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Perceptual Harm and the Corporate Criminal

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PERCEPTUAL HARM AND THE CORPORATE CRIMINAL

*Erin Sheley**

This article defends the controversial existence of criminal liability for corporations by showing how, when a corporation commits a crime, it imposes additional harms on its victims which flow specifically from the nature of the corporate structure itself and therefore cannot be vindicated solely through the punishment of individual employees. First, I examine the current debate on corporate criminal liability and argue that it overlooks the important question of whether there is a difference in kind, as opposed to simply degree, which distinguishes corporate crime from individual crime and therefore justifies allegedly “redundant” punishment. Second, I use the example of the crime of bribery to demonstrate how the nature of the wrong it punishes relates to the networks bribery creates to consolidate power—real and perceived—over other market participants, and the attendant social malaise that results from the corruption of these networks. Third, I marshal psychological, sociological, and narrative evidence suggesting that the same perceptual harms caused by corporate acts of bribery are frequently at work in less obvious ways whenever a corporation commits a crime. I argue that upon this basis, and under circumstances in which a showing of corporate mens rea is possible, that corporate criminal liability should be available. Finally, I argue that, notwithstanding these strong arguments for corporate criminal liability, the bribery cases also demonstrate how the dramatic and variable role of prosecutorial discretion in attaching official blame to corporate harm runs the risk of undermining the expressive value of corporate punishment through an emphasis on consequentialist outcomes. These outcomes, I argue, improperly aggrandize the prosecutor’s ex post remedial role at the expense of redressing the underlying corporate harm.

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I. INTRODUCTION

In 2011 Lindsey Manufacturing, a California maker of emergency power systems, became the first corporation to be convicted at trial for bribery under the Foreign Corrupt Practices Act (FCPA).¹ The case presented a colorful fact pattern: in exchange for business, Lindsey's agent bribed an official at the Mexican *Comision de Federal de Electricidad* with, among other things, a Ferrari and a \$1.8 million yacht.² It also presented an important question of statutory interpretation: whether an employee of a state-owned utility qualified as a "foreign official" for the purposes of liability under the Act.³ Far more importantly, however, *Lindsey Manufacturing* marks the first time in the more than thirty years of the FCPA's existence that a corporation has been convicted under it not through a plea agreement with the government, but through the societal "ritual by which the faith of the community in the administration of criminal justice is maintained."⁴

Described as a "new, ominous milestone" by the *Wall Street Journal* and heralded by the Department of Justice as only the first of more such outcomes,⁵ the Lindsey conviction should cause consternation amongst

1. See Stuart Pfeifer, *Azusa Firm, Two Execs Convicted of Mexican Bribery Scheme*, L.A. TIMES, May 11, 2011. Harris Corporation had also taken an FCPA indictment to trial, where the court dismissed the action after hearing the prosecution's case in chief. Jim Doyle, *Judge Tosses Out Overseas Bribery Case*, S.F. CHRON., Mar. 20, 1991, at B6.

2. *Id.*

3. See United States v. Aguilar, 831 F. Supp. 2d 1180 (C.D. Cal. 2011).

4. George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804, 807-08 (1995).

5. Nathan Koppel, *A Criminal First: Company Convicted of Foreign Bribery*, WALL ST. J., May 11, 2011, <http://blogs.wsj.com/law/2011/05/11/a-criminal-first-company-convicted-of-foreign-bribery/> ("Lindsey Manufacturing is the first company to be tried and convicted on FCPA violations,

FCPA critics and optimism from the statute's supporters. It should also be welcome by others who have argued that an increasingly pervasive recourse to plea agreements, deferred and non-prosecution agreements has contributed to an already excessive degree of prosecutorial discretion in determining the standards for liability for corporate criminal misconduct.⁶ But the *Lindsey* case—causing, as it did, the evaluation of an act of corporate bribery by the community representatives that comprise the criminal jury—also implicates a broader set of questions about corporate criminal liability more generally.

Opponents of entity liability argue that innocent shareholders and stakeholders should not be punished for the crimes of some employees, for whom the law of conspiracy already provides group liability (in the *Lindsey* case, for example, the corporation's CEO and CFO were also convicted along with Lindsey itself).⁷ Others argue that imposing criminal liability on a corporation over-deters misconduct from an economic standpoint.⁸ Those who support the availability of corporate criminal liability to punish corporations such as Lindsey point to the severity of the harm flowing from corporate misconduct⁹ and the expressive value of punishing corporations in addition to their constituents.¹⁰ Others draw upon the recent scholarship on the “utility of desert” to suggest that, if social norms support criminal liability for corporations, we risk delegitimizing the criminal law by failing to impose it.¹¹

For the proponents' arguments to overcome the objections of redundancy and unfairness raised by opponents, it is not enough to demonstrate, as many scholars have, that corporations cause a lot of harm or even that the condemnation of corporations accurately captures societal views about liability in a way that achieves utilitarian goals of legitimizing the criminal law. Due to the public harms the criminal

but it will not be the last,' said the DOJ's Lanny Breuer.”).

6. See, e.g., Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 AM. CRIM. L. REV. 1481 (2007).

7. See generally Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359 (2009); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009).

8. See, e.g., Daniel R. Fischel & Alan O. Skyes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477 (1996).

9. See generally Pamela H. Bucy, *Corporate Criminal Liability: When Does it Make Sense?*, 46 AM. CRIM. L. REV. 1437 (2009).

10. Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618–19 (1998).

11. See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 521 (2006).

justice system is designed to vindicate, the question of whether social norms support the notion of corporations as morally and criminally responsible is relevant. But the inquiry does not stop there; no utilitarian benefit of criminal punishment can justify imposing it on a non-culpable party. Corporate criminal liability proponents must also therefore prove that the harm caused by a corporation *qua* corporation—and, therefore, the *actus reus* component of the *wrong* sought to be criminalized by the justice system—is uniquely attributable to the corporation as a collective, beyond the harm that can be attributed to the employees that comprise it. If such additional harm can be shown to exist, it is not vindicated solely by punishing individual employees, and the corporation’s shareholders should not be able to avoid the financial repercussions of this harm being criminally redressed. The crime of bribery, when committed by corporate actors such as Lindsey, with its diffuse and complicated effects on society as a whole, provides a useful vehicle for exploring the nature of corporate criminal harm.

This article considers the structure and effects of corporate acts of bribery to challenge arguments against the availability of corporate criminal liability and to demonstrate that it serves a coherent and legitimate penal purpose alongside individual liability due to the dual nature of the corporation itself. On the one hand, because the corporation is perceived in the culture as a morally culpable personified individual, there are utilitarian benefits to holding it criminally liable and thereby avoiding the many pragmatic disadvantages of undermining social norms. Even more importantly, due to the *collective* qualities of a corporation—namely, the geographic, structural, and temporal complexities of its operations—corporate criminal misconduct actually imposes further harms (which I define as “perceptual harms”) on its victims and on society than would derive from the same misconduct if perpetrated by a group of unincorporated individuals. Therefore, beyond the utilitarian benefits that come from vindicating social norms about corporate culpability, punishing a corporation in addition to its constituents is philosophically coherent because of the additional layer of harm corporate crime produces. As I discuss in more detail further on, however, the current standard for corporate criminal liability—one of straight respondeat superior for all actions of individual employees, even when acting against orders—is overly broad. Because the perceptual harms I identify derive from an individual’s orientation to the overall corporation, it would be unjust to impose punishment for them in cases where the overall corporation cannot be said to have acted with, at a minimum, criminal negligence.

In Part II, I present a short overview of the debate over the existence of corporate criminal liability, noting that it largely misses the important

question of whether there is a difference in *kind* that distinguishes the harm caused by the criminal action of a corporation, rather than simply a difference in degree. I also discuss alternatives to the current standard of respondeat superior and argue that the imposition of corporate criminal liability should require a showing that, at the institutional level, the corporation acted with criminal negligence in its failure to prevent the misconduct of its employees. In Part III, I collect evidence of shared social intuitions about corporations as personified moral actors. I argue that the punishment of corporations along with their executives serves an important expressive function which in turn legitimizes the criminal justice system by tracking with the intuitions about moral blameworthiness that support it. These utilitarian benefits weigh in favor of corporate criminal liability, assuming the existence of substantive harm attributable to the corporation in fact.

In Part IV, I use the example of the crime of bribery to demonstrate how much of the substantive harm caused by corporate bribery flows in part from the networks bribery creates to consolidate power—real and perceived—over consumers and other market participants, and the social deterioration resulting from individuals' sense of helplessness before these institutional structures. These perceptual harms, I argue, arise from the nature of the corporate structure itself, with its enduring temporal existence and its capacity for broad geographical action. Where this harm is joined by the adequate degree of corporate culpability it should properly be accounted for through criminal punishment.

In Part V, I show how the same perceptual harms caused by corporate acts of bribery are at work in less obvious ways whenever a corporation commits a crime. Collecting psychological and narrative evidence suggesting that some of the harm suffered by victims of corporate crime arises directly from the corporate nature of the criminal, I will therefore propose that we can frequently discern at least some degree of corporate harm that is distinguishable from the harm caused by the corporation's individual constituents.

In Part VI, I argue that the FCPA cases demonstrate how the current dramatic and variable role of prosecutorial discretion in attaching official blame to corporate harm runs the risk of undermining the expressive value of corporate punishment through an emphasis on consequentialist outcomes. These outcomes, I argue, improperly aggrandize the prosecutor's ex post remedial role at the expense of redressing the underlying corporate harm, perhaps even increasing it by entrenching the structural interdependence between corporations and legal authorities. In Part VII, I conclude.

II. CRIMINALIZATION AND ITS CRITICS

In the controversial 1909 *New York Central* case, the Supreme Court imported the tort doctrine of respondeat superior into the criminal law, holding that for the purposes of criminal punishment, both the actions and intentionality of individual employees acting within the scope of their authority could be attributed to the corporation, even when acting “against the express orders of the principal.”¹² Later cases elaborated on this standard by holding, first, that the employee must act, at least partially, for the purposes of benefitting the corporation,¹³ and second, that the employee need have only apparent authority to act on behalf of the corporation.¹⁴

Critics of corporate criminal liability have argued that it violates the three classic purposes of criminal punishment (retribution, deterrence, and rehabilitation) because—while the misconduct in those cases is in reality perpetrated by employees of the corporation who can be criminally punished as individuals, including under collective liability theories such as conspiracy and aiding/abetting liability—the criminal punishment is suffered by innocent shareholders and stakeholders.¹⁵ Furthermore, empirical studies have found that corporate criminal liability—which by definition can only impose financial penalties in lieu of incarceration—is unnecessary to deterrence and, indeed, creates overdeterrence problems.¹⁶

Defenders of corporate criminal liability stake their claims on both philosophical and pragmatic grounds. In an influential article in the *American Philosophical Quarterly*, Peter French rebutted the argument that corporate actions are in reality only the actions of employees, which he described as the notion that “although corporate actions may not be

12. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493–95 (1909).

13. *See Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 722–24 (5th Cir. 1963).

14. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972) (“[L]iability may attach without proof that the conduct was within the agent’s actual authority.”).

15. John Hasnas makes the point that this notion violates retributive principles of justice by virtue of this unfair punishment of innocents: “A criminal justice system based exclusively on a retributivist theory of punishment would expressly exclude such vicarious criminal liability.” Hasnas, *supra* note 7, at 1339. Hasnas also argues that such punishment fails on deterrence grounds as well because, “In the Anglo–American Criminal Justice system, deterrence refers to inflicting punishment on a *wrongdoer* to discourage others from committing similar offenses. It does not refer to punishing the innocent to pressure them into suppressing the criminal activity of their fellow citizens.” *Id.* With respect to rehabilitation, Hasnas argues that, while corporate criminal liability may “influence managers to adopt legal compliance programs and to otherwise try to produce a corporate environment that discourages criminal activity by its employees,” such action is nonetheless unacceptable because “[t]hreatening innocent shareholders with punishment for the offenses of culpable corporate employees may be an effective means of producing a general improvement in ‘corporate culture,’ but it is not a form of rehabilitation that can justify criminal punishment in a liberal legal regime.” *Id.* at 1340.

16. *See generally* Fischel & Sykes, *supra* note 8; Khanna, *supra* note 8.

reducible without remainder, corporate intentions are always reducible to human intentions.”¹⁷ French pointed to the Corporation’s Internal Decision Structure (CID Structure), with its constitutive organization chart and corporate decision making policies, as evidence of a corporate intentionality above and beyond the sum of individual employee intentions.¹⁸ The CID Structure, French said, “licenses the descriptive transformation of events . . . to corporate acts by exposing the corporate character of those events,”¹⁹ thereby “licens[ing] redescription of events as corporate events and attributions of corporate intentionality” without obscuring “the private acts of executives, directors, etc.”²⁰ This conceptualization is consistent with scholarship on organizational behavior that finds individual behavior to be altered by membership in a collective.²¹

It should be noted here that the debate over corporate criminality can actually be broken down into two sets of concerns. The first is whether corporations should be criminally liable at all. The second is whether the current liability standard of respondeat superior is appropriate. One might, for example, believe that a company like Fannie Mae (which evidence suggests once had a top-to-bottom policy intended to encourage employees in each of the corporation’s functions to record their accounting decisions with an eye to meeting the president’s earnings-per-share target at the expense of truthfulness)²² should be held

17. Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 212 (1979).

18. *Id.* at 211–12.

19. *Id.* at 212.

20. *Id.* at 214.

21. See, e.g., SIGMUND FREUD, *GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO* 6 (1949) (noting that the discipline of group psychology arose from the fact that an individual “thought, felt and acted in quite a different way from what would have been expected” due to “his insertion into a collection of people which has acquired the characteristic of a ‘psychological group’”); ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 205–06 (1997) (discussing strategies of corporate management for drawing employees into firm culture); LARRY MAY, *SHARING RESPONSIBILITY* 75 (1992) (analyzing the means by which groups change the values of their members to create conformity); EDWIN HARDIN SUTHERLAND, *WHITE COLLAR CRIME: THE UNCUT VERSION* 240 (1983) (discussing how “criminal behavior is learned in association with those who define such behavior favorably and in isolation from those who define it unfavorably”).

22. A government investigation into Fannie’s top-to-bottom efforts to meet the president’s quarterly earnings-per-share target of 6.46 uncovered a speech given by the head of the company’s internal audit function in which he admonished his auditors:

By now every one of you must have 6.46 branded in your brains. You must be able to say it in your sleep, you must be able to recite it forwards and backwards, you must have a raging fire in your belly that burns away all doubts, you must live, breath and dream 6.46, you must be obsessed on 6.46 . . . After all, thanks to Frank, we all have a lot of money riding on it . . . We must do this with a fiery determination, not on some days, not on most days but day in and day out, give it your best, not 50%, not 75%, not 100%, but 150%. Remember, Frank has given us an opportunity to earn not just our salaries, benefits, raises, ESPP, but substantially over and above if we make 6.46. So it is our moral obligation to give well above our 100% and if we do this, we would have made

liable as an entity, but nonetheless object to entity liability in a case where a rogue employee commits a crime on his own initiative and against directives.

Indeed, several proposals have been made for limitations on the *New York Central* standard to cases in which collective corporate *mens rea* is more apparent. The Model Penal Code would limit liability to cases in which “the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.”²³ Other proposals have included requiring the prosecution to establish that the corporation has not taken all reasonable steps to prevent the misconduct of its employees²⁴ and allowing the affirmative defense that the organization had in place a compliance program relevant to the alleged crimes.²⁵ In reality, as I discuss in Part VI, prosecutorial charging guidelines have, in any case, resulted in a more narrowly tailored enforcement standard which, while licensing a vast degree of prosecutorial discretion, generally turn on some showing of institutional *mens rea*.

Because I agree with critics of the current standard that it allows for entity liability for individual acts unsanctioned by, and even contradictory to, any coherent understanding of corporate intentionality, my argument in this article in favor of entity liability is limited to cases where the prosecution can prove an institutional *mens rea* of, at a minimum, criminal negligence. Specifically, I would limit the imposition of such liability to cases where the corporation failed to perceive a substantial and justifiable risk of misconduct occurring and take reasonable measures to prevent it.

The standard of criminal negligence is particularly appropriate to the corporate context because it allows for consideration of what Patrick O’Neil calls non-proximate *mens rea*—that is:

[O]ne or more points of choice when the perpetrator either chose to indulge in the habits of mind which ultimately led to patterns of negligence or (more likely) chose not to take steps to correct patterns of negligence or patterns of mental inadvertency having the potential to lead

tangible contributions to Frank’s goals.

OFFICE OF FED. HOUS. ENTERPRISE OVERSIGHT, REPORT OF THE SPECIAL INVESTIGATION OF FANNIE MAE 4 (2006), available at <http://www.fhfa.gov/webfiles/747/FNMSPECIALEXAM.pdf> (emphasis omitted).

23. MODEL PENAL CODE § 2.07(1)(c) (2011).

24. Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1335 (2007).

25. Bucy, *supra* note 9, at 1442.

to acts of negligence.²⁶

J.W.C. Turner, in a well-known debate with H.L.A. Hart, once posited that the basic idea of criminal negligence was incoherent. The paradox he pointed out was that if the law of negligence requires that a negligent action be inherently unconscious—a failure to meet a standard rather than an act of will—then it cannot constitute *mens rea* at all because it is not intended.²⁷ By contrast, were a seemingly negligent act done with some awareness of the consequences, it would rise to the level of recklessness, obviating the need for the category of criminal negligence.²⁸ This argument is intellectually akin to the claim that a corporation cannot unilaterally “intend” its conduct and should therefore not be subject to the moral condemnation of the criminal law. O’Neil’s solution to the paradox of criminal negligence demonstrates the appropriateness of the standard in the corporate context. He posits that the non-proximate *mens rea* required for criminal negligence is “an immoral intention not close to the negligent act in time or chain of causation, but a (relatively) remote part of that chain of causation.”²⁹ He provides the example of the drunk driver who cannot be said to specifically “intend” his impaired actions upon getting behind the wheel of a car, but who did intend to consume the alcohol that got him into that state in the first place. In a corporation, composed of many actors engaging in cooperative behavior over extended temporal periods, the *mens rea* of employees or officers who fail to provide the proper oversight necessary to prevent foreseeable criminal misconduct properly supports a finding of corporate criminal negligence when connected in a chain of causation to an eventual *actus reus* on the part of another employee.³⁰

26. Patrick M. O’Neil, *The Moral Blindness of the Positivist Legal Hermeneutic and the Non-Proximate Mens Rea in the Law of Criminal Negligence*, 41 AM. J. JURIS. 289, 301 (1996).

27. *See id.*

28. *Id.*

29. *Id.*

30. The operative theory of causation underlying this analysis comes from the insights of Ned Hall and others who have shown how the two standard theories of causation—causation as production, which requires physical demonstration, and causation as dependence (“counterfactual” or “but for causation”)—govern two distinct classes of events. While causation-as-dependence has been seen to fail as a theory when applied to actions, due to oft-discussed problems of overdetermination, it successfully describes the causal relationship between an *omission* and its effects. *See generally* CAUSATION AND COUNTERFACTUALS (John Collins et al. eds., 2004). Marcelo Ferrante offers a useful example:

[O]missions are arguably *not just* absences. There is something in the world to which the statement “Borges omitted to give Verna the antidote at *t*” refers. Certainly, the mere absence of an action does not amount to an omission. For instance, it is not the case that I’m traveling to Alpha Centauri while I write these lines, and yet we will not say that I’m failing or omitting to travel to Alpha Centauri while I write this. Though it is part of the meaning of an omission-statement such as “Borges omitted to give Verna the antidote at

Consider, for example, a pair of hypothetical examples. In the first, *X* Corporation, based in Texas, acquires *Y* Corporation, based in Illinois. *Y* Corporation manufactures widgets and does much of its business selling them to the state government. *X* Corporation has a compliance program to train employees on the rules for bidding on procurement contracts, which consists of an annual training seminar at corporate headquarters for all officers and printed materials on the ethical rules of government contracting which are distributed to all employees. Nonetheless, the Illinois widget market is very small and dominated by two primary actors: *Y* Corporation and another small manufacturer. *Y* Corporation and the other manufacturer had a longstanding bid-rigging arrangement, dating from long before the merger with *X* corporation and creation of *XY* Corporation. The arrangement has effectively kept other widget manufacturers from entering the market, and has resulted in poor quality widgets being purchased by the state for use in their construction projects. The arrangement was an open secret and, had *XY* Corporation more closely scrutinized the reality of its new office's practices, it would have been detected.

In the second scenario, *X* Corporation also has a formal compliance program, as well as very strongly entrenched corporate norms against illicit bidding practices. After acquiring *Y* Corporation it sends a representative to Illinois to become acquainted with that office's bidding procedures and finds them to be above-the-board and in line with *X* Corporation's practices. Several months later, one of *Y* Corporation's contracting officers, acting against the explicit instructions of his supervisor and in the hopes of securing a commission for himself, works out and conceals a bid-sharing agreement on a pair of widget contracts with his counterpart at a rival corporation.

Under the current law, *XY* Corporation would be liable in both cases. Yet it is clear from the comparison of examples that in the first case, despite the existence of a paper compliance program, there were multiple opportunities for management and compliance officers within the corporation to become aware of the ongoing misconduct in the new Illinois office and the corporation nonetheless collectively failed to do

*t** that it is not the case that Borges gave Verna the antidote at *t*, the statement entails more than that. Indeed, the statement asserts a fact about Borges, which is made true by a number of concrete things that obtain in the world—like the existence of Borges himself and whatever additional facts it takes for us to truly claim that he is able at *t* to give Verna the required antidote (e.g., there being an antidote at Borges's reach, and so on). So the statement refers to those things, only that it describes them partly in a contrastive or negative way, picking out something they are *not*.

Causation in Criminal Responsibility, 11 NEW CRIM. L. REV. 470, 475 (2008). In a similar vein, when we say a corporation "omitted" an action necessary to prevent a crime committed by one of its employees we refer to the existence of some institutional capacity to do so—which may or may not exist depending on the difficulty of detecting the specific misconduct in question.

so. In the second case, the corporation—both in its central operations and at the management level in the Illinois office—took explicit steps to prevent misconduct of the sort that transpired. In neither case can the corporation have been said to have unilaterally “acted,” but the standard of criminal negligence allows for an inquiry into whether the corporation collectively *failed* to act in such a way at any point temporally prior to the *actus reus* in a chain of causation. In the second example, the question of whether a reasonable corporation acting with care would actually have prevented the misconduct might require a closer inquiry into the particular facts, but the law should nonetheless be able to distinguish it from the first, in which the failure is much clearer. The extent to which such a standard may leave factual uncertainty on a case-by-case basis only demonstrates the social utility of allowing juries—rather than prosecutors, who have institutional incentives beyond trying to peg punishment precisely to the degree of actual culpability³¹—to fill in the gaps by determining whether the requisite degree of corporate *mens rea* exists.

In any case, even if some form of corporate intentionality can in fact be demonstrated, it may nonetheless not follow that the non-human structures in which it resides should be punished, as many of the ramifications of criminal punishment cannot, as Hasnas and others note, affect the non-human structure itself, but only innocent third parties. To respond to this challenge, others have noted that, regardless of the seeming redundancy in punishing both corporations and their individual employees, corporate criminal liability serves yet another expressive function of criminal law. One of the retributive goals of criminal punishment is “to assert[] moral truth in the face of its denial.”³² To punish a corporation is, therefore, to publicly repudiate the harm done to individuals through an illegal act in pursuit of profit.³³

Building upon this insight, and rejecting the notion that deterrence

31. See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2554 (2004) (“Voters’ preferences, courthouse customs, the prosecutor’s reputation as a tough or lenient bargainer, her own views about what is a proper sentence for the crime in question—all these things play a role in defining the sentences that prosecutors are likely to seek in plea bargains.”).

32. Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 125 (1998); see also Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) (through imposing criminal liability “society says, in effect, that the offender’s assessment of whose interests count is wrong”); Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L. J. (forthcoming 2013) (arguing that only deterrence and expressivism taken together can justify the imposition of corporate criminal liability).

33. Kahan, *supra* note 10, at 618–19 (“Just as crimes by natural persons denigrate social values, so do corporate crimes 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.’”).

and efficiency are the only interests in play in considering corporate criminal liability, Lawrence Friedman argues that “[a]bsent the possibility of criminal liability, corporations would escape moral condemnation for wrongdoing, and the retributive import of criminal liability to the community would be lost.”³⁴ In thinking about the expressive function of criminal justice, it is not enough to observe that because “corporations cannot be imprisoned” the “essential question . . . is whether the criminal law has any useful role to play in setting the damages that firms must pay for the wrongful acts of their agents.”³⁵ The appropriateness of the criminal justice system as a means of imposing fines on organizations is an important and troubling question; certainly the bad effects on business and productivity threatened by overdeterrence—especially under the current overbroad standard of vicarious liability—should be considered in contemplating severity of available financial penalties and urge in favor of penalties better-keyed to actual harm caused in order to avoid unproductive over-penalization.

But concern about innocent shareholders cannot shut down the threshold question of whether corporate criminal liability should exist at all. Allowing corporations to be held liable even in tort likewise punishes shareholders up to the limits of their investment; yet the law permits this because it would be unjust for shareholders to be enriched at the expense of third parties who have suffered through the actions of the corporation. And shareholders, of course, can seek to recoup their losses through derivative actions against the officers and directors of the corporation. John Goldberg and Benjamin Zipursky have noted in the torts context that the role of the judicial function is not merely “the delivery of compensation to those in need, or the deterrence of antisocial conduct, or the shifting of losses to those who are responsible for the loss,” but “to afford the victims of certain wrongs an avenue of recourse against those who have wronged them.”³⁶ Likewise, the availability of the criminal law as a forum for the state’s condemnation of those who violate its precepts should not be determined solely by the nature, range and effects of any resulting penalties, even when they affect the investments of non-personally culpable shareholders. The criminal law addresses harms against the public perpetrated through harms against individuals; if the individual suffers a unique harm due to the corporate nature of the perpetrator, shareholders should not be able to avoid the

34. Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J. L. & PUB. POL’Y 833, 857–58 (2000).

35. Fischel & Sykes, *supra* note 8, at 320.

36. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 972 (2010).

financial ramifications of redressing this public harm any more than they should in the private tort context. Furthermore, to the extent that society thinks of corporations as personified individuals, the condemnatory function of the criminal law—even apart from the sum of whatever financial sanctions it imposes—makes the criminal condemnation of a corporation as socially meaningful as it is with respect to an individual person.

Furthermore, a body of scholarship on the so-called “utility of desert” has shown that this condemnatory function of punishment serves not only the moral or philosophical purposes of retribution but important utilitarian purposes as well. Social science shows that people obey the law not out of a fear of criminal punishment so much as through a combination of normative social influence and internal moral rules (with social influence often shaping the rules themselves).³⁷ There is evidence that these intuitions about just punishment are in fact shared among common citizens at an extremely nuanced level.³⁸ Robinson and Kurzban argue that these intuitions generate specific determinations of deserved punishment for particular crimes, not simply floor or ceiling generalities about extremities of justice and injustice.³⁹ Robinson and Darley have found that, due to the strength of these shared intuitions about guilt, the deviation from them in assigning punishment comes with great utilitarian risks; the law encourages greater obedience when it is perceived by the community to assign liability in “just” proportion to the moral blameworthiness of the offender.⁴⁰ They argue that this is because “the ability of the criminal justice system to harness the power of stigmatization, to avoid subversion and vigilantism, to gain compliance in borderline cases, and to have a role in shaping societal norms is directly related to its ability to gain moral credibility from those to whom it applies.”⁴¹ Furthermore, though it is a hotly contested

37. See, e.g., Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325 (1980); Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice*, 24 LAW & SOC'Y REV. 837, 854 (1990); Raymond Paternoster & LeeAnn Iovanni, *The Deterrent Effect of Perceived Severity: A Reexamination*, 64 SOC. FORCES 751, 769 (1986).

38. See generally Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007).

39. *Id.* at 1832–46. The authors note that these concepts of desert are not absolute but relative, meaning that notions of desert do not flow from an understanding of a “magical” connection between a certain act and an appropriate amount of punishment in the abstract, but from a shared understanding of “the amount needed to set the offender in his appropriate relative position on the continuum of deserved punishment.” *Id.* at 1835. Certain societies may allow for more severe maximum or minimum punishments, but the intuitions about the relative personal blameworthiness of offenders across whatever spectrum exists will not change.

40. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007).

41. *Id.* at 29–31 (citing, among other evidence, RICHARD PETTY & JOHN T. CACIOPPO,

question in the scholarship on law and economics, in areas in which social norms are in flux, the law may potentially contribute to the development of those norms in a particular direction.⁴²

With regard to corporations, entity liability might vindicate and shape social norms by virtue of the heightened visibility of corporate defendants.⁴³ Samuel Buell notes that the expressive purpose of entity liability could be one of two things: either “its ability to shape norms by conveying disapproval of certain forms of crime” or, following the notion of the “utility of desert” developed by Robinson and Darley, “its ability to satisfy popular demand for retribution against corporations and therefore to advance general contentment or general respect for the law.”⁴⁴ While not enough on its own to justify entity liability, the existence of norms about corporate moral culpability could therefore indicate substantial utilitarian costs to abolishing it. In the next part, I will gather evidence suggesting that, not only do such social norms exist, but they exist in part due to legal protections and business practices that actually benefit the corporations themselves.

III. LEGAL AND SOCIAL NORMS OF PERSONIFICATION

The scholarship on the utility of desert suggests that the criminal law is most likely to facilitate obedience to the law not simply by threatening punishment but when its expressive force contributes to the development of background social norms against certain behavior. Likewise, where it fails to do so or when it runs counter to social norms, it is likely to diminish the legitimacy of the criminal law itself. One question in thinking about corporate criminal liability, then, is whether criminalizing corporations in addition to their officers in appropriate cases contributes to the building of social norms against corporate

ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES 62–69 (1996); Tilmann Betsch, Henning Plessner & Elke Schallies, *The Value–Account Model of Attitude Formation*, in CONTEMPORARY PERSPECTIVES ON THE PSYCHOLOGY OF ATTITUDES 251–52 (Geoffrey Haddock & Gregory R. Maio eds., 2004); Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, in 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 123, 125 (Leonard Berkowitz ed., 1986); ELLIOT R. SMITH & DIANE M. MACKIE, SOCIAL PSYCHOLOGY 261–62 (2d ed. 2000).

42. See Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 24–37 (1991).

43. Buell, *supra* note 11, at 521 (“An expressive defense of entity criminal liability might say that the practice is a particularly influential way for criminal law to shape norms, perhaps because punishing firms has a salience that punishing individuals lacks. In considering this claim, it is important to distinguish between communicating *what* conduct is wrong and communicating *what* conduct is wrong *by various means*. Entity criminal liability adds nothing on the former score because it does not define an independent category of criminal behavior; enterprise liability is always derivative of an individual crime That being said, entity criminal liability might have particular force, assuming it has some heightened visibility, in driving home the messages that criminal law has chosen to send.”).

44. *Id.* at 520.

crime. A second question is, to the extent that social norms already consider corporations as capable of criminality in their collective forms, whether failing to criminalize corporations in appropriate cases would have the delegitimizing effect described above.

As Susanna Ripken notes, the nature of the corporation changes depending on whether one views it through the lens of philosophy, law, moral theory, political science, sociology, psychology, organizational theory, theology, or economics but, “taken together, [these lenses] reveal that the corporation is a multidimensional person with coinciding and conflicting properties that defy classification into a neat and tidy unified theory.”⁴⁵ Because the question of whether the debatable nature of corporate personhood requires corporate *criminality*, however, certain lenses are more useful than others. I will examine those aspects of corporate personhood that relate to a corporation’s capacity to commit a legal wrong punishable by collective condemnation, which will consider the relationship between institutional identity and collective harm. I will first consider the formal means through which the legal order personifies the corporation. I will then turn to evidence of social norms that treat corporations as morally culpable persons.

A. Legal Personification

Pope Innocent IV is generally credited with the first articulation of the “legal fiction” view of the corporation for his description of ecclesiastical bodies as both distinct entities as a matter of social fact, yet spiritually *personae fictae*—lacking a body or will and thus not susceptible of excommunication.⁴⁶ During the last two centuries, the

45. Susanna Kim Ripken, *Corporations are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 *FORDHAM J. CORP. & FIN. L.* 97, 167–68 (2009) (“Moral philosophy suggests the possibility that corporations are moral persons with the moral responsibility to act in ways that are just, and to conduct their business activities in accordance with moral norms that go beyond what the law requires. Organization theory highlights the sociological and psychological dimensions of organizational behavior, demonstrating that the corporate person has its own character and culture, through which it not only exerts considerable influence over its internal members, but also maintains a certain image and an identifiable presence in society. Political theory and philosophy shed a different light on the corporate person. The lighting in one political pluralist setting casts the corporate person in the role of a mediating institution, serving as a buffer between the individual and the coercive power of the state. However, the lighting in a contrasting pluralist setting reveals a corporate person who wields just as much power as the state. This political power can pose a threat to democracy if left unchecked; the state must serve as a countervailing force to protect individuals from corporate power. Religious thinkers focus on an entirely different aspect of the corporate person and see it as a center for the spiritual flourishing of its members and society. By cultivating virtues and the common good in a manner that is unique to the corporate person, the corporation takes on theological significance. Economic theory emphasizes the contractual exchanges that are so critical to corporate activity; the corporation resembles a marketplace where individuals draw mutual benefits from their bargains with each other.”).

46. John Dewey, *The Historical Background of Corporate Legal Personality*, 35 *YALE L.J.* 655,

jurisprudential debate over the nature of the corporate entity has frequently been conceptualized as a choice between two purported improvements on the ancient “legal fiction” model: “corporate realism,” which posits that a corporation’s legal personality is actually a manifestation of its real personality in society, and corporate “nominalism,” which holds it to be merely shorthand for describing a contractual arrangement amongst individual shareholders.⁴⁷ Despite the “death” of corporate nominalism in the 1920’s, with the ascent of theories such as John Dewey’s claim that “‘person’ signifies what law makes it signify,”⁴⁸ nominalism has been revived recently in the newer “contractual theory of the firm,” which describes corporations as “legal fictions which serve as a nexus for a set of contracting relationships among individuals.”⁴⁹

One of the many difficulties in any conception of corporate personhood is, as noted by many commentators—including Innocent IV when conceiving his original bifurcated theory of the organization—the very fact that a corporation is inherently “soulless;” an automated amalgam of individuals with no separate heart or mind.⁵⁰ Others have argued that because corporate managers make decisions based upon external factors which sometimes relate to social benefit, these external factors can sometimes function as a corporate “conscience” insofar as they can produce “good” corporate behaviors.⁵¹ Whatever the

664 (1926).

47. See Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 584 (1999).

48. Dewey, *supra* note 46, at 655.

49. Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976). In his legal history of the corporation Gregory Mark explains why the uncontroversial acceptance of the corporation as a legal person after World War II was a radical departure from the jurisprudential debates of the nineteenth and early twentieth centuries. Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1441 (1987). In the landmark early nineteenth century case *Dartmouth College v. Woodward* the Supreme Court held that a corporation owed its existence primarily to the government, rather than to its incorporators or constituents, and as a “creature of law” had only the rights and privileges granted to it by the government. 17 U.S. 518, 636 (1819). When states eventually shifted from attempting to regulate states through their charters to regulating the harm flowing from their activities, corporate lawyers attempted to protect corporate property from regulation by asserting a partnership-like model. Mark, *supra*, at 1442. This attempt, Mark argues, “laid the groundwork for the conception of the corporation as a real person, which saw the corporation as an autonomous, self-directed entity in which rights inhered,” and that even later after “legal realists undermined the conception of rights, the terminology remained, bereft of its theoretical underpinnings.” *Id.*

50. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 134 (3d ed. 2005); Lawrence E. Mitchell & Theresa A. Gabaldon, *If I Only Had a Heart: Or, How We Identify a Corporate Morality*, 76 TUL. L. REV. 1645, 1646–47 (2002); RALPH ESTES, *TYRANNY OF THE BOTTOM LINE: HOW CORPORATIONS MAKE GOOD PEOPLE DO BAD THINGS* 102 (1995).

51. See Colin P. Marks, *Jiminy Cricket for the Corporation: Understanding the Corporate “Conscience”*, 42 VAL. U. L. REV. 1129 (2008).

theoretical justification for corporate “personhood,” the pervasiveness of the concept has substantial cultural weight.⁵² Doubtless, this is due in part to the fact that the law formally recognizes the corporation as an individual identity in a number of ways which impact the society in which the corporation acts.

As the Revised Model Business Corporation Act states, “unless its articles of incorporation provide otherwise, every corporation . . . has the same power as an individual to do all things necessary or convenient to carry out its business and affairs,” including bringing and defending lawsuits and owning and selling property.⁵³ The corporate right to own property is constitutionally protected. The corporation has most of the constitutional criminal procedural rights guaranteed to individuals, with all of the law enforcement tradeoffs such rights necessitate.⁵⁴ And, as the *Citizens United* decision clarified, corporations even have free speech rights, such as the right to fund independent political broadcasts without campaign finance limits.⁵⁵ This legal framework guarantees that, regardless of how one conceptualizes the internal structure of a corporation, the law has equipped it to act in society with many of the same protective legal buffers available to individuals.

B. Cultural Personification

The law’s personalized conception of corporations has translated into the culture in ways both quantitatively and qualitatively measurable. This section will survey evidence of social norms about the nature of the corporate person and demonstrate how many of these norms have in fact developed through the efforts of corporations themselves. I will discuss two areas of research that suggest the existence of a pervasive cultural perception of the corporation as a personified actor with humanized and

52. Writing at the height of the Legal Realist movement, Thurman Arnold argued in *The Folklore of Capitalism* that the imagery of corporate personification coupled with American cultural ideals about individualism justified social acceptance of *laissez faire* policy toward corporations. THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 118–36, 185–230 (1937). Because, he claimed, “[m]en cheerfully accept the fact that some individuals are good and others bad” and “since great industrial organizations were regarded as individuals, it was not expected that all of them would be good.” *Id.* at 188. Consequently, “[s]ince individuals are supposed to do better if let alone, this symbolism freed industrial enterprise from regulation in the interest of furthering any current morality. The *laissez faire* religion, based on a conception of a society composed of competing individuals, was transferred automatically to industrial organizations with nation-wide power and dictatorial forms of government.” *Id.*

53. Model Bus. Corp. Act § 3.02 (1985).

54. See, e.g., *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (recognizing Fourth Amendment protection from unreasonable searches and seizures); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (recognizing Fifth Amendment protection from double jeopardy); *Ross v. Bernhard*, 396 U.S. 531, 542 (1970) (recognizing Seventh Amendment right to trial by jury).

55. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

moral qualities. The first considers the effects of a corporation's "brand personality" on consumers. The second considers the results of a corporation's participation in cultural discourse on moral and social issues.

1. The Emotionality of Brands

An obvious way in which corporations function as persons in the social world is through their relationships with intended consumers. One study, for example, has shown that targeted marketing strategies demonstrating positive human qualities such as "commitment to family values" generated support from consumers.⁵⁶ Scholars in the field of communications have empirically modeled the process through which a corporation's materially observable characteristics translate for a consumer into a "personality attribution perception" through a process of personification; people form subjective perceptions of corporations through the apprehension and evaluation of human qualities.⁵⁷ In other words, the ways in which individuals relate to corporations is through seeing them as people and reacting to them emotionally on that basis. For example, the perception of Allstate Insurance as a trustworthy caretaker in whose "good hands" one wants to be, or of Ben and Jerry's Ice Cream as "laid back" and nature-loving.

This process of evaluation also creates a relationship between the consumer and the entity in question; by projecting an internal dynamic onto an inanimate object a human being determines his relationship to the object itself.⁵⁸ Because one attributes personality to brands, he can have a relationship with the personality and, consequently, develop emotions toward it.⁵⁹ Corporations, of course, pay large sums of money to advertising executives to capitalize on precisely this phenomenon, deliberately crafting personalities most likely to connect with the target markets for their products.

Furthermore, research shows that individuals' perceptions of brands are often quite similar to one another and it is therefore possible to discern "shared" or "public brand meanings."⁶⁰ Bullmore has used the term "consensus of subjectivity" to describe the empirical phenomenon of numerous autonomous individual perceptions being discovered to be

56. Jay M. Handelman & Stephen J. Arnold, *The Role of Marketing Actions with a Social Dimension: Appeals to the Institutional Environment*, 63 J. MARKETING 33 (1999).

57. GIEP FRANZEN & SANDRA MORIARTY, *THE SCIENCE AND ART OF BRANDING* 242 (2008).

58. Mark S. Cary, *Ad Strategy and the Stone Age Brain*, J. ADVERTISING RES., Jan.-Apr. 2000, at 103-06.

59. *Id.*

60. FRANZEN & MORIARTY, *supra* note 57, at 245.

closely related.⁶¹ This supports the idea that shared social norms about the particular moral personification of a given corporation exist. Yet the perceptions of brand personality experienced by either individuals or groups are not merely the marketing creations of a corporation itself; consumers “derive the personality of a brand on the basis of all their experiences with [it].”⁶² Thus, the personified social conception of a corporation can arise from bad actions unintended to contribute to the brand personality it deliberately constructs. If a corporation does something to appear as a “bad actor,” this moral judgment can contribute to its personified public brand meaning.

2. Corporations as Participants in Moral Discourse

While the legal purpose of a corporation is to generate revenue for the shareholders that comprise it, it remains nonetheless the case that corporations participate in their collective capacities in the external moral discourse of society at large. In other words, by selecting public relations messages with social welfare angles (for example, Chevron’s “People Do” environmental ads) or sponsoring charitable activities, the corporation becomes a coherent moral discussant in a public forum and affects the overall discourse that goes on there in the same way that an individual speaker might.

The debate in the management literature over Corporate Social Responsibility—in general terms, over whether a corporation has legal, ethical, or philanthropic responsibilities beyond the economic duty to make money for its shareholders—is premised on the notion that a corporation may “choose” from among several sets of values. While, as Colin Marks notes, this does not mean a corporation has a literal internal human conscience, it nonetheless makes social choices “influenced by external factors stemming, at least in part, from the corporation’s status as a social entity. . . .”⁶³ From this fact, Marks proposes, “the corporation’s ‘conscience’ is a complex combination and interaction of social and market forces as well as the individual consciences of its corporate managers.”⁶⁴

Scholars of the communicative theory of the firm have drawn upon Habermas’ model of moral imperatives arising out of the consensus derived from social discourse to show how businesses participate in external moral discourse separately from, though related to, the communicative structures regulating their individual members.

61. JEREMY BULLMORE, *BEHIND THE SCENES OF ADVERTISING* (1998).

62. *Id.* at 246.

63. Marks, *supra* note 51, at 1150.

64. *Id.*

Corporations are both “bound by moral constraints in virtue of being institutions subject to the demands of public morality through legitimate law” and also “moral communities in which communicative action explains their ability to enhance the interests of all members.”⁶⁵ This communicative formulation gives some structure to the intuition that corporations function as moral actors, and as more than simply the sum of the actions of their human employees. In other words, a corporation’s unified moral stance to the outside world is something individualized and separate from its internal community comprised of individuals.

Interestingly, some evidence suggests that, when faced with moral dilemmas, corporations function like individuals in their internal behavior as well. The literature on organizational psychology demonstrates that corporations are capable of psychological reactions to their own misconduct that track with individual reactions to trauma but impose externalities on the world around them.⁶⁶ During an oil spill, for example, Tarja Ketola has studied how “an organization, like an individual, needs to dose the pain it experiences, in order to survive from a blow” through psychological defense mechanisms: “denial gives time to comprehend what has happened, intellectualization makes the incident look logical, projection eases the guilty feelings and rationalization provides justifications. All these defenses soothe the pain until the organization is mentally ready to sublimate its wrongdoing through compensation.”⁶⁷

These examples of how and why corporations adopt a morally inflected stance amidst the external cultural discourse point to the inevitability of social norms about corporations as conscience-endowed individuals. Regardless of the corporate purposes behind expressions of social concern—or of guilt—corporations still present individualized personalities to the world in which they act, and those personalities behave as though making moral choices through their actions.

65. Jeffery D. Smith, *A Précis of a Communicative Theory of the Firm*, 13 *BUS. ETHICS: A EUROPEAN REV.* 317, 329–30 (2004).

66. See, e.g., Andrew D. Brown, *Narcissism, Identity, and Legitimacy*, 22 *ACAD. MGMT. REV.* 643 (1997) (finding that the “self esteem” of organizations is regulated through such ego defenses); see also Andrew D. Brown & Ken Starkey, *Organizational Identity and Learning: A Psychodynamic Perspective*, 25 *ACAD. MGMT. REV.* 102 (2000); R. DE BOARD, *THE PSYCHODYNAMICS OF ORGANIZATIONS* (1978); Stephen Fineman, *Emotional Subtexts in Corporate Greening*, 17 *ORG. STUD.* 479 (1996); Larry Hirschhorn & Donald R. Young, *Dealing with the Anxiety of Working: Social Defenses as Coping Strategy*, in *ORGANIZATIONS ON THE COUCH: CLINICAL PERSPECTIVES ON ORGANIZATIONAL BEHAVIOR AND CHANGE* 215–40 (1991).

67. T. Ketola, *Corporate Psychological Defenses: An Oil Spill Case*, 65 *J. BUS. ETHICS* 149, 149 (2006).

3. Concluding Observations

Certainly many commentators have noted the social phenomenon of discussing collective entities in the language of individual responsibility.⁶⁸ A 1993 poll after the *Exxon Valdez* oil spill, for example, found that 87% of respondents felt “very angry” or “somewhat angry” toward “the companies involved.”⁶⁹ Likewise, when a January 2002 Fox News Poll, asked whether the “collapse of Enron” should be classified as a “political scandal,” a “financial scandal” or a “criminal scandal,” the greatest number of respondents, 39%, considered it a “criminal scandal” (the second greatest number, 24%, considered it “mixed,” with 21% considering it financial, only 6% considering it political and 10% unsure).⁷⁰ In two different 2010 polls following the BP oil spill, the majority of respondents, 56% and 65% respectively, felt that the federal government should pursue criminal charges against BP and “other companies” involved (42% and 51% respectively felt so “strongly”).⁷¹ These numbers exceed the 53% of respondents to a different, similarly timed poll who approved of the government “filing criminal charges against employees and executives at BP.”⁷²

These examples all suggest the existence of shared social norms about the corporation as a personified moral actor that can be culpable for its misconduct. Yet, the desire to vindicate social disapproval and thereby reap the utilitarian benefits of legitimacy cannot be the only justifications for imposing criminal punishment; otherwise we would resort to a system of mob justice. The fact remains that the law cannot, in order to realize utilitarian goals such as legitimacy, rightfully punish beyond the limits of harm actually caused by a criminal act.⁷³ So the

68. See, e.g., Buell, *supra* note 11, at 493 (“Where [institutional] effects make the difference in how someone behaves, we need the institutional referent to say so. Consider how we speak coherently and continuously about institutions while membership changes.”); PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 41 (2002) (“[I]n day-to-day life we have little difficulty attributing moral responsibility to corporations and other groups, and the law is not alone in recognizing group responsibility.”); Ripken, *supra* note 45, at 139 (“If the corporation is considered a member of society, deeper normative questions arise regarding its role and responsibilities...we might also question whether corporations bind our society together by facilitating the fulfillment of society’s beliefs, hopes, and promises.”).

69. NAT’L FAMILY OP. RESEARCH, PORTER/NOVELLI CRISIS SURVEY (June 1993), available at http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html.

70. FOX NEWS & OPINION DYNAMICS, POLL (Jan. 2002), available at http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html.

71. ABC NEWS & WASH. POST, POLL (July 2010), available at http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html; ABC NEWS & WASH. POST, POLL (June 2010), available at http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html

72. CNN/OP. RESEARCH CORP., POLL (June 2010), available at http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html.

73. See, e.g., HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 36 (1968); JEREMY

question becomes whether corporate crime can be said to produce additional harm beyond that which can be attributed to the responsible employees in their individual capacities. In other words, does the existence of a corporation produce harm that is distinguishable from that for which the law of conspiracy could punish the group of underlying employees that agrees to engage in the same primary behavior? I argue that the *collective* structural qualities of corporations—particularly when coupled with the personified moral qualities discussed previously—produce such harm.

IV. THE SUBSTANTIVE HARMS OF BRIBERY

To begin to make this claim, I first turn to the specific crime of bribery of government officials for business consideration, which has made legal headlines over the last few years due to a dramatic upswing in enforcement of the FCPA, which punishes U.S. issuers for their bribery of officials abroad. Because such crimes by definition take place in a commercial context, it is a particularly fertile ground for exploring the unique harms imposed by corporate crime. Until the boom in FCPA enforcement, the crime of bribery had been somewhat neglected in the scholarly literature.⁷⁴ Furthermore, as a quick Westlaw search reveals, the lion's share of recent empirical scholarship on bribery has focused on its effects in developing countries, as opposed to the domestic context, due in part to the efforts of international anticorruption NGOs.⁷⁵ The debates over the “federalization” of domestic public corruption prosecutions further illuminate the nature of the harm criminalized in the form of bribery.⁷⁶

In this Part, I identify what I call the “perceptual harms” imposed on society by a corporate entity engaging in bribery of government officials. I argue that—due to the enduring nature of the corporation, and the systemic interconnections between a corporate structure and the government entities with which it interacts—many of these perceptual harms arise from the existence of the corporate structure itself.

BENTHAM, THE RATIONALE OF PUNISHMENT (1830).

74. See Daniel Hays Lowenstein, *For God, for Country, or for Me?*, 74 CALIF. L. REV. 1479, 1480 (1986) (reviewing John T. Noonan, Jr., *Bribes* (1984)) (noting the dearth of work on bribery at the time of Noonan's book).

75. See generally BENJAMIN S. BUCKLAND, *GLOBAL ANTI-CORRUPTION EFFORTS: THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS* (2007).

76. See generally George D. Brown, *Should Federalism Shield Corruption? Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225 (1997).

A. Bribery and Public Confidence

The debate over the exact nature of the “wrong” represented by bribery has been age-old and largely culturally contingent. Most definitions turn on the core elements of: (1) a benefit passing to a public official, (2) the exercise of authority, and (3) some form of reciprocity but, as John Noonan notes in one of the most comprehensive existing treatments of the subject, the meanings of each of these elements vary according to the standards of a particular time and culture.⁷⁷ The behavior that counts as a bribe must therefore first be defined politically and socially in order to warrant the public moral condemnation of the criminal law.⁷⁸ The federal domestic anti-bribery statute, for example, prohibits giving or promising to give a “thing of value” to a federal official in exchange for a specific official action.⁷⁹

Regardless of precise definitions, most point to the deterioration of “public confidence” in governmental institutions as the general category of harm sought to be punished through the criminalization of bribery.⁸⁰ Daniel Lowenstein suggests the idea of “stewardship” as a framework for understanding this problem: both the increasing complexity and technological advancement of society create legal, political, and other institutional arrangements in which some parties act as stewards for the interests of other beneficiaries.⁸¹ This creates the danger that third parties will offer benefits to the stewards that do not advantage the beneficiaries, a situation which the very “ethical, legal, political, social, or economic values gave rise to the stewardship obligation in the first place” may be invoked to rectify.⁸² This definition makes it easy to see how part of what is at stake in talk of “public confidence” is actually the sum of individual reactions to a structural arrangement in which his or her well-being is improperly subordinated to a reciprocal relationship between a more powerful steward and a third party. In such a case, as Lowenstein notes, this political structure must police itself by imposing restraints on such risks through the criminal law.

In the United States, the “public confidence” casualties of bribery

77. JOHN T. NOONAN, JR., *BRIBES* xi (1984).

78. See Lowenstein, *supra* note 74, at 1510.

79. 18 U.S.C. § 201 (2006).

80. See, e.g., *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961) (stating that a “democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption”); H. R. Rep. No. 87-748, at 2 (1961) (noting as a reason motivating the domestic bribery law, 18 U.S.C. § 201, a “consensus of public expressions” on the subject of conflict of interest breaches in the Executive Branch of the federal government).

81. Lowenstein, *supra* note 74, at 1482.

82. *Id.*

were never more apparent than in the mood of heightened suspicion of corporate corruption that came on the heels of the Watergate scandal in the mid-1970s. Shortly after Watergate, SEC investigations had revealed that more than 400 U.S. companies had made improper payments totaling more than \$300 million to foreign government officials in exchange for business.⁸³ A 1976 Gallup poll revealed that while a majority of respondents (58%) believed the bribes to be the actions of a few dishonest individuals, a substantial minority (37%) considered the misconduct to be “the usual practices of business in general.”⁸⁴

This crisis in confidence elicited several notable government responses, which contributed to a clearer political definition of bribery in the United States. First, federal prosecutors began to rely on the public’s “intangible right” to the honest services of its employees as a basis for bringing prosecutions under the mail fraud statute against corrupt government employees whose conduct did not involve the explicit transfer of money required to state a charge under the bribery statute.⁸⁵ In *United States v. Mandel*, for example, the court held that the Maryland governor’s business dealings with entities seeking to benefit from state legislation on race tracks constituted fraud because “the public is not receiving what it expects and is entitled to, the public official’s honest and faithful service.”⁸⁶ Second, prosecutors began more frequently to utilize the Racketeering Influenced and Corrupt Organization Act (RICO), which includes the violation of the federal bribery statute as a predicate offense, to prosecute “patterns” of bribery in police departments, mayoralities, state legislatures, and gubernatorial offices in the same manner as they pursued members of organized crime syndicates.⁸⁷ This practice recognized the structural similarities between “the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce,” which RICO sought to eliminate,⁸⁸ and the illicit networks of power created by business interests entering into agreements with corrupt officials. In both situations, innocent third parties—citizens and consumers—suffer through the unfair and systemic distortion of the commercial playing field by self-interested actors with means to enforce their priorities.

83. See *United States v. O’Grady*, 742 F.2d 682, 701 (2d Cir. 1984).

84. Gallup Organization, Gallup/Newsweek Poll # 1976-946K: Political Attitudes Survey (1976).

85. Joshua A. Kobrin, *Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and § 1346*, 61 N.Y.U. ANN. SURV. AM. L. 779, 790 (2006).

86. 591 F.2d 1347, 1354–55, 1362 (4th Cir. 1979).

87. See 18 U.S.C. § 1961–68 (2006).

88. S. Rep. No. 617, at 76 (1969).

Third, Congress enacted the FCPA, intended to prevent the bribing of foreign officials by corporations doing business abroad.⁸⁹ When he signed the Act on December 19, 1977, President Jimmy Carter suggested that one of the goals of the Act was to prevent the public perceptions arising from pessimistic attitudes about the relationships between corporations and government: “[c]orrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions.”⁹⁰ Carter’s words point to the fact that a particular aspect of the crisis in “public confidence” the Act was intended to resolve related, like RICO, to the institutional relationship between corporate structures and government authorities. To understand whether the relationship between a corporation and government authority created by bribery produces a unique brand of harm, it is necessary to look below the generalized concern over “public confidence” threatened by all instances of bribery and examine the components of the harm produced by a corporate bribe.

B. The Structure of Corporate Bribery

Bribery is a somewhat unusual crime, both on account of the diffuseness of the harm attributable to an individual act and the indirect and various identities of its victims. Philip Nichols has identified several of the more extreme examples: the tens of thousands of people killed in Turkey after their homes—built after contractors had “bribed their way around Turkey’s building codes”—collapsed in an

89. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in sections of 15 U.S.C. § 78) amended by Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff) and International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff). The FCPA consists of three classes of prohibitions: first, the payment or offer to pay anything of value to a foreign official to obtain or retain business (“anti-bribery” provisions); second, failure to maintain adequate books and records to fully reflect all transactions (“books and records” provision); and, third, failure to maintain effective internal accounting controls (“internal controls” provision). The latter two apply only to issuers listed on U.S. stock exchanges and are therefore enforced primarily by the SEC, as opposed to the anti-bribery provisions, which are enforced, both criminally and civilly, primarily by the DOJ. Subsequent to the 1998 amendments to the FCPA, the anti-bribery provisions apply to U.S. persons (regardless of where the misconduct occurred), foreign and domestic companies doing business in the United States, companies traded on U.S. exchanges or registered with the SEC, and foreign persons or companies who perform any act within U.S. territory in furtherance of a bribe.

90. John T. Woolley & Gerhard Peters, Foreign Corrupt Practices and Investment Disclosure Bill Statement on Signing S. 305 Into Law, *The American Presidency Project*, available at <http://www.presidency.ucsb.edu/ws/?pid=7036>.

earthquake,⁹¹ and the collapse of the Sampoong department store in Seoul, South Korea, which killed over 300 people under similarly corrupt circumstances.⁹²

The economic victims of bribery are even more multitudinous. Corruption dissuades foreign investment in underdeveloped economies where such investment is necessary to spur technological innovation and create jobs.⁹³ According to Transparency International's Corruption Perception Index, the most corrupt states are the most impoverished, and "a country's improvement in the Corruption Perception Index ranking by even one point . . . increases capital inflows by 0.5 percent of a country's gross domestic product and average incomes by as much as 4 percent."⁹⁴

These facts suggest that, by its very nature, bribery harms not only through the immediate counterfactuals it precludes (the winning of a specific contract by another firm that could build to code, for example) but by the harms that flow from social perceptions of alliances between corporate interests and the structures of power.⁹⁵ These perceptions, as Nichols notes, can become self-reinforcing: corruption undermines the legitimacy of government and destroys popular hope for change and efforts to reform.⁹⁶ In short, the citizens of a corrupt state tend to

91. Philip M. Nichols, *The Myth of Anti-bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 627 (2000).

92. *Id.* at 627–28.

93. See Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT'L L. REV. 1307, 1316–17 (2004) (citing Ray Barrell & Nigel Pain, *Foreign Direct Investment, Technological Change, and Economic Growth Within Europe*, 107 ECON. J. 1770, 1770 (1997) and Glenn Firebaugh, *Growth Effects of Foreign and Domestic Investment*, 98 AM. J. SOC. 105, 105 (1992)).

94. See Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 427 (2009) (citing Transparency Int'l, *Persistently High Corruption in Low-Income Countries Amounts to an "Ongoing Humanitarian Disaster"* 7 (2008), available at <http://www.transparency.org/content/download/36589/575262> (quotations omitted)).

95. Commenting on a 2001 Gallup survey which found that 33% of 779 multinational executives believed that the problem of corruption in the business world was worsening, Transparency International Chairman Peter Eigen said that "the data provides a disturbing picture of the degree to which leading exporting countries are perceived to be using corrupt practices." See *New Poll Shows Many Leading Exporters Using Bribes*, TRANSPARENCY INT'L, Oct. 26, 1999 (emphasis added), available at <http://www.transparency.de/documents/cpi/cpi-bpi>.

96. Nichols, *supra* note 93, at 1319–20 ("Corruption delegitimizes governments and undermines support for change, particularly market-oriented change. Susan Rose-Ackerman powerfully summarizes the social affects [sic] of corruption and its detrimental effect on the legitimacy of governments: 'Citizens may come to believe that the government is simply for sale to the highest bidder. Corruption undermines claims that the government is substituting democratic values for decisions based on ability to pay. It can lead to coups by un-democratic leaders' There are two effects that are particularly acute in emerging economies. The first is that popular support for reform erodes, and the absence of that support can seriously undermine the possibility of positive change. The other effect is harder to quantify, but has far more of a human face: corruption contributes to miserable social conditions.") (citing Susan Rose-Ackerman, *The Political Economy of Corruption*, in CORRUPTION AND THE GLOBAL

distrust government, leading to an overall sense of the hopelessness of attempting to work within existing legal parameters.⁹⁷ Corruption also leads to a pervasive cultural malaise which renders the individual helpless alongside institutional structures.⁹⁸

As an example, consider post-Cold War Russia, notorious for its pandemic of bribery at all levels of society.⁹⁹ Though perhaps the country's recent entry into the Organisation for Economic Co-operation and Development (the "OECD") signals a new course, Russia had, over the last 20 years, become one of the most corrupt countries in the world.¹⁰⁰ In 2005 the World Bank found that 78% of businesses in Russia reported having to pay bribes and Russia's Foreign Investment Advisory Council found that 71% of businesses considered corruption the biggest barrier to foreign investment.¹⁰¹ An OECD study listed corruption as one of the most significant obstacles to reform in the country.¹⁰² Furthermore, the brutal hazing of young men conscripted to serve their mandatory two years of service in the Russian military has been exacerbated by the widespread availability of medical exemptions for those with the money to pay bribes for them.¹⁰³ The disproportionate percentage of conscripts coming from broken homes or criminal backgrounds has been pointed to as a reason for the dearth of qualified

ECONOMY 31, 44 (Kimberly Ann Elliott ed., 1997)); see also Martin Davies, *Just (Don't) Do It: Ethics and International Trade*, 21 MELBOURNE U. L. REV. 601, 614 (1997).

97. See A.W. Cragg, *Business, Globalization, and the Logic and Ethics of Corruption*, 53 INT'L J. 643, 654 (1998); Herbert H. Werlin, *The Consequences of Corruption: The Ghanaian Experience*, 88 POL. SCI. Q. 71, 79 (1973).

98. One reason for the self-perpetuating nature of beliefs about corruption may come from the phenomenon identified in psychology as the "availability heuristic," which describes the relationship between the perceived likelihood of an event based upon how easily an example may be brought to mind. Amos Tversky & Daniel Kahneman, *Judgments Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124-31 (1974). Classic examples of the cognitive biases explained by this phenomenon include the tendency to be more concerned about plane crashes than car crashes, due to the high profile nature of plane crashes and the ensuing media coverage, or to underestimate the risks of smoking due to available examples of personal acquaintances who lived long lives despite being smokers. Even in a reasonably uncorrupt society, then, high profile examples of bribery have the potential to generate a disproportionate degree of cynicism about government.

99. The Indem Foundation estimated, in 2008, that Russians pay \$319 billion annually in bribes. See Peter Finn, *Taking on Russia's Ubiquitous Bribery*, WASHINGTON POST, July 14, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/13/AR2008071301928.html>.

100. 143th out of 180th according to one ranking. TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX (2007), available at http://archive.transparency.org/policy_research/surveys_indices/cpi/2007.

101. See Steven Lee Meyers, *Pervasive Corruption in Russia is 'Just Called Business'*, N.Y. TIMES, Aug. 13, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9F03E2DC153EF930A2575BC0A9639C8B63&pagewanted=1>.

102. *Id.*

103. See *Victim of Hazing Andre Sychev Becomes Symbol of Russian Military Corruption*, PRAVDA, Sept. 2, 2006, <http://english.pravda.ru/russia/politics/09-02-2006/75688-sychev-0/>.

junior officers and the perpetuation of abuse by those whose job it should be to curtail it.¹⁰⁴

Despite the complexity and demonstrable severity of the harms bribery imposes on the Russian populace, recent data suggest that Russians themselves may have ceased to find it normatively wrong. In a 2006 Gallup poll, 44% of Russians surveyed consider it morally acceptable to bribe “nurses or doctors in order to get better care in the hospital,” and close to a third (33%) consider it morally acceptable to give a bribe in order to have a child admitted to a college or university.¹⁰⁵ Among 15–24 year-olds, 42% considered such bribes to universities to be morally acceptable.¹⁰⁶ Significantly, Russian business entrepreneurs appear both more likely to give bribes (called “blat” in the normal business context) than any other group and to deem it morally acceptable. The poll revealed that 47% of respondents identifying as business owners reported having given bribes in the previous twelve months. Furthermore, respondents who stated they had even *thought* about starting their own businesses were significantly more likely than those who had never done so to consider each type of bribe listed as morally acceptable: 56% thought it was morally acceptable to bribe nurses or doctors and 46% to pay bribes to get their child into a university.¹⁰⁷ And 32% of respondents who had thought about starting their own businesses said they have given bribes in the prior 12 months (compared to 21% for the entire population).¹⁰⁸

Yet other research strongly suggests that even among societies in which corruption is endemic, it is nonetheless deemed unacceptable. Studies in Sierra Leone,¹⁰⁹ Kazakhstan,¹¹⁰ Mongolia and Bulgaria¹¹¹—all countries with pervasive corruption problems—all found that the majority of citizens studied found corruption harmful and opposed it.

104. See Jeremy Bransten, *Russia: Military Conscripts Caught in Deadly ‘Cycle of Violence,’* Radio Free Eur., Oct. 21, 2004, <http://www.rferl.org/content/article/1055451.html>.

105. Sergei Gradirovski & Neli Esipova, *Corruption in Russia: Is Bribery Always Wrong?*, GALLUP, Nov. 15, 2006, <http://www.gallup.com/poll/25456/corruption-russia-bribery-always-wrong.aspx>.

106. *Id.*

107. *Id.*

108. *Id.*

109. SAHR JOHN KPUNDEH, *POLITICS AND CORRUPTION IN AFRICA: A CASE STUDY OF SIERRA LEONE* 161–66, 172 (1995) (finding that 83.8% of interviewees believed that a new government should put a high priority on combating corruption).

110. Philip M. Nichols, *The Fit Between Changes to the International Corruption Regime and Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. PA. J. INT’L ECON. L. 863, 927 (2001) (finding that 96% of respondents believed fighting corruption should be a high government priority).

111. Philip M. Nichols, George J. Siedel & Matthew Kasdin, *Corruption as a Pan-Cultural Phenomenon: An Empirical Study in Countries at Opposite Ends of the Former Soviet Empire*, 39 TEX. INT’L L.J. 215, 231 (2004) (finding that almost half of Bulgarians surveyed and over a third of Mongolians ranked corruption as the most serious social problem of the listed choices).

These data suggest several important things about the criminalization of bribery generally, and about corporate criminal liability for bribery specifically, from a utilitarian perspective. First, it is an area where social norms may be unsettled, and where the criminal law may do significant expressive work to the extent that it can build norms against it. Second, and relatedly, the failure to punish bribery is, at a minimum, closely correlated with an observable delegitimizing of the legal structures of the countries that allow it. Third, as the recent data from Russia suggest, the existence of a business context is associated with a greater tolerance of bribery in general—to the extent that individuals identify as proprietors of businesses, they are more willing to buy into existing networks of corruption across all sectors of society. This suggests that encouraging a view of bribery as a “corporate crime” has the expressive benefit of attacking this lower, business-associated moral standard responsible for this second set of bribery-friendly norms. As stated previously, however, the fact that we can derive these utilitarian benefits from punishing corporations for their employees’ participation in schemes of bribery is not in and of itself sufficient to support entity liability.

Several specific examples from recent FCPA enforcement actions will demonstrate how at the heart of the harm flowing from the crime of bribery is the perception of impermeable networks of power between business interests and corrupt governments. I argue that the temporally enduring and physically pervasive nature of the corporate structure intensifies these perceptual harms. It is these harms, linked to the structure of the corporation itself, that justify imposing entity liability in addition to liability for participating individual employees in cases where corruption can be said to pervade the corporate structure.

1. Siemens

In 2008, Siemens AG and three of its subsidiaries pleaded guilty to the largest FCPA settlement in history. The criminal information alleged that Siemens had paid more than \$800 million in corrupt payments between 2001 and 2007, as well as \$1.7 million in kickbacks to the Iraqi government in connection with the United Nations Oil-For-Food Program.¹¹² Among other things, the information alleged that Siemens Argentina conspired to make bribes to Argentinian officials in exchange for work on a \$1 billion project to develop a national ID card; Siemens Bangladesh channeled bribes to the son of the Prime Minister

112. U.S. DEP’T OF JUSTICE, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines* (2008), available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

of Bangladesh along with Telecommunications and Procurement officials in connection with a \$40.9 million mobile telephone contract; and Siemens Venezuela paid \$19 million in bribes to Venezuelan government officials in connection with mass transit systems in the cities of Valencia and Maracaibo.¹¹³ (The criminal information also mentioned bribery schemes in Israel, Mexico, Vietnam, China and Russia).¹¹⁴ The complexity and pervasiveness of the bribery undertaken by Siemens prompted one commenter to suggest that the Siemens scandal was to bribery what genocide is to murder for the purposes of moving a crime into “the realm of universally actionable rights” under principles of international law.¹¹⁵ All in all, Siemens was alleged to have made \$1.1 billion in profits from its corrupt transactions.

2. Technip/Snamprogetti/Halliburton/JCG

Technip, a French engineering company, and Snamprogetti, a Dutch engineering company, participated in a joint venture with Halliburton subsidiary Kellogg, Brown & Root, to win Engineering, Procurement and Construction (EPC) contracts to expand the Bonny Island liquid natural gas plant for Nigeria LNG Limited, which is owned in part by the Nigerian National Petroleum Corporation.¹¹⁶ From August 1994 until June 2004, Technip and Halliburton—which had succeeded in winning four contracts in connection with the Bonny Island Project—paid bribes totaling around \$182 million to a number of Nigerian government officials, including officials in the executive branch, employees of the government-owned Nigerian National Petroleum Corporation, and employees of government-controlled Nigeria LNG Limited.¹¹⁷ To conceal the bribes, the joint venture entered into sham consulting or services agreements with intermediaries and held “cultural meetings” where the joint venture partners and their agents made arrangements to pay the bribes.¹¹⁸

113. *Id.*

114. *Id.*; Brief for Plaintiff, *United States v. Siemens Aktiengesellschaft* (D.D.C. Dec. 12, 2008) at 21, available at <http://www.justice.gov/opa/documents/siemens-ag-info.pdf>; Complaint, *United States v. Siemens Aktiengesellschaft* (D.D.C. Dec. 12, 2008), available at <http://fcpa.shearman.com/files/0b9/0b9f5f40b093e1b889103edb2943ac7f.pdf?i=a8c51dd2f3db4606463ae15fac9da788>.

115. Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 442 (2010).

116. OFFICE OF PUB. AFFAIRS, U.S. DEP'T OF JUSTICE, *Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty*, June 28, 2010, available at <http://www.justice.gov/opa/pr/2010/June/10-crm-751.html>.

117. *Id.*

118. *Id.*; Brief for Plaintiff, *United States v. Technip, S.A.* (S.D. Tex. June 28, 2010) at 9,

It is perhaps not a coincidence that Nigeria, repeatedly listed as one of the most corrupt countries in the world by Transparency International, also contains one of the five most polluted spots on Earth: the Niger River delta, the site of the oil around which much of Nigerian corruption is centered.¹¹⁹ For the last half century, the equivalent of one *Exxon Valdez* worth of oil is spilled in Nigeria every year, and the discharge of the gas that is a byproduct of drilling causes rain “so acidic that corrugated iron roofs quickly turn to rust.”¹²⁰ The life expectancy of a Nigerian living in the Delta is seven years lower than in the rest of the country. Nigeria is also one of the most impoverished nations on earth with 80% of the profit from its oil exports ending up in the hands of one percent of the population.¹²¹ With Nigerian public officials neutralized by foreign bribery—or “settled,” as Nigerians call it—crusading former prosecutor Nuhu Ribadu explained, “[u]nless we address the problem of corruption there isn o hope, there is no future.”¹²²

3. Daimler

German automotive manufacturer Daimler AG and its subsidiaries paid hundreds of bribes worth tens of millions of dollars to officials in at least twenty-two countries including China, Croatia, Egypt, Greece, Hungary, Indonesia, Iraq, Ivory Coast, Latvia, Nigeria, Russia, Serbia and Montenegro, Thailand, Turkey, Turkmenistan, Uzbekistan, and Vietnam, for assistance in securing government contracts valued at hundreds of millions of dollars.¹²³ According to the Department of Justice (DOJ) press release, bribe payments were often identified internally and recorded as “commissions,” “special discounts,” or “nützliche Aufwendungen” or “N.A.” payments, which translates to “useful payment” or “necessary payment,” and were “understood by certain Daimler employees to mean ‘official bribe.’”¹²⁴ Daimler also admitted that it agreed to pay kickbacks to the former Iraqi government

available at <http://www.justice.gov/criminal/fraud/fcpa/cases/technip-sa/06-28-10-technip-%20information.pdf>.

119. See TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2009: CORRUPTION AND THE PRIVATE SECTOR, 200–03 (2009), available at http://www.transparency.org/whatwedo/pub/global_corruption_report_2009; Sam Kennedy, *Nigeria: The Hidden Cost of Corruption*, PBS.ORG, Apr. 24, 2009, <http://www.pbs.org/frontlineworld/stories/bribe/2009/04/nigeria-the-hidden-cost-of-corruption.html>.

120. Kennedy, *supra* note 120.

121. *Id.*

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

123. OFFICE OF PUB. AFFAIRS, U.S. DEP’T OF JUSTICE, *Daimler AG and Three Subsidiaries Resolve Foreign Practices Act Investigation and Agree to Pay \$93.6 Million in Criminal Penalties*, Apr. 1, 2010, available at <http://www.justice.gov/opa/pr/2010/April/10-crm-360.html>.

124. *Id.*

in connection with contracts to sell vehicles to Iraq under the United Nation's Oil for Food program.¹²⁵

4. Alcatel-Lucent

Telecommunications firm Alcatel-Lucent's three subsidiaries paid millions of dollars in bribes to officials in Costa Rica, Honduras, Malaysia and Taiwan and violated the internal controls and books and records provisions of the FCPA related to the hiring of third-party agents in Kenya, Nigeria, Bangladesh, Ecuador, Nicaragua, Angola, Ivory Coast, Uganda and Mali.¹²⁶ Overall, the company earned approximately \$48.1 million in profits resulting from the bribes.¹²⁷

Specifically, according to the DOJ press release, Alcatel CIT wired more than \$18 million to two consultants in Costa Rica, more than half of which they passed on to various Costa Rican government officials for assisting Alcatel CIT and Alcatel de Costa Rica in getting business.¹²⁸ The consultants then created phony invoices that they submitted to Alcatel CIT. Senior Alcatel executives approved the payments to the consultants despite the fact that they were performing little or no legitimate work.¹²⁹ As a result of this arrangement, Alcatel CIT won three contracts in Costa Rica worth a combined total of more than \$300 million as a result of corrupt payments to government officials and reaped a profit of more than \$23 million.¹³⁰ For his role in this scheme, Alcatel executive Christian Sapsazian was sentenced, in 2008, to 30 months in prison.¹³¹

In December 2010 the Instituto Costarricense de Electricidad of Costa Rica (ICE)—whose directors and employees were the recipients of the Alcatel bribes—petitioned a court for “protection of its rights as a victim” of the scheme, arguing that “it is universally recognized, in a scheme for bribery, that an entity whose employees accept improper benefits to affect corporate decisions is a victim.”¹³² ICE further

125. *Id.*

126. OFFICE OF PUB. AFFAIRS, U.S. DEP'T OF JUSTICE, *Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve Foreign Corrupt Practices Act Investigation*, Dec. 27, 2010, available at <http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html>.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Roger M. Witten et al., *Bloomberg, The Increased Prosecution of Individuals Under the FCPA: Trends and Implications* (2010), available at <http://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=92056>.

132. See Brief for Petitioner, *In re Instituto Costarricense de Electricidad*, No. 10-CR-20906, (11th Cir. June 15, 2011), available at <http://fcpprofessor.blogspot.com/search/label/Alcatel-Lucent>; see also FCPA Professor, <http://fcpprofessor.blogspot.com/search/label/Alcatel-Lucent> (last visited

contended that “the notion that acceptance of bribes by five of ICE’s more than 16,500 employees, managers, and directors necessarily renders ICE an active participant in Alcatel’s admitted bribery scheme is nonsense.”

Alcatel Standard hired a consultant in Honduras who was personally selected by the brother of a senior Honduran government official, despite being a perfume distributor with no experience in telecommunications.¹³³ According to the DOJ press release, Alcatel CIT executives knew that a significant portion of the money paid to the consultant would be paid to the family of the senior Honduran government official in exchange for favorable treatment of Alcatel CIT.¹³⁴ As a result of these payments, Alcatel CIT won contracts worth approximately \$47 million and from which it earned \$870,000.¹³⁵

Alcatel Standard also retained two consultants on behalf of another Alcatel subsidiary in Taiwan to assist in obtaining an axle counting contract worth approximately \$19.2 million.¹³⁶ Alcatel paid these two consultants more than \$950,000, despite the fact that neither consultant had telecommunications experience, so that Alcatel SEL could funnel payments through them to Taiwanese legislators who could influence the awarding of the contract. Alcatel earned approximately \$4.34 million from this contract.¹³⁷

C. General Observations

The details of these FCPA actions yield several observations. First, the misconduct at issue in all of them took place across a number of geographic regions and over many years. While individual corrupt deals could be attributed to specific employees, without the enduring nature of the corporate entity, and the organizational structure allowing it to operate in a consistently corrupt manner in so many countries at once, the same level of harm could not have been accomplished. In other words, a corporation like Siemens is able to marshal so much financial and political capital to commit a single act of bribery in one place and

Dec. 30, 2012).

133. See Brief for Petitioner, In re Instituto Costarricense de Electricidad, No. 10-CR-20906, (11th Cir. June 15, 2011), available at <http://fcpprofessor.blogspot.com/search/label/Alcatel-Lucent>; see also FCPA PROFESSOR, <http://fcpprofessor.blogspot.com/search/label/Alcatel-Lucent> (last visited Dec. 30, 2012).

134. OFFICE OF PUB. AFFAIRS, U.S. DEP’T OF JUSTICE., *Alcatel-Lucent S. A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve Foreign Corrupt Practices Act Investigation*, Dec. 27, 2010, available at <http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html>.

135. *Id.*

136. *Id.*

137. See *id.*

time in part due to the existence of a sustained machinery of corruption built up over many places and times. Furthermore, at the level of causal mechanics, one can point to the omission of corporate efforts to fulfill the corporation's legal duty to prevent bribery as a cause of each individual act. The harm that each act causes cannot, then, be entirely attributed to the individual employees directly responsible for that act of bribery. The harms themselves in terms of public confidence are, so to speak, greater than the sum of their parts. And the negligent failure to prevent them can properly be attributed to the corporation as a collective.

Second, the nature of the harms of bribery can be characterized, in part, as rendering visible the link between private, corporate power and government power—the power, to use the Nigerian colloquialism, of “settling” the relevant government interest. The examples of misconduct related to the Oil for Food Program demonstrate this harm at a particularly rarified level—one at which corporations, a corrupt totalitarian regime; and the supra-national structure of the United Nations cost the Iraqi population \$1.8 billion in aid.¹³⁸ But in all cases, this visible link is so harmful because it causes individuals in a society to feel helpless in the face of coordinated power, and deters outside market actors from positive intervention.¹³⁹ While we lack the same amount of literature on these effects in the domestic context, this structure suggests the underlying content of the crisis in United States “public confidence” surrounding corporate interactions with government institutions that Carter cited as the driving motivation behind the FCPA.

Third, the visible relationship between corporate crime and this sort of perceptual harm, which is so clear in bribery cases, can inform our thinking about corporate criminal liability generally. As I will explore in the next section, when victims of an oil spill speak of “helplessness” and the enduring nature of the corporate structure relative to their deceased love ones, they suffer the same sort of harm—derived from perceptions of the relationship between corporate and legal power—as the Nigerian population experiences in the face of “settling.” This harm is larger than the actions of any discrete set of individual actors and can only be vindicated through expressive condemnation of the larger

138. See generally INDEPENDENT INQUIRY COMMITTEE, MANIPULATION OF THE OIL-FOR-FOOD PROGRAMME BY THE IRAQI REGIME (2005), available at http://kms1.isn.ethz.ch/serviceengine/Files/ISN/13894/ipublicationdocument_singledocument/b2775461-f442-4575-b746-9c038d3c8bb6/en/ManipulationReport.pdf.

139. See notes 92–93, *supra*, and supporting text. The helplessness of the Nigerian populace is reflected in the results of a 2012 Gallup Poll, taken after widespread protests erupted over the government's decision to suddenly remove fuel subsidies: 94% of Nigerians believed corruption was widespread. Steve Crabtree, *Almost All Nigerians Say Gov't is Corrupt*, GALLUP WORLD, Jan. 16, 2012, available at <http://www.gallup.com/poll/152057/almost-nigerians-say-gov-corrupt.aspx>.

structure that produces it.

V. THE CORPORATE FORM AND THE EXPERIENCE OF HARM

The example of bribery shows us how the enduring temporal existence of a corrupt corporation and its interdependence with its corrupt government clients results in specific perceptual harms to a society, including the sense of helplessness felt by individual victims and the discouragement of investors. If one steps back for a moment, however, one can see how those same structural corporate features of permanence and interconnectedness may not only yield increased harm in the criminal context of bribery, but in many other criminal contexts. Even in cases where no actual criminal relationship exists between a corporation and a relevant government entity, the political interdependence between corporations, their lobbyists, and the government bureaucracy has been cited as potentially antithetical to the interests of the average private citizen.¹⁴⁰

While the corporation may no longer literally be a “creature of the state,” familiar problems such as regulatory capture demonstrate how the realities and incentives of the modern political world may result in state authorities acting to advance the interests of the corporations they regulate.¹⁴¹ Furthermore, the large corporation has evolved into a bureaucratic structure in its own right.¹⁴² Max Weber, one of the great theorists of bureaucracy, wrote that “[b]ureaucratic administration means fundamentally domination through knowledge,”¹⁴³ crystallizing the insight that bureaucratic processes managed by a staff of “experts” serve to legitimize an underlying threat of force. To the extent that the complex organizational structure and processes of the corporation allow it to make privileged claims to knowledge, especially when such claims appear to be supported by the authoritative structures of the state itself,

140. See KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 272 (1986) (noting that federal agencies are more often the targets of lobbying by corporations and trade associations, more so than by unions and citizen groups); GRAHAM K. WILSON, INTEREST GROUPS 59 (1990) (“The relationship between bureaucrats and interest groups in the United States is unusually suffused with politics.”).

141. See, e.g., George J. Stigler, *Can Regulatory Agencies Protect the Consumer?*, in THE CITIZEN AND THE STATE 178, 181 (1975).

142. See SANFORD JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900–1945, at 17–18 (1985); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (discussing the relationship between a corporation and its shareholders); Timothy L. Fort, *Religion in the Workplace: Mediating Religion’s Good, Bad and Ugly Naturally*, 12 NOTRE DAME J. L. ETHICS & PUB POL’Y 121, 165 (1998) (“Size, however, explains how corporations, which utilize size to achieve competitive economies of scale, can easily lurch toward the kind of bureaucracy that undermines moral identity.”).

143. MAX WEBER, ECONOMY AND SOCIETY 225 (Guenther Roth & Claus Wittich eds., 1978).

it occupies an inherently coercive role relative to the individual, which has the potential to enhance the psychological effects of its criminal misconduct on individuals and communities. In the remainder of this Part, II discuss the relevant framework provided by the psychological literature for understanding how perceptions of injustice that arise from these interconnections can result in additional long-term trauma to victims. I will then analyze how these perceptual harms take shape in the context of several specific examples of corporate crime.

Scholars of “just world theory,” first presented by Melvin Lerner and Carolyn Simmons in a ground-breaking 1966 study, argue that most people have a basic investment in “deserving” life’s outcomes; in other words, they learn from childhood to obey a “personal contract” that consists of forgoing the gratification of immediate impulses in favor of goal-directed behavior geared toward better long-term outcomes.¹⁴⁴ Maintenance of this socially beneficial contract requires maintenance of the “belief in a just world.” This belief is so important that, when exposed to instances of injustice that threaten it, people are motivated to attempt to preserve it through such defense mechanisms as blaming victims for their misfortune—by assuming, for example, that they had in some way “deserved it.”

Carolyn Hafer has argued that a primary function of the belief in a just world is to provide for long-term investment according to existing societal rules for deservingness.¹⁴⁵ Further research suggests that people also need to believe in a just world in order to maintain a sense of overall well-being in the face of negative events, and that these beliefs serve to minimize anger-induced stress.¹⁴⁶ These beliefs serve as a resource to strengthen the well-being of senior citizens.¹⁴⁷ Also, research suggests that the belief in a just world helps individuals find meaning in their lives, even if unjust events occur that cannot be reversed or compensated.¹⁴⁸ Finally, a person’s belief in a just world is threatened not simply when an unfair negative outcome occurs, but when the perpetrator of the outcome escapes punishment.¹⁴⁹ Any event

144. See Melvin J. Lerner & Carolyn H. Simmons, *Observer’s Reaction to the “Innocent Victim”*: *Compassion or Rejection?*, 4 J. PERSONALITY & SOC. PSYCHOL. 203 (1966); Melvin J. Lerner, *The Justice Motive: Some Hypotheses as to its Origins and Forms*, 45 J. PERSONALITY 1 (1977); Melvin J. Lerner, Dale T. Miller, & John G. Holmes, *Deserving and the Emergence of Forms of Justice*, 9 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 133 (1976).

145. See Carolyn L. Hafer, *Investment in Long-term Goals and Commitment to Just Means Drive the Need to Believe in a Just World*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1059, 1060 (2000).

146. See Claudia Dalbert, *Beliefs in a Just World as a Buffer Against Anger*, 15 SOC. JUST. RES. 123, 123 (2002).

147. J. Dzuka & C. Dalbert, *The Belief in a Just World and Subjective Well-Being in Old Age*, 10 AGING & MENTAL HEALTH 439, 442 (2006).

148. *Id.*

149. Carolyn L. Hafer, *Do Innocent Victims Threaten the Belief in a Just World? Evidence From*

that renders belief in a just world impossible by unavoidable demonstration of injustice therefore imposes additional trauma on the victim of an underlying injustice by simultaneously compromising his overall well-being through the threat to his belief in a just world.

As a specific example of how these effects might play out in the context of a corporation committing a criminal act, consider the events following the Buffalo Creek mining disaster in 1972 in which a dam used for filtration by the Buffalo Mining Company broke, flooding a valley of small West Virginia mining towns with waste water and killing 125 people. Before it came to light that the dam violated multiple state and federal safety regulations, a New York based representative of the parent Pittston Corporation initially stated to *The Charleston Gazette* that “the break in the dam was caused by flooding—an Act of God.”¹⁵⁰ The victims’ reactions to this institutional response suggests the existence of additional harm attributable to the structural arrangement whereby a remote parent entity attempts to impose a controlling legal narrative on events, which—in addition to being factually inaccurate—had the effect of psychic violence to the religious norms of a community: “I didn’t see God running any bulldozer,” said one Buffalo Creek resident, “It’s murder. The big shots want to call it an act of God. It’s a lie. They’ve told a lie on God, and they shouldn’t have done that.”¹⁵¹

The residents’ perceptions of the party culpable for their suffering can be summarized in the words of Rev. Jim Somerville, the Secretary of the Citizens’ Commission to Investigate the Buffalo Creek Disaster: “We think that this coal company, Pittston, has murdered the people, and we call upon the prosecuting attorney and the judge . . . to prosecute and bring to trial this coal company.”¹⁵² Somerville went on to link harm to the institutional monolith formed by the corporate entity of the coal company and the background governmental actors:

The fact of the matter is that these are all laws on the books which the company felt completely free to ignore, which says something about the relationship between coal companies and state governments . . . just this complete freedom to ignore these laws with no fear of any kind of prosecution.¹⁵³

These reactions point to a particular sort of harm done to the residents of

a Modified Stroop Task, 79 J. OF PERSONALITY & SOC. PSYCH 165, 171 (2000).

150. GERALD M. STERN, THE BUFFALO CREEK DISASTER 11 (1976).

151. *Id.* at 12.

152. Appalshop’s Buffalo Creek Film Preservation & Digital Outreach Project, The Buffalo Creek Flood: An Act of Man Transcript 5 (1975), available at <http://appalshop.org/buffalo/media/BCF-transcript.pdf>.

153. *Id.*

Buffalo Creek. In addition to the destruction of their homes and deaths of their loved ones, they suffered a certain violence to their psychic existences through the feeling of helplessness before the structure of the corporation itself, with its institutional connections to political power and the remote authority, even, to threaten the role of divine justice by falsely characterizing its misconduct as an act of God.

As a second example, consider the nature of the long-term psychological harm documented in victims of the major oil spills of the last several decades, which evidence suggests to be exacerbated by the corporate nature of the responsible entities and issues related to assignment of blame. The psychological literature has identified, in addition to the short-term effects of technological disaster on its victims, long-term social deterioration described as “the corrosive community.”¹⁵⁴ Evidence attributes part of this corrosive effect to the members of a community struggling over where to place blame, authorities being evasive and unresponsive, and victims becoming suspicious and cynical.¹⁵⁵ This suggests that the unavailability of a blaming mechanism in a corporate case of criminal negligence—which could be attributable to broad policies, as opposed to the discernable misconduct of particular individuals—would serve to exacerbate the actual harm felt by the victims of such disasters, in part due to a threat to their belief in a just world.

Psychologist Deborah du Wann Winter, whose expertise centers on the psychological effects of environmental damage, has observed from her studies of victims of the *Deepwater Horizon* oil spill the primary emotional reaction to be “anger . . . around the oil companies’ failure to abide by regulations,” as well as “helplessness” (which she explains by noting the phenomenon of “learned helplessness,” which is the tendency of organisms to become non-responsive in the face of situations over which they have no control).¹⁵⁶ Again, the structural relationship between the corporation and the background legal authority can be directly linked to the psychological damage experienced by victims.

In his Congressional testimony, Keith Jones, father of one of the BP employees killed during the explosion on the *Deepwater Horizon*,

154. See William R. Freudenburg, *Contamination, Corrosion, and the Social Order: An Overview*, 45 CURRENT SOC. 19 (1997); William R. Freudenburg & Timothy R. Jones, *Attitudes and Stress in the Presence of Technological Risks: A Test of the Supreme Court Hypothesis*, 69 SOC. FORCES 1143 (1991); Krzysztof Kaniasty & Fran H. Norris, *A Test of the Support Deterioration Model in the Context of Natural Disaster*, 64 PERSONALITY & SOC. PSYCHOL. 395 (1993); Kroll-Smith & Couch, *Symbols, Ecology, and Contamination: Case Studies in the Ecological-Symbolic Approach to Disaster*, 5 RESEARCH IN SOCIAL PROBLEMS AND PUBLIC POLICY 47–73 (1993).

155. See Freudenburg & Jones, *supra* note 154.

156. See Susan Koger, *Coping with the Deepwater Horizon Disaster: An Ecopsychology Interview with Deborah Du Wann Winter*, 2 ECOPSYCHOLOGY 205, 205 (2010).

explicitly couches his account of his own harm as related to the immutable corporate nature of the responsible entities: “TransOcean, Halliburton, and any other company will be back because they have the infrastructure and economic might to make more money. But Gordon will never be back. Never. And neither will the ten good men who died with him.”¹⁵⁷ This language—comparing, as it does, the singularity of his suffering with the static immortality of the corporate structure—suggests the feelings of helplessness from which he suffers flow specifically from the nature of that structure.

More research into the psychology of the victim impact of corporate crime would allow for a more robust understanding of the ways in which the nature of the corporate form produces criminal harm above and beyond that which flows from the direct actions of its employees. I will now turn briefly to the question of enforcement and discuss how the current means by which corporate criminal liability is enforced—the product of the strict substantive law standard of pure vicarious liability and essentially limitless discretion upon the part of prosecutors to make decisions about charging—is at odds with the purposes of corporate criminal liability which this article has discussed.

VI. PROBLEMS IN CURRENT ENFORCEMENT

Enforcement of federal corporate criminal law is somewhat inconsistent due in part to the gap between the official substantive law principle of respondeat superior—in which corporations are per se liable for the misconduct of their employees regardless of corporate policies against the conduct—and the prosecutorial guidelines developed by the DOJ which determine which actions are brought in reality and the penalties sought. In recent years one particularly notable variable has been the use of the deferred prosecution agreement (DPA) and the non-prosecution agreement (NPA) as tools for obtaining cooperation on behalf of corporate defendants in exchange for avoidance of indictment.

A watershed moment in the history of federal corporate prosecution occurred on June 16, 1999, when then United States Deputy Attorney General Eric Holder issued a memorandum containing the government’s first official guidance for prosecutors in corporate matters (popularly referred to as the “Holder Memo”).¹⁵⁸ The Holder Memo contained nine factors prosecutors could consider when deciding whether to prosecute a

157. Legal Liability Issues Surrounding the Gulf Coast Oil Disaster: Hearing Before the H. Comm. on the Judiciary, 111th Cong. 25 (2010) (statement of Keith D. Jones).

158. Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen., to All Component Heads and United States Attorneys, *Bringing Criminal Charges Against Corporations* (June 16, 1999), available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF>.

corporation: (1) the “nature and seriousness of the offense,” (2) the “pervasiveness of wrongdoing within the corporation,” (3) the “corporation’s history of similar conduct,” (4) the “corporation’s timely and voluntary disclosure of wrongdoing,” (5) the corporation’s “willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney–client and work product privileges,” (6) the “existence and adequacy of the corporation’s compliance program,” (7) the “corporation’s remedial actions,” (8) “collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable,” and (9) the “adequacy of non-criminal remedies.”¹⁵⁹

Subsequent to the explosion of corporate scandals involving Enron, Adelphia, Worldcom, and Tyco—and the high-profile implication of accounting firm Arthur Andersen in the Enron matter—then-Deputy Attorney General Larry Thompson issued a revision to the Holder Memo on January 20, 2003.¹⁶⁰ The Thompson Memo contained four primary additions to the basic directives of the Holder Memo. First of all, it became binding upon federal prosecutors, rather than advisory.¹⁶¹ It also stated that pre-trial diversion—such as through DPAs or NPAs—could be an appropriate resolution to a corporate investigation,¹⁶² and added a tenth factor for prosecutors to consider in making indictment decisions concerning corporations: “the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance[.]”¹⁶³ Perhaps most importantly, it placed “increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation,”¹⁶⁴ because “[t]oo often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation.”¹⁶⁵

The Thompson Memo prompted a backlash from the white collar crime bar after a flood of increasingly severe DPAs and NPAs were executed,¹⁶⁶ and in *United States v. Stein* the S.D.N.Y. held that the policy of the Memo had violated a KPMG employee’s Fifth Amendment right to counsel by interfering with an existing KPMG policy of

159. *Id.* at II(A).

160. Memorandum from Larry D. Thompson, Deputy Attorney Gen., to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at http://www.justice.gov/dag/cftf/corporate_guidelines.htm.

161. *Id.* at I(B).

162. *Id.* at VI(B).

163. *Id.* at II(A)(5).

164. *Id.* at Prefatory Statement.

165. *Id.*

166. See Bohrer & Trencher, *supra* note 6, at 1486 (discussing backlash from corporations and bar organizations).

advancing attorney's fees to employees during criminal investigations.¹⁶⁷ In response, on December 12, 2006, then-Deputy Attorney General Paul McNulty released yet another revision of the guidelines, limiting the circumstances under which prosecutors may request a waiver of the attorney client or work product privileges and restricting prosecutors from considering a company's payment of its employees' attorneys' fees as a sign of lack of cooperation.¹⁶⁸

The gap between substantive culpability standards and the extremely nuanced factors influencing prosecutorial decision making has created what some scholars have referred to as problems of incongruence. William Laufer and Alan Strudler put it succinctly:

First, forward problems emerge where changes in the general part of the law—liability rules and culpability standards—are conceived without concern for how punishment is crafted or justified. And reverse problems arise where standards for punishment impose liability or culpability that conflict with extant law in theory or practice.¹⁶⁹

Part of the problem, as Laufer and Strudler note, is that the federal charging guidelines abandon the basic notion of respondeat superior and turn, instead, on “features of the corporate person[,]” normally as defined by *post-offense* behavior which “may bear little correspondence to the underlying offense.”¹⁷⁰ Other scholars have noted that the dramatic increase in corporate cooperation with criminal investigations has had the unintended effect of blurring the distinction between government and private entity, which has resulted in, among other things, the risk of corporations qualifying as agents of the state for the purposes of the Constitution, the risk of unwitting undermining of employee Fifth Amendment protections, the possibility of the government being deemed “in control” of corporate documents for the purposes of discovery requests by individual employees, and the placing of prosecutors “beyond [their] institutional competence” and into corporate oversight roles.¹⁷¹

To return to the example of the FCPA, in cases involving a parent company with a subsidiary found to be involved in making illegal payments, the frequent strategy of prosecutors has been to bring actions

167. *United States v. Stein*, 440 F. Supp. 2d 315, 336–37 (S.D.N.Y. 2006).

168. Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Department Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations VII(B)(2)–VII(B)(3) (2006), available at http://lawprofessors.typepad.com/whitecollarcrime_blog/files/mcnulty_memo.pdf.

169. William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, 44 AM. CRIM. L. REV. 1307, 1311 (2007).

170. *Id.*

171. See generally Bohrer & Trencher, *supra* note 6, at 1482.

against the subsidiary under the anti-bribery provisions of the FCPA while entering into a side letter or DPA with the parent. In such cases, if the parent is an issuer, the SEC may then bring a civil action against the parent for books and records and internal controls violations.¹⁷² However, the DOJ has not consistently followed this practice; in at least one 2010 case, for example, the DOJ charged Pride International under the anti-bribery provisions for a scheme involving French and Venezuelan subsidiaries yet failed to allege Pride International's involvement in the scheme.¹⁷³

Also notable has been the inconsistent approach to the prosecution of individuals. Prior to 2007, very few individual defendants were charged under the FCPA; in 2007 and 2008 the DOJ and SEC brought actions against over thirty individuals between them.¹⁷⁴ In 2008 Mark Mendelsohn, Deputy Chief of the Fraud Section at the DOJ, declared that the increased number of individuals prosecuted was "not an accident. That is quite intentional on the part of the Department. It is our view that to have a credible deterrent effect people have to go to jail."¹⁷⁵ The trend continued in 2009 and 2010. In 2009 a sting operation directed at military and law enforcement equipment contractors yielded the largest single prosecution of individuals in the history of the enforcement of the FCPA (known as "the Shot Show cases").¹⁷⁶ There, an individual implicated in the BAE Systems investigation cooperated with the government and facilitated introductions to various industry acquaintances who all then agreed to pay a "20% [sales] commission" for a contract to outfit an African country's presidential guard, knowing that half would be paid as a bribe to the Minister of Defense and half split between the sales agent and the intermediary.¹⁷⁷ In 2010, the two agencies charged sixteen individuals between them (the DOJ specifically charged ten of these, four of them associated with one company, Lindsey Manufacturing).¹⁷⁸ The explosion in FCPA enforcement in recent years has resulted in a niche market for law firms hoping to sell their expertise in predicting and

172. See SHEARMAN & STERLING LLP, FCPA DIGEST OF CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977 9 (2012) [hereinafter Shearman Report], available at <http://shearman.symplicity.com/files/68c/68cf1e693fcaa178acbd6d852a86b084.pdf>.

173. See Criminal Information, United States v. Pride Int'l, Inc., No. 4:10-cr-766 (S.D. Tex. Nov. 4, 2010), available at <http://fcpa.shearman.com/?s=matter&mode=form&id=333>.

174. Witten, *supra* note 131.

175. Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007, 22 CORP. CRIME REP. 1 (2008), available at <http://www.corporatecrimereporter.com/mendelsohn091608.htm>.

176. Shearman Report, *supra* note 173, at 62.

177. *Id.*

178. *Id.* at v-xiii.

accommodating the often inconsistent enforcement patterns of the DOJ and the SEC.

The disconnect between the substantive liability standard of respondeat superior and this inconsistent use of prosecutorial discretion is particularly problematic in light of the justifications for corporate criminal liability developed in this article. Simply put, the purpose of punishment should be to track with the actual culpability of the entity being punished for the actual harm caused. Even if background social norms support the punishment of a “corporate person,” it makes no sense to punish this “person” for crimes that cannot be attributed to the person as a whole. If misconduct is perpetrated by a limited number of employees acting against overall corporate culture—particularly where the corporation has made good faith attempts to prevent such misconduct ahead of time—letting perceptions of personhood override this disconnect would improperly extend liability beyond desert. The standard of criminal negligence I outlined in the first part of this paper would eliminate unjust punishment in these situations. Yet it would also accommodate the long temporal periods that characterize most corporate misconduct by allowing a proximate *mens rea* of negligence on the part of the corporation as to a foreseeable future *actus reus* of an employee to form the basis for liability. This is particularly appropriate given that, as I argue, it is the enduring structure of a corporation that imposes a particular kind of harm on the victim of its crimes.

Furthermore, the current prosecutorial emphasis on post-indictment behavior such as cooperation undermines the expressive benefits of corporate criminal liability by divorcing punishment from the harm actual imposed by the misconduct. And, as this article has also shown, part of the harm caused by corporate misconduct is the creation of the perception of corporations as structurally aligned with sources of legal power. If this is the case, then the blurring of the line between prosecutor and management occasioned by the current regime’s focus on ex post cooperation risks solidifying this problem.

VII. CONCLUSION

In determining whether an employee of the state-owned utility Lindsey Manufacturing bribed qualified as a “foreign official” under the FCPA, the court considered the fact that the Mexican constitution gives its citizens a right to electricity.¹⁷⁹ As Mexico is a country where, according to a 2007 study, bribes consumed 8% of family incomes in

179. Transcript of Pretrial Motions Hearing, *United States v. Lindsey Manufacturing Co.*, C.R. 10-1031 AHM (C.D. Cal. Apr. 1, 2011) at 19, available at <http://www.scribd.com/doc/53563781/Hearing-Transcript-in-Lindsey-Foreign-Official-Challenge>.

2007 and moved 10% of all transactions with the government,¹⁸⁰ and where 44% of businesses reported that they continued to pay bribes to government officials,¹⁸¹ it is clear that Lindsey's misconduct interfered with a politically defined substantive right, and imposed the further harm of solidifying an institutional relationship between corrupt government officials and the business entities that support its corruption at the expense of individual citizens.

The Lindsey conviction also serves as a positive exception to the recent trend of corporate criminal liability being resolved through DPAs and NPAs. Rather than the question of culpability resting on prosecutorial charging decisions, it was thrown into the forum of the criminal courtroom, one of the few institutions in our system of government in which citizen representatives, rather than bureaucratic specialists, wield state authority. To be sure that the preponderance of criminal actions are resolved through settlement, as opposed to trial, is hardly unique to corporations; most individual federal defendants enter guilty pleas and waive a number of rights in so doing.¹⁸² The outcome of a jury trial has unique benefits in the corporate context under the current liability standard, however. This is not only because the utilitarian benefits of punishing corporations arise from the system's ability to capture background communal norms about corporate desert, but also because the very nature of the harm caused by a corporate action such as bribery is the reinforcing of the corporation's structural interconnectedness with other institutions of formal power. To further exacerbate this interconnectedness is counterproductive to the vindication of that particular harm.

It is certainly the case that criminal liability would make much more sense if the substantive law changed from the current standard of vicarious liability to require a showing of pervasive criminal intent throughout the corporate entity, in order to better justify finding the "corporate person" collectively liable for criminal misconduct. Yet where such pervasive intent exists, it is important to recognize the entity's liability for the distinctively collective harm it imposes.

180. Mark Stevenson, *Poll: Bribery Spending Rising in Mexico*, USA TODAY, June 16, 2008, http://www.usatoday.com/news/world/2008-04-16-mexico-bribery_N.htm.

181. KPMG en Mexico, KPMG Encuesta de Fraude y Corrupción en México 2008 4 (2008), available at <http://www.kpmg.com/MX/es/IssuesAndInsights/ArticlesPublications/Documents/DE2008/reporteFRAUDE.pdf>.

182. See Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1525 (2007).