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CORPORATE CRIMINAL MINDS

*Mihailis E. Diamantis**

Abstract

In order to commit the vast majority of crimes, corporations must, in some sense, have mental states. Lawmakers and scholars assume that factfinders need fundamentally different procedures for attributing mental states to corporations and individuals. As a result, they saddle themselves with unjustifiable theories of mental state attribution, like respondeat superior, that produce results wholly at odds with all the major theories of the objectives of criminal law.

This Article draws on recent findings in cognitive science to develop a new, comprehensive approach to corporate mens rea that would better allow corporate criminal law to fulfill its deterrent, retributive, and expressive aims. It does this by letting factfinders attribute mental states to corporations at trial as they ordinarily do to similar groups out of the courtroom. Under this new approach, factfinders would be asked to treat corporate defendants much like natural person defendants. Rather than atomize corporations into individual employees, factfinders would view them holistically. Then, factfinders could do just what they do for natural people—in light of surrounding circumstances and other corporate acts, infer what mental state most likely accompanied the act at issue. Such a theory harmonizes with recent cognitive scientific findings on mental state and responsibility attribution, developments that corporate liability scholars have mostly ignored.

Introduction

American criminal law adopted the fiction that corporations are people so it could hold them accountable for wrongdoing.[1] But it left the project

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1 *See* Balt. & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 329–30 (1883); 18B Am. Jur. 2d *Corporations* § 1811 (2016) ("[P]rivate corporations may commit almost every kind of a tort and be held liable, and this liability may be enforced in the same manner as if the wrong had been committed by an individual."); 19 C.J.S. *Corporations* § 816 (2012) ("Corporations generally are regarded as 'persons,' within the meaning of statutes which make certain acts by 'persons' [a criminal] offense."); Mark M. Hager, *Bodies*

incomplete. Though crimes typically require an actus reus and a mens rea,[2] courts have no real theory of how corporations, which have no bodies or minds, could instantiate either.[3] The best they have is an antiquated gimmick—respondeat superior—for holding corporations vicariously responsible for the crimes of their employees.[4] That approach may have the benefit of making courts somewhat consistent in deciding when to hold corporations accountable. But even that lone virtue is now threatened as respondeat superior, at this stage in corporate history, increasingly produces outcomes at odds with any sensible notion of criminal justice.

Sometimes respondeat superior lets patently criminal corporations off the hook. This could be because, in complex and opaque organizations, the paper trail may be too long and incomplete to find individuals who committed crimes attributable to the corporation.[5] Or it could be because there

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Politic: The Progressive History of Organizational 'Real Entity' Theory, 50 U. PITT. L. REV. 575, 585 (1989).

2 *See* United States v. Apfelbaum, 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.").

3 *See, e.g.*, David H. Kistenbroker et al., *Corporate Motive and* Time Warner*: Smoke and Mirrors Revisited*, *in* PRACTISING L. INST., SECURITIES LITIGATION & ENFORCEMENT INSTITUTE 2003, at 125, 129 (Jay B. Kasner & Bruce G. Vanyo eds., 2003) ("Corporations may legally be people, but they are also legal fictions and only natural persons can possess states of mind.").

4 *See* 18B AM. JUR. 2d *Corporations* § 1822 (2016).

5 *See* Memorandum from Eric Holder, Deputy Att'y Gen., to All Component Heads and U.S. Att'ys, Bringing Criminal Charges Against Corporations (June 16, 1999), http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF ("It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired."); BRANDON GARRETT, TOO BIG TO JAIL 113 (2014) ("[I]t can be hard to hold employees responsible."). There are numerous examples. In 2010, Barclays entered into a deferred prosecution agreement with prosecutors in which it admits to having violated U.S. sanctions by trading with enemy states. Deferred Prosecution Agreement at 19, United States v. Barclays Bank PLC, No. 1:10-cr-00218-EGS (D.D.C. Aug. 16, 2010), http://www.gibsondunn.com/publications/Documents/BarclaysBankDPA.pdf. The judge expressed disbelief that that no individuals were being prosecuted, to which the prosecutor replied, "In every case . . . we look. . . . But in this case, there . . . was not someone who we could prove to a court beyond a reasonable doubt . . . had committed an offense." Hearing at 5–6, United States v. Barclays Bank PLC, No. 1:10-cr-002180-EGS (D.D.C. Aug. 17, 2010). Similarly, after investigating General Motors for over a year, prosecutors entered into a deferred prosecution agreement in which the company admitted it hid fatal ignition switch flaws in its vehicles. Press Release, U.S. Att'y's Office S.D.N.Y., Manhattan U.S. Attorney Announces Criminal Charges Against General Motors and Deferred Prosecution Agreement with $900 Million Forfeiture (Sept. 17, 2015), http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred. To critics seeking individual liability, the prosecutor replied, "Criminal intent can be hard to prove. But if there is a case to bring,

literally is no individual employee who did anything proscribed by law. For example, in one case, a ferry capsized after setting sail with her bow doors open, killing nearly 200 passengers.[6] From top to bottom, the corporation that ran the vessel "was infected with the disease of sloppiness."[7] Prosecutors brought manslaughter charges against the corporation, but no individual employee was so sloppy as to have been grossly negligent, the required mens rea.[8] Applying respondeat superior, the court found the corporation not guilty.[9]

Other times, respondeat superior exposes a corporation to criminal charges despite the overwhelming sense that the true criminal is not the corporation but some rogue employee within its ranks.[10] In *United States v. Sun-Diamond Growers of California*,[11] a corporation's in-house lobbyist defrauded the corporation in order to make illegal payments to politicians who were his friends.[12] Since the lobbyist could have been acting "also, with an intent (however befuddled) to further the interests of his employer," the court upheld charges against the corporation.[13] Though, in the court's opinion, the corporation "look[ed] more like a victim than a perpetrator," it felt its hands were bound to uphold the conviction by prevailing doctrine and a poor exercise of prosecutorial discretion.[14] Even if one is not moved by the particular facts in *Sun-Diamond*, rogue employees are a pervasive concern.[15]

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we'll bring it." Drew Harwell, *Why General Motors' $900 Million Fine for a Deadly Defect Is Just a Slap on the Wrist*, WASH. POST (Sept. 17, 2015), https://www.washingtonpost.com/news/business/wp/2015/09/17/why-general-motors-900-million-fine-for-a-deadly-defect-is-just-a-slap-on-the-wrist/.

6 R. v. Her Majesty's Coroner for E. Kent, (1987) 3 B.C.C. 636, 638 (Eng.).

7 *Id.* (internal quotation marks omitted).

8 *Id.* at 640.

9 *Id.*

10 Contemplating such charges has been explicit Department of Justice policy. *See, e.g.*, Memorandum from Larry D. Thompson, Deputy Att'y Gen., to U.S. Att'ys, Regarding Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf ("In all cases involving wrongdoing by corporate agents, prosecutors should consider the corporation, as well as the responsible individuals, as potential criminal targets.").

11 138 F.3d 961 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999).

12 *Id.* at 970.

13 *Id.* at 970–71, 974.

14 *Id.* at 970 ("Where there is adequate evidence for imputation (as here), the only thing that keeps deceived corporations from being indicted [is] . . . simply the sound exercise of prosecutorial discretion."). For a similar example, see *Pevely Dairy Co. v. United States*, 178 F.2d 363, 370–71 (8th Cir. 1949), which reversed a corporate conviction for antitrust violations because all individual defendants had been acquitted.

15 *See* Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 65 (2007) ("[A] multinational corporation may theoretically be indicted, convicted, and perhaps put out of business based on the alleged criminal activity of a single, low-level, rogue employee who was acting without the knowledge of any executive or director, in violation of well-publicized procedures, practices, and instructions of the company."); Steven D. Feldman, *Win-*

Such scenarios are unavoidable in the current world of massive, dispersed, international corporations, regardless of how robust internal compliance mechanisms may be.[16] Judges and laypeople alike share the palpable sense of inappropriateness at criminally condemning corporations due to the acts of rogue employees, even when the facts are not so sympathetic.[17]

Cases such as these undermine the most basic goals of criminal law, and may even have ripple effects that compromise criminal law outside of the corporate context. There is no successor theory of corporate liability poised to take the reins, and nothing satisfactory floating in academic literature.[18] Some proposals, like Peter French's "internal decision structure" model,[19] rest on naïve understandings of how complex corporations actually operate. Others, like the "collective knowledge doctrine" advanced by judges[20] in some jurisdictions, only exacerbate the problems of respondeat superior.

Against this stark background, this Article takes a first step toward a solution by providing a comprehensive theory for adjudicating corporate mental states. Previous scholarship has been limited by the tacit assumption that triers of fact must use fundamentally different procedures for attributing mental states to individuals and corporations. But a substantial and growing body of cognitive science research indicates that people ordinarily use the same psychological mechanisms whether assessing the mental lives of individuals or of groups like corporations. An elegant solution to the problem of corporate mens rea, and the one proposed by this Article, would accept what

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ning Strategies and Challenging Trends for White Collar Defense Attorneys, *in* MANAGING WHITE COLLAR LEGAL ISSUES (ASPATORE 2014), 2014 WL 6629527, at *7 ("There is now more willingness to go after corporations for the bad acts of rogue employees."); Joseph W. Martini & Karen Mignone, *Minimizing Client Exposure to Criminal Enforcement for Environmental Violations*, 18 NAT. RESOURCES & ENV'T 27, 30 (2004) ("In many instances, internal investigations will reveal that the conduct that prompted [environmental] agency intervention involved the unauthorized acts of a 'rogue' employee.").

16 *See* Joan McPhee, *Corporate Criminal Liability and Punishment in the 21st Century: Departures from Constitutional and Criminal Norms and Anomalies in Practice*, 16 NO. 4 ANDREWS' PROF. LIAB. LITIG. REP. 13, *5 (2006) ("[T]he confluence of these two developments today allows for the isolated act of a single low-level employee—acting contrary to company policy, without knowledge or participation by senior management, and in the face of diligent efforts by corporate management to prevent commission of the conduct in issue—to subject the entire company to the threat of extraordinarily punitive sanctions."); Irwin Schwartz, *Toward Improving the Law and Policy of Corporate Criminal Liability and Sanctions*, 51 AM. CRIM. L. REV. 99, 112 (2014) ("No organization—private or government—can prevent all misconduct by all employees, all of the time.").

17 *See, e.g.*, Jonathan D. Glater & John Schwartz, *Enron's Many Strands: The Deliberations; Jurors Tell of Emotional Days in a Small Room*, N.Y. TIMES (June 17, 2002), http://www.nytimes.com/2002/06/17/us/enron-s-many-strands-deliberations-jurors-tell-emotional-days-small-room.html ("'They just forced us to come back with a guilty verdict,' said juror Wanda McKay . . . . 'One person did one thing and tore the whole company down.'").

18 *See infra* Part III.

19 PETER FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY (1984).

20 *See, e.g.*, United States v. Bank of New Eng., 821 F.2d 844, 855 (1st Cir. 1987).

people naturally do and build the requirements for mens rea around that understanding.

The Article begins by recounting how corporate criminal law ended up in its current predicament, a story intimately bound up with the history of respondeat superior and the evolution of the modern corporation. The Article next motivates the effort to keep a place for corporate mens rea in criminal law, despite how seemingly bizarre the concept may be. It argues that some requirement of corporate mens rea must remain if criminal law is to fulfill its central functions. The Article then raises, only to set aside, alternate theories of corporate mental states.

Turning to its positive argument, the Article asks first whether there really is a unique problem for adjudicating corporate mental states, and concludes that courts face similar problems with the mental states of natural person defendants. Drawing on this key observation, the Article proposes further anthropomorphizing corporations in the eyes of the law, and adjudicating their mental states just as courts do those of natural persons—inference to the best explanation from acts and surrounding circumstances. The resulting theory harmonizes with recent discoveries in cognitive science and social psychology about how people actually assess the blameworthiness of groups like corporations.

This Article proceeds from relatively open-ended starting premises. It makes no assumptions about the "real" nature of corporations or the best theory of corporate actus reus. In the early twentieth century, theorists debated whether corporations are just groups of people or actually constitute distinct entities separate from their members.[21] But, by focusing on how people perceive corporations, rather than on the nature of corporations themselves, this Article sidesteps that debate entirely. Similarly, though this Article assumes that there is some sensible theory of corporate actus reus—a way of resolving when a corporation has done something and what—nothing will turn on the details of that theory.[22]

I. The Unmaking of Respondeat Superior

Corporate criminal law developed its primary theory of liability at a time when corporations looked very different than they do today. Corporations began as limited entities[23] in twelfth-century England.[24] In colonial

21 *See* Hager, *supra* note 1, at 579–80; *see generally* Eric Colvin, *Corporate Personality and Criminal Liability*, 6 Crim. L.F. 1, 1–2 (1995).

22 Readers should feel free to press on with their favorite theory of corporate action in mind. And one must have such a theory if one is to think the whole concept of incorporation makes any sense. *Cf.* 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, 38 (1957) ("[A] corporation must of course be able to act . . . else the whole theory of incorporation would make no sense whatsoever.").

23 *See* Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 Quinnipiac L. Rev. 523, 531–32 (2010).

America, the actions they could take were severely restricted, and could never include anything not specified in their corporate charters.[25] In line with longstanding British law,[26] a corporation was not liable for so-called "ultra vires acts" because, being beyond the powers conferred by its corporate charter, the corporation literally could not do them.[27] From Blackstone's time[28] and well into the twentieth century,[29] the very possibility of disembodied and mindless corporate crime left theorists nonplussed.[30]

Around the time of the Civil War, American courts began utilizing doctrines of vicarious liability as a legal band-aid for the problem posed by ultra vires acts in the civil context.[31] Specifically, courts introduced the doctrine of respondeat superior,[32] according to which corporations are civilly liable for the acts of their "employees while acting within the scope of their employment."[33] Courts at the time regarded respondeat superior as a matter of "public policy and convenience" rather than a logical consequence of the nature of corporations.[34]

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24 Harvey M. Silets & Susan W. Brenner, *The Demise of Rehabilitation: Sentencing Reform and the Sanctioning of Organizational Criminality*, 13 AM. J. CRIM. L. 329, 332 (1986); *see also* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY 12 (2003).

25 *See* 19 C.J.S. *Corporations* § 673 (2012); Rubin, *supra* note 23, at 531–32.

26 *See* Albert J. Harno, *Privileges and Powers of a Corporation and the Doctrine of Ultra Vires*, 35 YALE L.J. 13, 23–24 (1925); *see also* Pulton v. London & S.W. Ry. Co., [1867] 2 LRQB 534, 540 (Eng.).

27 *See* Hager, *supra* note 1, at 592–94.

28 1 WILLIAM BLACKSTONE, COMMENTARIES *476 ("A corporation cannot commit . . . crime[ ] in its corporate capacity.").

29 *See, e.g.*, Paul Vinogradoff, *Juridical Persons*, 24 COLUM. L. REV. 594, 602–03 (1924).

30 *See* JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 8:21 (3d ed. 2015) ("The early cases declared that a corporation could not commit a crime for want of the requisite mens rea or intent."); *see also* Case 935, (1701) 88 Eng. Rep. 1518 (KB) ("A corporation is not indictable, but the particular members of it are."); BLACKSTONE, *supra* note 28 ("A corporation cannot commit treason, or felony, or other crime, in its corporate capacity though its members may, in their distinct individual capacities.").

31 *E.g.*, Phila., Wilmington & Balt. R.R. Co. v. Quigley, 62 U.S. (21 How.) 202, 209–10 (1859); Nims v. Mt. Hermon Boys' Sch., 35 N.E. 776, 777–78 (Mass. 1893); *see* JOHN W. SALMOND, THE LAW OF TORTS 57–58 (3d ed. 1910); Hager, *supra* note 1, at 594–95; Rubin, *supra* note 23, at 540–42.

32 *See, e.g.*, The Scotland, 105 U.S. 24, 30–31 (1881); Phila. & Reading R.R. Co. v. Derby, 55 U.S. (14 How.) 468, 486–87 (1852).

33 RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006).

34 *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495 (1909) ("[There is] no valid objection in law, and every reason in public policy, why the corporation . . . shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act."); *Phila. & Reading R.R. Co.*, 55 U.S. (14 How.) at 479 (citing JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 452 (6th ed. 1863)); Goodspeed v. E. Haddam Bank, 22 Conn. 530, 536, 542–44 (1853); MODEL PENAL CODE § 2.07, at 147 (AM. LAW INST.,Tentative Draft No. 4, 1968); Mueller, *supra* note 22, at 28 ("The law has developed the concept of corporate criminal liability without rhyme or reason, proceeding by a hit and miss method, unsupported by economic or sociological data.").

The development of vicarious criminal liability was a slower, piecemeal process[35] that progressed by way of analogy to tort law.[36] Corporations were first held liable for failures to act.[37] Later, corporations were charged with affirmative criminal conduct, so long as the offense did not have a mental state element.[38] It was not until the early twentieth century that prosecutors indicted corporations for guilty mental state crimes with any regularity.[39] The delay was no doubt occasioned by concerns such as that voiced by Lord Chancellor Edward Thurlow (1731–1806): "Corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like."[40] In recognizing corporate crime, U.S. courts led the charge,[41] adopting respondeat superior for this purpose, more out of convenience than thoughtful reflection[42] (though, perhaps to avoid potential due process concerns with vicarious criminal liability,[43] the doctrine was not always referenced by name).[44]

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35 *See generally* COX & HAZEN, *supra* note 30. Common law courts led the way; by the mid-twentieth century, most civil law countries stuck to the maxim that *societas delinquere non potest*, or "a corporation can do no wrong." Mueller, *supra* note 22, at 28–35.

36 Mueller, *supra* note 22, at 39.

37 *See, e.g.*, Queen v. Birmingham & Gloucester Ry. Co., (1842) 3 Q.B. 223, 114 Eng. Rep. 492, 496.

38 *See, e.g.*, Overland Cotton Mill Co. v. People, 75 P. 924 (Colo. 1904).

39 *See, e.g.*, *Hudson River R.R.*, 212 U.S. at 494–96; *see also* COX & HAZEN, *supra* note 30 ("Until the twentieth century, only on rare occasion did a court hold a corporation liable for commission of a 'true crime,' that is, a crime in which a mens rea was an essential element.").

40 *See* MICKLETHWAIT & WOOLDRIDGE, *supra* note 24, at 33.

41 European courts did not impose criminal liability on corporations until recent decades. *See* Gunter Heine, *New Developments in Corporate Criminal Liability in Europe: Can Europeans Learn from the American Experience—or Vice Versa?*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 173, 174.

42 *See generally* COX & HAZEN, *supra* note 30; *see also Overland Cotton*, 74 P. at 926; 18B AM. JUR. 2D *Corporations* § 1812 (2016).

43 I do not mean to claim that there actually are due process problems inherent in vicarious criminal liability, especially where an entity is concerned. But courts generally seem to be sensitive to potential conflicts between vicarious liability and due process. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); Scales v. United States, 367 U.S. 203, 224–25 (1961) ("In our jurisprudence guilt is personal."); United States v. Decker, 543 F.2d 1102, 1103 (5th Cir. 1976) ("[H]olding one vicariously liable for the criminal acts of another may raise obvious due process objections."). *See generally* Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of* Pinkerton, 57 AM. U. L. REV. 585 (2008).

44 Courts have been less comfortable with the notion of vicarious criminal liability, so respondeat superior officially remains, at least in name, primarily a doctrine of civil liability. *See* Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 111 (1893) ("[W]here it has been held that [a principal can be held liable for the criminal libel of his agent], it is admitted to be an anomaly in the criminal law."); Phila. & Reading R.R. Co. v. Derby, 55 U.S. (14 How.) 468, 479 (1852). *But see* United States v. A & P Trucking Co., 358 U.S. 121, 125 (1958) ("[I]t is elementary that such impersonal entities can be guilty of 'knowing' or 'willful' violations of regulatory statutes through the doctrine of respondeat superior."); The Hiram, 14 U.S. (1 Wheat.) 440, 446–47 (1861).

Corporations have changed dramatically in the two centuries since the introduction of respondeat superior. They were unbound from their restrictive state charters and became the flexible business entities they are today. In 1819, the Supreme Court decided that corporations possessed several private rights, thereby preventing states from arbitrarily rewriting corporate charters to keep them in check.[45] Shortly after, states independently began shedding limitations on corporations to attract business, even allowing them to incorporate without a state charter.[46]

Also, the number, size, and complexity of corporations have grown.[47] Before the late eighteenth century, business corporations were rare in the United States; the South had none until 1781.[48] Compare that to the ubiquity of the corporate form in modern America. Until relatively recently, though there were some economic giants like the Dutch East India Company, most business enterprises fit in single-family homes.[49] By the late nineteenth century, only a handful of U.S. corporations had a net worth of over $10 million.[50] But the twentieth century saw the creation of corporations with previously undreamt wealth and complexity.[51] It issued in the developed stock market, complex chains of authority, and the separation between ownership and control.[52]

In the early context of small, closely held, and relatively simple corporations, respondeat superior may have served well enough as a rule for determining corporate criminal liability. It did not answer the theoretical question of how mindless entities can commit crimes that require particular mental states,[53] or settle possible due process concerns raised by vicarious criminal liability. But it at least provided a relatively consistent answer in the vast majority of cases—just find out what one of the few employees running the corporation intended, and that is what the corporation intended too. The approach may have seemed intuitive enough when large areas of respon-

45 *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 571 (1819); MICKLETHWAIT & WOOLDRIDGE, *supra* note 24, at 45.

46 *See* MICKLETHWAIT & WOOLDRIDGE, *supra* note 24, at 45–46, 68–69.

47 *See Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1229 (1979) [hereinafter *Corporate Crime*] ("The twentieth century has witnessed a tremendous explosion in the number and size of corporations.").

48 *See* MICKLETHWAIT & WOOLDRIDGE, *supra* note 24, at 43–44.

49 *See id.* at 20–21. Indeed, England stuck largely to the simple family-run model well into the last century. *See id.* at 82 ("Family-run firms had no need for the detailed organization charts and manuals that had become commonplace in large American companies.").

50 *See* Thomas R. Navin & Marian V. Sears, *The Rise of a Market for Industrial Securities, 1887–1902*, 29 BUS. HIST. REV. 105, 109 (1955).

51 *See* MICKLETHWAIT & WOOLDRIDGE, *supra* note 24, at 58–59 (2003) (discussing Sears Roebuck).

52 *See id.* at 87, 104.

53 19 C.J.S. *Corporations* § 782 (2012). ("[B]eing a de jure person, [a corporation] cannot by itself have a mental state of any kind . . . ." (quoting La. Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 803 (E.D. La. 1986))); *id.* § 783 ("A corporation has no mind, and thus, cannot, per se, be adjudged to have committed a willful act.").

sibility for corporate activity could be traced to single employees or the owners themselves.

Whatever intuitive appeal respondeat superior may have had, its utility is increasingly limited at this stage in corporate history. The modern corporate behemoth operates with such diffused responsibility and decentralized decisionmaking that it is at times impossible to identify which employees approved or acquiesced in illicit conduct, often because no such employee exists.[54] Even where channels of authority and reporting responsibility are well-defined (and they often are not!), each employee's contribution to what amounted to an illicit act may be so compartmental and miniscule that none could have thought or done anything objectionable.[55] In those cases where prosecutors can pin criminal conduct to an individual employee, there is no guarantee that attributing the crime to the corporation will comport with the basic commitments of criminal justice.[56] The employee may, for all respondeat superior cares, be a rogue in an otherwise upstanding corporate citi-

54 *See*, Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scienter*, 2006 COLUM. BUS. L. REV. 81, 113.

55 *See* United States v. Hilton Hotels Corp., 467 F.2d 1000, 1006 (9th Cir. 1972) (recognizing that corporations are "[c]omplex business structures, characterized by [the] decentralization and delegation of authority"); COX & HAZEN, *supra* note 30; Abril & Olazábal, *supra* note 54, at 106–10; Michael L. Benson et al., *District Attorneys and Corporate Crime: Surveying the Prosecutorial Gatekeepers*, 26 CRIMINOLOGY 505, 507, 511–12 (1988) (reporting from a survey of district attorneys in California that the difficulty of pinpointing individual intent discourages them from filing charges against corporations); Kathleen F. Brickey, *Model Penal Code Conference Transcript—Discussion Two*, 19 RUTGERS L.J. 635, 635 (1988) ("[I]t's going to be impossible in many instances to find a single culpable individual."); Dan K. Webb et al., *Understanding and Avoiding Corporate and Executive Criminal Liability*, 49 BUS. L. 617, 625 (1944) ("Given the often complex and decentralized nature of many corporations, it is sometimes difficult, if not impossible, to prove that any single corporate agent acted with the necessary intent and knowledge to commit an offense."); Victor H. Kramer, Comment, *Criminal Prosecutions for Violations of the Sherman Act: In Search of a Policy*, 48 GEO. L.J. 530, 540 (1960) ("[R]esponsibility in the modern corporation is diffused among so many executives that it is difficult, if not impossible, to fix personal responsibility for the corporation's crime.").

56 *Corporate Crime*, *supra* note 47, at 1243 ("[G]enerally the criminal acts of a modern corporation result not from the isolated activity of a single agent, but from the complex interactions of many agents in a bureaucratic setting. Illegal conduct by a corporation is the consequence of corporate processes such as standard operating procedures and hierarchical decisionmaking."). This amorphous and organic picture of corporate decisionmaking is confirmed by longstanding models of decisionmaking in complex organizations. *See* GRAHAM T. ALLISON, ESSENCE OF DECISION 32–33 (1971); JOHN G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 157–90 (1958); Ann Foerschler, Comment, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CALIF. L. REV. 1287, 1300–02 (1990).

zen.[57] If courts use respondeat superior in such scenarios,[58] the end result is a verdict that undermines fundamental goals of criminal law.[59]

II. IS CORPORATE CRIMINAL LAW WORTH THE EFFORT?

This Article aims to provide an intuitive and workable theory of corporate mens rea to replace respondeat superior. Any substitute should cater to the basic objectives and tools of corporate criminal law. There is some disagreement about what precisely those objectives are. Some academics, particularly those who would scrap corporate criminal law entirely, have a mistakenly narrow understanding of what corporate criminal law is up to and how it can achieve its goals. A brief detour to engage these academics will clarify the diverse ends a successful theory of corporate mens rea should serve.

The fact that the American people, through their legislatures, have determined that mens rea requirements for corporate crime are desirable[60] should be enough to justify the effort. Without a new theory, the corporate criminal system will remain theoretically unjustified and increasingly self-undermining. A replacement theory need not imply that corporations actually have mental states[61]—corporations are, after all, only fictional persons. However, since nearly all crimes have a mental state element,[62] adjudicators must have some way of *attributing* mental states to corporations if corpora-

57 *See, e.g.*, United States v. Sun-Diamond Growers of Cal., 138 F.3d 961 (D.C. Cir. 1998).

58 18B AM. JUR. 2d *Corporations* § 1821 (2016) ("It must still be determined which individual within the corporate structure had the intent to commit the crime . . . ."); *id.* § 1815 ("[T]he requisite state of mind must necessarily be that of [the corporation's] employee or agent.").

59 The arguments below focus on criminal law's expressive goals. But respondeat superior often also undermines criminal law's deterrent aim. *See* Irina Sivachenko, *Corporate Victims of 'Victimless Crime': How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C. L. REV. 393, 396–97, (2013) ("[T]oday there is little a corporation can do to avoid prosecution for the unauthorized acts of its employees . . . . In turn, such helplessness leads to an undesired and unexpected result: a significant drop in a corporation's incentive to vigorously monitor its own compliance and conduct."). Others have criticized respondeat superior for generating incentives for corporations to gather insufficient information and to close channels of communication between employees, *see, e.g.*, V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 377–82 (1999), abandoning the crucial notion of culpability in criminal law, *see, e.g.*, William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1078–90 (1992), and imposing inefficient levels of liability on corporations, *see* Mueller, *supra* note 22, at 40–41.

60 22 C.J.S. *Criminal Law* § 39 (2015) ("Strict criminal liability statutes remain the exception in our criminal law system, not the rule, and have a generally disfavored status.").

61 *See, e.g.*, OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 22–30, 66–85 (F.W. Maitland trans., 1st ed. 1900) (describing Middle Age German views on the collective consciousness of corporations).

62 *See supra* note 60.

tions are ever to be liable for most crimes.[63] As this Article argues, a mechanism that can fulfill this role is available in human social-cognitive architecture and could readily be integrated into criminal procedure.

Yet some academics with a more revisionary mindset are not convinced that corporate criminal law is worth the trouble. A few have argued for abandoning traditional corporate crime altogether in favor of purely civil liability or a regime of strict liability.[64] These theorists take as their starting point an anemic view of the purposes served by the criminal law and of the remedies potentially available against corporations. They assume, for example, that "optimal deterrence"[65] is the sole aim of criminal punishment[66] and that "money damages"[67] is the only sanction it can dispense. In doing so, they effectively conceive of the corporate criminal system as a tort regime with procedural inefficiencies[68] and inflexible sanctions.[69] It should come as no surprise that corporate criminal law would make for a poor tort regime.

Ultimately, the question of whether to retain corporate criminal law may be purely academic. Corporate criminal law is growing here and among Western nations,[70] and the political will to reverse this trend is nowhere in sight.[71] Even if academic, the question itself is worth asking. Corporations, after all, are *fictitious* persons, so there is some choice in whether to treat them as such for purposes of criminal law. Consequentialist considerations of social utility should guide the inquiry. Still, when viewed in all its richness,

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63 This Article is not the first to search for a theory of corporate liability that could be implemented without uprooting current criminal law. *See, e.g.*, William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 669–70 (1994).

64 *See, e.g.*, Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 319 (1996) ("We argue that there is no need for corporate criminal liability in a legal system with appropriate civil remedies . . . ."); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477 (1996).

65 Khanna, *supra* note 64, at 1497.

66 *See* Jeremy Bentham, *Principles of Penal Law*, *in* 1 THE WORKS OF JEREMY BENTHAM 366, 396 (John Bowring ed., 1962) ("General prevention ought to be the chief end of punishment, as it is its real justification.").

67 Fischel & Sykes, *supra* note 64, at 320.

68 *See id.* at 332 (arguing that the higher standard of proof in criminal procedure is less efficient than the tort standard).

69 *See id.* at 331 (arguing that, unlike criminal sanctions, tort sanctions can be calibrated to the social costs of illegal corporate activity).

70 Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1482 (2009) ("[A] comparative review reveals something that may come as a surprise: in other countries, the focus in the past several decades has been on the creation of corporate criminal liability in jurisdictions in which it did not exist, and where such liability already existed the modern reforms included modifications intended to make it easier, rather than harder, to prosecute corporations criminally.").

71 Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. Rev. 577, 612 (2012) ("[C]orporate punishment is not likely to yield to corporate regulation any time soon. The public has increasingly registered greater moral outrage in response to corporate governance scandals. Moral outrage, in turn, fuels retributive motivations and therefore supports those institutions best poised to take advantage of such motivations.").

corporate criminal law as it stands today has a vital, socially useful role to play that civil or strict liability alone cannot.

A. The Diverse Purposes of Criminal Law

The ends served by criminal law extend beyond deterrence. Other commonly accepted aims include rehabilitation, incapacitation, and desert.[72] As the Model Penal Code's list of purposes attests,[73] deterrence is just part of the story, even for corporations. Were it otherwise, one would expect the scope of traditional corporate criminal law to recede over time, replaced by the efficient strict civil liability standards that deterrence-focused, law-and-economics theorists often favor.[74] In fact, precisely the opposite is occurring as the breadth of corporate criminal law expands both here and abroad.[75]

Desert is the most conspicuously absent aim in analyses favoring purely strict or civil liability regimes.[76] Though desert may "no longer [be] the dominant objective of criminal law,"[77] the Supreme Court recognizes it as a legitimate consideration for legislatures passing criminal statutes.[78] Legislatures and courts generally show a default concern for desert by specifying or inferring[79] intent requirements in statutes.[80] Adjudicators also appear to be sensitive to considerations of desert in sentencing corporations.[81] Desert

72 *Corporate Crime*, *supra* note 47, at 1231; *see also* Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL'Y 1, 2 (2010) ("[Corporate criminal law is t]he legal equivalent of one-stop shopping, it promises consequential, retributive and expressive benefits, all at the same time."); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 350–51 (1996) ("The idea that a single normative theory does or should determine the shape of all criminal doctrines is exceedingly implausible.").

73 MODEL PENAL CODE § 1.02(2) (AM. LAW. INST. 1985) (including classic retributive aims among "the general purposes of the provisions [on] sentencing").

74 *See, e.g.*, Fischel & Sykes, *supra* note 64, at 330 ("The analysis in the preceding sections suggests that corporations should bear liability for corporate crimes . . . ."); *see also Corporate Crime*, *supra* note 47, at 1237, 1243–44 ("Standards which require no finding of wrongful intent or carelessness may effectively deter illegal behavior but do not comport with the moral principle of just deserts [i.e., retribution].").

75 *See* RICHARD S. GRUNER, CORPORATE CRIME AND SENTENCING § 1.9.2, at 52–55 (1994); Khanna, *supra* note 64, at 1477.

76 Meir Dan-Cohen, *Sanctioning Corporations*, 19 J.L. & POL'Y 15, 22 (2010) ("The justification of punishment on this account is an interplay between deterrence and retribution [and this justification enjoys considerable support].").

77 Williams v. New York, 337 U.S. 241, 248 (1949).

78 *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) (holding that retribution is neither "a forbidden objective nor one inconsistent with our respect for the dignity of men").

79 United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978) (noting that there is "an interpretive presumption that *mens rea* is required" by criminal statutes).

80 *Corporate Crime*, *supra* note 47, at 1241; *see id.* at 1238; *see, e.g.*, TEX. PENAL CODE ANN. § 6.02 (2015) ("Requirement of Culpability.").

81 *See* Mark A. Cohen, *Empirical Trends in Corporate Crime and Punishment*, 3 FED. SENT'G REP. 121, 123 (1990) ("In the few [corporate crime] cases where there were multiple

remains a vibrant feature of our criminal law[82] that cannot be sidelined by scholarly fiat.

Desert will strike some as flatly inapplicable to corporations.[83] To an extent, they are right. But desert is an entrenched feature of our *corporate* criminal law,[84] so there must be some sense to it. It is important to distinguish between two possible desert-sensitive aims.[85] The classic desert theory comes from Immanuel Kant.[86] According to it, in a deep metaphysical sense, justice requires the punishment of wrongdoers.[87] So strong is this mandate that "[e]ven if a Civil Society resolved to dissolve itself . . . the last Murderer lying in prison ought to be executed [beforehand]."[88] Whatever plausibility this theory has, it derives from the unique moral nature of human beings. The theory does not translate well for corporations, which do not have the same sort of moral standing.[89]

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defendants as well as differing degrees of culpability, sanctions were generally based on the level of culpability.").

82 MODEL PENAL CODE § 1.02(2) (AM. LAW INST. 1985) (including classic retributive aims among "the general purposes of the provisions [on] sentencing").

83 *See* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1392 (2009) ("[A]ttributing blame to a corporation is no more sensible than attributing blame to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime."); John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 350 (2004) ("Corporations neither deserve nor attract our sympathy. . . . [A]s such they do not deserve sympathy simply because they are not human. For that reason alone, they should not be the subjects of criminal prosecution."). *But see* Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 832 (1927).

84 *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENTENCING COMM'N 2015) (reflecting a particular concern for "just punishment" in the sentencing of corporations, in addition to "adequate deterrence").

85 *See* Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 842–43 (2000).

86 IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 138 (John Ladd trans., 1999). There are other less mystical approaches to classical retributivism that may be more amenable to the corporate context. Herbert Morris, for example, sees retribution as righting the imbalance of burdens and benefits that a criminal upsets by violating the social contract. HERBERT MORRIS, ON GUILT AND INNOCENCE 33–34 (1976) ("Justice—that is punishing [criminals]—restores the equilibrium of social contract benefits and burdens . . . ."). But this sort of approach to classical retributivism has been persuasively refuted as a possible aim or justification of criminal law. *See, e.g.*, Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973).

87 IMMANUEL KANT, METAPHYSICS OF MORALS § 49E (Mary Gregor trans., 1991); IMMANUEL KANT, THE PHILOSOPHY OF LAW 196 (W. Hastie trans., Edinburgh, T. & T. Clark 1887) ("[T]he undeserved evil which any one commits on another, is to be regarded as perpetrated on himself."); *see* Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER AND EMOTIONS 179 (F. Schoeman ed., 1987) ("Retributivism is the view that punishment is justified by the moral culpability of those who receive it." (emphasis omitted)).

88 KANT, THE PHILOSOPHY OF LAW, *supra* note 87, at 198.

89 *See* Friedman, *supra* note 85, at 845 ("So far as pure Kantian retribution is concerned, the critics of corporate criminal liability may well be correct . . . . This theory

The second approach to desert justifies criminal punishment by its expressive significance.[90] Some scholars speak more broadly about the "expressive function of [all] law," but the values implicated are clearest in the criminal context.[91] According to these expressive theories,[92] criminal punishment "conveys society's authoritative moral condemnation" and "reaffirms its commitment to the values that the wrongdoer's own act denies."[93] Though there has been a recent resurgence of interest in similar theories, they have been around for centuries.[94] Joel Feinberg, in his classic essay on the subject decades ago, observed that "[criminal] [p]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation."[95] It allows the community on whose behalf the punishment is meted out to disavow the criminal act, reflecting the common sense "idea that in failing to punish wicked acts society endorses them and thus becomes *particeps criminis*."[96]

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assumes a certain conception of the wrongdoer . . . ."); *see also Corporate Crime*, *supra* note 47, at 1241 ("For an individual defendant, the mental state with which he committed the illegal act determines his moral culpability. But mental state has no meaning when applied to a corporate defendant . . . .").

90 *See generally* Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965).

91 Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024, 2044–45 (1996) ("The criminal law is a prime arena for the expressive function of law . . . .").

92 Also known as "social cohesion theories." *See* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 104 (9th ed. 2012).

93 Kahan & Nussbaum, *supra* note 72, at 352; *see* Friedman, *supra* note 85, at 843 ("Criminal liability in turn expresses the community's condemnation of the wrongdoer's conduct by emphasizing the standards for appropriate behavior—that is, the standards by which persons and goods properly should be valued."); Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1426 (2009) ("The label 'criminal' has a social significance aside from the particular punishment imposed on the offender."). Some commentators argue that, in addition to its moral message, criminal punishment conveys "political, cultural, racial and ideological messages." Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between* The Moral Limits of the Criminal Law *and* The Expressive Function of Punishment, 5 BUFF. CRIM. L. REV. 145, 168 (2001).

94 *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 235 (1968) ("[Some] modern retributive theory has shifted the emphasis . . . to the value of the authoritative expression, in the form of punishment, of moral condemnation for the moral wickedness involved in the offense."); JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW IN ENGLAND 81–82 (1883) ("[T]he infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offense.").

95 Feinberg, *supra* note 90, at 400.

96 *Id.* at 404–08.

Expressive theories can apply to defendants that do not have the same moral nature as individual humans.[97] Defendants need only be identifiable entities capable of socially perceptible, purposeful activity.[98] Thus, as Émile Durkheim notes, punishment achieves its expressive purpose not "by virtue of some mystic strength or other," but by "giv[ing] voice to the unanimous aversion that the crime continues to evoke, and this by an official act."[99] No one doubts that corporations are purposeful entities, typically pursuing profit;[100] as discussed later,[101] cognitive scientists now know people naturally perceive corporations in this way. Through criminal punishment, the community can express its stance on conflicts between, for example, profit-seeking and fundamental individual and social rights.[102]

When theorists who prefer civil to criminal liability do consider the expressive component of criminal law, they fail to appreciate the uniquely condemnatory (toward the criminal) and affirming (toward the victim) message behind criminal conviction.[103] Placed in the mix among generic con-

97 Friedman, *supra* note 85, at 845–46 ("Expressive theory accordingly entails a relatively 'thin' conception of the wrongdoer, . . . an identity upon which the community's judgment can be focused in a meaningful way.").

98 *See* Baer, *supra* note 72, at 4–5 ("We can credibly blame the financial institution known as 'Goldman Sachs' because we believe, on multiple levels, that Goldman Sachs is an identifiable entity."). Friedman disserves his case for corporate criminal liability when he argues that corporations must also be able to "express attitudes toward particular persons or goods." Friedman, *supra* note 85, at 845. Purposeful conduct is a lower and sufficient threshold, and one that corporations can much more easily clear.

99 Emile Durkheim, The Division of Labor and Society 62–63 (W.D. Halls trans., 1984).

100 18B Am. Jur. 2d *Corporations* § 1825 (2016) (discussing "the corporation's nature as an economically motivated entity"); *Corporate Crime*, *supra* note 47, at 1235 ("[C]orporate activity is normally undertaken in order to reap some economic benefit . . . .").

101 *See infra* Section IV.B.

102 Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. Legal Stud. 609, 618–19 (1998) ("Just as crimes by natural persons denigrate societal values, so do corporate crimes. Members of the public show that they feel this way, for example, when they complain that corporations put profits ahead of the interests of workers, consumers, or the environment. Punishing corporations, just like punishing natural persons, is also understood to be the right way for society to repudiate the false valuations that their crimes express. Criminal liability 'sends the message' that people matter more than profits and reaffirms the value of those who were sacrificed to 'corporate greed.'"); *id.* at 621 ("To the extent that criminal liability more effectively expresses public condemnation than does civil liability, criminal punishments can be expected to be more effective in instilling aversions to crime.").

103 *See, e.g.*, Friedman, *supra* note 85, at 854–55 ("Civil and criminal liability have distinct social meanings . . . . [T]he finding of [criminal] liability must recognize that . . . the victim or object's value is beyond price."); Khanna, *supra* note 64, at 1532 ("[S]ending the [condemnatory] message through corporate criminal proceedings costs society more than sending the message through civil liability . . . ."). The law and economics literature on retribution in corporate criminal law also has not taken into account Gabriel Markoff's recent empirical work demonstrating that the stigmatizing effects of corporate prosecution are often grossly over exaggerated. *See generally* Gabriel Markoff, *Arthur Andersen and the*

tract and unintentional tort awards, the expressive force of this message would weaken,[104] if not change entirely.[105] And in losing the ability to send this message, society would lose something valuable.[106]

Even conceding that corporations have what Meir Dan-Cohen calls "practical personality,"[107] could criminal law integrate this insight "behind the scenes" without explicitly requiring any kind of corporate mens rea as an element? Such a strict liability approach to corporate crime[108] would also undermine criminal law's expressive aims. Expressions of condemnation target wrongdoing, not just injury.[109] To identify wrongdoing, adjudicators must look behind the fact of injury to the mental states that brought it about.[110] There is all the difference in the world between mistaking someone else's bag for one's own and stealing it, even though the injury caused is identical.[111] A practice that treats both the same cannot "reaffirm[ ] [society's] commitment to the values that [only the thief's] act denies."[112]

B. The Diverse Sanctions Available in Corporate Criminal Law

Scholars who favor strict or civil liability for corporations often assume that, because corporations cannot be imprisoned, the only criminal sanctions

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Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century, 15 U. PA. J. BUS. L. 797 (2013).

104 Kahan, *supra* note 102, at 619 ("[L]ike fines, civil damages seem to connote that society is 'pricing' corporate crime.").

105 *See* Alschuler, *supra* note 83, at 1373 ("Someone who applies this word ['criminal'] to objects and entities that are not blameworthy uses the label falsely."); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition."); *see also* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 525 (2006) ("[C]riminal legal process[ ] adds unique and strong communicative force to any societal conclusion about institutional fault.").

106 Kahan, *supra* note 102, at 619–20 ("The public demands moral condemnation of criminal wrongdoers, whether natural persons or corporations; when the law satisfies that demand, it creates social welfare . . . . [P]eople do take satisfaction in this institution."); Ved P. Nanda, *Corporate Criminal Liability in the United States: Is a New Approach Warranted?*, *in* CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK 63, 64 (Mark Pieth & Radha Ivory eds., 2011).

107 DANIEL DENNETT, THE INTENTIONAL STANCE 43, 58 (1987); Dan-Cohen, *supra* note 76, at 24–27; Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980). *But see* Kahan, *supra* note 102, at 615–17 (arguing that shaming and expressive punishments may be as efficient as monetary punishments).

108 *See, e.g.*, Fischel & Sykes, *supra* note 64.

109 *See* BLACKSTONE, *supra* note 28, at *27 ("[P]unishments are . . . only inflicted for the abuse of that free will, which God has given to man . . . .").

110 Bertram F. Malle, *The Social and Moral Cognition of Group Agents*, 19 J.L. & POL'Y 95, 100 (2010) ("It appears that people share a folk concept of intentionality and spontaneously use it to judge behaviors.").

111 *See* Kahan & Nussbaum, *supra* note 72, at 351–52.

112 *Id.* at 352.

available against them are fines.[113] But courts have some latitude in tailoring sanctions to the corporate context, so long as the result is reasonably based on differences between individuals and corporations.[114] Imprisonment aside, many of the punishments available for individual defendants are also available against corporations. The U.S. Sentencing Guidelines, for example, explicitly provide for orders of restitution,[115] remedial orders,[116] community service,[117] notice to victims,[118] publicity of the offense,[119] and probation.[120] Courts have also imposed debarment and suspension, and ordered corporations to publish letters of apology.[121]

Foreign law presents still other possibilities. In addition to fines, France[122] alone allows for dissolution,[123] bans on professional or social activities,[124] periods of judicial supervision,[125] closure of establishments operated by the corporation,[126] exclusion from the marketplace,[127] and bans on public offering.[128] Italian corporate criminal law adds various forms of "disqualification" to the mix, including prohibition of activity related to the offense, revocation of licenses, and prohibitions on contracting with the govern-

113 This was perhaps true of American law in the past. *See* 18B Am. Jur. 2d *Corporations* § 1826 (2016) ("A corporation may be punished by fine; indeed, the only punishment that can be inflicted on a corporation for a criminal offense is a fine or seizure of its property which can be levied by an execution issued by the court." (citing N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909))).

114 *See* Mallinckrodt Chem. Works v. Missouri *ex rel.* Jones, 238 U.S. 41, 55–56 (1915) ("[C]orporations may not arbitrarily be selected in order to be subjected to a burden to which individuals would as appropriately be subject. Classification must be reasonable . . . ."); Tarlton v. State, 93 S.W.3d 168, 176 (Tex. Crim. App. 2002) ("[A] statute imposing a different punishment for individuals than for corporations did not violate equal protection because a corporation cannot be imprisoned." (citing *Ex Parte* Walsh, 129 S.W. 118, 123 (Tex. Crim. App. 1910))); *see also* Tex. Penal Code Ann. § 12.51 (2015) (setting equivalencies between imprisonment and fines for corporations).

115 U.S. Sentencing Guidelines Manual § 8B1.1 (U.S. Sentencing Comm'n 2015).

116 *Id.* § 8B1.2.

117 *Id.* § 8B1.3.

118 *Id.* § 8B1.4.

119 *Id.* § 8D1.4; *see generally* Andrew Cowan, Note, *Scarlet Letters for Corporations? Punishment by Publicity under the New Sentencing Guidelines*, 65 S. Cal. L. Rev. 2387 (1992).

120 U.S. Sentencing Guidelines Manual § 8D1.1 (U.S. Sentencing Comm'n 2015); *see generally* Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 Am. J. Crim. L. 1 (1988).

121 *See* Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988–1990*, 71 B.U. L. Rev. 247, 265–66 (1991).

122 *See generally* Leonard Orland & Charles Cachera, *Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (Personnes Morales) under the New French Criminal Code (Nouveau Code Penal)*, 11 Conn. J. Int'l L. 111 (1995).

123 Code pénal [C. Pén.] [Penal Code] art. 131-39(1), no. 1 (Fr.).

124 *Id.* at no. 2.

125 *Id.* at no. 3.

126 *Id.* at no. 4.

127 *Id.* at no. 5.

128 *Id.* at no. 6.

ment.[129] The availability of multiple sanctions does not disprove the argument for a purely civil or strict regime of corporate liability, but it does at least show that the argument needs to be much more sophisticated than any currently in the literature.

It is worth noting that some of the most significant penalties that corporate defendants face after conviction are technically not criminal sanctions at all. Collateral civil penalties that follow conviction, such as suspension and debarment, can often impact a corporation far more than criminal fines.[130] Not all available sanctions are socially productive, and these civil collateral consequences may be particularly suspect.[131] The point here is simply that courts' tool chest of corporate sanctions is richer than often supposed.

C. Other Reasons to Make Current Corporate Criminal Law Work

This Article presents no principled objection to developing an entirely novel system of corporate liability. But such a project, even if it adequately fulfills the diverse aims of criminal law, would face significant practical, theoretical, and legal hurdles. To begin, the system would represent a major overhaul of our criminal law. Even if Congress or state legislatures turned their attention to the project, there is no reason to expect there would be consensus on how to go about it. In short, such reform would likely be a long way off. A new theory of corporate mens rea that could be plugged into the current framework of criminal liability would do the trick.

Furthermore, not just any overhaul of the regime of corporate criminal liability would work. For example, replacing criminal standards with tort-like standards would merely pass the buck. Whether turning to intentional torts or torts of negligence, desire and belief[132] or attention and judgment[133] pose the same problem: How can adjudicators attribute corporate mental states when respondeat superior does not work?[134] Of course, tort law does

129 Legge 8 giugno 2001, n.231, G.U. June 19, 2001, n.140, art. 9(2) (It.). Spanish law overlaps with Italian and French law. *See* C.P., B.O.E. n.281, art. 129, Nov. 24, 1995 (Spain); Melanie Ramkissoon, *Country Report: Spain*, *in* EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY 310, 313–14 (James Gobert & Ana-Maria Pascal eds., 2011).

130 *See* RICHARD S. GRUNER, CORPORATE CRIMINAL LIABILITY AND PREVENTION ch. 13 (2015); Beale, *supra* note 70, at 1500 ("[T]he conviction of a corporation often triggers collateral consequences that have a far greater impact than any criminal penalties that may be imposed.").

131 *See* Candace Zierdt & Ellen S. Podgor, *Back Against the Wall: Corporate Deferred Prosecution Through the Lens of Contract "Policing"*, 23 CRIM. JUST. 34 (2008).

132 RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965) ("The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.").

133 *Id.* § 283 cmt. b ("The words 'reasonable man' denote a person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others.").

134 It is also not clear whether a negligence regime for assessing corporate crimes would make good policy. *See* Thomas A. Hagemann & Joseph Grinstein, *The Mythology of*

allow for strict liability in some cases.[135] But, as argued above, it is doubtful that strict liability rules can fulfill the important expressive purposes of criminal law.[136] Moreover, corporations enjoy many of the same constitutional protections as individuals,[137] including equal protection.[138] Any effort to create a completely separate system of corporate criminal liability with only strict liability offenses may have to contend with some as-yet-unaddressed constitutional hurdles.[139]

III. Available Alternatives to Respondeat Superior

This Article is not the first to try to remedy the shortcomings of respondeat superior,[140] and other scholars have proposed alternatives. However, their theories suffer from one or more of the following disqualifying limitations:[141] they apply only to a limited class of mental states, they exacerbate the problems of respondeat superior, and they often presuppose an antecedent, unarticulated theory of corporate mens rea. Understanding the short-

Aggregate Corporate Knowledge: A Deconstruction, 65 Geo. Wash. L. Rev. 210, 242–43 (1997) ("If criminal liability for intentional offenses were extended by Congress in widespread fashion to corporations for mere negligent behavior or less, corporations with a desire to follow the law would have to implement massive and unwieldy preventative measures to ensure as much.").

135 *Liability*, Black's Law Dictionary (9th ed. 2009) ("Strict liability most often applies either to ultrahazardous activities or in products-liability cases.").

136 *See* Andrew von Hirsch, Doing Justice: The Choice of Punishments (1976) (arguing that desert is the only legitimate end of criminal law); Kant, Metaphysics of Morals, *supra* note 87, § 49E ("Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime."); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 Minn. L. Rev. 1095, 1099–100 (1991) ("This blurring [of criminal and civil liability] dilutes the impact of a criminal conviction, and, ultimately, erodes the power of the criminal law." (footnote omitted)); Laufer, *supra* note 59, at 1078–90 (arguing that law and economics approaches to corporate criminal liability leave out important retributive elements at the heart of criminal law).

137 *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340–43 (2010) (free speech); Dow Chem. Co. v. United States, 476 U.S. 227, 235 (1986) (Fourth Amendment); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (double jeopardy); United States v. R.L. Polk & Co., 438 F.2d 377, 379 (6th Cir. 1971) (trial by jury).

138 *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 536 (1933) ("Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons."); Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888); Santa Clara Cty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886).

139 *See also* United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978). *But see also* Khanna, *supra* note 59.

140 *See* Buell, *supra* note 105, at 520 ("[A]lmost no one has defended respondeat superior as the right liability rule.").

141 The criticisms below reference, but do not detail, arguments about the policy implications of the theories. This is partly because that terrain is already well-trod, but largely because the discussion can turn to policy implications only after a conceptually coherent apparatus for determining mens rea is on the table.

comings of the theories considered below will bring into focus the features a theory of corporate mens rea should have.

A. The Inner Circle

The Model Penal Code offers an approach according to which a corporation is liable when "the commission of the offense was authorized . . . by the board of directors or by a high managerial agent."[142] The driving intuition behind this view, which also reflects the position currently taken by English courts,[143] is that the offensive act must somehow have issued from the "brain" of the corporation.[144] By equating corporate officers with the corporate nerve center, the inner circle approach does not hold a corporation liable for the acts of low-level "rogue" employees and provides a stopper to some of the overbreadth of respondeat superior.

But the inner circle approach only exacerbates the underinclusiveness of respondeat superior. It presumes that those in the inner circle are sufficiently informed about and in control of the operations of the corporation. In today's mega corporation, characterized by diffusion of responsibility and authority, this simply is not true, or possible.[145] Even where there are channels of communication designed to keep the upper echelon informed, these channels can devolve organically, without the direction or reckless disregard of any overseer.[146] Their degradation results from countless decisions by individuals throughout the corporate hierarchy, influenced by factors such as their (mis)understanding of their job responsibilities, good or bad interpersonal relationships, forgetfulness, and a desire to protect themselves (or those above or below them).[147] Because the inner circle are uninformed about and uninvolved in the day-to-day activities of a corporation, where

142 MODEL PENAL CODE § 2.07(1)(c) (AM. LAW INST. 1985); *see also* State v. Christy Pontiac-GMC, Inc., 354 N.W.2d 17, 19–20 (Minn. 1984) (discussing liability arising from corporate policy).

143 *See* L.H. LEIGH, THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW 29–43 (1969).

144 *See* Mueller, *supra* note 22, at 40–41; *see also* MODEL PENAL CODE § 2.07 explanatory note 1 (AM. LAW INST. 1985).

145 *See* Brickey, *supra* note 55, at 626.

146 *Cf.* ANTHONY DOWNS, INSIDE BUREAUCRACY 143 (1967) ("The larger any organization becomes, the weaker is the control over its actions exercised by those at the top." (emphasis omitted)).

147 *Cf.* Commonwealth v. Beneficial Fin. Co., 275 N.E.2d 33, 83 (Mass. 1971) ("'There are not enough seats on the Board of Directors, nor enough offices in a corporation, to permit the corporation engaged in widespread operations to give such a title or office to every person in whom it places the power, authority, and responsibility for decision and action . . . .' In a large corporation, with many numerous and distinct departments, a high ranking corporate officer or agent may have no authority or involvement in a particular sphere of corporate activity, whereas a lower ranking corporate executive might have much broader power in dealing with a matter peculiarly within the scope of his authority. Employees who are in the lower echelon of the corporate hierarchy often exercise more responsibility in the *everyday operations* of the corporation than the directors or officers.").

criminal action often takes place, corporations will routinely escape liability.[148]

While limiting the reach of respondeat superior is surely the whole point of the inner circle approach it was this too well. It offers immunity to corporations that, through neglect or design, manage to keep the upper echelon in the dark about potential misdeeds. That is not the sort of structure the criminal law should incentivize.

B. Collective Knowledge

A minority[149] of courts have adopted the doctrine of collective knowledge as a supplement to respondeat superior. Under this doctrine, a court will attribute to a corporation anything any of its employees knows. If one employee knows A, and another knows B, under the collective knowledge doctrine the corporation knows both A and B. The collective knowledge approach would hold corporations criminally liable even when there is no single employee with a guilty mental state.

In *United States v. Bank of New England*,[150] a seminal case for the doctrine,[151] the bank was charged with violating the Currency Transaction Reporting Act by failing to report cash transfers in excess of $10,000.[152] Criminal liability attaches only if the violation was willful, i.e., the Bank knew about the reporting requirements and specifically intended to commit the crime.[153] Individual tellers separately cashed checks to the same individual that, when summed, totaled more than $10,000. Other employees of the Bank who were not involved in the transactions knew about the requirements, but not about the transactions.[154] All of the employees were acquitted because none knew both the legal limits and that the transactions exceeded the limits.[155] However, the court upheld the corporation's conviction using collective knowledge.[156]

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148 *See* Brickey, *supra* note 55, at 626 (stating a bit hyperbolically that "a liability rule requiring proof that a high managerial agent ratified a subordinate's misconduct is apt to be, in practice, a rule of no liability at all"). This will especially be the case if, as some critics have suggested, the Model Penal Code will encourage corporations to further insulate the inner circle from the general operation of the corporation.

149 *See* Hagemann & Grinstein, *supra* note 134, at 227 ("[O]nly a few courts addressing criminal or civil issues have alluded to the collective knowledge rule . . . ." (footnotes omitted)).

150 821 F.2d 844 (1st Cir. 1987).

151 *But see* Hagemann & Grinstein, *supra* note 134, at 227 (arguing that academics have misinterpreted *Bank of New England* and its progeny as endorsing the collective knowledge doctrine).

152 *See* 31 U.S.C. § 5322 (2012).

153 *Bank of New Eng.*, 821 F.2d at 854.

154 *See id.* at 856–57.

155 *See id.* at 847–48.

156 *See id.* at 856 ("Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrele-

The collective knowledge doctrine certainly addresses some of the limitations of respondeat superior. But it is heavily criticized for doing the job too well, subjecting corporations to liability whenever any employee, no matter how low ranking, knows something suspicious.[157] While these criticisms do have merit, there is also a respect in which the collective knowledge doctrine does not, and cannot, go far enough as a general theory of corporate mens rea. It may operate straightforwardly enough for knowledge-based crimes. Knowledge is generally understood to be justified, true belief.[158] Since all knowledge is true, different things known by different employees can never conflict. The process of aggregating their knowledge to attribute to the corporation is easy—just take the conjunction of all the things known by employees and say the corporation knows it all.

But there are over one hundred mental state terms and combinations in the Federal Criminal Code alone.[159] The process of aggregating mental states quickly becomes complex, if not impossible. Consider crimes where mens rea turns on the beliefs (rather than the knowledge) of the defendant. Beliefs, of course, can be false, as in the classic hornbook case of the would-be murderer who shoots a corpse.[160] And they can also be true, as in the case of knowledge. So, what happens when different employees have conflicting beliefs? The collective knowledge doctrine provides no answer.

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vant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation . . . ."); *see also* United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974) ("[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly." (citing Steere Tank Lines, Inc. v. United States, 330 F.2d 719, 722 (5th Cir. 1963))).

157 *See In re* Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig., 870 F. Supp. 1293, 1307 (E.D. Pa. 1992), *aff'd*, 995 F.2d 219 (3d Cir. 1993) ("[T]he imputation of every bit of knowledge known to each individual employee—from the Chief Executive Officer to the most recently hired recruit—would likely paralyze a corporation as upper level management attempted to keep informed of all information known to all the corporation's employees."). Some argue that the collective knowledge doctrine subjects corporations to criminal liability for mere negligence, for example with respect to maintaining open channels of communication. *See, e.g.*, Hagemann & Grinstein, *supra* note 134, at 239. Their proposed plug, only applying collective knowledge "[w]hen a corporation *deliberately* structures itself" to prevent the flow of information, *id.* at 245 (emphasis added), is circular as a theory of mens rea.

158 *See* PLATO, *Theaetetus*, *in* THE COLLECTED DIALOGUES OF PLATO 906–08 (F.M. Cornford trans., Edith Hamilton & Huntington Cairns eds., 1961). *But see* Edmund Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121 (1966).

159 Laufer, *supra* note 59, at 1065.

160 *See* ALAN M. DERSHOWITZ, THE BEST DEFENSE 85 (1982) ("Whatever Else It May Be, It Is Not Murder to Shoot a Dead Body. Man Dies but Once.").

The limitations of the collective knowledge doctrine become even more intractable for non-epistemic mental states.[161] Consider an easy one—intention. Philosophers of group agency have rejected attempts to aggregate individual intentions in order to decipher group intention.[162] In *Bank of New England* it is pretty clear that the tellers each intentionally cashed the checks (say, for $5,500), but it is far from clear how to sum these intentions. Did the bank itself intentionally transact over $10,000 for a single client? Or just intentionally transact $5,500 for the same client, twice? The collective knowledge doctrine gives no answer, but guilt or innocence lies in the balance.

Similarly, as with beliefs, intentions can conflict. If a teller intentionally fails to file a report, but his supervisor intends to have all transactions reported, what result? Again, the collective knowledge doctrine gives courts no way to answer. Proponents could adopt some supplemental rule like one guilty intention is enough, or the more specific intention trumps. But such rules go beyond the collective knowledge doctrine, and no one has proposed, let alone attempted to defend, them. This is perhaps because any such rule would not be generally applicable. Whatever rules work for intention may not work for recklessness, or malice, or any of the hundred or so mental states phrases that appear in Title 18.

C. Corporate Ethos

The two theories just discussed, like respondeat superior, are "atomistic," meaning they look to the mental states of individual employees and attribute those to the corporation. The remaining theories are "holistic." They focus instead on corporations as distinct entities to which mental states can be attributed directly (even if only as part of a legal fiction). According to these theories, attending solely to individuals misses the important impact of institutional and ad hoc relationships between them.[163]

Proceeding from the observation that sometimes crime is a predictable result of membership in certain organizations,[164] some theorists propose looking to corporate culture as a proxy for corporate intent.[165] Pamela Bucy has developed one prominent approach. According to it, "[t]he government

161 A similar point has been made with respect to "emotional" mental states. *See* Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 668–69 (2000).

162 *Cf.* Christian List & Philip Pettit, *Aggregating Sets of Judgments: An Impossibility Result*, 18 ECON. & PHIL. 89, 92–96 (2002); Philip Pettit, *Groups with Minds of Their Own*, *in* SOCIALIZING METAPHYSICS 167, 167 (Frederick F. Schmitt ed., 2003); *see also* Joan McPhee, *Corporate Criminal Liability and Punishment in the 21st Century: Departures from Constitutional and Criminal Norms in Practice*, 16 NO. 4 ANDREWS' PROF. LIAB. LITIG. REP. 13 (2006).

163 *See* Colvin, *supra* note 21, at 23–24 ("Organizations comprise not only individuals but also institutionalized relationships among individuals.").

164 *See generally* Martin L. Needleman & Carolyn Needleman, *Organizational Crime: Two Models of Criminogenesis*, 20 SOC. Q. 517 (1979).

165 *See, e.g.*, Bucy, *supra* note 136, at 1099; Brent Fisse, *The Attribution of Criminal Liability to Corporations: A Statutory Model*, 13 SYDNEY L. REV. 277, 279 (1991); Foerschler, *supra* note 56, at 1304. *But see* Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guide-*

can convict a corporation . . . only if it proves that the corporate ethos encouraged agents of the corporation to commit the criminal act."[166] Adjudicators can ascertain a corporation's ethos by looking at its hierarchy, goals and policies, treatment of prior offenses, efforts to educate employees on compliance with the law, and compensation scheme.[167]

Unlike the other holistic approaches to corporate liability, corporate ethos has garnered some, however modest, attention from lawmakers. Australia, for example, has adopted a version of this theory, allowing prosecutors to prove intent or recklessness by showing "a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to noncompliance with the relevant provision."[168] The current U.S. Sentencing Guidelines also incorporate elements of the ethos approach in determining sentencing enhancement and mitigation for corporations.[169]

Bucy's ethos theory has some of the same limitations as the theories already discussed. By its own terms, it can only be used to determine intent,[170] and is inapplicable to crimes with different mens rea elements. Additionally, some of the elements of Bucy's model are flatly circular. For example, she suggests that intentionally closed channels of communication may indicate a criminal corporate ethos.[171] "Factfinders should ascertain whether channels of communication are open and effective. If not, is the ineffectiveness *accidental or planned*?"[172] But answering that question presupposes a separate way of discerning corporate intent.

The ethos theory also has some unique defects. Bucy turns to ethos in the search for "a new conceptual paradigm for identifying and proving corporate intent."[173] She thinks that in the context of corporate crime, corporate ethos "translates into intention."[174] But the corporate ethos Bucy defines is a measure of propensity to commit crime (i.e., something like character), not of intent. As Bucy herself argues, the notion of intent, as distinct from character, is fundamental to our system of criminal justice.[175] Indeed, the Federal Rules of Evidence explicitly prohibit the introduction of charac-

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lines, 34 ARIZ. L. REV. 743, 759–60 (1992) (discussing how courts are reluctant to allow corporations to escape liability with a well-crafted corporate policy).

166 Bucy, *supra* note 136, at 1099.

167 *See id.* at 1101.

168 Crim. Code. Act of 1995, (Cth) s 3 ch 1 div 12.3(2)(c) (Austl.).

169 *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(c)(1) (U.S. SENTENCING COMM'N 2015) (providing sentencing enhancements if a corporation has engaged in "similar misconduct" within the prior decade).

170 *See* Bucy, *supra* note 136, at 1181 ("Another valid criticism of the corporate ethos standard is that it addresses only one of the jurisprudential problems concerning corporate criminal liability—intent."); *see also* Crim. Code. Act of 1995, (Cth) s 3 ch 1 div 12.3(2)(c) (Austl.) (proving corporate culture as one element of intent).

171 *See* Bucy, *supra* note 136, at 1136–37.

172 *Id.* at 1137 (emphasis added).

173 *Id.* at 1099.

174 *Id.*

175 *See id.* at 1105–13.

ter evidence: "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[176] This is because perfectly normal people (natural and juridical) sometimes commit crimes for which they should be convicted.[177] And people (natural and juridical) with bad characters sometimes do bad things just by accident, and should not be convicted. Bucy's equation of intention with character muddles these distinctions.

The heart of this last criticism is that corporate ethos is a much better measure of causation than of intent.[178] Bucy's own examples are illustrative. She considers the case of a pharmacy retailer that had errors on reimbursement forms it filed with Medicaid.[179] As a result, Medicaid rejected the forms, and the retailer lost out on reimbursements that were otherwise due to it. The retailer was charged with falsification when two employees, without any direction from higher management, falsified and resubmitted the forms. According to Bucy, the history of defective form filing is evidence of corporate intent. But, while that history is certainly part of the causal chain—without the backlog of denied reimbursements, the employees would have had no opportunity to falsify them—it seems much more indicative of a stupid corporation than a criminal one. In a similar vein, Bucy would take Ford Motor Company's "ambitious production and earnings goals" as evidence of its intent to mislead the government in obtaining an EPA certification.[180] But, while causally relevant, it is not so clear why these goals of the corporation amount to intent rather than competitive drive. For Bucy, the causal story is the end of the story.

D. Corporate Internal Decision Structure

Peter French has pioneered a holistic approach to corporate intent that ties it to the corporation's internal decision structure (CIDS), i.e., the corporation's flowchart and procedural and recognition rules.[181] According to French, the CIDS synthesizes the intentions and acts of individuals within the corporation into genuine corporate intent.[182] "Corporate intent then, is

176 FED. R. EVID. 404(a)(1).

177 *See, e.g.*, United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972) (holding corporation criminally liable when employee acted contrary to direct orders); *see also* CHRISTOPHER R. BROWNING, ORDINARY MEN (1998) (describing how average Germans came to participate in genocide).

178 *Cf.* Laufer, *supra* note 63, at 674.

179 *See* Bucy, *supra* note 136, at 1130–31. She borrows the example from DIANE VAUGHN, CONTROLLING UNLAWFUL ORGANIZATIONAL BEHAVIOR 1–16 (1983).

180 Bucy, *supra* note 136, at 1133. She borrows this example from Brent Fisse and John Braithwaite. *See* BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS 144 (1983).

181 *See* FRENCH, *supra* note 19, at 39.

182 *See* Peter A. French, *Integrity, Intention, and Corporations*, 34 AM. BUS. L.J. 141, 151 (1996).

dependent upon relatively transparent policies and plans that have their origins in the socio-psychology of a group of human beings."[183]

French's theory has two primary failings. First, it only applies to corporate intent, and as such cannot serve as a general theory of corporate mens rea. Second, it rests on a naïve view of corporate governance in which a crisp flowchart and "transparent policies" necessarily indicate how the corporate machine decides what to do. But, as already indicated, corporations are not always well-oiled machines. Even if a corporation has an official flowchart and written policies, the governance reality of a complex corporation is often much murkier. Chains of responsibility and authority shift organically in response to many factors, including changing interpersonal relationships and individual personalities. Shortcuts are taken, informal policies are adopted in the face of changing circumstances, and water cooler politics is often the real decisional force. Policies, even clear ones, are frequently just rough rules that employees may not even know or remember. As such, they often tell very little about how a corporation really ended up doing what it did.

E. The Reasonable Corporation

William Laufer advances a theory that resembles in some respects the one this Article proposes. He suggests using indirect evidence of corporate mental states by having courts ask: "Would an average corporation, of like size, complexity, functionality, and structure, engaging in an illegal activity *X*, given circumstances *Y*, have the state of mind Z?"[184] Laufer's theory certainly represents an advance over those previously considered in that it provides a rubric for any mental state, not just intentions or knowledge. But, like some of the others, it cannot serve as a standalone theory. To apply his test for corporate mens rea, courts must already know what mental states an average corporation would have in various circumstances. And this data point presupposes an antecedent theory of corporate mens rea.

IV. A NEW TAKE

The theory offered below avoids the limitations of the theories discussed above. It is generally applicable to all manner of mental states and any scenario of alleged corporate criminal wrongdoing. Unlike some of the other theories, it does not presuppose any antecedent theory of corporate mens rea because it rests heavily on well-developed theories of mens rea for natural persons. In doing so, it preserves for the corporate context the tight connection between punishment and culpability that is central to criminal law's expressive goals.[185]

183 *Id.* at 152.

184 Laufer, *supra* note 63, at 701.

185 As such, this Article proposes what Samuel Buell thought was unavailable, a "first-best rule" for fixing corporate liability. *See* Buell, *supra* note 105, at 527 ("*Unavailability of a First-Best Rule*[:] Unfortunately, under existing technologies of responsibility assessment,

A. Criminal Minds

The evolution of corporate liability reflects an abiding assumption that corporations must be treated differently.[186] The key battleground for the struggle has been corporate mental states. But it is worth considering whether this is not just another one of the "many . . . problems with corporate liability [that] are endemic to U.S. criminal law, rather than unique [to the corporate context]."[187]

Ever since American criminal law endorsed the fiction that corporations can have mental states, it has wrangled with the nagging concern that corporations do not *really* have minds.[188] As a first step, respondeat superior effectively ignored the problem of corporate mens rea through principles of vicarious liability. Next, some lawmakers tried to construct the corporate mind from the mental states of either the managers (the Model Penal Code approach) or all employees (the collective knowledge approach). Still dissatisfied academics have pressed the project further, by proposing more sophisticated models of corporate mentality to run parallel to, but always distinct from, any understanding of the minds of natural persons. As argued above, none of these approaches can work as a general theory of corporate mens rea.

It is time to step back, take stock, and assess the problem free from the inertia of a history that, by all accounts, has proceeded in an unprincipled way.[189] The American legal system is committed to the personhood of corporations.[190] As such, it is also committed to them having mental states. This is

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there is no optimal means of assessing firm fault. We do not have the slightest concept of how one could judge a firm to have committed a crime in the absence of an agent crime.").

186 *See* Lederman, *supra* note 161, at 649 ("This process [of developing standards for corporate liability] is accompanied by a change from using ideas aimed at emphasizing the possible similarities between imposing criminal liability on individuals and the imposition of such responsibility on legal bodies, toward the formation of constructions underlining the unique structure of corporations. Consequently, the issue, in recent years, has moved away from the notion of adapting the imposition of criminal liability on a human being to its imposition on corporate bodies."). This assumption has persisted, even though it is not usually present in criminal statutes. *See* 1 U.S.C. § 1 (2012) (indicating that "person" includes corporations unless context indicates otherwise).

187 Beale, *supra* note 70, at 1482.

188 *See* Cruz v. HomeBase, 99 Cal. Rptr. 2d 435, 439 (Cal. Ct. App. 2000) ("Corporations are legal entities which do not have minds capable of recklessness, wickedness, or intent to injure or deceive."); 19 C.J.S. *Corporations* § 783 (2012) ("A corporation has no mind . . . ."); Larry May, *Vicarious Agency and Corporate Responsibility*, 43 PHIL. STUD. 69, 71–72 (1983) (arguing that corporations have no minds).

189 *See* Mueller, *supra* note 22, at 21, 23 (arguing that the law of corporate criminal liability "has proceeded without rationale whatsoever" and that "[n]obody bred it, nobody cultivated it, nobody planted it. It just grew"). Much non-legal, moral discourse about corporations is committed to their having the full array of mental states as normal moral agents. *See* Colvin, *supra* note 21, at 24.

190 A corporation is an entity "having authority under law to act as a single person." *Corporation*, BLACK'S LAW DICTIONARY (9th ed. 2009).

true not only because corporations are liable for crimes, which usually have a mens rea element. Within the fiction of the law, corporations also enter into contracts, buy property, sell goods, and perform all manner of acts implying they have minds. It is hornbook contract law that without "the meeting of the minds of both parties" there can be no contract.[191] Entering into such arrangements is the whole point of creating corporations in the first place. As a result, lawyers and judges are committed to a legal fiction according to which corporate mental states permeate the law. Of course, outside of the courtroom, these individuals can recognize corporations for the mindless entities they are, but within the courtroom, corporations can know things, intend things, be malicious, etc. The problem courts face is not a metaphysical one—do corporations have mental states? The law already tells courts to proceed as though they do. Rather, the problem is an epistemic one—how can adjudicators possibly figure out what those mental states are?

It is over this epistemic question that courtroom fiction and the constraints of the real world collide. If factfinders need to know whether a gun was used in a crime, the prosecutor can bring it into court and show the fingerprints on it. But, even if adjudicators entertain the fiction of corporate mental states in the courtroom, a prosecutor cannot put a corporate mind on display.

The more familiar case of demonstrating what mental state a natural person has may shed light on the problem of ascertaining corporate mental states. Unlike with corporate minds, prosecutors can haul natural minds into the courtroom by summoning the defendant. But, unlike fingerprints on a revolver, finders of fact cannot examine a defendant's mind directly.[192] The most direct access they have is the defendant's self-report, and even that is often mediated by the defendant's self-interest—a very strong incentive to lie, or at least massage the truth.

And yet the criminal justice system for individuals moves on. Courts long ago settled on the only sensible solution to the epistemic problem of determining what mental states a natural defendant has: allow factfinders to infer a defendant's probable mental state from his acts and the circumstances in which he was acting. Thus, in response to a jury verdict challenge, one court wrote: "[T]he surrounding circumstances, the use of a bottle, the absence of warning and the force of the blow are facts from which the jury could reasonably infer the intent to cause permanent disability."[193] And

191 Ins. Co. v. Young's Adm'r, 90 U.S. (23 Wall.) 85, 107 (1874).

192 *See* John Tooby & Leda Cosmides, *Foreword* to SIMON BARON-COHEN, MINDBLINDNESS: AN ESSAY ON AUTISM AND THEORY OF MIND, at xvii (1995) ("Normal humans everywhere not only 'paint' their world with color, they also 'paint' beliefs, intentions, feelings, hopes, desires, and pretenses onto agents in their social world. They do this despite the fact that no human being has ever seen a thought, a belief, or an intention."); Bucy, *supra* note 136, at 1178 ("[D]irect proof of intent is impossible . . . .").

193 People v. Conley, 543 N.E.2d 138, 143–44 (Ill. App. Ct. 1989). Some state legislatures have codified this approach in their rules of criminal procedure. *See, e.g.*, DEL. CODE ANN. tit. 11, § 307(a) (1987) ("The defendant's intention, recklessness, knowledge or belief at the time of the offense for which the defendant is charged may be inferred by the

such language is the common response when the epistemic problem is explicitly posed.[194] Judicial opinions recite it so rarely because all involved are familiar with the opacity of other people's minds and the inferences everyone must make to determine what others are thinking. Cognitive scientists now know that humans have innate and socialized neural mechanisms for overcoming the problem in everyday life by just the sorts of inferential reasoning courts allow.[195] And, as argued below, these mechanisms could provide the basis for a theory of corporate mens rea too.

B. The Psychology of Corporate Blame

If criminal law is to satisfy its expressive aims—to satisfy "society's desire to see those [corporations] responsible for misconduct punished"[196]—it should reflect the way people actually attribute responsibility to groups.[197] Cognitive scientists and social psychologists from the last two decades have much to say on the topic. Even though legal scholars recognize the sociological fact that humans believe corporate entities can be responsible for wrongful conduct,[198] they have paid surprisingly little attention to the more recent discoveries in cognitive science.

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jury from the circumstances surrounding the act the defendant is alleged to have done."); MONT. CODE ANN. § 45-2-103(3) (1993) ("The existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense.").

194 *See, e.g.*, United States v. Wells, 766 F.2d 12, 20 (1st Cir. 1985) ("Being a state of mind, willfulness can rarely be proved by direct evidence. Rather, findings of willfulness usually require that factfinders reasonably draw inferences from the available facts." (citing United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980))); United States v. Stagman, 446 F.2d 489, 493 (6th Cir. 1971) ("The general rule in criminal cases is that . . . intent may be inferred from the totality of circumstances surrounding the commission of the prohibited act."); United States v. Vasen, 222 F.2d 3, 8 (7th Cir. 1955) ("[S]cienter may always be inferred from the proved circumstances, where its asserted lack is based on ignorance of evidentiary facts which any ordinary person under similar circumstances would be bound to know." (citing Stone v. United States, 113 F.2d 70, 75 (6th Cir 1940))).

195 *See generally* BARON-COHEN, *supra* note 192; ALVIN I. GOLDMAN, JOINT VENTURES: MINDREADING, MIRRORING, AND EMBODIED COGNITION (2013); SHAUN NICHOLS & STEPHEN P. STICH, MINDREADING: AN INTEGRATED ACCOUNT OF PRETENCE, SELF-AWARENESS, AND UNDERSTANDING OTHER MINDS (2003); TADEUSZ WIESLAW ZAWIDZKI, MINDSHAPING: A NEW FRAMEWORK FOR UNDERSTANDING HUMAN SOCIAL COGNITION (2013); THEORIES OF THEORIES OF MIND (Peter Carruthers & Peter K. Smith eds., 1996); UNDERSTANDING OTHER MINDS: PERSPECTIVES FROM DEVELOPMENTAL SOCIAL NEUROSCIENCE (Simon Baron-Cohen et al. eds., 2013).

196 Peter J. Henning, *Should the Perception of Corporate Punishment Matter?*, 19 J.L. & POL'Y 83, 93 (2010).

197 *See id.* (arguing that criminal law should reflect public perceptions of corporate punishment); Malle, *supra* note 110, at 136 ("[T]he law must heed the concepts and criteria by which ordinary people recognize group agents and judge their moral conduct.").

198 *See, e.g.*, Buell, *supra* note 105, at 491.

When groups exhibit high levels of coherence, as do most corporations,[199] humans perceive them as possessing many of the attributes traditionally associated with individuals.[200] Cognitive scientists and social psychologists call this property of groups "entitivity" (also known by the tongue-twister "entitativity"), which they define as being "a unified and coherent whole in which members are tightly bound together" by, for example, a collective goal like profit making.[201] The shift in human perception of sufficiently cohesive groups happens at a fundamental level in cognition.[202] Research indicates that the human mind represents such groups as unified entities, rather than as collections of individuals.[203] Once this happens, humans are naturally inclined to make inferences of group-level intentionality behind the groups' actions,[204] rendering "blame and punishment [of] these groups . . . psychologically sensible and sustainable."[205] As some legal scholars have observed, the public "perc[eives] that corporations are 'alive,'

199 Corporations are examples of what social psychologists call "task groups," which are relatively high along the spectrum of the sort of coherence at issue. *See* Brian Lickel et al., *Intuitive Theories of Group Types and Relational Principles*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 28, 34 (2006) (discussing features of groups that incline people to see them as entitive and capable of bearing collective responsibility); Brian Lickel et al., *Varieties of Groups and the Perception of Group Entitativity*, 78 J. PERSONALITY & SOC. PSYCHOL. (2000); Steven J. Sherman & Elise J. Percy, *The Psychology of Collective Responsibility: When and Why Collective Entities Are Likely to be Held Responsible for the Misdeeds of Individual Members*, 19 J.L. & POL'Y 137, 150 (2010).

200 *See* David L. Hamilton & Steven J. Sherman, *Perceiving Persons and Groups*, 103 PSYCHOL. REV. 336, 337–41 (1996); Sherman & Percy, *supra* note 199, at 139–40, 149.

201 Sherman & Percy, *supra* note 199, at 149–50; *see* Donald T. Campbell, *Common Fate, Similarity, and Other Indices of the Status of Aggregates of Persons as Social Entities*, 3 BEHAV. SCI. 14, 17 (1958); Lloyd Sandelands & Lynda St. Clair, *Toward an Empirical Concept of Group*, 23 J. THEORY SOC. BEHAV. 423, 453 (1993) (providing "evidence for the existence of group entities"); *see generally* THE PSYCHOLOGY OF GROUP PERCEPTION: PERCEIVED VARIABILITY, ENTITATIVITY, AND ESSENTIALISM (Vincent Yzerbyt et al. eds., 2004).

202 *See* Amy L. Johnson & Sarah Queller, *The Mental Representations of High and Low Entitativity Groups*, 21 SOC. COGNITION 101, 112 (2003) (providing evidence of a basic shift in cognition toward groups with high versus low entitivity); Nadzeya Svirydzenka et al., *Group Entitativity and Its Perceptual Antecedents in Varieties of Groups: A Developmental Perspective*, 40 EUR. J. SOC. PSYCHOL. 611, 622 (2010) (demonstrating that children also make assessments about group entitivity).

203 *See* Marilynn B. Brewer & Amy S. Harasty, *Seeing Groups as Entities: The Role of Perceiver Motivation*, *in* 3 HANDBOOK OF MOTIVATION AND COGNITION 347, 353 (Richard M. Sorrentino & E. Tory Higgins eds., 1996); Sherman & Percy, *supra* note 199, at 152.

204 *See* Koichi Hioki & Karasawa Minoru, *Effects of Group Entitativity on the Judgment of Collective Intentionality and Responsibility*, 81 JAPANESE J. PSYCHOL. 9 (2010) (finding that people are more likely to attribute intentionality and criminal responsibility to groups with high entitivity).

205 Sherman & Percy, *supra* note 199, at 156; *see* Thomas F. Denson et al., *The Roles of Entitivity and Essentiality in Judgments of Collective Responsibility*, *in* 9 ENCYCLOPEDIA OF GROUP PROCESSES AND INTERGROUP RELATIONS 43, 55–56 (John M. Levine & Michael Hogg eds., 2006); Anna-Kaisa Newheiser et al., *Why Do We Punish Groups? High Entitativity Promotes Moral Suspicion*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 931, 935 (2012) (arguing that people are naturally inclined to blame entitive groups for wrongdoing).

and can act, through their agents, in specific ways."[206] People commonly speak of corporations "as 'real' entities in ordinary language and in moral discourse."[207]

Recent cognitive science indicates that the practice of blaming groups like corporations closely resembles the practice of blaming individuals.[208] Humans the world over see each other's behavior as situated within an interconnected[209] causal network of intentions, circumstances, beliefs, and desires.[210] Most judgments of intentionality use a quick, spontaneous cognitive system that operates unconsciously, but humans also have a slower, deliberate mechanism that works consciously.[211] Both these mechanisms operate by drawing inferences of intentionality from observed behavior and contextual clues.[212] The same mechanisms are in play when humans ascribe mental states to entitive groups.[213] Experiments show that people ascribe intentionality to group behavior just as readily as they do to other humans.[214] In doing so, people take the same "intentional stance" toward the group as they do toward individuals.[215]

Judgments about the mental states motivating behavior underlie the way humans assess culpability.[216] Humans form these judgments about individuals and groups in the same way, and thereby use the same process for deter-

206 Friedman, *supra* note 85, at 847.

207 Colvin, *supra* note 21, at 24.

208 *See* Malle, *supra* note 110, at 132 ("[G]roup agents can be blamed through the operation of the same cognitive apparatus through which individuals are blamed.").

209 *See generally* JERRY A. FODOR, THE MODULARITY OF MIND (1983).

210 *See* Malle, *supra* note 110, at 96, 132–33 (describing a 2010 experiment and concluding that "both individual and group agents elicited similar and differentiated rates of inference [of intentionality] . . . and that speed of inferences were also remarkably similar across agents"); *see generally* BERTRAM F. MALLE, HOW THE MIND EXPLAINS BEHAVIOR: FOLK, EXPLANATIONS, MEANING, AND SOCIAL INTERACTION (2004); Bertram F. Malle & Joshua Knobe, *The Folk Concept of Intentionality*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 101 (1997).

211 *See* DENNETT, *supra* note 107, at 51 ("Although we don't usually use the method self-consciously, we do use it self-consciously on those occasions when we are perplexed by a person's behavior, and then it often yields satisfactory results . . . . [W]hat we are doing on those occasions is not switching methods but simply becoming self-conscious and explicit about what we ordinarily accomplish tacitly or unconsciously.").

212 *See* Malle, *supra* note 110, at 109.

213 *See* Paul Bloom & Csaba Veres, *The Perceived Intentionality of Groups*, 71 COGNITION B1 (1999); Austen Clark, *Beliefs and Desires Incorporated*, 91 J. PHIL. 404 (1994); Malle, *supra* note 110, at 107–10, 116 ("[S]ocial perceivers appear to use the same conceptual framework (their folk theory of mind and behavior) for explaining group behaviors as they do for explaining individual behaviors . . . .").

214 *See* Joshua Knobe & Jesse Prinz, *Intuitions About Consciousness: Experimental Studies*, 7 PHENOMENOLOGY & COGNITIVE SCI. 67, 71–72 (2008); Matthew J. O'Laughlin & Bertram F. Malle, *How People Explain Actions Performed by Groups and Individuals*, 82 J. PERSONALITY & SOC. PSYCHOL. 33, 33 (2002).

215 *See* DENNETT, *supra* note 107, at 15, 58.

216 *See* Steve Guglielmo et al., *At the Heart of Morality Lies Folk Psychology*, 52 INQUIRY 449 (2009); Tracy Isaacs, *Collective Moral Responsibility and Collective Intention*, 30 MIDWEST STUD. PHIL. 59, 62 (2006); Malle, *supra* note 110, at 124–30.

mining whether to blame both.[217] To fulfill its expressive aims, criminal law must be responsive to the human impulse to find corporations culpable, and to the means by which humans make their culpability judgments.

Lest entitive groups and intention attribution seem like the exclusive province of cognitive scientists and desert theorists, it bears noting that even those with a minimal, deterrence-oriented conception of corporate criminal law must endorse a similar conceptual framework. Underlying the commonplace thought that sanctions can influence corporate activity are robust assumptions about the causes of corporate behavior. If corporations can be deterred, they must behave as though they have interests or purposes that they pursue rationally and seek to avoid impediments, like fines, that stand in the way. The following is a typical statement reflecting this assumption: "Since corporations are primarily profit-seeking institutions, they choose to violate the law only if it appears profitable."[218]

If corporate criminal law is to fulfill its expressive aims, it must exhibit the same sort of sensitivity to circumstance that social practices of judgment and condemnation do. As proposed below, one way to do this is to retain the mediating role mens rea plays between act and conviction. This can be done without any deep commitment to the existence of corporate mental states. But it will require, at a minimum, engaging in a kind of useful pretense where discourse about corporate mental states can help sort between those cases where criminal sanction would be expressively appropriate, and those where it would not. Philosophers call this kind of pretense, and the discourse modeled on it, "fictionalism."[219] Many modern philosophers are fictionalists about all manner of discourse, from math[220] to morality[221] to truth.[222] In the present context, fictionalism would mean that when lawyers and judges talk about something like corporate liability, they may not always aim at the literal truth of the matter. Rather, they may engage in a kind of pretense mandated by Congress and state legislatures, presumably because doing so has some social utility.[223]

C. A Natural Process for Corporate Defendants

Courts are familiar with adjudicating the mental states of invisible minds. The real question is why they have had so much trouble determining what

217 *See supra* note 208.

218 *Corporate Crime*, *supra* note 47, at 1365; *see generally* ROBERT H. BONCZEK ET AL., FOUNDATIONS OF DECISION SUPPORT SYSTEMS (1981); HAROLD L. WILENSKY, ORGANIZATIONAL INTELLIGENCE: KNOWLEDGE AND POLICY IN GOVERNMENT AND INDUSTRY (1967).

219 Matti Eklund, *Fictionalism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jul. 20, 2011), http://plato.stanford.edu/archives/fall2011/entries/fictionalism/.

220 *See, e.g.*, HARTRY FIELD, REALISM, MATHEMATICS AND MODALITY (1989).

221 *See, e.g.*, RICHARD JOYCE, THE MYTH OF MORALITY (2001).

222 *See, e.g.*, ALEXIS G. BURGESS & JOHN P. BURGESS, TRUTH (2011).

223 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[T]he corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact." (citing Klein v. Bd. of Tax Supervisors, 282 U.S. 19, 24 (1930))).

corporations are thinking. It is probably because they have always assumed, even within the fiction of corporate personhood, that corporations need some fundamentally different process. The approach proposed here starts from the opposite premise, that there is no unique problem of assessing corporate mentality. As discussed, scientists now know that humans innately utilize the same cognitive mechanisms whether attributing mental states to individuals or to groups like corporations.[224] In light of these results, the supposed need for separate procedures for individuals and corporations is unmotivated. There is really only one sort of criminal mind before the law.[225]

It bears emphasizing once again that the current proposal is not to personify the corporate mind in any metaphysical sense. But analogizing corporations to natural people could be a useful tool for making sense of corporate liability within criminal law, given that it is already committed to a legal fiction of corporate personhood. As Gerhard O.W. Mueller wrote in a different context:

> Likening a corporation to a natural person for the purpose of criminal law administration is not [just] an outgrowth of the "psychological tendency toward personification," . . . but is a rational interpretation of the theory of the corporate fiction for purposes of the application of a rational theory of corporate criminal liability.[226]

With this premise in place, the present proposal is simple. Courts should ask factfinders to do exactly what they have been asked to do for centuries, and what they do every day in their normal social interactions[227]—

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224 *See* Malle, *supra* note 110, at 132.

225 This Article is not the first to question the uniqueness of corporate criminal liability. Sara Sun Beale has emphasized other, pragmatic respects in which problems that confront corporate liability are shared by individual liability too. *See* Beale, *supra* note 70; Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503 (2007). The approach of pressing the parallel between corporate and natural persons has been embraced, at least in principle, by the Israeli criminal code. *See* CrimA 3027/1990 Modiem Constar. & Div. Ltd. v. State of Israel, 35(4) PD 364, 381 (Per CJ Aaron Barak) (Hebrew) (Isr.) (describing Israeli law as pursuing "a legal norm that requires the existence of human characteristics might, in principle, apply to a corporation as well"). But Israeli law does not get past the Model Penal Code model, *see supra* Section IV.A, and analogizing some employees to various organs of the company, *see* Companies Law, 5759–1999, § 47, SH No. 1711 (Isr.) ("The actions and intentions of an organ shall be the actions and intentions of the company.").

226 Mueller, *supra* note 22, at 41 (quoting Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 347 (1911)); *see also* Am. Med. Ass'n. v. United States, 130 F.2d 233, 253 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943) ("When a corporation is guilty of crime it is because of a corporate act, a corporate intent . . . . The fact that a corporation can act only by human agents is immaterial.").

227 Factfinders may also smuggle their extralegal conceptions of corporate blameworthiness into court. Psychological studies show that "jurors' own theories of criminal responsibility contribute to their verdicts independent of the legal theories of the crime." Richard L. Wiener et al., *The Social Psychology of Jury Nullification: Predicting When Jurors Disobey the Law*, 21 J. APPLIED SOC. PSYCHOL. 1379, 1397 (1991); *see also* Vicki L. Smith, *When*

when presented with a set of actions[228] and the circumstances within which they took place, infer which mental state accompanied them.[229] This "inferential" approach calls upon courts to abandon the atomistic doctrines of vicarious liability,[230] and to assess corporations' mental states by looking at them holistically.

The inferential approach would be easy enough to implement. Supposing the acts and circumstances are not in dispute, the prosecution and the defense would spin different narratives featuring the corporation as an independent agent; these narratives would be tailored to tee up each side's preferred mental state inference.[231] The court would then ask factfinders to determine which narrative they find most plausible, keeping in mind ordinary folk-psychological principles, and whether they find it plausible enough to convict. Of course, if the acts and the circumstances are also in dispute, then the process of determining the most likely mental state of the corporation will be much messier, but such is the ubiquitous challenge of being a factfinder.

Prior Knowledge and Law Collide: Helping Jurors Use the Law, 17 L. & HUM. BEHAV. 507, 508 (1993) (demonstrating that jurors' naïve conceptions of criminality influence their verdicts, even in the face of conflicting instructions from a judge). And even if they do hew closely to jury instructions, "decision makers will engage in motivated cognition to achieve their preferred outcomes within the technical constraints of a given law." Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 CALIF. L. REV. 1313, 1324 (2012). Jurors may not even know they are doing this. *See id.* at 1346 (discussing "evidence for the nondeliberate nature of this motivated cognition effect").

228 This is where the assumption that there already exists a satisfactory theory of corporate action, *see supra* Part I, becomes important.

229 There is precedent for extending the ordinary interpersonal inferential mechanisms to fictitious entities. *See, e.g.*, Lisa Zunshine, *Theory of Mind and Experimental Representations of Fictional Consciousness*, 11 NARRATIVE 270 (2003) (applying these mechanisms to discern the mental lives of fictional literary characters).

230 *See* George F. Deiser, *The Juristic Person—III*, 57 U. PA. L. REV. 300, 313 (1909) ("The great materializing tendency will now look straight through the theories—through the mist, at the people and the facts themselves.").

231 Legal scholars are just beginning to recognize the centrality of such narratives in the judicial process. *See, e.g.*, Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMM. & RHETORIC: JALWD 99, 100 (2012) ("I believe that it is not only okay that judges pay attention to stories; it is imperative that they do so."); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 291 (2013) ("Social scientists have . . . demonstrate[d] that jurors make decisions by evaluating competing narratives."); Diana Lopez Jones, *Stock Stories, Cultural Norms, and the Shape of Justice for Native Americans Involved in Interparental Child Custody Disputes in State Court Proceedings*, 5 PHX. L. REV. 457, 463 (2012) ("Litigants tell competing stories to the judge to persuade her of the legitimacy of each litigant's version of events."); Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239, 252 (2012) (noting the importance of storytelling to courtroom advocacy).

The inferential approach shares some features with an approach already codified in the Private Securities Litigation Reform Act (PSLRA).[232] With the PSLRA, Congress sought to raise the pleading standard for suits brought pursuant to Section 10(b) of the Securities Exchange Act,[233] which generally proscribes the use of fraud in the sale of securities.[234] To be liable under Section 10(b), defendants must have acted with a mental state embracing "intent to deceive, manipulate, or defraud."[235] Supplementing the standard fraud pleading rules,[236] the PSLRA requires would-be plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[237] To satisfy this hurdle, the Supreme Court clarified in a suit against a corporate manufacturer that the alleged mental state "must be cogent and at least as compelling as any opposing [mental state] inference."[238] For example, the court must determine that intent to defraud is at least as likely, given the facts alleged, as "mere motive and opportunity" to defraud.[239]

So, courts are already in the business of comparing competing inferences about corporate mental states. This Article just proposes expanding, refining, and fleshing out the practice for criminal law. Courts have long expressed readiness to do this, even if they have had, until now, no mechanism available for formalizing the inquiry.[240]

D. Inference in Action

As suggested already, the inferential approach would play out a lot like the approach currently used for adjudicating the mens rea of individual criminal defendants. From the perspective of adjudicators and advocates, their roles would be very similar for both sorts of defendant. Advocates would present evidence of circumstances surrounding the corporate act, emphasizing some, downplaying others, to weave narratives in which their preferred mental state inferences seem most natural. Adjudicators would have the age-

232 Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.).

233 *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 81 (2006).

234 *See* 15 U.S.C. § 78j(b) (2012); 17 C.F.R. § 240.10b-5 (2015).

235 Ernst & Ernst v. Hochelder, 425 U.S. 185, 193 (1976).

236 *See* FED. R. CIV. P. 9(b) ("[A] party must state with particularity the circumstances constituting fraud or mistake.").

237 15 U.S.C. § 78u-4(b)(2)(A).

238 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314 (2007); *see* Fidel v. Farley, 392 F.3d 220, 227 (6th Cir. 2004).

239 *In re* Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999).

240 *See, e.g.*, United States v. Bank of New Eng., 821 F.2d 844, 854 (1st Cir. 1987) ("Willfulness can rarely be proven by direct evidence, since it is a state of mind; it is usually established by drawing reasonable inferences from the available facts."); United States v. Wells, 766 F.2d 12, 20 (1st Cir. 1985) ("Being a state of mind, willfulness [of a corporate defendant] can rarely be proved by direct evidence. Rather, findings of willfulness usually require that factfinders reasonably draw inferences from the available facts." (citing United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980))).

old task of weighing the likelihood of these circumstances, the credibility of the narratives, and, treating the corporation as a holistic agent, inferring the mental state they think most likely.

The jury instructions guiding the process could be very similar to those that courts already use. The court should first remind the jury that criminal law engages in a fiction according to which corporations are treated as people.[241] In California, courts have a sua sponte duty to instruct the jury that, "[u]nder the law, a corporation must be treated in the same way as a natural person."[242] Following that, something along the lines of New York's model instructions for intent would work:

> The question naturally arises as to how to determine whether or not a defendant had the intent required for the commission of the crime.
>
> To make that determination in this case, you must decide if the required intent can be inferred beyond a reasonable doubt from the proven facts.
>
> In doing so, you may consider the person's conduct and all of the circumstances surrounding that conduct.[243]

Some details of the inferential approach—like specifying the allowable rules of inference from acts and circumstances to mental states—are not available, and probably never will be. This is because it is not at all clear as an empirical matter that the inferences humans naturally make, whether to individual or to group mental states, are governed by generalizable rules.[244] Some cognitive scientists think, as a conceptual matter, that there can be no such rules.[245] Fortunately, the law need not specify allowable rules of inference in order for the current proposal to get underway. The cognitive architecture of normal people is already suited to the task, whether or not it is rule-governed in any formal sense. Indeed, factfinders already use it, without

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241 In California, judges have a sua sponte duty to do this whenever the defendant is a corporation. *See* JUDICIAL COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS § 122 (2015).

242 *Id.*

243 N.Y. STATE UNIFIED COURT SYSTEM, EXPANDED CHARGE ON INTENT, http://www.nycourts.gov/judges/cji/1-General/CJI2d.Intent.pdf (last updated Dec. 11, 2000).

244 *See* ALVIN I. GOLDMAN, SIMULATING MINDS: THE PHILOSOPHY, PSYCHOLOGY, AND NEUROSCIENCE OF MINDREADING 10–13, 21 (2006) (arguing largely on the basis of empirical studies against the theory-theory of mindreading, according to which mental state inferences are governed by theoretical rules).

245 *See* Jane Heal, *Simulation, Theory, and Content*, *in* THEORIES OF THEORIES OF MIND 75, 82 (Peter Carruthers & Peter K. Smith eds., 1996) (arguing against the theory-theory of mindreading because of "our inability to say much of a structured or systematic kind about the central notion of relevance"). The point is familiar to philosophers—particularists have long argued that since a fact may favor one conclusion in one set of circumstances, but the opposite conclusion in a different set, the prospect of providing strict rules of inference from circumstances to normative conclusions is dim. *See generally* JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES (2004); JOSEPH RAZ, ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION 218–46 (2003) ("The Truth in Particularism"); Jonathan Dancy, *The Role of Imaginary Cases in Ethics*, 66 PAC. PHIL. Q. 141 (1985); Jonathan Dancy, *Moral Particularism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2013), http://plato.stanford.edu/entries/moral-particularism/#WhaParBel.

explicit rules, when trying individual defendants. To the extent that explicit rules would be helpful, courts are surely up to the task of providing them as the body of jurisprudence applying the inferential approach grows. The commonsense factors that federal prosecutors consult in determining whether to charge a corporation are among the factors that will likely be salient for jurors in determining whether, for example, the corporation intended to commit a crime or whether it was the victim of a rogue employee: the pervasiveness of the wrongdoing within the corporation, involvement of management, history of similar conduct, the effectiveness of any compliance program, timely and voluntary disclosure of the wrongdoing, remedial actions taken, and willingness to cooperate with the investigation.[246] There should be little concern about juries' ability to cognize these and like factors; they are already among the considerations used to sentence corporations.[247]

An example will clarify the sort of dynamic the inferential approach envisions. Consider *Regina v. Her Majesty's Coroner for East Kent*,[248] in which the corporation killed nearly 200 people by setting sail with the bow doors open on one of its passenger ferries. Applying respondeat superior, the court acquitted the corporation of manslaughter charges because, after reviewing the unusually "huge mass of material"[249] about the conduct of the vessel, no individual employee was grossly negligent.[250]

If the inferential approach were in effect, the case may very well have shaken out differently. The prosecution would likely emphasize the two-sentence narrative—the defendant launched its ferry with doors open; hundreds died when the ferry sank. Presented with just that narrative, factfinders would likely infer that the corporation was grossly negligent—how else does a corporation that runs ferries launch with bow doors open? The defense could then seek to complicate the narrative, perhaps trying to introduce evidence of the corporation's diligence, in general and leading up to the incident at issue: perhaps the corporation implemented several redundant safety checks, had a strict safety policy, disciplined its workers for policy violations, etc. In light of that competing narrative, factfinders may begin to question the inference that the corporation was grossly negligent—perhaps an act of God was at work instead.

Under the actual facts of the case, the defense would have a difficult time advancing the narrative of diligence since there was ample evidence that the corporation "was infected with the disease of sloppiness."[251] In light of those circumstances—setting sail with bow doors open and a track record of

246 *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-28.300 (2015), http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

247 *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (U.S. SENTENCING COMM'N 2015), http://www.ussc.gov/guidelines-manual/2015/2015-chapter-8#8c25.

248 (1987) 3 B.C.C. 636 (Eng.).

249 *Id.* at 639.

250 *Id.* at 642.

251 *Id.*

sloppy, unsafe behavior—factfinders could very easily infer that the corporation was grossly negligent in causing the ferry to capsize. The expressive aims of the criminal law were disserved in this case by acquitting the corporation. By opening the possibility of a conviction, the inferential approach is a step in the right direction.

A different result would also be possible in *United States v. Sun-Diamond Growers of California*[252] under the inferential approach. Recall that Sun-Diamond was convicted of bribing public officials when its in-house lobbyist defrauded it to funnel money to his politician friends.[253] Under respondeat superior, the court felt its hand was forced since the employee intended to bribe the officials, and could conceivably have the mistaken belief that his employer would benefit thereby.[254] But a court applying the inferential approach would have looked to the surrounding context, notably the lack of actual corporate benefit and the fact that the lobbyist defrauded Sun-Diamond to effectuate the payments.[255] If other factual details supported this narrative, the inferential approach would have allowed the court to infer that Sun-Diamond did not intend to bribe officials. This would vindicate the overall impression that Sun-Diamond "look[ed] more like a victim than a perpetrator."[256]

At this point, the unique advantage of the inferential approach should be apparent. Whatever one's view about the use of juries in criminal trials,[257] their central role for corporate defendants is here to stay.[258] That role should emphasize juries' competencies, especially where, as for corporate defendants, jury competence may be particularly suspect.[259] The inferential approach leverages one of juries' distinctive strengths—distinguishing whether, in light of the totality of the circumstances, a guilty mental state is attributable to the defendant. In this role, juries can serve as litmus tests, for corporate as well as individual defendants, of when criminal condemnation furthers society's expressive interests. Respondeat superior and other atomis-

252 138 F.3d 961 (D.C. Cir. 1998).

253 *See id.* at 964, 970.

254 *See id.* at 970–71.

255 *See id.* at 969–70.

256 *Id.* at 970.

257 *See generally* Neil J. Vidmar, *Empirical Research and the Issue of Jury Competence*, 52 L. & CONTEMP. PROBS. 1, 5–8 (1989) (citing relevant articles).

258 *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."); United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 664 (2d Cir. 1989) ("[I]t is determined that the Sixth Amendment guarantees corporate contemnors a jury trial at some level of punishment severity."); United States v. Troxler Hosiery Co., 681 F.2d 934, 935–36 (4th Cir. 1982) (holding Sixth Amendment right to jury trials applies to corporate contemnors); United States v. R.L. Polk & Co., 438 F.2d 377, 379 n.* (6th Cir. 1971) ("[A] corporation [has] the right to a jury in the trial of a serious criminal contempt.").

259 *See* Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 L. & CONTEMP. PROBS. 177, 182–91 (1989).

tic theories never let the jury assess the expressive appropriateness of convicting corporate defendants; the inquiry starts and ends with individual employees.

E. Limits on the Analogy to Natural Person Defendants

There are limits to the analogy possible between natural person and corporate defendants. This will necessitate some procedural differences in how criminal law treats the two. For example, one obvious disanalogy stems from the mechanisms individuals and corporations have for gathering information about their environment. Humans have five perceptual organs that constantly feed them visual, tactile, auditory, olfactory, and gustatory information about their environment. Factfinders know very well how these sensory systems work and may infer, for example, from the fact that a loud bang happened near a defendant, that he heard it. Corporations obviously lack these.

But creative development of the inferential approach could allow it to accommodate these disanalogies while retaining the core benefits of the view. For example, the difference in perceptual ability between corporations and humans masks a deeper similarity between corporations and humans. Corporations must have some means for gathering information that is important for their survival. Any corporation that lacks them will not be around for long. One way of accommodating this fact would be to allow factfinders to assume corporations know any generally available knowledge that is important to their survival.[260] This, of course, would be in addition to the inferential mechanisms already described, allowing factfinders to infer corporate knowledge from corporate behavior sufficiently responsive to environmental cues.

F. Deterrence and the Inferential Approach

The main selling point of the inferential approach is its harmonization with the expressive aims of criminal law. But the approach should perform well with respect to criminal law's deterrence aims as well. Deterrence theorists will agree that respondeat superior botches that goal, as it does when applied to the two cases with which this Article began. In terms of substitute doctrine, it may be that strict liability would provide the most efficient incentives under conditions of perfect information and where penalties can be optimally tailored to particular corporations. But the analysis breaks down when, as in the vast majority of circumstances, these idealizations are absent.

In the messy real world, the inferential approach should still have robust deterrent effects. This is commonsensical. Few doubt that criminal law for individuals, with its reliance on mens rea, achieves deterrence. The only sensible response to a law that proscribes engaging in some conduct intention-

260 Some scholars have already floated a similar proposal. *See, e.g.*, Abril & Olazabal, *supra* note 54, at 156–59; *see also* City of Monroe Emps. Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 687 (6th Cir. 2005) (imputing to corporation knowledge of public facts that entailed a potential "major financial hit").

ally is to try to avoid that conduct, not somehow to try to engage in that conduct, just unintentionally. Similarly, if the law penalizes, for example, "willful" misrepresentations (as opposed to all misrepresentations), corporations will be incentivized to avoid making misrepresentations.[261] And corporations will likely strive to comply by implementing the sorts of compliance and response mechanisms that Bucy describes.[262] Corporations accused of crimes could then try to disavow criminal liability by situating their alleged crime in a broader context of good corporate stewardship, arguing that what it did looks, at the entity level, more like an unavoidable accident rather than something done intentionally, recklessly, knowingly, etc.[263] To the extent that criminal law under-penalizes corporations by letting some acts of unwilled misrepresentation go unpunished, civil law mechanisms are still available to pick up the slack (though it is not always clear that the slack should be picked up).[264] Strict liability rules are less concerning in that domain.

Further, there are some unique deterrent advantages to the inferential approach when the criminal law is viewed more holistically. Few in the corporate crime literature consider the effects adjustments to the corporate criminal system could have on criminal law more generally. But, as Paul Robinson has pointed out, our criminal law is an integrated whole, and compromises in one domain can have ripple effects elsewhere. In particular, a criminal legal system that is more responsive to society's perceptions of blameworthiness may foster forces, like respect for and confidence in the law, that ultimately increase compliance by individuals.[265] Conversely, ignoring

261 *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 458 (1997) ("[S]entences based upon desert do provide the opportunity for rehabilitation, incapacitation, and deterrence.").

262 *See* Bucy, *supra* note 136, at 1153–57, 1160 ("[The corporate ethos standard] encourag[es] corporations to implement, on their own, prophylactic procedures that reduce the potential for criminal activity.").

263 Some scholars argue that the presence of an effective corporate compliance program should be a defense to liability. *See, e.g.*, Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 676 (1995) ("A corporation should be able to defend against vicarious criminal liability by showing that it had a clear and effective policy for complying with the law in place at the time of the violation, and that the employee's acts violated that policy."). The approach proposed here would take a more measured stance that avoids some of the problems the effective-corporate-compliance-program defense faces (e.g., if it committed a crime, was the compliance program by definition not effective?). The presence of a compliance program would be just one of the totality of circumstances finders of fact would consider in assessing mens rea, albeit one tending to militate against a finding of guilt.

264 *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-28.300.A.9 (2015), http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations (instructing U.S. attorneys to consider the "adequacy of remedies such as civil or regulatory enforcement actions" in deciding whether to prosecute a corporation).

265 *See* PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 176–88 (2013) ("[T]he criminal law's moral credibility is essential to effective crime control.");

lay perceptions of blameworthiness in even one area of criminal law, as regimes of respondeat superior or strict liability inevitably do, threatens to undermine the broader effectiveness of the criminal law in preventing crime.

Conclusion

The current doctrine for adjudicating corporate mens rea—respondeat superior and its variants—undermines widely recognized aims of criminal law. This Article highlighted the disconnect between the outcomes dictated by respondeat superior and the outcomes consistent with the criminal law's expressive aims. To displace respondeat superior, a new approach to corporate mens rea should have several features: (1) further the aims of criminal law; (2) be conceptually coherent; (3) apply generally to all the mental states that are mens rea elements of crimes; and (4) be easy to implement and administer.

The inferential approach proposed here, uniquely among the available alternatives, meets all four requirements. It begins by recognizing that criminal punishment is a social practice, fulfilling social values that should reflect the human socio-psychological nature motivating it.[266] The inferential approach would have factfinders do exactly what they naturally do already when discerning the mental states of individuals and groups outside of the courtroom—infer likely mental states from acts and circumstances. By treating corporate defendants holistically, the inferential approach would reduce the current administrative burden of assessing corporate mens rea, which requires assessing the mental states of all involved employees.[267] And since it would draw on the process and types of inference already used for trying individual defendants, the inferential approach would be painless to implement and apply generally to all types of mental states. Lastly, the inferential approach furthers the aims of the criminal law better than respondeat superior. Because it uses the cognitive mechanisms by which people naturally assess group responsibility, the inferential approach is particularly apt to fulfill the criminal law's expressive aims.

As a general theory of corporate mental states, the inferential approach has applications outside the criminal context, wherever corporate mental

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Tom R. Tyler, Why People Obey the Law 161 (1990) (finding people are willing to obey the law only if they perceive legal authorities as legitimate); Robinson & Darley, *supra* note 261, at 454–58, 474–77; *see also* Maggie Wittlin, Note, *Buckling Under Pressure: An Empirical Test of Expressive Effects of Law*, 28 Yale. J. on Reg. 419 (2011) (discussing effectiveness of expressive effects of seatbelt laws).

266 Analogous approaches are available in the philosophical literature. *See* D.E. Cooper, *Collective Responsibility*, 43 Phil. 258, 258 (1968); Marion Smiley, *From Moral Agency to Collective Wrongs: Re-Thinking Collective Moral Responsibility*, 19 J.L. & Pol'y 171, 189–90 (2010) (discussing the Aristotelian notion of "moral responsibility"); Deborah Tollefsen, *The Rationality of Collective Guilt*, 30 Midwest Stud. Phil. 222, 226–28 (2006).

267 No fewer than three times, the judge in *Her Majesty's Coroner* highlighted the "huge mass" of evidence required for applying respondeat superior. R. v. Her Majesty's Coroner for E. Kent, (1987) 3 B.C.C. 636, 639, 642 (Eng.).

states are at issue. Some of these were mentioned above—for example, tort law with all the mental states that the negligence inquiry implicates, and contract law, which is premised on a meeting of the minds. It may also help illuminate some otherwise puzzling aspects of recent constitutional jurisprudence affecting corporations, such as what sense, if any, there is to make of the notion of a corporation's sincere beliefs.[268] These and related applications of the inferential approach suggest provocative avenues for future research.

268 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).