically, political theories leverage a distinction between the sorts of justifications given internally to a practice and those given for having the practice itself. Thereafter, I reconsider the relationship between corporate moral agency and corporate criminal liability from the perspective of political philosophy.

#### A. *Two Concepts of Rules*

Why should a corporation be subject to criminal punishment? Here is one type of answer: *Because it committed a crime*. Here is a second type: *Because it deserves it*, or *because society demands it*. These answers respond to fundamentally different understandings of what appears to be the same question. The first answer provides a legal justification that operates within the practice of criminal law as it presently exists. It presupposes that corporations are subject to the criminal law. But even assuming this to be the case—that corporations *could* conform to the requirements of the criminal law—there is the further question of whether the criminal law *should* regulate them in the first instance. The second answer offers justifications for the propriety of having an institution of criminal law that applies to corporations as well as individuals.

That these two levels of justification exist is a staple of modern political philosophy—specifically, of theories of punishment. The modern exemplar of this distinction, which appears in John Rawls' *Two Concepts of Rules*,

seeks to reconcile criminal punishment's competing utilitarian and retributive impulses by suggesting that each operates at different levels of justification.<sup>67</sup> Generally, utilitarianism grounds the basis for having an institution of criminal punishment by appealing to the state's interest in deterring future harms. But the justification for having this institution does not explain why a given individual should be subject to punishment—that is, utilitarianism provides a “justification of a practice,” which is distinct from a “justification of a particular action falling under it.”<sup>68</sup> With respect to the latter, appeals to deterrence fall flat—if conviction and punishment would prevent future crimes, why bother limiting that punishment to guilty individuals?<sup>69</sup>—and some further story about just deserts is necessary to ground the application of the practice.

I suspect that a similar bifurcation may help explain distinctions in differing strategies for responding to the extensive puzzle of corporate criminal law. Economic theories are primarily concerned with providing a “justification of a practice.” That is, by taking moral considerations off the table, economic theories endorse the extension of criminal law to corporations if and to the extent that such an institution would cost-effectively prevent undesirable consequences.<sup>70</sup> By contrast, moral agency theories are better understood as concerned with the “justification of a particular action falling under” the preexisting institution of criminal law. Here, the operative inquiry is whether a corporation can satisfy the requirements of moral agency that are necessary to give rise to culpability. To the extent that moral agency theories answer a larger, institutional question about whether to have corporate criminal law in the first instance, this answer derives from the fact that inquiries into corporate moral agency are categorical—*viz.*, the question is framed in terms of whether a corporation could ever, in principle, constitute a moral agent. Stepping back, then, it seems reasonable to understand these two strategies as focusing on fundamentally different questions or different aspects of the same puzzle.

### *B. The Virtue of Political Theories*

What about political theories? I think that political accounts are a promising avenue for corporate criminal law and represent an interesting compromise between the other two strategies. As it turns out, what strikes me as the promise of political theories is that they are equipped to operate at both levels of justification.

Particularly relevant here, Tim Scanlon has recently leveraged a comparable distinction in defending specifically expressive theories of punishment.<sup>71</sup> Scanlon

67. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

68. *Id.* at 16.

69. *Id.* at 9.

70. See discussion in Section II.A.

71. T.M. Scanlon, *Punishment and the Rule of Law*, in THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 219 (2003).



suggests that expressive accounts of criminal punishment are operating at both levels of justification in a manner that is frequently conflated.<sup>72</sup> With respect to having an institution of criminal law, the state's affirmation of a wrong done is a crucial function of an institution of criminal law lest individuals "whose sense of being wronged is not recognized and affirmed . . . [may] have less respect for and less investment" in legal institutions more generally.<sup>73</sup> At the same time, separate norms of fairness constrain who the state can use, and under what circumstances, to reaffirm a victim's moral status. Scanlon's suggestion is that affirmation by necessity requires tying the identification of a wrong done to the specific perpetrator—that is, in order to "affirm a victim's sense of being wronged" the state, through punishment, "must condemn the agent who inflicted the wrong."<sup>74</sup> This connection between the general need for affirmation and the specific need to use the perpetrator in order to affirm further explains both why criminal law is interested in intentional attitudes (*mens rea*) and why it allows for excuses and justifications to preempt conviction. In other words: according to Scanlon, the propriety of imposing sanctions presupposes the offender had "fair opportunity to avoid" bringing about the kinds of harm that made condemnation appropriate.<sup>75</sup>

Applied to the question of corporate criminal liability, this approach sidesteps corporate moral agency but locates the unique normativity of criminal law in the duties owed to individuals by the state, which both expressive and deficit-style accounts seem focused on vindicating. This justification is consequentialist in an important sense; it concerns the state's obligation to protect the moral statuses of individual victims even if the reason for doing so is merely to ensure individual confidence in the law. And, in terms of who the state can sanction, a central concern seems to be the unfairness of either ignoring a wrong done by a corporation or blaming individuals within a corporation for conduct that is not fairly traceable to them. But again, the fairness considerations here run to individuals—not just to victims, but also to those who would face censure for the same conduct—as moral agents without further regard for whether the corporation itself has moral agency.

This schema also proposes a way for thinking about the problem of corporate punishment as bloodletting. We can ask the question of whether to punish corporations at two levels, and we should expect different sorts of answers for each. At an institutional level, the question concerns whether the state should maintain an institution that deters harm even if that institution has the effect of bringing about harm to non-culpable parties along the way. At a practical level, the question is

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72. See Anderson & Pildes, *supra* note 52, at 1510–11 (defending the view that expressive justifications synthesize "a purely consequentialist approach" with what would otherwise be "a 'vulgar deontology'").

73. Scanlon, *supra* note 71, at 223, 232; see generally FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (Douglas Smith trans., 2009) (1887).

74. Scanlon, *supra* note 71, at 231.

75. *Id.* at 231–32.

whether to punish any particular offender within the institution given the particular spillover consequences. Here, the propriety may well—or, at least, should—turn on the specifics of the circumstances.<sup>76</sup>

### C. *Towards a Criminal Law without Corporate Moral Agency*

The reconstruction above suggests that moral agency plays an important role in corporate criminal liability and that, despite being non-moral agents, corporations are being let into the practice. How can we account for this? Or, better, how can we justify this extension in a principled manner? Considered another way: if moral agency is not a prerequisite to criminal responsibility, what explains what many see as the proper exclusion of other non-moral agents from criminal liability? Why don't political theories admit liability for children, animals, inanimate objects, or whatever the mob might suppose has wronged it?

First, I think the constellation of fairness norms sketched above is particularly well-suited to answer these questions. I have argued elsewhere that this type of fairness-oriented approach is consonant with the historical development of corporate criminal liability.<sup>77</sup> Here, the fairness antecedent is rooted in corporations' accretion of the benefits of legal personhood, particularly in other domains of law. Recognition of corporate criminal liability alongside the benefits of legal personhood, then, is something of a *quid pro quo*—not between the state and the corporation (or its founders),<sup>78</sup> but between the state and individuals in society. Criminal responsibility is appropriate because the law has already recognized corporations as eligible for legal personhood elsewhere and because it would be unfair to individuals in society not to extend that status to the criminal law when corporations are capable of both causing and avoiding the kinds of harms that criminal law condemns. This approach admits as an open question whether the state should extend legal personhood to corporations—a position I take to be harder to maintain if corporations were moral agents. But, given the prolific extent to which the state has done so, it has a further obligation to extend this legal personhood in the core legal domain of criminal law as well.

Second, to say that corporations are legal persons in the sense described here is to say that they can participate in the practice of criminal law. But, internal to the practice, criminal law does not deal directly with moral judgments; instead, it deals with legal standards. Focusing on mental states may be a proxy for our moral judgments, but criminal law focuses solely on these proxies—not the real but opaque grounding in some separate moral domain.<sup>79</sup> I have no legal defense

76. In thinking about corporate crime specifically, it is worth bearing in mind that the criminal law ordinarily does not take harm to third parties into account in deciding whether or how severely to punish.

77. Thomas, *supra* note 1.

78. Jennifer A. Quaid, *The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis*, 43 MCGILL L. J. 67 (1998); see also David Ciepley, *Can Corporations Be Held to the Public Interest, or Even to the Law?*, 2 J. BUS. ETHICS 7 (2018).

79. See Sarch, *supra* note 57; Alec Walen, *The Low Cost of Recognizing (and of Ignoring) the Limited Relevance of Intentions to Permissibility*, 3 CRIM. L. & PHIL. 71 (2009).

in saying that, having committed all the elements of a crime and being unable to avail myself of existing justifications or defenses, the law should nevertheless find me not guilty because I am not morally blameworthy.<sup>80</sup>

In this respect, I am sympathetic to the economic account's observation that criminal law is not qualitatively different from civil or regulatory alternatives. In one sense—and it is an important sense—there is not a meaningful difference across domains; even where the substantive and procedural rules differ, they differ in degree rather than in kind. But, on the separate question about justifying whether to have an institution of criminal law at all—and, crucially here, whether that institution should encompass corporations alongside individuals—I agree with moral agency theorists that criminal law is importantly moralized in ways that economic theories fail to capture. What I see as the central point of political theories is that there exist separate justifications for extending the institution to corporations than for extending it to individuals. Moral agency may well be a sufficient condition for extending criminal liability to a class of agents. But the style of argument sketched above seeks instead to ground corporate criminal liability on the state's obligation to those same individual moral agents—an obligation that is already central to the justification behind having an institution of criminal law in the first place. If I am right that we can draw this distinction, then the next step is to figure out not just what the alternative normative basis to moral agency is, but how that alternative can be applied to corporations without sounding ad hoc. Here, I think the central consideration to note is this: if corporations are not moral agents, neither do they seem moral patients.<sup>81</sup> As such, the fairness concerns we might have about the criminal law mistreating objects of moral consideration fail to attach in the same way to corporations as they do to individuals. A structurally similar point has been raised with respect to the propriety of certain morally troublesome penal sanctions,<sup>82</sup> but the generalized point may in fact apply broadly.

#### CONCLUSION

There are lots of efforts to make sense of corporate criminal law. The ambition of this project is to identify a distinction that is too often overlooked in discussions of corporate moral agency and the criminal law. In doing so, I show how attention to the distinction can inform prominent strategies for defending (or attacking) the foundations of corporate criminal law. Broadly speaking, I have

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80. To be clear, this does seem a viable, even appropriate argument, but one that sounds in mercy from an otherwise lawful judgment. That is, my plea is not “I didn’t break that law,” but “I shouldn’t be held responsible even though I broke the law.”

81. See Thomas W. Pogge, *Rawls on International Justice*, 51 PHIL. Q. 246 (2001) (discussing JOHN RAWLS, *THE LAW OF PEOPLES* (1999)); see also Dietmar von der Pfordten, *Five Elements of Normative Ethics: A General Theory of Normative Individualism*, 15 ETHICAL THEORY & MORAL PRAC. 449 (2012).

82. E.g., Mihailis Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507 (2017) (rehabilitation); Thomas, *supra* note 31 (incapacitation).

identified three types of strategies. First, economic theories of corporate criminal law reject the idea that criminal law is unique from other civil or regulatory regimes. Second, moral agency theories posit that criminal law does have some important moralized component and thus take corporate moral agency to be a necessary prerequisite for extending the institution of criminal law to corporations. Third, political theories acknowledge the moralized character of criminal law but reject the idea that corporations must be fully fledged moral agents in order to do justice to the criminal law's moral core in so extending the institution. Instead, corporate criminal liability requires only a thin sense of collective agency, and the underlying moral considerations somehow run to individuals within society. The project here is primarily one of rational reconstruction; I am more interested in situating prominent accounts within this framework than I am in advancing my own. That said, I do see the moral agency theories of criminal law as potential targets of this project. Appreciating the distinction lays the groundwork for a moralized account of corporate criminal law that does not appeal to or depend upon positing the existence of corporate moral agency in any robust sense.