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FREE WILL, RESPONSIBILITY, AND THE CORPORATION: A CRITIQUE OF CORPORATE CRIMINAL LIABILITY

INTRODUCTION

Free will is central to legal responsibility—the law generally only holds responsible those actors who exercise free will. Free will is closely related to the mind—mindless entities do not have free will. But the law applies criminal liability to entities that do not have minds and consequently cannot exercise free will: corporations and other business associations.[1] This Note acknowledges that there is not a satisfactory theoretical solution to this contradiction. The contradiction is not solely academic; the existing entity liability regime determines who gets punished and who escapes responsibility for wrongful action. When executives at a pharmaceutical giant decide to market drugs for unsafe, off-label uses,[2] should they be held accountable? Or should they be able to pass accountability on to the companies they represent, forcing shareholders, employees, and customers to pay the price? By allowing criminal liability for corporations, the law punishes the corporation to the benefit of the actual humans who engage in wrongdoing.[3]

Consider the following example. In June 2020, Pacific Gas & Electric Company (PG&E), a publicly traded energy utility, pleaded guilty to eighty-four counts of manslaughter and one count of unlawfully causing a fire for its role in the 2018 Camp Fire, which killed eighty-five people and destroyed the town of Paradise, California.[4] PG&E entered the plea pursuant to an agreement that limited the company's sentence to a $3.5 million fine.[5] California's energy regulator blamed the fire on PG&E's failure to adequately

1. *See, e.g.*, MODEL PENAL CODE § 2.07(1) (A.L.I. 2024) (describing circumstances in which a corporation may be convicted of a criminal offense).

2. *See* Press Release, U.S. Dep't of Just., Justice Department Announces Largest Health Care Fraud Settlement in Its History (Sep. 2, 2009), https://www.justice.gov/opa/pr/justice-department-announces-largest-health-care-fraud-settlement-its-history [https://perma.cc/E7RV-HBH2].

3. *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 393-94 (1981).

4. *See PG&E Confesses to Killing 84 People in 2018 California Fire as Part of Guilty Plea*, THE GUARDIAN (June 16, 2020, at 15:30 ET), https://www.theguardian.com/business/2020/jun/16/pge-california-wildfire-camp-fire-paradise-guilty-plea [https://perma.cc/4AWN-XM3W].

5. Pac. Gas & Elec. Co., Current Report (Form 8-K), Exhibit No. 10.1 (Mar. 23, 2020), https://www.sec.gov/Archives/edgar/data/75488/000095015720000421/ex10-1.htm [https://perma.cc/2QVQ-UKM5].

maintain a power line.[6] The company subsequently agreed to pay almost $2 billion in civil fines,[7] and settled civil suits with the victims of several fires for approximately $13.5 billion.[8] Three months later, PG&E's equipment caused another wildfire, killing four people.[9]

The monetary punishments and the stigma of criminal culpability imposed on PG&E failed to deter it from inadequately maintaining its infrastructure. Its equipment has sparked dozens of wildfires since it pleaded guilty for the Camp Fire.[10] It is difficult to see how fining PG&E could deter future negligent maintenance and consequent fires. Every dollar PG&E pays in fines is one less dollar it has to implement remedial maintenance and implement fireproof infrastructure. Ultimately, the costs of wildfire mitigation and insurance are not borne by the people responsible for the fires; instead, those costs are passed on to PG&E's customers.[11]

So, who should be punished for PG&E's conduct? While delivering the firm's guilty plea, then-CEO Bill Johnson told the Butte County Superior Court, "I'm here today on behalf of the 23,000 men and

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6. ELEC. SAFETY & LIAB. BRANCH, SAFETY & ENF'T DIV., CAL. PUB. UTILS. COMM'N, SED INCIDENT INVESTIGATION REPORT FOR 2018 CAMP FIRE WITH ATTACHMENTS 1-3 (2019).

7. *See* Kavya Balaraman, *CPUC Imposes Largest Ever Penalty of $1.9B on PG&E for Northern California Wildfires*, UTILITY DIVE (May 11, 2020), https://www.utilitydive.com/news/cpuc-imposes-largest-ever-penalty-of-19b-on-pge-for-northern-california/577625/ [https://perma.cc/VY34-ENPR].

8. *See* Ivan Penn, *PG&E Gives Wildfire Victims More Stock in Bankruptcy Plan*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/business/energy-environment/pge-wildfire-victims-stock.html?searchResultPosition=4 [https://perma.cc/GUL5-PFY8].

9. *Report: California Wildfire Sparked when Tree Hit Power Line*, ASSOCIATED PRESS (Mar. 23, 2021, at 01:11 ET), https://apnews.com/general-news-bcfb3fe5ec2d9acfaee4f0adbc5d6fd1 [https://perma.cc/3JBT-KYLH].

10. *See* Katherine Blunt, *PG&E Is Racing to Stem Increasing Fires Ignited by Its Power Lines*, WALL ST. J. (Aug. 22, 2024, at 10:08 ET), https://www.wsj.com/business/energy-oil/pg-e-is-racing-to-stem-increasing-fires-ignited-by-its-power-lines-0228c556 [https://perma.cc/D2XM-PD3R].

11. *See California Regulator Allows PG&E Rate Hike for Wildfire Mitigation*, REUTERS (Nov. 16, 2023, at 18:29 ET), https://www.reuters.com/markets/commodities/california-regulator-decide-pge-base-rate-hike-request-2023-11-16/ [https://perma.cc/3EFE-5Y3G]. PG&E incorporated $15,100,000,000 in wildfire-related costs into rates from 2019 to 2023. CAL. PUB. UTILS. COMM'N, 2024 SENATE BILL 695 REPORT 50 (2024), https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/office-of-governmental-affairs-division/reports/2024/2024-sb-695-report.pdf [https://perma.cc/7B4Q-M55Y].

women of PG&E to take responsibility for the fire."[12] Should Johnson have been sent to prison, given that he took responsibility, on the record, at a judicial proceeding?[13] That would be a strange outcome; he had no affiliation with the company at the time of the Camp Fire.[14] The CEO at the time of the fire, Geisha Williams, might be a more appropriate target, but she presumably did not perform the type of affirmative act necessary to trigger liability under California's manslaughter or arson statutes.[15] Maybe the twenty-three thousand PG&E employees on whose behalf Johnson took responsibility[16] should be the targets of criminal liability. But this seems too broad; surely only a small minority of these employees had any role in the failure to maintain the infrastructure that started the fire. What Johnson, Williams, the customers who ultimately bore the cost of PG&E's conduct, the vast majority of PG&E's employees, and PG&E itself have in common is that none of them chose for PG&E to fail to maintain the particular wires that started the fire. That is, none of them used their free will to cause the company to engage in criminal conduct.

Rather than apply legal fictions imputing corporations with minds or use vicarious liability to hold third parties criminally responsible for the acts of corporate agents, the law should look only to natural persons who exercise free will. This Note argues that when corporations engage in conduct that violates criminal laws, blame should be apportioned to the individuals who actually exercised free will and formed the intent that provided the impetus behind a corporation's criminal conduct. This will have the effect of increasing exposure to criminal liability for controlling shareholders, directors, officers, and employees whose encourage-

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12. Ivan Penn & Peter Eavis, *PG&E Pleads Guilty to 84 Counts of Manslaughter in Camp Fire Case*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/16/business/energy-environment/pge-camp-fire-california-wildfires.html [https://perma.cc/C6KE-6CXF].

13. *See id.*

14. *See PG&E Announces New Chief Executive Officer and Appointment of a Refreshed Board of Directors; New Leadership Focused on Enhancing Safety Culture and Operational Excellence*, PAC. GAS & ELEC. CO., (Apr. 3, 2019), https://investor.pgecorp.com/news-events/press-releases/press-release-details/2019/PGE-Announces-New-Chief-Executive-Officer-and-Appointment-of-a-Refreshed-Board-of-Directors-New-Leadership-Focused-on-Enhancing-Safety-Culture-and-Operational-Excellence/default.aspx [https://perma.cc/4PBX-GQS7].

15. *See* CAL. PENAL CODE §§ 192(b), 452 (Deering, LEXIS through 2025-2026 Reg. Sess.).

16. *See* Penn & Eavis, *supra* note 12.

ments create the impetus for corporate criminal conduct, while protecting non-offending shareholders and other stakeholders by limiting the harm to a corporation's value and other downstream effects caused by prosecution of the corporation itself. Furthermore, this regime would support the deterrent function of criminal law by strongly disincentivizing corporate decision makers from allowing corporate criminality.

Part I of this Note will provide background on the relationship between free will and criminal liability and discuss the extant theories underpinning corporate criminal liability. Part II will examine the shortcomings of those theories. Part III will argue for a free will-based approach for apportioning blame for corporate criminal conduct. Such an approach is both theoretically and practically justified.

I. BACKGROUND

This Part examines the relationship between free will and the assignment of criminal blame. It will show that criminal liability is only proper when the actor being held liable acted according to their free will. It will then discuss the history of and basis for the existing system of entity liability.

A. Free Will and Criminal Liability

The concept of criminal liability, and consequently the justification for punishing criminals, is underpinned by the assumption that the actors subject to criminal liability have free will.[17] The centrality of free will to the justification for criminal liability and punishment has deep roots in Anglo-American law.[18] Under the common view,

17. *E.g.*, Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937) ("[T]he law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems."); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 207 (2d ed. 2008) (criminal punishment must "be justified by (*inter alia*) the demonstration that the person ... could have helped doing what he did"); MODEL PENAL CODE § 2.01 (A.L.I. 2024) ("A person is not guilty of an offense unless his liability is based on conduct that includes a *voluntary* act or the omission to perform an act of which he is physically capable." (emphasis added)).

18. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *27 ("[P]unishments are ... only inflicted for the abuse of that free-will, which God has given to man."). The fundamentality of free will

the ability of the law's subjects to form their will freely and act according to that free will is not merely ancillary to legal responsibility; it is a necessary condition for the assignment of legal blame.[19] Consequently, criminal laws are formulated in a manner that presupposes that their subjects possess free will.[20] Specifically, criminal laws (except for strict liability statutes) require that a mental element (mens rea) be satisfied to impose liability, and only those culpable mental states that arise pursuant to the actor's exercise of free will are proper bases for criminal liability.[21]

The traditional defenses to criminal liability demonstrate the fundamentality of free will to criminal liability. Take, for example, duress. An actor's otherwise criminal conduct is excused under the doctrine of duress if the actor was coerced to violate the law by a threat from a third party.[22] An act performed under duress is not involuntary in the same way that an act performed while unconscious is involuntary. As one court explained, "duress cannot, as a matter of law, make criminal conduct involuntary.... [A] person who commits a crime under duress 'makes a choice' to violate the law."[23] Actions under duress are still, in some sense, willed, but the actor is excused because his will was not free.[24] The actor's will was not free because there was a necessitating causal relationship between an outside factor, namely the threat, and the actor's ultimate action.[25] An alternative conception of this dynamic is that the actor acted pursuant to his will, but the outside threat precluded the

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to criminal responsibility has origins "in Biblical, Greek, Roman, Continental and Anglo-American law." Morissette v. United States, 342 U.S. 246, 250 n.4 (1952) (citing Max Radin, *Intent, Criminal*, *in* 8 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 126 (Edwin R.A. Seligman & Alvin Johnson eds., 1937)).

19. *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 221 n.81 (1982).

20. *See* State v. Jones, 577 P.2d 357, 361 (Kan. Ct. App. 1978) ("[O]ur whole criminal code presupposes that an individual possesses a free will.").

21. *See* Michael David Weiss, Book Note, *Critique of Pure Punishment*, 19 AM. J. CRIM. L. 71, 71-72 (1991) ("Most commentators agree that actors cannot be criminally liable unless their mental states proceed from free choice and not from some compulsion beyond the actors' control.").

22. 1 JENS DAVID OHLIN, WHARTON'S CRIMINAL LAW, § 15:7 (16th ed. 2025).

23. State v. Daoud, 679 A.2d 577, 581 (N.H. 1996).

24. *See* Lawrence Newman & Lawrence Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. CAL. L. REV. 313, 313 (1957).

25. *See* Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1102-03 (1985).

possibility of forming any alternative wills, and consequently his will was not free. The difference between putatively criminal acts performed under duress and criminal acts that incur liability is the degree to which the actor was able to freely form their will. This dynamic, wherein an actor's exposure to legal liability hinges on whether the actor acted with free will, is borne out in each of the "compulsion excuses" at criminal law, including duress, necessity, provocation, and addiction.[26] Like duress, necessity excuses otherwise criminal conduct when an external, irresistible force acts as the teleological cause of the actor's conduct, thereby limiting the actor's ability to freely act according to their will.[27] Similarly, the compulsive insanity excuse and the addiction excuse limit criminal liability when a force internal to the actor prevents the actor from acting according to their free will.[28] This brief survey of excuses should illuminate a common trend: The criminal law excuses actors from liability when their conduct was not caused by an exercise of free will, which in turn demonstrates the central place of free will in assignments of criminal liability.

1. A Brief Aside on Free Will

Before proceeding, it is necessary to briefly discuss what is meant in this Note by the term "free will" and to lay out some basic assumptions. It should not be controversial to posit that most people believe that they possess free will.[29] However, the thesis of determinism plausibly undermines the proposition that free will exists. Determinism holds that "the state of the world at any given time is fixed in all of its details by prior states and by the laws of nature."[30] If this thesis applies to human conduct, that is, if any act performed by a human was necessitated by the operation of the laws of nature upon prior states of the world (including the neurological functions of that human), then the common-sense proposition that humans have free will—meaning the ability to choose from among possible

26. *Id.* at 1097.
27. *See id.* at 1102-03.
28. *See id.* at 1109, 1131; OHLIN, *supra* note 22, § 17:3.
29. *See* Gary Watson, *Introduction*, *in* FREE WILL 1, 1 (Gary Watson ed., 2nd ed. 2003).
30. *Id.* at 2.

actions—is false.[31] The belief that determinism precludes the existence of free will, or at least the type of free will necessary for moral and legal responsibility, is called incompatibilism.[32] Alternatively, compatibilist theories hold that the truth of determinism does not preclude the type of free will necessary for moral responsibility, and libertarian theories hold that the existence of free will is a first principle which shows the falsity of determinism.[33]

This Note assumes a libertarian perspective because the law, at least as applied in the criminal law context in the United States, assumes libertarianism.[34] Chief Justice Burger made explicit the rejection of determinism and presumption of free will in American positive law, writing in the majority opinion in *United States v. Grayson* that a "deterministic view of human conduct ... is inconsistent with the underlying precepts of our criminal justice system."[35] Accepting the central role of free will in the justification of criminal liability and punishment, this Note examines the incongruity of the common-sense notion of free will (meaning the ability to choose from among several alternative courses of action)[36] with entity liability.

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31. Peter van Inwagen, *An Argument for Incompatibilism*, *in* FREE WILL, *supra* note 29, at 38, 39, 49-50.

32. Luis E. Chiesa, *Punishing Without Free Will*, 2011 UTAH L. REV. 1403, 1422 (2011).

33. *Id.* at 1422-23.

34. *See* OHLIN, *supra* note 22, § 17:3 ("The very existence of a penal code including the prospect of punishment for violators assumes ... that an actor has a free will to determine their course of conduct.").

35. 438 U.S. 41, 52 (1978); *see also* Blocker v. United States, 288 F.2d 853, 865 (D.C. Cir. 1961) (Burger, J., concurring in the judgment) ("While philosophers, theologians, scientists and lawyers have debated for centuries whether such a thing as 'free will' really exists, society and the law have no choice in the matter. We must proceed ... on the scientifically unprovable assumption that human beings make choices in the regulation of their conduct."). For an argument taking the opposite position and seeking to justify criminal punishment under an incompatibilist theory, see generally Chiesa, *supra* note 32.

36. The conception of free will as the ability to choose from different courses of action is not universally accepted and is, perhaps, distinctly imprecise. *See, e.g.*, Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, *in* FREE WILL, *supra* note 29, at 322, 330-31 (characterizing free will as a product of an actor's first order volitions being informed by second order volitions). Nevertheless, this seems to be the conception of free will embraced by the law. *See, e.g.*, *Grayson*, 438 U.S. at 52.

B. Entity Liability: Mens Rea and Intent

Entity liability, or criminal liability for corporations and other business entities, is a relatively recent development in Anglo-American law.[37] As the doctrine of entity liability developed, prosecutors and courts grappled with the challenge of imputing intent and culpable states of mind to corporations, given that corporations lack minds with which to form intents.[38] Theories that purport to resolve this challenge largely fall into two categories: vicarious liability, including respondeat superior and the collective knowledge doctrine, and theories relying on a legal fiction of the corporate mind.

1. Vicarious Liability

Courts using vicarious liability impute the intent and state of mind of particular corporate agents to the corporate principal, applying respondeat superior to satisfy the intent and mens rea elements of crimes for corporate action.[39] The Supreme Court adopted respondeat superior as a justification for corporate criminal liability in *New York Central & Hudson River Railroad Co. v. United States*,[40] which was the first instance in which the Court affirmed a decision finding a corporation guilty of a crime requiring intent.[41] The Model Penal Code embraces a version of this theory, under which a corporation can only be convicted of crimes requiring a showing of intent if the crime "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."[42] Under respondeat superior, a corporate defendant may be found to have acted

37. *See* Jennifer Ferrigno, *Corporate Criminal Liability*, 61 AM. CRIM. L. REV. 493, 494 (2024).

38. *See* Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 401-04 (1982).

39. *See* Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 337 n.32 (1996).

40. 212 U.S. 481, 494-95 (1909).

41. Ferrigno, *supra* note 37, at 494.

42. MODEL PENAL CODE § 2.07(1)(c) (A.L.I. 2024).

intentionally through the acts of a single agent—sometimes even if that agent acted contrarily to the direct instructions of its corporate principal—as long as the agent was acting with apparent authority and within the scope of their employment.[43]

The collective knowledge rule is a form of vicarious liability that imputes the requisite knowledge and general intent for an offense from agents to the corporate principal, as does traditional respondeat superior, but does not require that the knowledge and intent be vested in one individual.[44] Under the collective knowledge doctrine, "the corporation is considered to have acquired the collective knowledge of its employees."[45] Consequently, a corporation may be found liable for general intent crimes even if no individual involved in the conduct possessed any culpable state of mind.[46] Many courts have treated a corporate state of mind, inferred from the collected aggregate of the corporation's agents, as sufficient to satisfy the mental elements of general intent crimes.[47] Other courts, however, have questioned or limited the application of the collective knowledge doctrine.[48]

2. The Corporate Mind (Monist Theories)

Another category of theories, not yet adopted by courts, proposes that a singular mind can be attributed to corporations through their internal processes or attributes, and this fictional mind can

43. *See* United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972) (applying respondeat superior to hold a corporate defendant criminally liable for an antitrust violation, despite the corporate principal instructing its agent not to engage in the offending conduct).

44. *See* Ann Foerschler, Comment, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1304-05 (1990).

45. United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974).

46. *See* Ferrigno, *supra* note 37, at 498-99.

47. *See id.* at 498 n.38 (collecting cases in which courts applied the collective knowledge doctrine).

48. *See id.* at 498-99 (citing Southland Sec. Corp. v. INSpire Ins. Sols., Inc., 365 F.3d 353, 366 (5th Cir. 2004) (rejecting the collective knowledge doctrine for specific intent); then citing United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1274 (D.C. Cir. 2010) (same)). *Science Applications International Corp.* presents a particularly interesting rejection of the collective knowledge doctrine because the D.C. Circuit had affirmed a finding of liability for a specific intent civil offense based on the collective knowledge doctrine just a year prior to that decision. *See* United States v. Philip Morris USA Inc., 566 F.3d 1095, 1121 (D.C. Cir. 2009).

generate the types of states of mind and intentions necessary for criminal liability. One theorist contends that when corporations' self-referential, recursive, reflective decision-making processes mimic the decision-making processes of natural persons, those corporations have a type of mind that can properly be assigned legal blame.[49] Another variety proposes a multi-step framework for assessing corporations' intentions to violate the law based on corporate practice.[50] Yet another posits that intent can be imputed to a corporation as a unitary entity when the corporation's ethos encourages agents to violate the law.[51]

This Note labels this category of theories as "monist theories." The unifying feature of these theories is that they attribute the culpable state of mind and intent to the corporation as a distinct, unitary entity, rather than looking to the natural persons who comprise the corporation as the sources of the mental elements of crimes.[52] The following section of this Note will discuss the failure of both vicarious liability and monist theories to justify corporate criminal liability.

II. THE PROBLEM OF CORPORATE CRIMINAL LIABILITY AND FREE WILL

As discussed in Part I.A, free will—the exercise of which requires a mind—is a necessary component of the proper assignment of criminal liability. Nevertheless, corporations—which do not have minds—are commonly subject to entity liability in American criminal law.[53] These two propositions contradict one another. The theories discussed in Part I.B, vicarious liability and the monist theories, seek to resolve this contradiction by describing how corporations can satisfy the mental elements of crimes.[54] In so doing, they would serve to provide a nexus between an exercise of free will

49. *See* Carlos Gómez-Jara Díez, *Corporate Criminal Liability in the Twenty-First Century: Are All Corporations Equally Capable of Wrongdoing?*, 41 STETSON L. REV. 41 (2011).

50. *See* Foerschler, *supra* note 44.

51. *See* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991).

52. *See id.* at 1121-24; Díez, *supra* note 49, at 55-56; Foerschler, *supra* note 44, at 1306-07.

53. *See generally* Brickey, *supra* note 38.

54. *See supra* Part I.B.

and the corporation's criminal act. Each category of theory seeks to overcome the fundamental challenge of entity liability: Corporations lack minds. The following Subparts explain why these theories fail in that endeavor and why entity liability makes for poor public policy.

A. The Failures of Current Theories of Corporate Mind State and Intent-Formation

1. The Failure of Vicarious Liability

Vicarious liability fails to solve the problem of free will and entity liability because it can only describe corporate actions that are unfree. Consider the facts of *United States v. Hilton Hotels Corp.*: The defendant corporation's management instructed its purchasing agent not to participate in a boycott of a certain supplier that was not part of a local trade association.[55] The purchasing agent nevertheless threatened that supplier with the loss of the hotel's business, thereby causing the defendant corporation to participate in the boycott in violation of the Sherman Act.[56] The trial court instructed the jury that the defendant corporation could be held vicariously liable, even though the defendant's managers told the agent not to engage in the offending conduct.[57] So, despite the mechanisms of corporate decision-making working to avoid criminal conduct, the corporation could not help but engage in criminal

55. 467 F.2d 1000, 1002-04 (9th Cir. 1972).

56. *Id.* at 1004. The Ninth Circuit's holding in *Hilton Hotels* that a corporation can be criminally liable for acts of its agents performed counter to the corporation's instructions was specific to the Sherman Act. See *id.* at 1007. However, the Ninth Circuit's reasoning suggested that this doctrine should be applied to crimes beyond just Sherman Act violations because legislators generally seemed to want to hold corporations liable for the acts of their agents. *See id.* at 1006. Several federal circuits have adopted the *Hilton Hotels* court's holding that a corporation may be vicariously liable under the Sherman Act for the actions of its agents contrary to the corporation's managers' instructions and intentions. *See, e.g.*, United States v. Basic Const. Co., 711 F.2d 570, 573 (4th Cir. 1983); United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir. 1978). Courts have also applied this doctrine in contexts outside of the Sherman Act. *See, e.g.*, State v. Zeta Chi Fraternity, 696 A.2d 530, 535 (N.H. 1997) ("[A] corporation can be convicted for actions of its agents even if it expressly instructed the agents not to engage in the criminal conduct."); State v. Hy Vee Food Stores, Inc., 533 N.W.2d 147, 150 (S.D. 1995).

57. *Hilton Hotels*, 467 F.2d at 1004.

conduct because one employee, using his own free will, engaged in criminality while acting within the scope of his employment.[58] The purchasing agent in *Hilton Hotels* admitted that he was acting for personal reasons; he "violated his instructions because of anger and personal pique toward the individual representing the supplier,"[59] yet his decision to act to restrain trade was imputed to the corporation.[60] Thus, the entity that was punished in *Hilton Hotels*, the corporate defendant, was not the entity that exercised free will and decided to engage in criminal conduct. The corporate defendant instead was bound to act according to the will of another.

A similar situation is necessarily true in all cases of corporate crime to which vicarious liability is applied. The intentional actor is an agent of the corporation, who presumably acts according to their own free will, and the corporation acts not according to any process of will-formation that is endemic to the corporation itself, but according to the will of another—the agent. Yet the corporation is the entity that faces criminal punishment.[61] This argument is not meant to elicit sympathy for corporations. Rather, it is meant only to show that vicarious liability does not resolve the contradiction that arises when a system holds that free will is a necessary precondition for criminal liability but corporations, which lack free will, are held criminally liable.

The collective knowledge doctrine takes vicarious liability to its logical extreme by allowing a court to impute to a corporation the collective knowledge of all of its employees.[62] One court justified the collective knowledge doctrine on the basis that it prevents corporations from escaping wrongdoing by compartmentalizing information.[63] This justification is unconvincing, even if one accepts the argument that vicarious liability can substitute for a corporation's lack of free will. Whereas traditional vicarious liability imputes the intentional action of the agent to the principal, under the collective knowledge doctrine, a corporation can be held liable for crimes of intent even if no actor acted with intent. This theory

58. *See id.* at 1007.
59. *Id.* at 1004.
60. *Id.* at 1006-07.
61. *See* Fischel & Sykes, *supra* note 39, at 335.
62. *See* Ferrigno, *supra* note 37, at 498.
63. *See* United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987).

thereby leaves the corporation helpless—the corporation's agents or managers could not have known ex ante what they should have done to prevent the offending conduct because they did not know of impending illegal conduct. The corporation is thus in a position where it could not have done otherwise, but the ability to do otherwise is a predicate for the exercise of free will, at least under the common-sense definition on which the criminal law is based.[64] Consequently, the corporation does not exercise free will in the commission of a crime imputed to it under the collective knowledge doctrine. Hence, criminal conviction using the collective knowledge doctrine is improper in a system that values the primacy of free will. Whereas the collective knowledge doctrine is justified by its ability to prevent corporations from escaping responsibility for their agents' wrongdoing,[65] the actual result of the application of the theory is that it makes the corporation's wrongdoing inescapable.

In addition to the free will-based reason for rejecting the collective knowledge doctrine, there is a body of literature discussing the theory's shortcomings. Thomas Hagemann and Joseph Grinstein posit that collective knowledge is nothing more than "a myth."[66] They argue instead that when courts purport to apply collective knowledge, they are really punishing corporations for engaging in willful blindness to the activities of their agents.[67] Alternatively, Eliezer Lederman notes the impossibility of any literal construction of the collective knowledge doctrine.[68] He points out that corporations lack central information processing hubs (that is, they lack brains) in which the collective knowledge of their employees can be aggregated.[69] Consequently, the idea that knowledge can be collectivized is a fiction.[70]

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64. *See supra* notes 34-36 and accompanying text.

65. *See Bank of New England*, 821 F.2d at 856.

66. Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210, 237 (1997).

67. *See id.*

68. *See* Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285, 306-07 (1985).

69. *See id.*

70. *Id.* at 307.

2. The Failure of Monist Theories

Monist theories ascribe to corporations the type of mind necessary to incur legal responsibility, but any corporate mind of this type is purely a legal fiction[71] and is fundamentally beholden to outside forces. One can analogize the systems of corporate decision-making to the processes by which individuals make decisions,[72] attribute mindful action to corporations through the aggregation of the agency of the individuals who comprise the corporation,[73] infer the existence of a corporation's mental state from its actions,[74] or apply any other monist conception,[75] but none of these theories properly describe the corporation as having free will. Like vicarious liability, these theories fail to describe a corporation as possessing free will because, under these theories, the corporation remains beholden to the will of another. As demonstrated by the compulsion excuses, an actor who acts beholden to the command of an outside force acts without free will.[76]

Consider a variation of the facts in *Hilton Hotels*.[77] Imagine that the defendant corporation's upper management condoned the criminal conduct after a robust, dialectical decision-making process, and participation in localized agreements with competitors to boycott certain suppliers in violation of the Sherman Act was a common practice of the corporation. A monist theory could hold that the intent to act can be imputed to the corporation because the corporation's leadership formed that intent through a sufficiently robust process, or because the corporate ethos supports criminal actions, or because the corporation's various agents intended to do the criminal

71. *See id.* ("The corporate entity lacks the corporal organ that centralizes information and controls the activities of the limbs.").

72. *See* Díez, *supra* note 49, at 53-57.

73. *See* David Shoemaker, *Blameworthy but Unblamable: A Paradox of Corporate Responsibility*, 17 GEO. J.L. & PUB. POL'Y 897, 899 (2019) (citing CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN AND STATUS OF CORPORATE AGENTS (2011)).

74. *See* Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2080-83 (2016).

75. For example, Pamela Bucy's corporate ethos theory of entity liability. *See* Bucy, *supra* note 51, at 1121-22.

76. *See supra* Part II.A.

77. 467 F.2d 1000 (9th Cir. 1972).

acts.[78] However, under each of these variations of monist theories, the corporation's putative will to engage in the violating conduct originates somewhere outside of the corporation. It originates either in the upper managers who decide to condone the criminal conduct, or in the corporation's agents who create the corporate ethos, or in the minds of the specific agents who perform the criminal conduct. In any case, the corporation's will to engage in the offending conduct is beholden to the will of certain individuals; the corporation cannot form a will contrary to that of the individuals who create the relevant intention to act under a monist theory. The corporation's will is beholden to the will of those individuals because the corporation cannot act other than how the individuals who comprise the corporation cause it to act. Their acts are the corporation's acts. If the purchasing agent engages in the boycott, then the corporation participates in the boycott, and it cannot will otherwise. Thus, even if monist theories do accurately describe a process of corporate will-formation, they do not describe a process of will-formation that is free, and they are thereby insufficient to form a basis for corporate criminal liability because criminal liability requires free will.

Monist theories also fail to satisfactorily impute free will to corporations because these theories rely on legal fictions. Corporations do not have literal minds with which to exercise free will.[79] The mind that monist theories impute to corporations as the basis for the corporation's exposure to legal responsibility is fictional. Legal fictions, while occasionally necessary, should be avoided when an alternative is available,[80] and are particularly undesirable when they allow individuals to exercise control over others.[81] As discussed in the previous paragraph, under a monist theory of entity liability, the individuals responsible for forming the corporate will exercise control over the will formed by the corporation. While this may not create the same type of facial inequity present when a person

78. *See* Díez, *supra* note 49, at 53-57; Bucy, *supra* note 51, at 1121-22; *see also* Shoemaker, *supra* note 73, at 899.

79. *See* Lederman, *supra* note 68, at 307.

80. *Cf.* LON L. FULLER, LEGAL FICTIONS 2 (1967) ("The fiction has generally been regarded as something of which the law ought to be ashamed, and yet with which the law cannot, as yet, dispense.").

81. *See* Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 70 (1990).

exercises control over another natural person, allowing individuals to control the corporate will in this manner indirectly allows those individuals to exercise control over the wills of others. Namely, shareholders, agents, and other stakeholders in corporations are affected, typically adversely, when the corporation is caused to act criminally by the individuals who exercise control over it.[82] This suggests that entity liability is the type of situation where legal fictions are undesirable.[83]

B. The Practical and Policy Failures of Entity Liability

The lack of a satisfactory theoretical justification for holding entities that lack free will criminally liable is unlikely to persuade supporters of entity liability that the doctrine should be abandoned. Supporters of entity liability would argue that, setting aside the world of abstract theoretical arguments, entity liability is desirable because of its ability to deter corporate wrongdoing (the deterrence justification),[84] or because it reflects moral condemnation of a corporation's wrongful actions (the retributivist justification).[85]

Some commentators question whether retribution can justify punishing corporations at all.[86] One failure of the retributivist

82. *See infra* Part II.B.2.

83. *See* Harmon, *supra* note 81, at 70. Analogously, Lon Fuller argued that the "danger" of legal fiction varies inversely to the degree to which the user of the legal fiction is aware of the fiction's falsity. *See* FULLER, *supra* note 80, at 10. The idea of corporations as unitary entities capable of forming wills may plausibly be sufficiently engrained in common discussion of corporations' features that lawyers and judges discuss corporate wills without considering the fictitious nature of the corporate will. If that supposition is true, then the legal fiction of the corporate mind is dangerous under Professor Fuller's theory. *See id.*

84. *See, e.g.*, Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1232-34, 1241-42, 1246 (1984).

85. *See, e.g.*, Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 852 (2000).

86. *See* John T. Byam, Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 585 (1982) (arguing that corporations are not proper targets for retributive justice because retribution is predicated on moral blameworthiness, and corporations, lacking minds, cannot be subjected to moral blame). *But see* Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109 (2010). Many theorists, and some judges, argue that retribution is not a proper aim of criminal justice in any context. *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1494 nn.92-93 (1996) (collecting instances of scholarly and judicial rejection of the retributivist justification of criminal punishment).

justification for entity liability is that its proponents describe the desirability of expressing moral condemnation of corporations in terms of retribution's effects, thereby causing the retributivist justification to collapse into the deterrent justification.[87] While a comprehensive discussion on the validity of retributivist theories of culpability and punishment is outside the scope of this Note, supporters of retributivist justifications for corporate criminal liability must show why a display of moral condemnation of a corporation's act is a sufficiently important consideration to warrant the use the machinery of the state. They commonly do so by pointing to reasons of deterrence.[88] The following Subparts will argue why deterrence does not justify criminal liability for corporations and sketch the incidental harms that justify the abandonment of entity liability.

1. Breakdown in the Mechanics of Deterrence

Numerous legal commentators and economists have observed that the criminal law is not an efficient deterrent system for corporate wrongdoing.[89] In addition to the difficulty (or impossibility) of designing a system of corporate criminal liability that does not impose costs to society greater than its benefits, criminal law is fundamentally unable to guide corporate action in the same way

87. For example, Lawrence Friedman argues that an expressive rationale for retribution justifies corporate criminal liability because it defeats corporations' incorrect valuations of the moral worth of people and objects. *See* Friedman, *supra* note 85, at 845. Professor Friedman's argument thereby justifies the retributive theory of punishment in terms of its effectiveness in deterring incorrect valuations. *See id.* Similarly, Regina Robson defends entity liability along retributivist lines because the moral content of criminal laws targeting corporations "energiz[es] an organization to take a 'second look' at conduct that might be intrinsically suspect." Robson, *supra* note 86, at 140. Thus, under Professor Robson's theory, the aspect of retribution that justifies punishment is its ability to affect how corporations act (and thereby deter corporate wrongdoing). *See id.* at 144.

88. *See supra* note 87.

89. *See, e.g.*, Byam, *supra* note 86, at 603 (analyzing several frameworks of corporate criminal liability and finding that none are economically efficient); Khanna, *supra* note 86, at 1532-34 (arguing that the deterrent effects achieved through the extant criminal liability regime could be achieved more efficiently through a more robust civil liability regime); Fischel & Sykes, *supra* note 39, at 320, 347-48 (arguing that criminal entity liability is an inefficient deterrence system). For a robust discussion of the economics of vicarious liability, see generally Sykes, *supra* note 84.

that it guides the actions of natural persons. There are several reasons for this.

Corporations cannot be imprisoned.[90] This is perhaps the fundamental difficulty of using a legal system designed with natural persons in mind to guide the behavior of corporations. The most obvious—and likely most commonly implemented—solution to this difficulty is to fine corporations, rather than imprison them.[91] The United States Sentencing Guidelines authorize federal courts to impose fines, community service, restitution, compliance programs, probation, and related measures on corporations.[92] These types of punishment are conceptually similar because each has the effect of imposing a strictly monetary cost upon the corporation.[93] Other conceptually possible punishments include dissolution and debarment, but these are rare.[94] The federal sentencing guidelines do not authorize dissolution or debarment, although the United States Sentencing Commission did contemplate the possibility of concurrent administrative sanctions, potentially including debarment.[95] Acknowledging that corporations are creatures of state law, federal courts are particularly hesitant to revoke corporate charters, even in civil proceedings in which shareholders petition for dissolution, out of deference to states' interests in regulating corporations

90. *See* Fischel & Sykes, *supra* note 39, at 320.

91. *See* Lederman, *supra* note 68, at 310-11. Punishments for corporations also often include provisions requiring the corporation to comply with oversight by an external monitor or implement self-monitoring. Peter R. Reilly, *Justice Deferred Is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, 2015 B.Y.U. L. REV. 307, 312-13 (2015).

92. U.S. SENT'G GUIDELINES MANUAL § 8 (U.S. SENT'G COMM'N 2024).

93. *Cf.* Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 943 (2005) ("[S]anctions imposed for criminal liability are not substantially distinct from the sanctions imposed for civil liability.").

94. *See* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 827 (2013) ("No public company convicted in the years 2001-2010 went out of business because of a federal criminal conviction."); *see also* Dave Michaels, *For Big Companies, Felony Convictions Are a Mere Footnote*, WALL ST. J. (July 30, 2024, 05:30 ET), https://www.wsj.com/us-news/law/corporate-criminal-convictions-lack-consequences-boeing-28e4e06c [https://perma.cc/A7RH-9Y7M] (noting the difficulty of debarment, given governmental reliance on contractors and consequent reticence to forbid a company from contracting with the government).

95. Ramirez, *supra* note 93, at 944.

chartered under their laws.[96] State courts are also hesitant to dissolve criminal corporations and typically only do so for certain types of offenses for which the punishment of judicial dissolution is explicitly prescribed.[97] Thus, given the primacy of fines and sanctions substantially similar to fines as punishments for corporate criminal actions, the remainder of this Note will focus on fines as the main method of punishing corporations.

The threat of a fine will deter loyal corporate managers from causing the corporation to engage in criminal acts when the risk of detection is high and the benefit of criminality is low. However, if the expected amount of a potential fine is too low, a profit-maximizing corporation will accept the risk of incurring a fine as a cost of doing business.[98] There will remain situations in which the benefit of criminality is sufficiently high, or the risk of detection sufficiently low, that rational, profit-maximizing corporate managers will cause the corporation to engage in criminality because doing so is in the corporation's best interest and the corporation is unlikely to internalize the costs of the criminal conduct.[99] The solution to this issue would be to increase the amount of fines, but the correct amount of a fine is difficult to determine ex ante, increasing fines risks over-deterrence,[100] and a given corporation's assets represent an upper bound of what it can be fined.[101] Furthermore, fines cannot render any conduct categorically undesirable for a rational economic actor in the same way that the threat of imprisonment can.[102]

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96. *See* Friedman v. Revenue Mgmt. of New York, Inc., 38 F.3d 668, 671 (2d Cir. 1994) ("[E]very federal court that has addressed the issue of dissolving state corporations has either abstained or noted that abstention would be appropriate.").

97. *See* Thomas Linzey, *Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations*, 13 PACE ENV'T. L. REV. 219, 224, 240-47 (1995). The Supreme Court has analogized the dissolution of a corporation to the death of a natural person. Oklahoma Nat. Gas Co. v. Oklahoma, 273 U.S. 257, 259 (1927).

98. *See* Byam, *supra* note 86, at 587.

99. *See* Lederman, *supra* note 68, at 313.

100. *See* Byam, *supra* note 86, at 600-03.

101. *See* Khanna, *supra* note 86, at 1504 n.154.

102. *See* Lederman, *supra* note 68, at 313-14.

The deterrence justification of criminal punishment is predicated on assumptions that are inapplicable to corporations.[103] Consequently, even in systems in which the threatened punishments are properly calibrated to achieve optimal deterrence, criminal liability will not have the desired deterrent effect on corporations.[104] The incongruity between the assumptions of deterrence and the corporate form stems from the fact that corporations do not have minds, thus they do not have free will, and thus they cannot be deterred directly.[105] The logic of deterrence assumes that the actor being influenced by the deterrent threats is a rational actor capable of choosing based on the expected outcomes of its choice.[106] However, corporations are not rational actors capable of choosing because the corporation is subject to the control of the individuals who manage it and is thereby incapable of independent choice.[107] Given that the corporation is a separate entity from its owners and managers, and that ownership and control are separate for all but closely held corporations, the entity subject to the threat of deterrence (the corporation, and indirectly the corporation's owners) is not the entity that chooses whether to comply with the deterrent threat (the managers).[108] This dynamic limits the ability of the threat of criminal liability—and consequent punishment of the corporation—to effectively deter corporate criminal conduct because the individuals who control the corporation can choose to cause the corporation to violate the law and shift the cost of that action to the corporation and, as the next Subpart of this Note will discuss, innocent groups.

Empirical research shows the theoretical observation discussed above to be correct: The extant entity liability regime does not effectively deter corporate criminality.[109] One study found that criminal prosecutions of corporations rarely lead to major adverse

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103. Put differently, theories of deterrence are designed with natural humans as their object. *See id.* at 316.

104. *See* Khanna, *supra* note 86, at 1514.

105. *See id.* at 1494.

106. *See* Lederman, *supra* note 68, at 316.

107. *See supra* Part III.A.1.

108. *See* Lederman, *supra* note 68, at 316.

109. *See* Markoff, *supra* note 94, at 802; *see also* Michaels, *supra* note 94; Jim Edwards, *Pfizer Stock Shrugs Off $2.3B Bextra Fine; Can Anything Deter Off-Label Promotion?*, CBS NEWS (Sep. 8, 2009, 11:17 ET), https://www.cbsnews.com/news/pfizer-stock-shrugs-off-23b-bextra-fine-can-anything-deter-off-label-promotion/ [https://perma.cc/A8NT-AEYM].

effects for the corporate defendant.[110] Consequently, firms can repeatedly engage in criminal conduct when they can afford the potential punishment.[111] The solution to this problem is to implement a system that places the costs of corporate criminality on the individuals who, using their free will, choose to cause the corporation to perform a criminal act.

2. Moral Hazard and Externalities

When corporations face criminal punishment, the costs of the punishment are imposed upon other, often innocent, entities.[112] Prosecutors must, at least at the federal level, consider the impacts on external entities of prosecuting a corporation.[113] For example, when a corporation is fined, shareholders experience the diminution of their shares' values, and creditors experience increased risk.[114] This effect may be desirable when it imposes punishment on shareholders who exercise control over the corporation in a manner that makes them culpable for the criminal action. But when the corporation's criminality is attributable to actions outside of shareholders' control, which is true of almost any discrete action of an employee of a public corporation with a large number of dispersed shareholders,[115] the shareholders have not performed any act making them worthy of punishment. Criminal punishment of the corporation may also have less direct, but collectively more severe, negative effects than diminution of share value. Namely, corporations faced with fines are likely to pass on costs to consumers and, if the punishment is severe enough, lay off employees.[116] The universe of potential stakeholders impacted by corporate punishment

110. *See* Markoff, *supra* note 94, at 827-30.

111. *See* Michaels, *supra* note 94.

112. *See* Coffee, *supra* note 3, at 386-87.

113. *See* U.S. DEP'T OF JUST., JUST. MANUAL § 9-28.300 (2024).

114. *See* Coffee, *supra* note 3, at 401.

115. *See* Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 597-99 (2005) (positing the limited ability of shareholders to effectively monitor for and control organizational and occupational misconduct).

116. *See* Coffee, *supra* note 3, at 401-02.

is broad,[117] and most of these stakeholders have effectively no ability to control the conduct of corporations.[118]

By dispersing the effect of the punishment across a swathe of mostly innocent stakeholders, the extant regime of corporate criminal liability allows the actual wrongdoers—those who, by their own free will, caused criminal conduct—to escape punishment.[119] Albert Alschuler observed that "[c]orporate officers fearful of prosecution may offer the corporation's guilty plea and its payment of a substantial fine to avoid the risk of jail themselves."[120] Thus, when the corporate officers are the wrongdoers, they can shift the impending punishment from themselves to the corporation and the stakeholders harmed by the corporation's punishment.

In economic terms, the corporate decision maker's ability to shift costs to the corporation creates moral hazard.[121] Internal compliance regimes could mitigate the moral hazard by shifting costs downward from the corporation to the individual decision maker (for example, by firing individuals who cause the corporation to violate the law).[122] However, evidence suggests that corporate compliance initiatives do not, in fact, sufficiently align corporate decision makers' incentives with the corporation to avoid risk shifting.[123] Perhaps this is a consequence of the fact that the same decision makers responsible for implementing compliance initiatives often stand to benefit from the moral hazard.[124] Whatever the reason, experience and reason show that internal compliance cannot make up for individual wrongdoers'

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117. *Cf.* Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 823-28 (2003) (discussing impact of corporate misconduct on stakeholders outside of the criminal punishment context). Hale observes that corporations' downfalls adversely impact stakeholders including employees, suppliers, creditors, and other organizations that have relied on the corporation. *Id.* at 825, 830.

118. *See* John C. Carter, *The Rights of Other Corporate Constituencies*, 22 MEM. ST. U. L. REV. 491, 504-11 (1992).

119. *See* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1370 (2009).

120. *Id.*

121. *See* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 270-71 (1996).

122. *See* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1406 (1999).

123. *Id.* at 1405-16.

124. *See id.* at 1410-15.

ability to shift punishment onto the corporation and its various stakeholders.

Consider a variation on the experience of the California energy utility, PG&E.[125] Suppose that PG&E's CEO at the time of the Camp Fire[126] knew of PG&E's dangerously undermaintained infrastructure and willfully caused the corporation to neglect to remediate it. Suppose further that she did so because it accrued some benefit to her, perhaps by increasing PG&E's profits and thereby earning her a salary bonus tied to profits. Perhaps she knew of the risk of a calamitous fire, but she knew too that she would not personally face criminal punishment; only the corporation would. She could, of course, be fired, and she could face civil liability, but she was insured against that.[127] Thus, she could shift the costs of criminal conduct, such as a potential sentence of decades in prison for eighty-four counts of involuntary manslaughter, to the corporation, while keeping many of the benefits—salary bonuses tied to increased profits—for herself.

An additional externality problem arises from the fact that a corporation and its stakeholders are exposed to punishment for criminal conduct before the corporation is convicted. One mechanism for this exposure operates through the use of deferred prosecution agreements or other pre-trial settlements.[128] Given the potentially disastrous consequences of a conviction at trial, corporations often have strong incentives to settle with the government before or immediately following an indictment, rather than try to defend themselves.[129] The pressure of public opinion on consumer-

125. *See generally supra* notes 4-16 and accompanying text.

126. J.D. Morris, *PG&E CEO Geisha Williams Out amid Utility's Widening Financial Crisis*, S.F. CHRON. (Jan. 14, 2019), https://www.sfchronicle.com/business/article/PG-E-CEO-Geisha-Williams-out-amid-utility-s-13530807.php [https://perma.cc/627P-WNEP].

127. *See Ex-PG&E Execs to Pay $117M to Settle Lawsuit over Wildfires*, KCRA (Sep. 30, 2022), https://www.kcra.com/article/ex-pgande-execs-pay-dollar117m-settle-lawsuit-over-wildfires/41468750 [https://perma.cc/Q4PV-NSQD]. The potential for moral hazard is perhaps most acute when insurance incentivizes risk-taking. *See* Baker, *supra* note 121, at 267-72.

128. *See* Barry J. Pollack & Annie Wartanian Reisinger, *Lone Wolf or the Start of a New Pack: Should the FCPA Guidance Represent a New Paradigm in Evaluating Corporate Criminal Liability Risks?*, 51 AM. CRIM. L. REV. 121, 124 (2014).

129. *See* Reilly, *supra* note 91, at 320-23 (2015) (observing that corporations often accept agreements with the government to avoid debarment and exclusion, which are existential threats to corporations that do large portions of their business with the federal government, such as firms in the government contracting sector); *see also* Andrew Weissmann & David

facing firms also creates strong incentives for corporate managers to seek swift disposition of an impending criminal case.[130] These mechanisms deprive the stakeholders that bear the costs of corporate punishment of any semblance of the procedural safeguards normally afforded to criminal defendants. Not only are the stakeholders exposed to punishment before any conviction is obtained, but the individuals who have the opportunity to vindicate the stakeholders' rights are strongly disincentivized from doing so.

Systems of criminal law should be designed to limit both the social costs of criminal conduct and the externalities created by the functioning of the criminal justice system itself. While it is true that all criminal punishment creates externalities,[131] this Subpart has sketched the ways in which the extant entity liability regime imposes excessive costs on innocent stakeholders. Compounding the externality problem of entity liability, the same stakeholders who are injured by the corporation's crime may also face the injury inflicted by the punishment.[132] The extant regime holds corporations liable for crimes committed by their agents even if the corporation itself—and consequently its shareholders and other stakeholders—is the victim.[133] A system for punishing criminal conduct that occurs in the corporate context should seek to limit the externalities on innocent stakeholders. This can be accomplished by targeting the decision makers—that is, reserving criminal punishment for the individuals who use their free will to cause criminal action.

Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 426-27 (2007). Professors Weissmann and Newman argue that the "death penalty" faced by Arthur Andersen LLP after its conviction at trial has served as a warning for companies facing criminal charges, and as a result, such companies are unwilling to risk trials. *Id.* Consequently, it is rare for corporations to experience the type of corporate death penalty experienced by Arthur Andersen. *See* Markoff, *supra* note 94, at 807, 821-28.

130. *See* James Kelly, *The Power of an Indictment and the Demise of Arthur Andersen*, 48 S. TEX. L. REV. 509, 525 (2006).

131. *See* Coffee, *supra* note 3, at 401.

132. For example, when a corporation defrauds its shareholders. *See* Krawiec, *supra* note 115, at 609.

133. *See, e.g.*, United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 970-71 (D.C. Cir. 1998) (imputing liability to a corporate defendant for acts of its agents that defrauded the corporation because those acts were intended to benefit the corporation), *aff'd*, 526 U.S. 398 (1999).

III. THE SOLUTION: AN INDIVIDUAL LIABILITY REGIME

To recap, the exercise of free will is a necessary condition for the assignment of criminal liability.[134] Corporations do not have free will, yet they are subject to criminal liability.[135] This contradiction leads to the failure of theoretical justifications for entity liability and empirically suboptimal outcomes.[136] There is no satisfactory solution to these problems.[137] Consequently, entity liability should be abandoned. The remainder of this Note proposes that, in order to solve the problems stemming from corporations' lack of free will, the law should focus blame and punishment on actors who do have free will.

A. Proposing a New Theory of Criminal Liability for Corporate Crime

This Subpart argues for a new regime of criminal liability for when corporations misbehave. It will discuss methods for identifying and punishing individuals who freely and willfully impel the corporation to act criminally.

1. Identification of the Proper Subject of Punishment

When the impetus behind corporate criminal conduct can be traced to particular individuals who control the corporation's conduct, those individuals should be assigned blame and punishment. Unlike the current regime of corporate punishment, this system would achieve fairness by imputing blame only to those actors who, by their own free will, engaged in blameworthy conduct.[138] In some cases, the blameworthy individuals will be controlling shareholders, directors, or upper-level officers. In others, the blameworthy individual will be a lower-level officer or employee.

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134. *See supra* Part I.A.
135. *See supra* Part I.B.
136. *See supra* Part II.
137. *See generally* Khanna, *supra* note 86; Lederman, *supra* note 68.
138. *See generally* Pamela Hieronymi, *The Force and Fairness of Blame*, 18 PHIL. PERSP. 115 (2004).

Identifying the appropriate individuals to target for prosecution will require identifying the person or people who used the apparatus of the corporation to accomplish some end, and in doing so caused the corporation to engage in illegal conduct. Consequently, a necessary condition for the imputation of liability in these cases will be that the liable individual used the corporation as an instrument, such that the acts of the corporation originate from the acts of the individual. This condition will be satisfied whenever a corporate agent performs an illegal act by their own free will in the scope of their employment.[139] Alternatively, it will also be satisfied whenever a director, officer, controlling shareholder, or employee commands, using actual or apparent authority, other employees to engage in the conduct that causes the violation.[140] A second necessary element is a nexus between the individual's free will and the conduct that caused the criminal violation.[141]

Consider again *United States v. Hilton Hotels*.[142] There, the defendant's purchasing agent caused the defendant to violate the Sherman Act by boycotting a supplier that the purchasing agent held a personal grudge against.[143] The corporation's actions were attributable to the purchasing agent because he acted with authority to make purchasing decisions.[144] And the decision to engage in the boycott was a product of the purchasing agent's own free will; he was not commanded to engage in the boycott,[145] nor was it an action

139. *Cf.* United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987) (equating the acts of a corporation to the acts of the corporation's employees).

140. This is the situation that occurred in *United States v. T.I.M.E.-D.C., Inc.*, where a trucking company's draconian sick leave policy required dispatchers to direct drivers to drive while sick, in violation of Federal Highway Administration regulations. *See* 381 F. Supp. 730, 736-37 (W.D. Va. 1974). There, the correct individuals to target for prosecution would have been those who made the sick leave policy and commanded dispatchers to instruct truckers to follow it, not the truckers who directly caused the violations by driving while sick.

141. This does not mean that the individual needs to will that the corporation commit a crime in the specific intent sense. General intent suffices. *Compare* United States v. Philip Morris USA Inc., 566 F.3d 1095, 1118 (D.C. Cir. 2009) (where executives' intent to make knowingly false statements satisfied specific intent), *with T.I.M.E.-D.C.,* 381 F. Supp. at 740 (where no specific intent was required). In either case, the corporate policymaker's intent to cause the corporation to commit the violating act qualifies the policymaker for liability, not the policymaker's intent that the corporation commit a crime.

142. 467 F.2d 1000 (9th Cir. 1972).

143. *Id.* at 1004, 1006-07.

144. *Id.* at 1007.

145. *Id.* at 1004.

with the sort of mechanical regularity that could make the decision attributable to another.[146] Thus, criminal liability, and consequently punishment, should have been targeted at the purchasing agent.

This result should have an intuitive appeal; the wrongdoer in that case was the person who used a business apparatus to vindicate his personal feelings toward another. This intuitive inclination to punish actual wrongdoers will point to the correct results in many, if not all, cases. The law should punish the tobacco executives who intentionally mislead the public about the health effects of cigarettes,[147] or the decision makers who put sick and fatigued truckers on the road.[148] It should not allow these individuals to use the corporate form to shield themselves from responsibility.

2. Punishment

Legal punishment flows from legal blame.[149] So, the target of legal blame should be the target of legal punishment. Punishment should be calibrated to minimize social costs by balancing the costs of overdeterrence with the costs of underdeterrence.[150] In switching from corporate liability to individual liability, a recalibration is necessary to efficiently impose punishments. Such a recalibration must acknowledge that sanctions on humans should differ in both kind and degree compared to sanctions on corporations.[151]

The level of punishment necessary to deter an individual from causing a corporation to violate the law is likely lesser than the level necessary to deter corporations. Individuals are presumably less wealthy than corporations and thereby less able to endure fines, so smaller fines levied against individuals can accomplish the same

146. This type of mechanical regularity was at play in *T.I.M.E.-D.C.*, where the dispatchers' encouragements to truckers to work while sick was a consequence of corporate policymakers' imposition of the onerous sick-leave policy. *See* 381 F. Supp. at 733.

147. *See* United States v. Philip Morris USA Inc., 566 F.3d 1095, 1106-09 (D.C. Cir. 2009).

148. *See T.I.M.E.-D.C.,* 381 F. Supp. at 736-37.

149. David Shoemaker, *Blame and Punishment*, *in* BLAME: ITS NATURE AND NORMS 100, 102-03 (D. Justin Coates and Neal A. Tognazzini eds., 2013).

150. Byam, *supra* note 86, at 588 ("Corporate offenses impose two social costs: the cost of reducing the number of offenses to a certain level, and the cost of enduring the offenses at that level. Therefore, an efficient enforcement system minimizes the cost of offense prevention and the cost that committed offenses impose on society.").

151. *See supra* Part I.B.1.

level of deterrence as larger fines levied against corporations. Alternatively, the threat of imprisonment—which can be imposed upon humans (but not corporations)—for certain crimes provides a stronger deterrent than fines.[152] Some criminal statutes already provide for different levels and types of punishment, depending on whether the violator is a corporation or a natural person.[153] Which crimes are worthy of the threat of imprisonment is a question to be answered by legislators. But given the tendency under the extant regime to punish corporations with fines, legislatures may consider fines adequate for punishing individuals.

As a consequence of the proposition that smaller fines are capable of deterring conduct under an individual liability regime, such a regime can minimize the social cost of punishment. Individual punishment will more effectively deter crime in the corporate setting because, unlike punishment imposed on corporations, the deterrent function will operate on the actual person exercising free will to decide whether to engage in criminal conduct.[154] Fines of equal value in proportion to the recipient's wealth will have a stronger deterrent effect on an individual, compared to a corporation, because in the case of the individual it is the decision maker who bears the entirety of the cost. For example, compare a $10,000 fine levied against an individual with a $1,000,000 net worth with a $1,000,000 fine levied against a corporation with $100,000,000 in assets available to satisfy the fine. Each of these fines corresponds to 1 percent of the recipient's wealth. However, for the individual, the person deciding whether to take the action that will cause the fine to be incurred bears the entire cost. For the corporation, the person deciding whether to take the action bears only a portion of the cost, which primarily consists of the diminution of the value of the stock they hold (if any) and the internal sanctions the corporation levies (if any). In sum, it will require less severe threats to make individuals choose not to engage in criminality under an individual liability scheme. Thus, less severe punishments can be

152. For a discussion of the types of punishment applicable to corporations, see *supra* notes 90-97 and accompanying text.

153. *See, e.g.*, Sherman Act § 1, 15 U.S.C. § 1 (allowing for a maximum fine of $100,000,000 for corporate violators, and a maximum of a $1,000,000 fine and ten-years imprisonment for all other violators).

154. *See supra* Part II.B.1.

imposed without creating underdeterrence. Additionally, individual punishment minimizes externalities compared to the current system because it narrowly focuses the costs of punishment and does not allow corporate decision makers to pass the costs of the corporation's crimes on to other stakeholders, such as shareholders, employees, and consumers. Smaller punishments and fewer externalities reduce the frequency and costs of overdeterrence. Thus, a system that targets the originators of corporate criminal actions with primarily fine-based punishments creates fewer social costs than the extant system.

B. Additional Policy Considerations

1. Enforcement

One justification for the current system of punishing corporations is that prosecutors are able to secure a conviction more easily against a corporation than against an individual in cases of corporate crime.[155] One issue with this justification is that the empirical proposition—that corporations are easier to convict—is difficult to either prove or disprove because corporations rarely go to trial.[156] Additionally, if corporate criminal responsibility fails to achieve the policy goals for which it is intended, as this Note has argued,[157] then it does not matter that they are easier to convict than natural persons. The ease of doing something is not a reason per se to do that thing. The possibility of convicting corporations, coupled with the ineffectiveness of doing so, creates a perverse incentive for prosecutors to focus on corporations and ignore potentially culpable individuals. If society wants its prosecutors to focus their resources on the prosecutions that will create the most social good, then society should encourage prosecutors to target individuals, rather than corporations.

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155. See OHLIN, *supra* note 22, § 11:5 (citing MODEL PENAL CODE § 2.07 cmt. at 146-55 (AM. L. INST., Tentative Draft No. 4 1955)).

156. *See* Markoff, *supra* note 94, at 811.

157. *See supra* Part II.B.

2. Inaction and Oversight

The earliest cases of criminal liability for corporations often involved cases of corporate nonfeasance.[158] Corporations are still subject to liability for crimes of nonfeasance,[159] despite a general aversion in the legal system to imputing criminal liability for inaction.[160] The proposition that criminal liability is appropriate in certain instances of inaction poses a problem for the theory of liability proposed in this Note, which holds that liability is related to the exercise of free will and consequent action. This problem is particularly acute if a corporation has a culture of widespread illegality and poor information-gathering by officers. In such instances, it may be difficult to identify any individuals who perform affirmative actions to cause the corporation to engage in illegal conduct. This problem is not intractable, however. In many cases, nonfeasance still occurs through the type of act that can give rise to individual liability. Consider, once again, *Hilton Hotels*.[161] There, the boycott of the supplier can be construed as inaction—it was the defendant's omission to consider certain purchases that created liability.[162] Nevertheless, that putative inaction was an event that can be traced back to an exercise of free will by an individual—the purchasing agent.[163] The misfeasance-nonfeasance distinction collapses into irrelevance in instances of a discrete failure to act that can be traced back to an exercise of an individual's free will. However, some situations might involve more sweeping failures to act that cannot be traced back to any particular decision, such as a company's failure to exercise oversight over some operation, which then causes an injury and results in criminal negligence. In such

158. *See* Brickey, *supra* note 38, at 405-10.

159. 10 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4943; *see* State v. Adjustment Dep't Credit Bureau, Inc., 483 P.2d 687, 689 (Idaho 1971) ("Under the modern view, however, a corporation may be found guilty of a breach of a duty imposed by law, both for acts of nonfeasance and misfeasance.").

160. *See generally* Marcia M. Ziegler, Comment, *Nonfeasance and the Duty to Assist: The American Seinfeld Syndrome*, 104 DICK. L. REV. 525, 527-28 (2000). Criminal liability is not imposed for inaction unless there is a clearly defined duty to act. *See, e.g.*, Barber v. Superior Ct., 195 Cal. Rptr. 484, 490 (Ct. App. 1983).

161. 467 F.2d 1000 (9th Cir. 1972).

162. *See id.* at 1004.

163. *See id.*

cases, liability should be imposed on individuals who had a duty to act but chose not to. Consider PG&E's liability for the Camp Fire. California law imposed a duty on PG&E to maintain its infrastructure in line with certain standards, and PG&E failed to do so.[164] Presumably some PG&E officers and employees decided to allocate capital away from infrastructure maintenance, decided to not prioritize maintenance that would bring the firm's infrastructure into compliance with the law, and decided to not maintain the particular transmission tower that sparked the fire. These are the facts that a court should consider when identifying the appropriate target of blame. If a causal chain can be drawn from any of these decisions to the criminal conduct, then criminal liability is appropriate for the person who made the decision.

Another rejoinder to the nonfeasance issue flows from the fact that corporate directors have a duty to exercise oversight over the corporation, and failure to fulfill that duty exposes directors to civil liability.[165] If directors' *Caremark* duty is extended to provide a basis for criminal liability, then the failure to exercise oversight can be considered the type of discrete inaction that flows from particular exercises of free will. Suppose that directors, knowing that they have a clearly defined duty to establish and use monitoring systems, choose not to do so. If that act in itself causes a crime to occur, then the directors are the appropriate targets for legal blame. If, however, that decision leads to corporate agents performing an act that causes a crime, and that act cannot plausibly be construed as something commanded by the directors and thereby a product of their free will, then the appropriate target is not the director but the employee who actually did the act.

It may be the case in some instances of nonfeasance that nobody willed the offending conduct. In such instances, there is no appropriate target for criminal liability. Although facially a suboptimal outcome, this comports with the general aversion to criminal liability for inaction.[166] Civil liability may represent a more efficient mechanism to remedy corporate nonfeasance.[167] And this situation

164. *See* CAL. PUB. UTILS. COMM'N, *supra* note 6, at 2-5.
165. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).
166. *See* Barber v. Superior Ct., 195 Cal. Rptr. 484, 490 (Ct. App. 1983).
167. *See* Khanna, *supra* note 86, at 1533-34.

highlights the intuition underlying the problem examined in this Note: why label something a criminal when there is no person who engaged in blameworthy conduct?

CONCLUSION

It is doubtful that many people feel sympathy for corporations that are convicted of crimes. There is good reason for this: Corporations are not appropriate objects for emotions like sympathy.[168] Consequently, perhaps they are not appropriate targets for emotions like anger and actions like retribution.[169] When a company does something bad, should society spread its contempt for that bad action across the entire company, innocent stakeholders and all, or should society target its contempt at the specific individuals responsible for the bad action? This Note argues for the latter. This Note argues too that an individualized liability regime will likely resolve both the overdetterance and underdeterrence problems inherent in corporate criminal liability. Admittedly, the solution presented in this Note would be a radical change to American law's current mechanisms for dealing with corporate crime. But the extant regime is itself a fundamental departure from the foundation of Anglo-American criminal law, which focuses on the free will of the individual as the starting point for appropriate imputation of criminal responsibility. Thus, what this Note proposes is merely a return to the basic principles of criminal law.

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168. *Cf.* Shoemaker, *supra* note 73, at 901-03 (arguing that corporations are facially inappropriate targets for angry blame because they are not moral agents).

169. *See id.*

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