HOW AND WHY CORPORATIONS BECAME (AND REMAIN) PERSONS UNDER THE CRIMINAL LAW

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I. INTRODUCTION

> *Perhaps, there is not, in the history of the common law, more distinctive evidence of its modifications, of the rejection of its narrow technicalities, than in the adaptation of the legal relation of corporations to a just liability for the acts, omissions, or engagements of the governing body, or its agents, or servants, employed in the transaction of corporate business.*[1]

The Supreme Court concluded in 1909 that a corporation, like an individual, can be held criminally responsible for its misconduct.[2] Yet even now, corporate-criminal liability has yet to overcome the same skeptical argument it faced then—and, for that matter, for centuries prior.

The skeptic's challenge appears as simple as it is persistent: Lacking a mind distinct and independent from its constitutive stakeholders, a corporation cannot produce the sorts of intentional attitudes needed to satisfy the law's mens rea component.[3] In other words, a corporation is straightforwardly incapable of satisfying one of criminal law's most basic requirements. Accordingly, to the skeptic, the very idea of corporate-criminal liability is, and always has been, pure nonsense.

Though it presents as a simple, common-sense challenge to a corporation's ability to intend—criminally or otherwise—unpacking the skeptic's critique quickly implicates profound considerations regarding the nature of personhood and proper methods of attribution. Animating the dispute between skeptics and proponents of corporate-

1. Jordan v. Ala. Great S. R.R. Co., 74 Ala. 85, 88 (1883).

2. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494-95 (1909).

3. *See infra* notes 44-50 (collecting authorities). I limit my attention to crimes for which an intentional attitude—understood broadly to include at least states of knowledge, maliciousness, or recklessness—is a required element. Unless otherwise specified, I understand the term "corporate-criminal liability" to exclude strict criminal liability.

criminal liability is a disagreement over how to evaluate personhood—namely, how one's conception of personhood licenses which actions, attitudes, and responsibility judgments can be attributed to the entity in question. This brand of disagreement is nothing new. These themes recur throughout Western thought and extend far beyond corporate law, from Plato's *Phaedo* to Boethius and Bartolus of Sassoferato, from Thomas Hobbes to John Locke.[4] Given the intellectual lineage behind what is otherwise an ordinary policy disagreement, perhaps it should not be terribly surprising that skepticism about corporate-criminal liability was never put to rest.

I don't expect that we can break this conceptual stalemate all at once, if at all, to solve the challenge facing corporate crime. More to the point, we don't need to. As it turns out, in taking up this very dispute at the turn of the twentieth century, courts and legislatures sided with the proponents of corporate crime in a way that the skeptic cannot, or at least should not want to, unwind. The proponents of corporate-criminal liability did not just win the policy fight; they did so in a way that rendered the skeptic's position incompatible with broader theoretical commitments that are now instrumental to the modern corporation.

This Article offers two contributions to the debate over corporate-criminal liability: one conceptual, and one practical. First, the same argument embraced by today's skeptics was tried but rejected in the late 1800s, when the practice of holding corporations responsible first developed. Courts previously receptive to the skeptic's reasoning abandoned the view—and more importantly, the relationship between personhood and attribution underwriting it—as increasingly untenable amidst a changing economic environment in which commercial corporations transformed from tiny, narrowly constrained, quasi-state entities to sprawling, sophisticated, dominant participants in the national marketplace. Meanwhile, the gradual embrace of corporate liability, both in tort and crime, is intimately connected to the simultaneous demotion of corporate law as a regulatory tool. The turn towards corporate-criminal liability thus reflects a broader abandonment both of a long-dominant conception of personhood and of an approach to corporate regulation rendered ineffective by the development of what has become the basis for our modern corporate law. In a slogan, corporations today are persons under the criminal law not because they have *always* been eligible, but rather because they *became* eligible.

I should delay identifying the practical lessons in this Article to note the irony in my approach. These days, the history behind corpo-

4. *See infra* Section II.B.

rate crime's development is usually offered as evidence for *attacking* the practice. There is a standard story in the corporate crime literature about the sudden birth of corporate-criminal liability in the face of centuries of settled precedent.[5] Briefly, according to this received wisdom, legislatures expanded the criminal law to corporate persons as a way of deterring harms attendant to the steadily increasing presence of commercial corporations throughout the 1800s. Precedent and common sense notwithstanding, courts acquiesced, trading theoretical coherence for practical expedience. Placed in an impossible situation, courts sidestepped the issue of genuine corporate mens rea by importing from tort law into criminal law a form of vicarious liability as a substitute. Linking the standard story up to present times, the legacy of this judicial dodge remains with us: Federal courts still use vicarious liability to impute to a corporation the criminal attitudes of most any individual inside it.[6] But if the need to bring corporations to heel once outweighed the loss of theoretical consistency, that is no longer the case. Today, civil and administrative innovations can accomplish the same or better results without the ontological baggage. Told from the perspective of today's skeptic, the standard story of corporate-criminal liability's development reinforces that the practice was and remains unjustified, while deterrence arguments no longer excuse our prior tolerance of conceptual nonsense.

But the standard story is wrong. Or rather, it is incomplete in ways that end up having profound implications for our modern practices. The development of corporate-criminal liability is emblematic of two major changes that get short shrift in the corporate-crime literature. First, a series of drastic revisions to corporate law, while well documented among legal historians addressing corporate law and personhood, go largely overlooked in discussions of corporate-criminal liability's development. Specifically, virtually absent from the standard story's discussion of corporate-criminal liability's development is a serious treatment of the simultaneous transformation in the content and purpose of corporate law.[7] This omission is a serious mistake: Corporate and criminal law embodied diametrically opposed approaches towards corporate regulation; the rise of the latter cannot be understood in isolation from the decline of the former. Several near-revolutions in corporate law changed the domain from an invasive, internal-looking tool for corporate regulation to a system that gives broad deference to individuals to organize and coordinate as they see fit. These changes laid the groundwork for making corpora-

5. *See infra* Sections III.A-B.

6. *See infra* Section III.A.

7. *See infra* Section III.A.

tions into the kinds of sophisticated entities capable of becoming persons for purposes of criminal law.

Second, scant attention is paid to the actual arguments made to, or reasons given by, those courts developing the doctrine. Yet law is a reason-giving enterprise; courts at the time grappled, often quite explicitly, with the thorny assumptions implicated by the potential extension of certain tort and criminal liability to corporations.[8] In fact, across a variety of legal domains courts rejected their previous reliance on what I refer to throughout this Article as the "intrinsic conception of personhood" because it no longer provided a workable framework to conceive of and understand corporations, which were growing increasingly dissimilar from their historical counterparts.[9] The intrinsic conception of personhood, however, plays a central role in the skeptic's argument. Meanwhile, what I call the "pragmatic conception of personhood," which courts adopted as a viable alternative, sits on the other side of the conceptual impasse from the skeptic.[10] As a matter of theory, a pragmatic conception of personhood creates space for the possibility of genuine corporate attitudes generally, and corporate-criminal liability specifically. As a matter of law, the pragmatic conception of personhood underwrites nineteenth-century reforms, the product of which structure today's corporate law.

On to the practical upshot of this Article: A clear theoretical understanding of how and why courts first held corporations criminally responsible has profound consequences for how and why we continue to hold them responsible today.

Most directly, recognizing the conditions under which corporations became persons for the purposes of criminal law removes from contemporary debates one complaint with modern practice and does so without having to resolve some deep metaphysical truth about the ultimate nature of personhood. The conception of personhood underlying the development of corporate-criminal liability now serves as a touchstone of our modern corporate-law framework. Thus, the skeptic may be right about corporate-criminal liability's incoherence but only on the presupposition of a corporate paradigm that no longer holds sway. Conversely, taking seriously the skeptic's conceptual objection today, given our current commitments, risks upending the foundation of today's corporate law. Pyrrhic does not begin to describe an argument against corporate crime whose incidental victim is the framework for creating and maintaining the modern corporation.

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8. *See infra* Sections III.B, IV.B.
9. *See infra* Section III.B.
10. *See infra* Section III.B.

Next, close attention to prior judicial reasoning shines new light on how to reform the worst feature of our modern doctrine of corporate-criminal liability: the continued willingness to use vicarious liability as a substitute for genuine corporate mens rea. This is because, notwithstanding the Supreme Court's endorsement of vicarious liability in *New York Central*,[11] contemporary courts actually explored how to make sense of genuine corporate attitudes. These efforts provide a lens for understanding federal *practice*—as opposed to federal *doctrine*—as a second-best alternative to approaches articulated more than a century ago. On this view, improving corporate-criminal liability is not a matter of rebuilding the institution from the ground up, but instead merely transferring to a jury those considerations currently being entertained by prosecutors and sentencing courts in the shadow of a capacious vicarious liability doctrine, and which have the effect of approximating genuine corporate mens rea. In short, understanding historical practices shows us how we could prosecute corporate-criminal liability better, how prosecutors and sentencing courts are already mimicking these strategies, and how the whole enterprise would stand on a better conceptual and normative footing by aligning our corporate-crime doctrine with its shadow practice.

Finally, appreciating that corporate-criminal liability developed for deeper reasons than merely a lack of regulatory alternatives brings to the forefront a justification for holding corporations criminally responsible that has gone mostly forgotten in today's conversations. Notwithstanding the conventional wisdom's focus on bare deterrence arguments, contemporary judicial opinions reveal that courts were overwhelmingly preoccupied with a constellation of fairness considerations as justification for expanding corporate liability. These considerations reflect a procedural heuristic, according to which courts endeavored to treat all persons equally, but at a minimum sought not to discriminate against individual persons[12] in favor of corporate persons.[13] Thus, with respect to criminal liability, courts refused to favor corporations over individuals by exposing the latter, but not the former, to the harsh sanction of criminal responsibility. Commitment to this qualified antidiscrimination sentiment applies at least as powerfully today as it did a century ago: Far from being a

11. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494 (1909).

12. The common practice is to refer to what I call "individual persons" (presumably humans) as "natural persons." However, this presentation loads the dice in favor of the skeptic on precisely the issue of the nature of personhood, which I take to be up for grabs. Thanks to Peter Railton for pressing me to abandon the standard term.

13. Relatedly, although scholars refer interchangeably to "corporate persons" and "artificial persons," the latter invites troubling and avoidable ambiguity. *See* Saul A. Kripke, *Unrestricted Exportation and Some Morals for the Philosophy of Language*, *in* PHILOSOPHICAL TROUBLES, 322-50 (2011). Accordingly, I restrict myself to the term "corporate person."

once-excusable, now-superfluous practice, corporate-criminal liability has as much reason to exist today as it did upon inception.

This Article proceeds as follows: Part II unpacks the conflict between skeptics and proponents. I detail the received wisdom about the historical development of corporate-criminal liability. I then show how this history is leveraged to support the skeptic in what is fundamentally a conceptual dispute over the nature of personhood and attribution. Finally, because my ultimate view is that courts in the nineteenth century actually did reject the skeptic's intrinsicism in favor of a pragmatic conception of personhood, I detail the stringent conditions needed to satisfy personhood from a pragmatic perspective.

Part III dives into the history of corporate-criminal liability's development. Drawing on the work of legal historians, I situate this innovation alongside the radical reinventions of corporate law, corporate personhood, and the commercial corporation occurring throughout the 1800s. Central to this discussion are changes in corporate law at both the legislative and judicial levels, which created entities of sufficient sophistication that it became felicitous to attribute to them characteristics of personhood that are relevant for criminal law—albeit under a pragmatic, rather than an intrinsic, formulation.

Part IV establishes how corporations became eligible for personhood as that concept is understood for the purpose of criminal law, and further how this discovery can improve our modern practice. First, I demonstrate that a confluence of regulatory and economic pressures developed corporations into agents capable of satisfying stringent requirements identified in Part II as essential to a pragmatic conception of personhood. Next, I focus on the actual reasoning employed by courts, particularly state courts, addressing the very conceptual dispute at issue between skeptics and proponents of corporate-criminal liability today. Close attention to judicial reasoning demonstrates that prior regulatory techniques—themselves premised on an intrinsic conception of personhood—became unworkable as the role, scope, and complexity of corporate activity expanded throughout society. I further argue not just that courts rejected the intrinsic conception of personhood, but moreover began to identify the pragmatic conception of personhood as a suitable alternative for making sense of corporate activity. As evidence of this, courts even began to articulate principled methods for attributing genuine collective attitudes to corporations. This approach highlights a way forward to putting our modern practice on a more solid footing—and, as it turns out, reveals that the first steps towards such a foundation have already been taken by sentencing courts and federal prosecutors.

Part III is the when, Part IV is the how, and Part V is the why. I close by addressing the justifications courts gave supporting their abandonment of tradition in favor of developing corporate-criminal

liability, and what this motivation tells us about why we should hold corporations criminally responsible today. Corporate-criminal liability developed for deeper reasons than merely a lack of regulatory alternatives. Courts justified their innovation by appealing to a range of fairness considerations, which all centered around preserving an equal, if not preferred, status for individual persons. The expression of this justification, though mostly forgotten in today's conversations about corporate crime, is every bit as valuable today as it was then.

II. SKEPTICAL CHALLENGES TO CORPORATE-CRIMINAL LIABILITY: HISTORICAL AND CONCEPTUAL PERSPECTIVES

A. The Standard Story of How Corporate-Criminal Liability Developed, and Why It Matters Today

Let's begin with the received wisdom—or, at least, a frequently proffered version—about how corporate-criminal liability came to be, and how this standard story is leveraged today to support skepticism about corporate-criminal liability's continued existence. Although I focus on two prominent retellings, invocation of the same or similar story is a common trope in the scholarly literature on corporate-criminal literature.[14]

1. The History

For centuries it was understood that corporations were incapable of satisfying even the minimum requirements of criminal law, which generally involve a proscribed act (actus reus) carried out concurrently with a proscribed attitude (mens rea).[15] On the then-prevailing understanding, corporations could not satisfy one or both of these requirements because they lacked the organs, common to individuals, to instantiate either. To that end, courts routinely invoked, as reason to deny corporations' legal rights and responsibilities, the absence of some feature common to individual persons. Lord Coke is credited with denying a corporation's liability because "[corporations] have no

14. For a representative smattering, see WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY 3-44 (2006); CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 18-30 (1975); Barbara A. Belbot, *Corporate Criminal Liability*, *in* UNDERSTANDING CORPORATE CRIMINALITY 211, 219-23 (Michael B. Blankenship ed., 1993); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN L. REV. 1471 (1989); James R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73 (1976); Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution As a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 111-19 (2010).

15. Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2054 (2016) (colleting authorities).

souls"[16]—the same argument offered by Pope Innocent IV in 1246 A.D. to justify his decision that a corporation could not be excommunicated.[17] Similarly, Chief Justice Marshall argued that a corporation, being "destitute of the natural organs of man," should be prohibited from entering into a contract except through a writing.[18] And a New York court refused to require a corporation to fix a highway damaged by its negligence because "surely [a corporation] has no corporeal body. It has no material existence, it is incapable of performing labor, and therefore can not be compelled to perform an impossibility."[19]

Of particular interest for the instant discussion is the application of this schema to corporate mens rea. Widely espoused, at least through the turn of the twentieth century, was the view that because "a malicious motive and criminal intent cannot be attributed to a corporation, in its corporate capacity, it is not indictable for those crimes, of which malice, or some specific criminal intent, is an essential ingredient."[20] This reasoning would feature prominently in discussions of the expansion of corporate liability for both intentional torts and crimes. For example, the Supreme Court of Missouri rejected the possibility of a corporation (in particular, a bank) committing an intentional tort because "[t]he bank is a corporation—it cannot utter words—it has no tongue—no hands to commit an assault and battery with—no mind, heart or soul to be put into motion by malice."[21] The purported impossibility of attributing intentional attitudes to a corporation was met with steadfast judicial approval, particularly with respect to proscribing corporate-*criminal* liability, well into the nineteenth century.[22]

Despite centuries of consensus reflected in decades of state and federal jurisprudence, a break from tradition began in the late 1880s and culminated with the Supreme Court's 1909 decision blessing Congress's ability to create general-intent crimes applicable to corporations.[23] Naturally, how and why this shift occurred stands to be ex-

16. Case of Sutton's Hosp. (1612) 77 Eng. Rep. 960, 973 (K.B.); 10 Co. Rep. 23a, 32b (Coke, J.).

17. *See* Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 780 n.38 (2005) (discussing also Bartolus of Sassoferato).

18. Bank of U.S. v. Dandridge, 25 U.S. (12 Wheat.) 64, 92 (1827) (Marshall, C.J., dissenting).

19. Bank of Ithaca v. King, 12 Wend. 390, 390 (N.Y. Sup. Ct. 1834).

20. Owsley v. Montgomery & W. Point R.R. Co., 37 Ala. 560, 563 (1861).

21. Childs v. Bank of Mo., 17 Mo. 213, 215 (1852).

22. *See, e.g.*, Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. (2 Gray) 339, 345 (1854); State v. Morris & Essex R.R. Co., 23 N.J.L. 360, 364 (1852); *see also infra* Part III.

23. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).

plained. Why would courts and legislatures abandon long-standing precedent to adopt a position long understood to be impossible? And how would they, courts especially, justify this radical shift in thinking?

a. Why Courts Suddenly Embraced Corporate-Criminal Liability

On the received wisdom, courts traded theoretical coherence for practical expedience. The particular issue to be combatted was the increasingly salient problem of serious harms stemming from corporate activities, coupled with the relative dearth of state regulatory mechanisms for effectively deterring their occurrence. Kathleen Brickey argues that early criminal prosecutions of corporations reflect the fact that "corporate criminal accountability constituted a more effective response to problems created by corporate business activities than did existing private remedies."[24] Going further, Vikramaditya Khanna argues that "[g]iven the absence of widespread public civil enforcement prior to the early 1900s, corporate criminal liability appears to have been the only available option that met both the need for public enforcement and the need for corporate liability."[25]

In other words, corporate-criminal liability developed because criminal law provided the best, and potentially the only, forum for the states to incentivize corporations to avoid or limit their misconduct. On this view, there is nothing special about the fact that courts began to hold corporations *criminally* liable; had another enforcement mechanism been available, corporate-criminal liability may never have arisen.

b. How Courts Dealt with Conceptual Obstacles to Holding Corporations Criminally Responsible

Even assuming the need to use criminal law as a regulatory stopgap to deter corporate harm, it still remains to be explained how courts managed to overcome the conceptual obstacles that for so long held corporate-criminal liability at bay. How did courts resolve the thorny issue posed by corporate intentional attitudes? On the standard story, they did not. Or, as Gerhard Mueller put the point in deriding the development of corporate mens rea, "by ignoring the problem, they have solved it."[26]

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24. Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 423 (1982).

25. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1486 (1996) (footnote omitted); *accord* Brickey, *supra* note 24, at 422.

26. Gerhard O. W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 39 (1957).

According to the received wisdom, courts imported vicarious liability—namely, the doctrine of respondeat superior—from tort law into criminal law as a means of avoiding the conceptual challenge posed by attributing intentional attitudes to a corporation.[27] Under the doctrine of respondeat superior, "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment."[28] Analogizing respondeat superior to the corporate context, a court would impute to the corporation the actions and intentional attitudes of an employee acting in the scope of his or her employment. Crucially, a court thereby never need consider the corporate master's capacity to possess its own intentional attitudes; under the doctrine of respondeat superior, the only attitudes of interest are those of the individual servant.

The most famous adoption of this strategy came from *New York Central & Hudson River Railroad Co. v. United States*, in which the U.S. Supreme Court affirmed for the first time Congress's power to create a general-intent criminal statute that applies to corporations.[29] In doing so, the Supreme Court expressly incorporated tort doctrine into the criminal law to hold that a corporation could be "charged with the knowledge and purposes of their agents."[30] Thus, the "old and exploded doctrine"[31]—namely, that a corporation cannot commit a crime—was cast aside without a moment's attention paid to the conceptual challenges that so long had protected corporations from criminal liability.

2. How Modern Skeptics Leverage the Standard Story of Corporate-Criminal Liability's Development

Properly packaged, the received wisdom about corporate-criminal liability's historical development purports to offer a devastating critique of the practice's continued existence.

First, on the skeptic's view, the practice from its inception lacked a sound conceptual foundation to justify the innovation—a fact explicit in previous opinions and implicit in the decision to use respondeat superior to avoid making sense of the idea of corporate mens rea. And nothing has changed. The same strategy for sidestep-

27. Brickey, *supra* note 24, at 416-21 (1982) (discussing vicarious liability's development and importation into criminal law); *accord* Sarah Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*, 46 STETSON L. REV. 41 (2016).

28. RESTATEMENT (SECOND) OF AGENCY § 219 (AM. LAW INST. 1958).

29. 212 U.S. 481 (1909).

30. *Id.* at 495.

31. *Id.* at 496.

ping the possibility of corporate intentional attitudes by using tort-style vicarious liability continues today.[32] *New York Central* not only remains good law, but its method of attributing attitudes to a corporation continues to stand as the cornerstone of federal doctrine.[33] Federal doctrine continues to impute attitudes to a corporation through respondeat superior, for which the federal courts have been roundly criticized.[34]

Second, the rationale for developing corporate-criminal liability—the practice arose as the best, maybe only, avenue for the states to deter corporations from doing harm—takes for granted that no other rationales could apply. Both Brickey's and Khanna's analyses "treat deterrence, not retribution, as the aim of both corporate criminal liability and corporate civil liability."[35] This approach is clearly the majority view today; Regina Robson notes that there has occurred a "virtual elimination of retribution as an acknowledged goal of [corporate-]criminal sanctioning."[36] Similarly, any expressive rationale flounders in the absence of a corporate personality understood to have the basic capacities to commit the underlying crime. On this point, Albert Alschuler has argued that because on his view a corporation is incapable of being held criminally responsible, punishing it is an instance of "deodand," which "refers to the punishment of an animal or inanimate object that has killed a person."[37]

Deterrence alone is a weak foundation upon which to rest entirely a practice of *criminal* responsibility; to quote Gregory Gilchrist,

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32. *See, e.g.*, United States v. Park, 421 U.S. 658, 670 (1974); United States v. A & P Trucking Co., 358 U.S. 121, 125 (1958) (reaffirming that courts may find corporations "guilty of 'knowing' or 'willful' violations of regulatory statutes through the doctrine of *respondeat superior*").

33. The Model Penal Code limits attributing to a corporation only those intentional attitudes demonstrated by "high managerial agent[s]." MODEL PENAL CODE § 2.07(1)(c) (AM. LAW INST. 1962). Twelve states follow this approach. Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107 app. B (2006).

34. Beyond the skeptical critique at issue here, critics argue that vicarious liability leads to an overly broad doctrine of corporate crime, *see* Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 62, 65 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) [hereinafter PROSECUTORS IN THE BOARDROOM], and that it fails to accomplish the purpose sought for it by the Supreme Court—that is, it fails to deter corporations from committing crime, *see* V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 356 (1999).

35. Khanna, *supra* note 25, at 1494, 1494 n.91 (collecting citations).

36. Robson, *supra* note 14, at 121.

37. *See* Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307 (1991); Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1360-61 (2009).

"[C]arrots and sticks are not sufficient justification for the imposition of criminal liability on corporations."[38] To be sure, there are those who argue that criminal liability deters in a manner unique from civil liability.[39] Nevertheless, once one grants the received wisdom, it becomes much harder to maintain the practice. In particular, argues the critic, the historical circumstances that once excused corporate-criminal liability no longer obtain. Civil and regulatory avenues now exist through which the states can regulate corporate activity. Plausibly, these avenues offer more effective methods of regulation than criminal law; for example, the states can prevail on lower standards of proof and corporations lack constitutional protections otherwise available in the criminal context. Thus, Khanna concludes that the practice of holding corporations criminally responsible should be abandoned:

> [T]he circumstances in which substantially all of the traits of corporate criminal liability are socially desirable are nearly nonexistent.
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> . . . [S]ome justification for corporate criminal liability may have existed in the past, when civil enforcement techniques were not well developed, but from a deterrence perspective, very little now supports the continued imposition of criminal rather than civil liability on corporations.[40]

This conclusion encapsulates how skeptics of corporate-criminal liability are able to leverage the standard story to at once explain and undermine our current practice. On this view, the development of corporate-criminal liability was an excusable, but conceptually unjustifiable, historical aberration. Given its questionable deterrent value, the longstanding theoretical challenges that still plague the practice, and the real harm that individuals experience in its service, the practice should be confined to the dustbin of history.

B. Disputes Over Corporate-Criminal Liability's Historical Development Are Conceptual, Not Historical

Prior discussion notwithstanding, the skeptical critique of corporate-criminal liability at issue in this Article is a conceptual one, not a historical one. The law treats corporations as persons under various

38. *Cf.* Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 6 (2012).

39. *E.g.*, Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006).

40. Khanna, *supra* note 25, at 1532, 1534.

constitutional and statutory schemes.[41] Chiefly for our purposes, the term "person" under criminal law refers to entities for which, among other things, it is possible to attribute intentional attitudes.[42] This limitation derives from the ordinary requirements of criminal law, which holds a person accountable for the commission of a proscribed act (actus reus) performed concurrently with a proscribed attitude (mens rea).[43] In reality, the skeptic offers the standard story as circumstantial evidence of his core theoretical critique, which can be captured in a syllogism made more powerful for its simplicity:

P1. If *X* is a person for the purposes of criminal liability, then *X* is at least capable of committing a proscribed act while possessing a proscribed intentional attitude.

P2. A corporation is not capable of possessing an intentional attitude.

C. Therefore, a corporation is not a person for the purposes of criminal liability.

There is nothing logically problematic with the structure of this argument; it is deductively valid. Instead, the controversy between proponents and skeptics focuses largely on the truth of the second premise—that corporations are incapable of producing intentional attitudes. As the disagreement evinces widely different conceptions of personhood and the nature of attribution, it is worth pinning down exactly the nature of the disagreement.

1. Intrinsic Conception of Personhood and Individual-Person Premise

Start with assertions in support of the premise that corporations are incapable of possessing intentional attitudes. Modern skeptics echo the centuries of judicial reasoning that precede them; specifically, they argue that a corporation lacks a distinct mind, that a mind is required to attribute intentions constitutive of criminal law, and that thereby a corporation is incapable of being held criminally liable. So, for example, Jeffrey Parker derides the development of corporate-criminal liability as "brush[ing] aside concerns about the lack of

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41. *E.g.*, Santa Clara Cty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886) (Fourteenth Amendment); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839) (jurisdiction, Privileges and Immunities Clause); Bank of U.S. v. Dandridge, 25 U.S. (12 Wheat.) 64, 70-73 (1827) (contract law); *cf.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2769 (2014) ("The term 'person' sometimes encompasses artificial persons . . . and it sometimes is limited to natural persons." (citing the Dictionary Act, 1 U.S.C. § 1 (2012)).

42. *See* MODEL PENAL CODE § 2.02 (AM. LAW INST. 1962) (noting the general requirements of culpability).

43. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.2 (2d ed. 2003).

mens rea at the corporate level," which occurred when "[t]he corporate entity was treated as a person and endowed with a corporate 'mind' that could be found guilty."[44] Similarly, Richard Epstein argues that "[o]n first principles, the law should reject corporate criminal liability on the widely acknowledged ground that corporations do not have the state of mind to authorize actions, to turn a blind eye to their occurrence, or to display callous indifference to their effects."[45] Likewise, Professors Fischel and Sykes claim that "[c]orporations are legal fictions, and legal fictions cannot commit criminal acts. Nor can they possess mens rea, a guilty state of mind. Only people can act and only people can have a guilty state of mind."[46] Others take a similar stance.[47]

In fairness, this skepticism extends beyond corporate crime. There are philosophers investigating the nature and possibility of group agency and collective accountability who endorse a similar view.[48] Most notably, some philosophers who are expressly sympathetic to the idea that a group should be held responsible separate from its members nevertheless reject the possibility of collective intentional attitudes. Larry May, for example, says that "collective intentions proper, that is, to say that the group can intend in just the same way that individual persons can intend, is a fiction."[49] More pointedly, Marion Smiley concludes that "collectives do not appear to have minds and hence do not appear to be capable of formulating intentions."[50]

What is the basis for denying the possibility of genuine corporate attitudes sufficient to license criminal responsibility? Operating in the background is both a particular conception of personhood and an attendant view about the nature of attribution and its relationship to personhood. Start with the latter first.

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44. Jeffrey S. Parker, *Corporate Crime, Overcriminalization, and the Failure of American Public Morality*, *in* THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW 407, 411 (F.H. Buckley ed., 2013).

45. Richard Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 34, at 38, 45.

46. Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320 (1996); *see also* Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS Q. 531, 545-46 (2003).

47. *See, e.g.*, Brickey, *supra* note 24, at 401, 411; John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1332-33 (2009); Velasquez, *supra* note 46, at 543-46.

48. *See, e.g.*, Michael McKenna, *Collective Responsibility and an Agent Meaning Theory*, 30 MIDWEST STUD. PHIL. 16, 31 (2006).

49. LARRY MAY, THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS 64-65 (1987).

50. Marion Smiley, *From Moral Agency to Collective Wrongs: Re-Thinking Collective Moral Responsibility*, 19 J.L. & POL'Y. 171, 185 (2010).

The sorts of impossibility claims that are central to skepticism about corporate-criminal liability, at their most general, posit a specific limiting relationship between the concepts of personhood and attribution. Adherents argue, or sometimes assume, that certain classes of attribution can be applied only to individual persons—that is, to humans. For example, attributing speech to a person presupposes that the person has a mouth with which to speak; attributing action to the person presupposes that it has a body with which to act; attributing intentions to the person presupposes that it has a mind with which to intend. The upshot of this position is that determining the range of available attributions requires first determining whether the entity is an individual. Call this limiting relationship the "individual-person premise." Per the individual-person premise, an entity must possess a single, natural mind in order to have attributed to it intentional attitudes.

The individual-person premise operates against the backdrop of a specific conception of personhood, which I call the "intrinsic conception of personhood." John Dewey, in discussing broadly similar disputes over corporate liability and corporate personhood then raging in the 1920s, encapsulates the central commitment of the intrinsic conception of personhood:

> The postulate, which has been a controlling principle although usually made unconsciously, leading to the merging of popular and philosophical notions of the person with the legal notion, is the conception that before anything can be a jural person *it must intrinsically possess certain properties, the existence of which is necessary to constitute anything a person*.[51]

Those "certain properties" are, for the purposes of the individual-person premise, features of individuals that license the sorts of attitudinal attributions that are a foundational requirement of criminal liability. On this conception, personhood, and thus the attributions licensed by personhood, "reflect[s] a definite metaphysical conception regarding the nature of things" and "proceeds in terms of an essential and universal inhering nature."[52] And while Dewey's rhetoric may seem a bit anachronistic to the modern scholar, nevertheless he is identifying a conception of personhood with a prestigious and enduring pedigree. Reuven Avi-Yonah traces such a conception of the corporation to a pronouncement by Pope Innocent IV in 1246 C.E., ad-

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51. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 658 (1926) (emphasis added); *see also* Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 807-08 (noting the enduring effect of Dewey's contribution).

52. Dewey, *supra* note 51, at 660.

dressing the possibility of excommunicating a corporation;[53] a proto-strand of this same intrinsicism is central to Plato's discussion of immortality and the soul.[54] Separately, Professors List and Pettit argue that the intrinsic conception of personhood plays a foundational role in Boethius's work.[55]

2. The Pragmatic Conception of Personhood

Many proponents of corporate-criminal liability, as should come as no surprise, take it to be possible and perfectly ordinary to attribute intentional attitudes to a corporation. But again, this view about the nature of attribution operates against the backdrop of a conception of personhood distinct from the intrinsic conception. Call this alternative the "pragmatic conception of personhood." Here, what it is "[t]o be a person is to have the capacity to perform as a person," which means in the legal context "to be party to a system of accepted conventions, such as a system of law, under which one contracts obligations to others and . . . derives entitlements from the reciprocal obligations of others."[56] In other words, the term "person" picks out a narrow class of agent: one who "can perform effectively in the space of obligations" in which it relates with other agents.[57] Legal personhood thus describes an agent that can perform effectively in the space of legal obligations. Crucially, nothing in this approach to personhood presupposes the existence of a single, physical body or mind. Assessment of personhood turns on whether an entity has demonstrated its capacity to satisfy admittedly stringent conditions of effective performance—not on whether the agent possesses particular intrinsic, flesh-and-blood properties.[58]

Again, return to Dewey: After cataloguing the legal confusion generated by the intrinsic conception of personhood, Dewey suggests instead that the term "person" should instead be defined pragmatically—that is, that personhood should be assessed according to whether the entity in question is capable of "display[ing] the specified conse-

53. *See* Avi-Yonah, *supra* note 17, at 780-81, 780 n.38.

54. *See* PLATO, PHAEDO 30-31 (G.M.A. Grube trans., 6th ed. 1977).

55. CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 173 (2011).

56. *Id.* at 173.

57. *Id.*; *see also* Daniel Dennett, *Conditions of Personhood*, *in* THE IDENTITIES OF PERSONS 175, 177-78 (Amélie Oksenberg Rorty ed., 1976).

58. *See* LIST & PETTIT, *supra* note 55, at 173 ("[M]ap[ping] the distinction between persons and non-persons onto the divide between agents who can be incorporated in a conventional system of mutual obligation and agents . . . that do not have this capacity."); *cf.* Thomas M. Powers, *On the Moral Agency of Computers*, 32 TOPOI INT'L REV. PHIL. 227, 228-29 (2013) (offering a similar approach).

quences" of personhood.[59] Particularly relevant for our purposes is Dewey's suggestion that courts attribute intentional attitudes to individual and corporate persons in the same way: "[D]etermine the absence or presence of 'intent', and the kind of 'intent', by discrimination among concrete consequences, precisely as we determine 'neglect.' "[60]

More generally, the pragmatic conception of personhood reverses the relationship between personhood and attribution. The individual-person premise limits attributions to those entities already established to be individual persons; more specifically, it inquires into the inner features of an entity to determine what attributions are (im)permissible. By contrast, the pragmatic approach assesses personhood according to an entity's observable performance. Attribution, on this picture, becomes an interpretive practice. As Professors Anderson and Pildes put the point:

> To interpret what an action means, we try to identify what the agent is doing. Deeds are identified, not by mere physical descriptions of bodily movement, but by the intentions that they express and that give them meaning. Interpretation is a matter of making sense of the speech or action in its context.[61]

On this view, whether an entity is capable of expressing attitudes—and the content of those attitudes—is a matter of public interpretation of the entity's actions, whereby expressions of intentional attitudes through words or action embody and make recognizable those attitudes.[62]

Pragmatic conceptions of personhood also draw from a long pedigree. We see this conception of personhood in Locke's suggestion that personhood is a forensic concept "appropriating [a]ctions and their [m]erit; and so belongs only to intelligent [a]gents capable of a [l]aw."[63] Hobbes too embraced something approaching a pragmatic conception.[64] As for contemporary support, I reserve that discussion for Section II.C.

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59. Dewey, *supra* note 51, at 661-62.

60. *Id.* at 663.

61. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1507 (2000).

62. *Id.* at 1513 ("Expressive theories of action hold people accountable for the public meanings of their actions.").

63. John Locke, *Of Identify and Diversity*, *in* AN ESSAY CONCERNING HUMAN UNDERSTANDING 328, 346 (Peter H. Nidditch ed., 1975) (1694).

64. LIST & PETTIT, *supra* note 55, at 170-73.

3. Sidestepping the Dispute

It is beyond the scope of this Article to declare a victor, at the level of pure theory, of this foundational disagreement between skeptics and proponents over the proper conception of personhood and its impact on the attendant nature of attribution.[65] For now, each theory I take to be successful by its own respective rights—by this, I mean that the theories are internally consistent. I am not interested in arguing one theory is correct in some deep, metaphysical sense—for my part, I am skeptical that such a correct answer exists. Instead, I take a different tack.

Parts II and III demonstrate first that, as a matter of fact, proponents of corporate-criminal liability "won" this dispute at the time the doctrine first developed. Second, this victory cannot be undone without doing profound, arguably existential, damage to modern corporate law. Taking the skeptic's argument seriously, its logical consistency notwithstanding, would indeed end any justification for holding corporations criminally responsible—but it also may well end the modern commercial corporation as we know it.

It is worth disambiguating what I mean when I say that proponents "won" the debate of corporate-criminal liability. There is an uncontroversial, uninteresting interpretation, according to which proponents won because courts then and now do hold corporations criminally responsible. It is uninteresting because the skeptic's whole point is that this practice was and is a mistake, based on a conceptual confusion that is (at least no longer) excusable. Rather, I use the term "won" in a deeper sense to mean that proponents not only obtained their policy preference but moreover had their underlying conceptual machinery vindicated and incorporated into the law.[66]

My view is that nineteenth-century courts did not thoughtlessly expand criminal liability to corporations; the reasoning these courts proffered reflects both a rejection of the intrinsic conception of personhood as incompatible with their world and further a turn towards the pragmatic conception of personhood. And when I say that the win cannot easily be reversed, I mean that the shift in judicial reasoning reflects underlying changes in the role and nature of corporations and corporate law that made the prior embrace of the intrinsic conception increasingly (and still today) unsustainable.

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65. I address this issue more directly elsewhere. *See* W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 601, 624-45 (2017).

66. *Cf. generally* Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629 (tracing the historical development of a pragmatic approach to corporate personhood with a focus on its roots in contract and property jurisprudences).

For now, though, and before turning to pragmatism's historical victory and its modern consequences, I need to say more about what it takes to be eligible to be a person under a pragmatic conception of personhood.

C. What It Takes to Be a Legal Person (Pragmatically)

Begin with a corporation's eligibility for criminal liability. The typical criminal statute attaches liability to a person—specifically, a person who demonstrates the appropriate concurrence between wrongful action (actus reus) and attitude (mens rea).[67] Thus, the question of eligibility can be understood as asking whether a corporation can qualify as a person as the concept is understood in the context of criminal law. In particular, I focus for now on whether we can coherently attribute to a corporation the actions and attitudes necessary to satisfy the ordinary criminal statue's actus reus and mens rea requirements.

1. Pragmatic Approaches to Agency

Demonstrating the capacity to perform as a person requires at least the ability to possess intentional states and a capacity for action. Intentional states consist of an attitude and a proposition towards which that attitude is held.[68] An attitude might describe the way the world is—for example, I believe that the proposition "The water glass is full" is false. Alternatively, an attitude might describe the way an agent wants its environment to be—so, I might desire that "The water glass is full" be true. Meanwhile, a capacity for action refers specifically to an agent's ability first to identify a divergence between the environment as it is and the environment as the agent wants it to be, and second to take suitable steps to reconcile this divergence. To wrap up the example, I am able to notice that "The water glass is full" is false; that I desire "The water glass is full" to be true; and that, by walking to the kitchen and turning on the tap, I can reconcile my diverging attitudes.

I have described merely the simplest of agents. And although the constituent elements necessary for criminal liability are beginning to emerge—intentional states correspond to mens rea, capacity for action corresponds to actus reus—simple agency is insufficient to satisfy legal personhood. As Tim Scanlon puts the point, it is not enough to expect merely that a competent agent can respond to stimuli; we need an "expectation grounded in a supposed responsiveness to cer-

67. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.2 (2d ed. 2003).

68. LIST & PETTIT, *supra* note 55, at 20-21.

tain reasons."[69] What is needed is an agent that can conform to the requirements of criminal law, and further can take the fact of criminality as a reason to conform its practice. More generally, a legal person must be able to "perform effectively in the space of [legal] obligations,"[70] which amounts to demonstrating what Stephen Darwall refers to as "second-personal competence."[71] A legal person must be capable of making and following through on commitments to other persons.[72] Effective performance, in particular, requires recognizing that the existence of an obligation constitutes a reason to act and that failing to satisfy an obligation constitutes grounds for criticism. Such recognition means the agent is sensitive to criticism; it is capable of both recognizing failures of rationality[73] and learning from past mistakes by taking action designed to avoid repeating irrational missteps in the future.[74] This assumes both a capacity for second-order attitudes—that is, attitudes *about* the simple attitudes already described—and specifically some motivation to improve and reform one's conduct by imposing checks on one's processing.

2. Collective Agency

Thus far, I have said nothing to preclude the possibility of a collective or group qualifying as a person; eligibility for legal personhood turns on whether an agent can reliably demonstrate it is appropriately "responsive to reasons," not on whether it has a single or organic body.[75] Accordingly, collective agents, the same as individual agents, are eligible in principle to count as legal persons for the purposes of

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69. T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 161 (2008) [hereinafter SCANLON, MORAL DIMENSIONS]; *accord* LIST & PETTIT, *supra* note 55, at 178. The sort of responsiveness in mind here tracks what Scanlon elsewhere refers to as judgment-sensitive attitudes. *See* T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1998).

70. LIST & PETTIT, *supra* note 55, at 173.

71. STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY 23 (2006) ("[G]enuine obligations can result only from an address that presupposes . . . second-personal competence.").

72. *Id.* at 59; *accord* LIST & PETTIT, *supra* note 55, at 178.

73. List and Pettit note that "if a reasoning agent fails to be rational, then the fact that it self-corrects, recognizing its failure in a manner open only to a reasoning agent, will provide a ground for continuing to view it as an agent." LIST & PETTIT, *supra* note 55, at 31; *see also* DARWALL, *supra* note 71, at 21; Philip Pettit, *Akrasia, Collective and Individual*, *in* WEAKNESS OF WILL AND PRACTICAL IRRATIONALITY 68, 83-85 (Sarah Stroud & Christine Tappolet eds., 2003) (failures of rationality).

74. LIST & PETTIT, *supra* note 55, at 31 ("The sensitivity to the demands of rationality displayed in the acknowledgement that criticism is appropriate may be evidence of agency . . . .").

75. SCANLON, MORAL DIMENSIONS, *supra* note 69, at 162 (defending an account according to which it is possible to hold collective agents responsible); *accord* DARWALL, *supra* note 71, at 35; LIST & PETTIT, *supra* note 55, at 178.

criminal liability. That said, qualifying for legal personhood poses special challenges for collective agents.

I largely follow the approach to collective agency articulated by Margaret Gilbert, whose work on plural subjects is broadly consonant with the pragmatic approach to personhood articulated here.[76] For Gilbert, a plural subject consists of some "population of persons who are jointly committed in a certain way."[77] Individual members of a collective enter into a joint commitment to act as a single body. What it would mean for a plural subject to intend to *X* is for its members to act "together to constitute, as far as is possible, a single body that intends" to *X*.[78]

Acting as a single body does not require that each member further *personally* intend to *X*. Instead, what matters is that a member's "behavior generally should be expressive of the [intention], in the appropriate contexts."[79] For a noncorporate example, consider the U.S. Senate. The Senate acts and expresses attitudes through legislation and resolutions. Successful legislation ordinarily requires that a majority of senators communicate their support directly to the Senate clerk during a voting session. A Senator's personal attitudes about legislation, to the extent that they differ from the support she expresses to the clerk during a voting session, are irrelevant in determining the Senate's attitude towards legislation. At an extreme, we could imagine that no Senator privately holds an attitude that is nevertheless appropriately attributed to the Senate. Conversely, a Senator's expression of an attitude outside of a voting session is not attributable to the Senate.

Although Gilbert's work canvasses all plural subjects, I restrict my attention to what is required for a sophisticated plural subject—one with a large membership, or a series of open-ended joint commitments—to act and hold attitudes to satisfy the requirements of legal personhood. Coordinating members in such a plural subject requires a complex internal structure, constituted by interlocking rules,

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76. *See generally* MARGARET GILBERT, JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD 88-89 (2013). Indeed, Darwall argues that Gilbert's account is a second-personal one. DARWALL, *supra* note 71, at 198-99.

77. Margaret Gilbert, *Who's to Blame? Collective Moral Responsibility and Its Implications for Group Members*, 30 MIDWEST STUD. PHIL. 94, 99 (2006) [hereinafter Gilbert, *Who's to Blame*].

78. *Id.* at 100 (emphasis omitted). Gilbert's schema applies to all intentional attitudes. *See, e.g.*, *id.* (desires); Margaret Gilbert, *Shared Intention and Personal Intentions*, 144 PHIL. STUD. 167 (2009) (intentions); Margaret Gilbert, *Collective Belief and Scientific Change*, *in* SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY 37 (2000) (beliefs).

79. Margaret Gilbert, *Corporate Misbehavior and Collective Values*, 70 BROOK. L. REV. 1369, 1376 (2005) (emphasis omitted).

norms, and customs.[80] Through this structure, individual members are able to produce collective attitudes derived from, but independent of or autonomous from, the personal attitudes of any particular member.[81] Likewise, a plural subject's structure designates the contexts in which actions by a member should be attributed to the plural subject, as opposed to contexts where a member's actions are attributable only to the individual.

A plural subject's internal structure may take a variety of shapes. The structure may be broadly egalitarian; more likely, for example, it consists of interlocking hierarchies and delegations of authority.[82] To get a sense of this complexity, return to the Senate. The Senate's majority voting rules create the impression of an egalitarian, deliberative internal structure. That impression is mistaken. The Senate limits its members' access to voting sessions through supermajority cloture requirements—sixty Senators must vote to open and close debate on proposed legislation—alongside an evolving practice about when members will contest cloture.[83] Hierarchies exist in rules (e.g., legislation ordinarily cannot reach the Senate floor without being approved by a committee), norms (e.g., the Senate Judiciary Committee will not approve a judicial nominee before receiving a "blue slip" from both home-state Senators), and culture (e.g., party members usually defer to their respective leader).[84] Indeed, because a variety of ordinary procedures require the unanimous consent of the Senate to proceed, each Senator has peremptory authority to effectively close down the Senate—this power is held in check largely by norms of decorum.[85] Proper appreciation of the structure informs the attitudes ex-

80. *See* SCANLON, MORAL DIMENSIONS, *supra* note 69, at 162-65 (discussing "procedures through which [a collective agent] can make institutional decisions").

81. Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171, 184 (2007).

82. *See, e.g.*, Gilbert, *Who's to Blame*, *supra* note 77, at 103-04 (hierarchies); LIST & PETTIT, *supra* note 55, at 720-77 (heterogeneous decisionmaking structures).

83. *E.g.*, Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html; *see also* THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 31-81 (2012) (describing the drastic increase in cloture motions).

84. *See generally* Brandon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001) (discussing the blue slip process). *But see* Carle Hulse, *As G.O.P. Moves to Fill Courts, McConnell Takes Aim at an Enduring Hurdle*, N.Y. TIMES (Sep. 13, 2017), https://www.nytimes.com/2017/09/13/us/politics/mcconnell-federal-judges-trump.html (discussing circumvention of the blue slip tradition).

85. *See* Norm Ornstein, *Why the Senate Can't Resist Dysfunctional Obstruction*, ATLANTIC (July 18, 2013), http://www.theatlantic.com/politics/archive/2013/07/why-the-senate-cant-resist-dysfunctional-obstruction/277912/.

pressed by the Senate. For example, Senate norms establish that the Senate adopts specific intentional attitudes towards legislative acts—namely, those identified by the markup committee and, to a weaker extent, the sponsoring member of the legislation.[86]

3. Is Legal Personhood Sufficient to License Criminal Liability?

I leave until later whether corporations in fact are capable of satisfying the high bar sketched for legal personhood under a pragmatic conception of personhood. Still, some critics will argue that legal personhood alone is insufficient to license criminal responsibility—some further element, not accessible by group agents, is required.[87] Implicit to this position is that some notion of moral responsibility is a necessary component of criminal responsibility and that personhood by itself does not give rise to moral responsibility.

The moral status and capacity of corporate agents is, by itself, a contentious and somewhat unfocused topic. If all that critics have in mind is that corporations must be responsive to the sorts of normative considerations that arise in the criminal law, then I see no problem for my account.[88] Nothing I have described thus far constrains the sorts of attitudes attributable to a corporation. Through contract law, for example, corporations routinely participate in a normative practice akin to promising. Practically speaking, insofar as corporate attitudes would derive from the contributions of individuals who themselves are uncontroversially moral agents, it would be surprising that every emergent corporate attitude would be stripped of normative content.

However, if critics expect something more robust—Michael Moore and Amy Sepinwall suggest that personhood requires an emotional capacity akin to reactive attitudes;[89] Michael McKenna suggests that robust moral agency requires a free will in some deep Kantian sense[90]—then claims of corporate moral agency are more complicated. That is not to say that the possibility of robust moral agency is be-

86. Anderson & Pildes, *supra* note 61, at 1522-23; Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863-64 (1992).

87. *E.g.*, Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 428-30 (2012) (articulating the importance of emotional capacity to moral agency); *see also* McKenna, *supra* note 48, at 23.

88. At the other extreme, some require far less to qualify for moral personhood. *E.g.*, Tracy Isaacs, *Collective Moral Responsibility and Collective Intention*, 30 MIDWEST STUD. PHIL. 59, 61 (2006) ("To the extent that they have the capacity to act on the basis of intentions, corporations and other similarly structured organizations are moral persons.").

89. MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 614-17 (1997); Sepinwall, *supra* note 87, at 428-30.

90. McKenna, *supra* note 87, at 23-29.

yond reach. David Silver, as well as Gunnar Björnsson and Kendy Hess, argue that corporations are Strawsonian agents capable of reactive attitudes sufficient to give rise to moral agency.[91] Margaret Gilbert has extended her schema for collective attitudes to collective emotions.[92] Bryce Huebner, relying on an account broadly similar to Gilbert's, has offered a detailed account of what it would look like for a collective to experience fear.[93] Peter French has done something of the same for corporate shame.[94] For my part, I am inclined towards the position that corporations are able to participate in at least broad swaths of our normative practices, even if they are not an object of moral concern in and of themselves.

What does the controversy over corporations' moral agency portend for criminal law? After all, criminal law is not coextensive with morality, even if the latter ideally provides some loose grounding relationship for the former. Some take the mere fact of admittedly deep-seated controversy over the corporation's moral status as reason to reject the sort of account of corporate personhood I have been developing.[95] I concede the controversy, but not the solution. Discussions of moral agency blur the line between eligibility and aptness—between whether the states can hold corporations criminally responsible and whether they should. As to whether robust moral agency is a requirement of eligibility for criminal liability, I am skeptical that criminal law enshrines such a requirement.[96] At most, it may be the case that retributive justifications fall short in their application to corporations. Yet this alone would not put corporations outside the bounds of our criminal practice.[97] To that point, the law mitigates its treatment of minors and the mentally impaired on the basis of suspicion that these individuals lack the robust moral agency necessary to license retributivist justifications.[98] However, neither of these classes

91. Gunnar Björnsson & Kendy Hess, *Corporate Crocodile Tears? On the Reactive Attitudes of Corporate Agents*, 94 PHIL. & PHENOMENOLOGICAL RES. 273 (2017); David Silver, *A Strawsonian Defense of Corporate Moral Responsibility*, 42 AM. PHIL. Q. 279, 279-80 (2005).

92. Gilbert, *Who's to Blame*, *supra* note 77.

93. Bryce Huebner, *Genuinely Collective Emotions*, 1 EUR. J. PHIL. SCI. 89 (2011).

94. Peter A. French, *The Hester Prynne Sanction*, 4 BUS. & PROF. ETHICS J. 19, 22 (1985).

95. Sepinwall, *supra* note 87, at 430.

96. *Cf.* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 *passim* (1955) (distinguishing the rules justifying an institution from the rules contained therein).

97. *See infra* Part V.

98. *E.g.*, Atkins v. Virginia, 536 U.S. 304, 319 (2002) (concluding that certain mental disabilities render an individual less morally culpable, such that retributive rationales apply less strongly with respect to the death penalty); *see also* Roper v. Simmons, 543 U.S. 551 (2005) (extending *Atkins*'s rationale to children); *accord* Miller v. Alabama, 567 U.S. 460, 471-75 (2012) (discussing children's moral development).

is immune from the criminal law; it would be surprising then to grant corporations such a luxury.

More fundamentally, I disagree that legal personhood is insufficient to give rise to criminal liability. What it means to be a legal person is to be able to participate in the space of legal rights and obligations, which includes being held responsible for violating those legal obligations. One paradigmatic feature of that space is criminal law and punishment. Nothing further should be necessary to establish a legal person's standing to accept criminal liability and punishment.

III. THE SIMULTANEOUS DEVELOPMENT OF CORPORATE-CRIMINAL LIABILITY, CORPORATE LAW, AND THE MODERN CORPORATION

Appreciating the development of corporate-criminal liability requires situating it alongside the corporate-law backdrop against which it occurred. Accordingly, Part III connects the development of corporate-criminal liability at the turn of the twentieth century to the liberalization of corporate law in the preceding decades.

A. Special Charters and Corporate Nuisance

At the dawn of the nineteenth century, the private commercial corporation was rare, small, and intertwined with the government. Fewer than four hundred commercial corporations existed nationwide in 1800; most commercial activity occurred instead through partnerships and sole proprietorships.[99] For many, the benefits of the corporate form—legal status as an independent entity able to contract and own property in its own name,[100] and to a lesser extent, limited liability[101]—simply did not outweigh the inconvenience of incorporating. This is because, at the time, incorporation was a power exercised on a case-by-case basis by state legislatures.[102] An entity seek-

99. Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1145 (2012). Brickey claims that 225 private charters existed in 1800, of which less than a third were commercial in nature. Brickey, *supra* note 24, at 404. Hurst identifies 317 business corporations chartered before 1801. JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970, at 14 (1970).

100. Head & Armory v. Providence Ins. Co., 6 U.S. (2 Cranch) 127, 169 (1804) (contract); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *465-66 (Oxford, Clarendon Press 1765) (property).

101. *See* HURST, *supra* note 99, at 28 (arguing that limited liability was not a priority for early incorporators); *accord* Blair, *supra* note 51, at 795.

102. The constitutionality of federal incorporation would not be settled until 1819. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); *accord* Luxton v. N. River Bridge Co., 153 U.S. 525, 529 (1894). The political unpopularity of federal incorporation ensured that the practice remained rare. Kyle Noonan, Note, *The Case for a Federal Corporate Charter Revocation Penalty*, 80 GEO. WASH. L. REV. 602, 608-09 (2012).

ing the benefits of the corporate form had to petition the legislature, which would then draft the entity its own special charter.

Compounding the inconvenience of obtaining legislative approval was a strong norm, albeit not an explicit requirement, that incorporation should serve a public purpose.[103] As Chief Justice Marshall put the point: "The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant."[104] This norm reinforced the state's motivation to create private corporations in the first place—namely, "the need to promote a volunteer muster of capital for sizable ventures at a time when fluid capital was scarce and there were severe practical limits on government's ability to tax in order to support direct intervention in the economy."[105] Thus, Virginia's Supreme Court of Appeals would describe incorporation at the time as follows:

> With respect to acts of incorporation, they ought never to be passed, but in consideration of services to be rendered to the public. . . . It may be often convenient for a set of associated individuals, to have the privileges of a corporation bestowed upon them; but if their object is merely private or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privilege.[106]

Legislatures construed this public-purpose norm narrowly, which is reflected in the fact that most early commercial corporations existed to perform a quasi-governmental function. Nearly two-thirds of the early commercial corporations built or maintained a bridge, turnpike, or highway; of the remaining commercial corporations, a plurality operated state-chartered banks.[107] Meanwhile, although incorporation did not guarantee a state grant of monopoly power, many early

103. *See* Johnson, *supra* note 99, at 1145; David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 207.

104. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 637 (1819).

105. HURST, *supra* note 99, at 23; *accord* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1609 (1988).

106. Currie's Adm'rs v. Mut. Assurance Soc'y, 14 Va. (4 Hen. & M.) 315, 347-48 (1809) (emphasis omitted).

107. HURST, *supra* note 99, at 22, 37-41; Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 93 (1999) ("As . . . the early decades of the nineteenth century unfolded, state legislatures began to issue significant numbers of corporate charters for banks and transportation projects.").

charters had the effect, explicitly or implicitly, of thwarting unincorporated commercial competition.[108]

Corporate liability, in either tort or crime, played at best a negligible role during this period. As Edwin Dodd concludes, "the cases in which the courts had occasion to consider corporate liability in tort were surprisingly few."[109] Where liability did occur, it frequently involved nuisance suits and reflected the idea that corporations implicitly owed a reciprocal duty to perform the specialized power chartered to them by the government.[110] Meanwhile, criminal liability remained extremely circumscribed, though courts occasionally enforced the aforementioned duties through criminal suits.[111] That said, these infrequent suits involved strict criminal liability. The old, unchallenged rule, attributed to Coke and stating that corporations were incapable of committing any crime requiring an intentional attitude, provided the background against which corporate liability would develop over the coming decades.

B. General Incorporation and Corporate-Tort Liability

During the middle of the nineteenth century, populist distrust set in concerning the tight relationship between the public and private commercial corporations.[112] More mundanely, the task of responding to special-charter petitions consumed an inordinate amount of legislative resources, while the practice of crafting bespoke charters prevented uniformity in corporate law.[113] States responded by standardizing and democratizing corporate law. Most states adopted a general-incorporation statute by the 1850s, while a majority went further and prohibited the creation of special charters by the 1880s.[114]

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108. Hovenkamp argues that subsequent corporate-law jurisprudence—in particular, the Supreme Court under the guidance of Chief Justice Taney—sought to construe special corporate charters narrowly in order to avoid vesting in a corporate entity any monopolistic privilege. Hovenkamp, *supra* note 105, at 1601-25.

109. EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 113 (1954); *id.* at 114 ("[T]he volume of corporate tort litigation had not become substantial by 1830 . . . .").

110. *See, e.g.*, Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. (2 Gray) 339, 345 (1854); Commonwealth v. Hancock Free Bridge Corp., 68 Mass. (2 Gray) 58 (1854); People v. Corp. of Albany, 11 Wend. 539, 542-43 (N.Y. Sup. Ct. 1834); Murfreesboro & Woodbury Turnpike Co. v. Barrett, 42 Tenn. (2 Cold.) 508 (1865).

111. *See Corp. of Albany*, 11 Wend. at 543; *accord New Bedford Bridge*, 68 Mass. at 345-46; *Hancock Free Bridge Corp.*, 68 Mass. at 67.

112. Avi-Yonah, *supra* note 17, at 792; Johnson, *supra* note 99, at 1146.

113. Or. Ry. & Navigation Co. v. Oregonian Ry. Co., 130 U.S. 1, 21 (1889) (identifying "the desire to fix some more uniform rule by which the rights and powers of private corporations, or those for pecuniary profit, should come into existence"); HURST, *supra* note 99, at 29.

114. *See* Hamill, *supra* note 107, at 178-79 (tabulating all general-incorporation and special-incorporation statutes).

A general-incorporation statute permits any enterprise to incorporate upon satisfying minimal administrative requirements. In exchange for the benefits of incorporation—again, primarily independent-entity status and the possibility of limited liability—an entity received a generic charter specifying the entity's new structure, including "powers of directors and officers, amendment of articles, share structure, capital requirements, and sources of dividends."[115]

The creation of general-incorporation statutes enabled a dramatic increase in the number of commercial corporations. Without ex ante legislative inquiry into an entity's public-serving purpose, businesses were free to incorporate for any commercial purpose they saw fit.[116] It would be reductive to conclude that the general-incorporation statute singlehandedly accounts for the tremendous economic growth of the nineteenth century. Nevertheless, it is fair to say that the regime change opened the floodgates to exploitation of the corporate form. As Blair explains, the corporate form enabled speculative, large-scale commercial projects that would come to dominate the latter half of the nineteenth century.[117] It should not surprise, at least, that the general-incorporation era coincides with a marked expansion of the commercial corporation's presence in the American economy. Indeed, as early as 1868 the U.S. Supreme Court remarked that "[t]here is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations[.] It is not too much to say that the wealth and business of the country are to a great extent controlled by them."[118]

Notwithstanding the shift to general-incorporation statutes, states continued to exercise tight control over commercial corporations. However, instead of regulating corporations by limiting access to the corporate form, states now specified in detail a corporation's structure, size, duration, and permissible activities. For example, legislatures capped the length of a corporate lifespan to twenty, thirty, or fifty years.[119] Legislatures implemented industry-specific capitalization limits.[120] Courts likewise prohibited one corporation from owning

115. HURST, *supra* note 99, at 56.

116. Although states required that a charter contain a corporate purpose, incorporators were left to identify their own purpose without legislative consultation. *Id.* at 44; *cf. Oregonian Ry. Co.*, 130 U.S. at 26-27 (noting that the articles of a corporation "do not take place under the supervision of any official authority whatever").

117. Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 389-90 (2003).

118. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181-82 (1868).

119. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 555 n.29 (1933) (Brandeis, J., dissenting) (citing Report of the Committee on Corporation Laws of Massachusetts (1903)).

120. *Id.* at 550-54 nn. 5-26 (collecting statutes).

shares in another corporation.[121] Federal courts gave legislatures broad authority to discriminate, to the point of exclusion, against out-of-state corporations.[122] Courts hampered managers' and directors' decisionmaking capacities by prohibiting any fundamental changes to the corporation without unanimous shareholder approval.[123] Legislatures restricted limited personal liability—New York, for example, held shareholders personally liable for twice their capital contribution[124]—which courts further constrained.[125]

The ultra vires doctrine best exemplified the pitfalls of using corporate law as a regulatory tool. Formally, the ultra vires doctrine holds that any purportedly corporate action falling outside the scope of the entity's written charter could not be, as a matter of law, an action taken by the corporation.[126] Over time, the ultra vires doctrine proved a hopeless tool for regulating economic activity with any sophistication. No incorporator could reasonably anticipate the varieties of business decisions that the doctrine required to be covered in a charter's stated purpose. Nor was interpreting a charter like interpreting either a statute or a contract. Courts depended on the corporate purpose, provided at the time of incorporation, to identify the scope of a venture. Yet, a corporation's chartered purpose was a self-serving statement drafted by incorporators without any sort of adversarial review.[127] Meanwhile, the remedy for ultra vires conduct was harsh; action taken beyond the corporation's charter could be

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121. *E.g.*, De La Vergne Refrigerating Mach. Co. v. German Sav. Inst., 175 U.S. 40, 54-55 (1899) ("[I]t is not within the general powers of a corporation to purchase the stock of other corporations for the purpose of controlling their management."); People v. N. River Sugar Ref. Co., 3 N.Y.S. 401, 408 (1889); *see* HURST, *supra* note 99, at 45.

122. *See* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839) (denying corporations protection under the Privileges and Immunities Clause and deeming corporate access to out-of-state markets a matter of interstate comity); *see also* Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 186 (1888) ("The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the State."). A state's ability to condition entry by a foreign corporation was later constrained by the Fourteenth Amendment. *See* W. Union Tel. Co. v. Kansas, 216 U.S. 1, 21 (1910).

123. Courts adopted unanimity requirements from partnership law. As seen in the next Section, the comparison of the corporation to a general partnership proved increasingly untenable. *See infra* notes 142-47.

124. Act of Feb. 17, 1848, ch. 40, 1848 N.Y. Laws 54; Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 208 (1985) (describing New York's approach as "[t]he most typical provision").

125. Sawyer v. Hoag, 84 U.S. (17 Wall.) 610 (1873) (establishing the trust-fund doctrine), *aff'd in* Handley v. Stutz, 139 U.S. 417 (1891). For detailed discussion of the trust-fund doctrine and its decline, see Horwitz, *supra* note 124, at 207-14.

126. *See* Stephen J. Leacock, *The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience Over Logic*, 5 DEPAUL BUS. & COM. L.J. 67, 76-78 (2006).

127. Or. Ry. & Navigation Co. v. Oregonian Ry. Co., 130 U.S. 1, 26-27 (1889).

voided in its entirety.[128] Although the doctrine may have been capable of carving out broad domains where corporations could not participate—the doctrine survived for a while as a tool for keeping corporations out of the political sphere[129]—it was always more hatchet than scalpel. In response, courts, and state courts, in particular, developed countless exemptions and modifications meant to ameliorate or avoid outright the harshness of the doctrine.[130]

Corporate defendants during this period routinely argued that the logic underwriting the ultra vires doctrine established a comprehensive bar on corporate liability in both tort and crime.[131] After all, a corporate charter could never authorize the corporation to commit tortious or criminal misconduct. Accordingly, the ultra vires doctrine would preclude attributing any tortious or criminal act to the corporation; by its nature, a corporation was incapable of performing such an action. Of course, this reasoning highlights the absurdity of the ultra vires doctrine. That the government would not recognize as legally enforceable a corporate action does not mean that the action did not occur.

Instead, courts largely dismissed appeals due to this "technical" reasoning,[132] particularly when embracing it would have worked to the disadvantage of injured parties.[133] Indeed, the harsh outcomes predicted by strict application of the ultra vires doctrine encouraged courts to instead expand corporate-tort liability as a substitute. Ac-

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128. Leacock, *supra* note 126, at 76; *see also* Horwitz, *supra* note 124, at 186-87.

129. Daniel Lipton, Note, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VA. L. REV. 1911 (2010).

130. *See* Avi-Yonah, *supra* note 17, at 802; *see also* Charles E. Carpenter, *Should the Doctrine of Ultra Vires Be Discarded?*, 33 YALE L.J. 49, 49 (1923) ("It does not seem to be an exaggeration to say that there are no sound theories [of exceptions to the ultra vires doctrine] consistently applied and there are many unsound ones discordantly applied.").

131. *See, e.g.*, Owsley v. Montgomery & W. Point R.R. Co., 37 Ala. 560 (1861) (malicious prosecution); Goodspeed v. E. Haddam Bank, 22 Conn. 530 (1853) (same); Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. (2 Gray) 339 (1854) (public nuisance); State v. Morris & Essex R.R., 23 N.J.L. 360 (1852) (same); Pa. R.R. Co. v. Vandiver, 42 Pa. 365 (1862) (same).

132. For courts deriding the ultra vires argument against corporate liability as a "technical" argument, see Jordan v. Ala. Great S. R.R. Co., 74 Ala. 85, 88 (1883); Goodspeed v. E. Haddam Bank, 22 Conn. 530, 537 (1853); Wheless v. Second Nat'l Bank, 60 Tenn. 469, 475 (1872).

133. Phila., Wilmington, & Balt. R.R. Co. v. Quigley, 62 U.S. 202, 209 (1858) (rejecting petitioner's claim that corporate libel is impossible); *Goodspeed*, 22 Conn. at 542; Scofield Rolling Mill Co. v. State, 54 Ga. 635, 638 (1875); Boogher v. Life Ass'n of Am., 75 Mo. 319, 323 (1882) (citing THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT (2d ed. 1888)); State v. Morris & Essex R.R. Co., 23 N.J.L. 360, 369 (1852). *But see* State v. Great Works Milling & Mfg. Co., 20 Me. 41, 43 (1841) ("A corporation . . . . [C]an neither commit a crime or misdemeanor, by any positive or affirmative act, or incite others to do so, as a corporation.").

cordingly, just as courts upheld corporate actions beyond the scope of a charter's purpose, so too courts held corporations responsible for actions beyond the narrow confines of the corporate charter.[134] Importantly for the subsequent development of corporate-criminal liability, courts even held corporations liable for intentional torts like libel and malicious prosecution.[135]

C. Enabling Acts and Corporate-Criminal Liability

Around the turn of the twentieth century, "drastic change set in toward removing regulatory emphasis from the general incorporation acts, with a high premium on giving the greatest freedom and vigor to central management."[136] This enabling-act era marked a shift towards using tort law, and for the first time, criminal law, instead of corporate law, as a means for regulating corporate activity.

Two considerations inform the sudden liberalization of corporate law. First, corporate law and its enforcing judicial doctrines had proven incapable of keeping pace with the large-scale economic activity conducted by sophisticated commercial corporations.[137] Bear in mind that corporations were becoming more than just commonplace. An infrastructure of railroads provided previously local businesses access to national markets, as well as a prominent example of the power of the corporate form to aggregate capital; as a result, "between 1865 and the 1890s the widely held, publicly traded, non-owner managed enterprises gradually became the norm for U.S. business activities."[138] Whole industries previously thought not to need large amounts of capital suddenly saw a reason to incorporate, and burgeoning equity markets supplied them capital.[139] A corporation could thereby become broader and more geographically diverse in its shareholder base. As ownership further separated from control, the corporation looked increasingly dissimilar to other commercial organizations like the general partnership.[140]

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134. *Cf.* Fowle v. Common Council of Alexandria, 28 U.S. 398, 409 (1830) ("[T]hat money corporations . . . are liable for torts, is well settled . . . .").

135. *See, e.g.*, *Jordan*, 74 Ala. at 88-89; *Goodspeed*, 22 Conn. at 542; *Scofield Rolling Mill Co.*, 54 Ga. at 638-39; Jeffersonville R.R. Co. v. Rogers, 28 Ind. 1, 6-7 (1867); Lyne v. Bank of Ky., 28 Ky. (5 J.J. Marsh.) 545, 559 (1831); Detroit Daily Post Co. v. McArthur, 16 Mich. 447, 454-55 (1868); Vance v. Erie Ry. Co., 32 N.J.L. 334, 337 (1867).

136. HURST, *supra* note 99, at 57.

137. *See supra* notes 127-34; *see also* HURST, *supra* note 99, at 109-10.

138. Avi-Yonah, *supra* note 17, at 793.

139. *See generally* Thomas R. Navin & Marian V. Sears, *The Rise of a Market for Industrial Securities, 1887-1902*, 29 BUS. HIST. REV. 105 (1955) (cataloguing the rise of early-modern finance markets).

140. Blair, *supra* note 51, at 805 ("[T]he railroads had been financed by selling equity and debt securities to thousands of small investors, and by the early 1890s, other industrial

On top of all of this, the increasingly national reach of corporations incentivized corporations to develop for themselves singular, coherent corporate personas.[141] As the twentieth century grew near, scholars began to develop and advocate for a "real entity" conception of corporate personhood, one that understood the corporation to exist as a single agent distinct and independent from both its membership and the State—a view that came to dominate the coming decades.[142] As Millon concludes, "[t]he triumph of the new [real-entity] theory therefore signaled a willingness to dispense with the use of corporate law as a regulatory tool designed to address the special social and economic problems that Americans saw as stemming from the rise of the business corporation."[143]

Second, the general-incorporation regime existed in a state of perpetually unstable equilibrium. That equilibrium broke when New Jersey passed a series of acts liberalizing corporate law.[144] New Jersey's revamped corporate law allowed incorporation "for any lawful purpose," thereby removing the textual hook for the ultra vires doctrine and setting the stage for its "ultimate demise."[145] Perhaps more importantly, New Jersey became the first state to allow its commercial corporations to own shares in another corporation. At the time, corporations had already tried a variety of methods to skirt size limits, with limited success. Business trusts were initially thought to avoid the strictures of corporate law. However, two spectacular decisions—one against Standard Oil in Ohio, the other against the sugar-manufacturing industry in New York—rejected trusts as a noncorporate strategy for aggregation.[146] Outright purchase of another corporation's assets was permissible in theory, but impossible in practice.

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organizations were beginning to finance themselves the same way. It was no longer credible, then, to think of the great railroad corporations, or the big trusts that dominated oil, steel, tobacco, and sugar, as just some sort of partnership of shareholders." (footnote omitted)).

141. *Id.* at 798, 810 (arguing that development of a singular corporate identity reflects a conscious market strategy to both consumers and employers).

142. *See* Avi-Yonah, *supra* note 17, at 797-98 (arguing "the period between 1890 and 1906 marked the height of the debate" about corporate personhood, which ended with the triumph of the real-entity view); Horwitz, *supra* note 124, at 180-85 (tracing real-entity view in German social thought, arguing that it first emerged in the United States during the 1890s, and concluding that "by 1900, the 'entity' theory had largely triumphed and corporation and partnership law had moved in radically different directions").

143. Millon, *supra* note 103, at 213.

144. Act of Mar. 14, 1893, ch. 171, §2, 1893 N.J. Laws 301; Act of May 9, 1889, ch. 265, § 4, 1889 N.J. Laws 412, 414; Act of Apr. 7, 1888, ch. 295, §1, 1888 N.J. Laws 445; Act of Apr. 4, 1888, ch. 269, § 1, 1888 N.J. Laws 385.

145. Avi-Yonah, *supra* note 17, at 802-03. New Jersey was not the first state to relax the corporate-purpose requirement. *See, e.g.*, Act of Apr. 14, 1874, ch. 165, § 1, 1874 Mass. Acts 109; Act of June 21, 1875, ch. 611, § 1, 1875 N.Y. Laws 755.

146. People v. N. River Sugar Ref. Co., 3 N.Y.S. 401 (1889); State v. Standard Oil Co., 30 N.E. 279 (Ohio 1892).

This is because courts, analogizing from partnership law, concluded that such a fundamental change to a corporation could occur only with *unanimous* consent by the shareholders.[147] Thus, by virtue of New Jersey's reformed corporate code, corporations for the first time could easily merge.

The effect of reform was drastic. Corporations quickly abandoned their home states to reincorporate in New Jersey—so many that an estimated ninety-five percent of major corporations were New Jersey entities by 1901.[148] Thus, when American Sugar Company's home state of New York busted its attempt to form a trust consisting of every sugar manufacturer nationwide,[149] the corporation immediately reincorporated in New Jersey and did directly what New York prevented it from doing indirectly.[150] By 1902, filing fees and franchise taxes generated so much revenue that New Jersey not only retired the entirety of its debt but also abolished its property tax.[151]

Other states responded, initiating a race to the bottom to attract corporations and their fees. The concentration of corporations in a few jurisdictions meant that the race's effects were quickly felt. For example, although the Supreme Court would enforce the ultra vires doctrine as late as the 1930s, enforcement had no effect on the overwhelming majority of major corporations, which were located in New Jersey or follow-on states—like Delaware—that lacked an ultra vires doctrine.[152] "Any lawful purpose" requirements neutered the ultra vires doctrine.[153] Legislative creation of no-par stock circumvented judicial limitations on limited liability.[154] States removed limits on capitalization size, corporate lifespan, and ownership restrictions. Legislatures facilitated a corporation's ability to make fundamental changes by requiring only majority rather than unanimous shareholder approval to implement the change. Courts further inoculated corporations from judicial inquiry into the corporate structure

147. *See* Millon, *supra* note 103, at 215.

148. Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 13 (2008) (citing Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 AM. J. LEGAL HIST. 160, 164 (1982)).

149. *N. River Sugar Ref. Co.*, 3 N.Y.S. at 401.

150. *See* United States v. E.C. Knight Co., 156 U.S. 1 (1895). The Supreme Court declined to apply the Sherman Antitrust Act on the basis that the Commerce Clause did not extend to manufacturing. *Id.*

151. Crane, *supra* note 148, at 13.

152. Avi-Yonah, *supra* note 17, at 803.

153. *See supra* note 145 and accompanying text.

154. Horwitz, *supra* note 124, at 213. Previously, violations of the trust fund doctrine resulted in damages calculated as the difference between a share's par value and the price a shareholder actually paid to acquire the share. *Id.* at 208. Once corporations could set the par value of shares at zero, recoverable damages disappeared.

through the development of the Business Judgment Rule, which prohibits a court from second-guessing a broad swath of decisions made internal to the corporation.[155]

Corporate-criminal liability developed alongside this dramatic liberalization of corporate law. Several reasons make it implausible to dismiss the timing as mere coincidence. First, the same legislatures turning corporate law over to private negotiation simultaneously passed criminal statutes applicable to all persons, including corporations.[156] Second, regulation via criminal law sidesteps the race-to-the-bottom dynamic then weakening regulation through corporate law. While a state's corporate law applies to only corporations incorporated in that state, criminal law applies to all persons whose misconduct falls within that state's jurisdiction, be they in-state or out-of-state corporations. Third, criminal law is a better tool for regulating corporate activity.[157] Tinkering with the corporation's internal structure is a clunky, indirect process; it is easier to regulate corporate activity directly, as tort and criminal law do. Moreover, criminal law aligns regulatory strategy with institutional competence; neither courts nor legislatures are experts when it comes to commercial decisionmaking, but they are experts at drafting and interpreting statutes and the common law.

Courts could have refused to expand corporate-criminal liability, holding to old doctrines that mostly excluded corporations from liability. They did not do so. Most famously, the Supreme Court blessed Congress's decision to expose corporations to liability for a general-intent crime.[158] And yet, the Supreme Court was hardly at the vanguard of innovation; several state supreme courts had already held corporations criminally responsible for general-intent crimes, and courts soon extended these holdings to include specific-intent crimes.[159] Granted, courts did not expand corporate-criminal liability

155. Although the first statement of the doctrine occurred in 1888, within fifteen years the Business Judgment Rule had become a settled feature of corporate law. Avi-Yonah, *supra* note 17, at 799-800 (citing Leslie v. Lorillard, 18 N.E. 363, 365 (N.Y. 1888)).

156. *See, e.g.*, Crane, *supra* note 148, at 15 (noting that the Sherman Antitrust Act "goes out of its way to make clear that corporations and associations are covered as well"); *cf.* State v. Gen. Fire Extinguisher Co., 9 Ohio N.P. (n.s.) 438, 444 (Ct. Com. Pl. 1910) ("It is hardly to be presumed that the General Assembly of Ohio . . . could have intended to relieve the corporation, doing ninety-nine per cent. of the mischief, from punishment by penalty of law, and legislate against only the individual doing one per cent. of the mischief.").

157. *But see* Crane, *supra* note 148, at 27-50 (discussing the problems of applying a tort-crime model, rather than a regulatory model, to antitrust law).

158. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).

159. *E.g.*, United States v. Alaska Packers' Ass'n, 1 Alaska 217, 222-23 (D. Alaska 1901); Grant Bros. Constr. Co. v. United States, 114 P. 955, 957 (Ariz. 1911); People v. Palermo Land & Water Co., 89 P. 723, 725 (Cal. Ct. App. 1907); S. Express Co. v. State, 58 S.E. 67, 69 (Ga. 1907); State v. Belle Springs Creamery Co., 111 P. 474, 476 (Kan. 1910); Telegram

indiscriminately. For example, courts were slow to recognize that a corporation could commit manslaughter because no one had previously suspected longstanding manslaughter statutes referring to "persons" to cover corporations.[160] Similarly, courts recognized that certain crimes were beyond the purview of a corporation.[161] Nevertheless, the enabling-act era set the stage for both the modern corporation and the practice of holding corporations criminally responsible as if they were individual persons.

IV. HOW AND WHEN CORPORATIONS BECAME PERSONS FOR PURPOSES OF THE CRIMINAL LAW

A. Corporate Law's Changes Created Corporations Eligible for Pragmatic Personhood Under the Criminal Law

Assume for now the adoption of a pragmatic conception of personhood—an assumption I put to the test in Section II.B. Set against this conceptual backdrop, corporate-criminal liability was justified at its inception—not because corporations have always been eligible for criminal liability, but because they became eligible late in the nineteenth century. The expanded availability of the corporate form, the relaxing of corporate-purpose requirements, and the general liberalization of corporate law during and immediately following the nineteenth century enabled the creation and proliferation of corporate persons sophisticated enough to be eligible for legal personhood under criminal law, and specifically to satisfy criminal law's mens rea requirement.

Recall from Part II that even without the constraints of the individual-person premise, it is difficult for an entity—particularly, a collective entity—to satisfy the requirements necessary for legal personhood.[162] Eligibility for legal personhood under a pragmatic conception requires an entity sufficiently well organized to participate effectively in the space of legal obligations. For the collective agent, like a corporation, this requires a population committed to an open-ended joint commitment, pursed through an internal structure that makes possible the following: allowing the corporation to act and express attitudes as a single agent; acknowledging its ability to enforce legal claims and

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Newspaper Co. v. Commonwealth, 52 N.E. 445, 446 (Mass. 1899); State v. Passaic Cty. Agric. Soc'y, 23 A. 680, 680 (N.J. 1892); People v. Rochester Ry. & Light Co., 88 N.E. 22 (N.Y. 1909); State v. Rowland Lumber Co., 69 S.E. 58, 58-59 (N.C. 1910); State v. E. Coal Co., 70 A. 1, 7 (R.I. 1908); State v. First Nat'l Bank of Clark, 51 N.W. 587, 587 (S.D. 1892).

160. *See, e.g.*, Commonwealth v. Ill. Cent. R.R. Co., 153 S.W. 459 (Ky. 1913); *Rochester Ry. & Light Co.*, 88 N.E. 22.

161. United States v. John Kelso Co., 86 F. 304 (N.D. Cal. 1898) (listing crimes).

162. *See supra* Section II.C.2.

have legal claims enforced against it; and identifying failures of the corporation's rational processes and improving those processes.

The first lesson of Part III is that commercial corporations did not start out as the sort of sophisticated agents described above as necessary to establish the eligibility requirements for personhood under the criminal law.[163] On the one hand, even the earliest corporations had a population of members brought together by a joint commitment. On the other hand, the joint commitments at issue were narrowly proscribed, public-minded projects chosen for them by the legislature who drafted their charters. Moreover, these corporations were tiny and hyperlocal, obviating the need for much sophistication amidst the internal organization that did exist. Corporations started out without much in the way of uniform structures, and courts liberally borrowed from partnership law to fill in gaps in corporate law. And although the legal benefits obtained through the corporate form—independent-entity status, limited liability, and separation of ownership from control—existed in principle at this time, these advantages had not yet been widely exploited.

The second lesson of Part III is that the steady liberalization of corporate law over the nineteenth century—driving and in turn being driven by expanding, increasingly national economic opportunities—created the possibility of, as well as the need for, sophisticated corporate agency.[164] To track the language of collective agency, the expanding scope of a corporation's joint commitment—coupled with the rapid increase in a corporation's membership—necessitated the development of sophisticated internal structures.

Start with joint commitment. Courts and legislatures repeatedly expanded the permissible scope of a corporation's joint commitment throughout the nineteenth century. First, general incorporation democratized access to the corporate form, thereby allowing entities committed to purely private commercial interests to incorporate. As a result, commercial corporations arose beyond the confines of a narrow class of quasi-public industries. At the same time, judicial liberalization of the ultra vires doctrine allowed corporations to push the limits of their self-selected chartered purpose. The legislative shift to enabling acts and the creation of "any lawful act" statutes made it easier still for corporations to pursue multiple related commitments. Meanwhile, the removal of caps on a corporation's lifespan made it possible for corporations to pursue truly open-ended commitments. The cumulative effect of these reforms was to virtually eliminate legal impediments on corporate action. This allowed corporations to

163. *See supra* Section III.A.

164. *See supra* Sections III.B-C.

expand beyond single-purpose ventures, to change strategies or industries in response to market demands, and to plan long-term commercial projects.

At the same time, corporations expanded dramatically with respect to membership. In the early 1800s, corporations were small enterprises with a local base of shareholders and strong overlap between ownership and control. However, the ability to separate capital contributions from corporate decisionmaking made corporations the preferred enterprise vehicle for pursuing large commercial projects. The development of a countrywide infrastructure and local financial markets allowed corporations to pursue business, and to attract capital, from a national market. Geographic dispersion accelerated the separation of ownership from control. Increased size, in turn, allowed for larger ventures, which itself fueled growth and further expanded the geographical base of shareholders. This cycle was exacerbated initially by the use of trusts to aggregate corporate wealth, and later by changes in corporate law allowing corporations to own shares in each other.

How did these changes influence corporate structures? From the government's perspective, the nineteenth century saw a sea of change in regulatory attitudes towards corporations, which influenced the development of corporate structures that realized the corporation's status as a single legal entity. General-incorporation statutes provided corporations with a default structure that provided the backdrop for sophisticated agency. Modern corporations live with the legacies of these default structures: Corporate law delineates classes of members within a corporation,[165] divvies up decisionmaking authority amongst classes,[166] and specifies the scope and breadth of each class's powers and obligations.[167] Specifically, the default corporate structure beginning with the typical general-incorporation charter encourages the adoption of a hierarchical structure—what Peter French refers to as the Corporate Internal Decision structure—whose "primary function is to draw experience from various levels of the corporation into a decisionmaking and ratification process."[168] Such

165. *E.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2016) (broad default powers of directors); MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR ASS'N 2006) (same); DEL. CODE ANN. tit. 8, § 142(a) (2016) (creation of officers); MODEL BUS. CORP. ACT § 8.40(a) (AM. BAR ASS'N 2006) (same).

166. *E.g.*, DEL. CODE ANN. tit. 8, § 141(k) (2016) (allowing removal of directors via shareholder majority); MODEL BUS. CORP. ACT § 8.08 (AM. BAR ASS'N 2006) (same); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (articulating the Business Judgment Rule).

167. *E.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2016) (limiting directors' personal liability resulting from a breach of their duty of care).

168. Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 212 (1979). *See generally* LAUFER, *supra* note 14.

an organizational structure consolidates much of the intra-member deliberations within a corporation. Meanwhile, this structure creates both the fact and the perception of what social psychologists refer to as a "highly entitative group agent," which is a "unified and coherent whole in which the members are tightly bound together."[169]

The enabling-act era signaled a retreat by the states from a practice of regulating corporate activity by inspecting the corporation's internal structure and correspondingly saw an effort to regulate the entity *qua* entity directly through tort and criminal law. During this period, an increasing disregard for the strictures of the ultra vires rule—in corporate law as well as in tort and contract—illustrated courts' growing unwillingness to intervene in the internal negotiations of corporate members. Instead, courts and legislatures increasingly dealt with a corporation as a single agent for purposes of both legal powers and responsibilities. The creation of the Business Judgment Rule reinforced this judicial commitment to stay out of the process of internal decisionmaking. At the same time, the legislative removal of, for example, shareholder-unanimity requirements strengthened the hierarchical nature of corporate decisionmaking. Whatever the states' motivation—a desire to compete for corporate relocation, a better alignment of regulatory mechanisms with legislative and judicial competence, or jurisdictional reach—the larger effect was to turn over internal organization and decisionmaking to the corporation while interacting with it, from the states' perspective, as a single entity.

From the commercial perspective, particularly in the latter part of the nineteenth century, strong economic incentives pushed corporations to structure themselves in a manner—consistent with French's and Laufer's hierarchal structure—that embraced their legal status as a single entity. Economic opportunities made possible vastly larger, geographically diverse structures, privileging a centralized, hierarchical structure. Changes in size and national focus created a need for internal structures that were flexible and responsive to increasingly competitive markets. The need to win customers away from local businesses in an increasingly national marketplace meant that developing a single branded identity became a good business practice. Likewise, as corporate employees spread over a wider community, a single corporate identity could substitute for physical presence as a means of inspiring loyalty. In short, corporations faced economic

169. Steven J. Sherman & Elise J. Percy, *The Psychology of Collective Responsibility: When and Why Collective Entities Are Likely to be Held Responsible for the Misdeeds of Individual Members*, 19 J.L. & POL. 137, 149 (2010).

incentives to organize themselves to resemble and respond like they were single entities.

To summarize, during the latter part of the nineteenth century, it became in the commercial corporations' interests to develop for themselves internal structures that allowed them to act and respond as the single entities corporate law treated them as. At the same time, courts and legislatures increasingly signaled their willingness to interact with corporations as single agents, rather than interfere with a corporation's internal structure. The cumulative effect encouraged sophisticated internal structures, which were capable not only of corporate attitudes and actions but further of effective participation in the space of legal obligations. In short, economic and corporate-law innovations in the latter part of the nineteenth century created the conditions of corporate eligibility for criminal responsibility. Courts began holding corporations criminally liable just at a time when corporations themselves became capable of qualifying for criminal responsibility.

B. The Pragmatic Conception of Personhood Supplanted the Intrinsic Conception of Legal Personhood

It is one thing to show that corporations are eligible, and even became eligible, for criminal liability on the assumption of a pragmatic conception of personhood. It is another thing to argue that this outcome actually occurred. And yet, that appears to be the case. As it turns out, and contrary to the conventional wisdom, courts did grapple with questions of how to conceive of the corporation. More to the point, we see a pragmatic turn in judicial thinking about personhood taking root during the nineteenth century. Not only did courts reject the individual-person premise while expanding corporate liability, but they embraced reasoning underlying the pragmatic conception of personhood and further took steps to develop methods for attributing attitudes to corporations.

1. Rejecting the Individual-Person Premise

Recall that the pragmatic conception of personhood reverses the relationship between personhood and attribution from that articulated by the individual-person premise, which instead constrains attributions according to whether the underlying entity is an individual person.[170] In reviewing the early development of corporate-criminal liability, it is clear that state courts rejected the individual-person premise in a variety of legal contexts. Indeed, when asked to preserve the longstanding prohibition on attributing intentional attitudes to

170. *See supra* notes 59-62 and accompanying text.

corporations in the criminal context, many courts noted that they already rejected the individual-person premise with respect to a corporation's liability for intentional torts. Accordingly, these courts reasoned it would be disingenuous to maintain in the criminal context that corporations, by their very nature, could not have attributed to them intentional attitudes. As the Supreme Court of New Jersey put the point:

> The very basis of the action for libel or for malicious prosecution is the evil intent, the malice of the party defendant. It is difficult, therefore, to see how a corporation may be amenable to civil suit for libel and malicious prosecution and private nuisance, and mulcted in exemplary damages, and at the same time not be indictable for like offenses where the injury falls upon the public.[171]

Supreme courts in Alaska,[172] Georgia,[173] Massachusetts,[174] New York,[175] and Rhode Island,[176] as well as federal courts across the country,[177] offered identical rationales.

Other courts reached the same conclusion via other legal domains. For example, one federal court noted with respect to contract law that "[i]t seems to me as easy and logical to ascribe to a corporation an evil-mind as it is to impute to it a sense of contractual obligation."[178] More generally, concluded the Supreme Court of Alaska, "[i]f

171. State v. Passaic Cty. Agric. Soc'y, 23 A. 680, 681 (N.J. 1892).

172. United States v. Alaska Packers' Ass'n, 1 Alaska 217, 219 (D. Alaska 1901). ("[W]here life is taken by a corporation in pursuing its business, and it is compelled to answer civilly because of such wrongful death, there is no good reason why it may not be required to answer criminally for the same act done in the line of its business, if the law so provides.").

173. *Cf.* Scofield Rolling Mill Co. v. State, 54 Ga. 635, 640-41 (1875) (discussing corporate-criminal liability in a civil action to recover state funds).

174. Telegram Newspaper Co. v. Commonwealth, 52 N.E. 445, 446 (Mass. 1899) ("There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil.").

175. People v. Rochester Ry. & Light Co., 88 N.E. 22, 23 (N.Y. 1909).

176. State v. E. Coal Co., 70 A. 1, 7 (R.I. 1908) ("If corporations have the capacity to engage in actionable conspiracy [in tort], they have the power to criminally conspire.").

177. *See, e.g.*, United States v. N.Y. Herald Co., 159 F. 296, 297 (C.C.S.D.N.Y. 1907) ("To fasten this species of knowledge upon a corporation requires no other or different kind of legal inference than has long been used to justify punitive damages in cases of tort against an incorporated defendant."); United States v. MacAndrews & Forbes Co., 149 F. 823, 836 (C.C.S.D.N.Y. 1906) ("[T]here is no more intellectual difficulty in considering [a corporation] capable of homicide or larceny than in thinking of it as devising a plan to obtain usurious interest."); United States v. John Kelso Co., 86 F. 304, 306 (N.D. Cal. 1898) ("[T]he same evidence which in a civil case would be sufficient to prove a specific or malicious intention upon the part of a corporation defendant would be sufficient to show a like intention upon the part of a corporation charged criminally with the doing of an act prohibited by the law.").

178. *MacAndrews & Forbes Co.*, 149 F. at 836; *accord* McDermott v. Evening Journal Ass'n, 43 N.J.L. 488, 491-92 (1881) ("But it is obvious that mind, in its legal sense, means

. . . the invisible, intangible essence of air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can also intend to do those acts, and can act therein as well viciously as virtuously."[179] Joel Bishop's then-influential treatise on the law of corporations reflected a similar sentiment, concluding "the powers of these artificial beings are limited; but, since the capacity to act is given them by law, no good reason appears why they may not intend to act in a criminal manner."[180]

To be sure, appealing to prior tort and contract cases pushes the theoretical question back one step; for what reason did courts reject the individual-person premise in civil cases? Reviewing these earlier cases reveals that courts rejected the individual-person premise on its merits. Courts expanding corporate-tort liability took the fact of deliberate activity as circumstantial evidence sufficient to prove that corporations are apt for attitudinal attributions. Consider the following from the Connecticut Supreme Court:

> To say that a corporation can not have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one, they can intend to do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be.[181]

The Supreme Court of New Jersey embraced a similar approach, concluding that "[n]o technical difficulties" prevented a jury from inferring that a corporation committed a "wrongful act *intentionally done*."[182] Supreme courts in Alabama,[183] Georgia,[184] Indiana,[185] Kentucky,[186] and others similarly rejected the individual-person premise. In summary, they trusted, and sometimes expressly stated, that a jury was capable of ascertaining a corporation's intentional attitudes, and did not bother to develop some special method for ascertaining

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only the ability to will, to direct, to permit, or assent. A corporation exerts its mind each time that it assents to the terms of the contract.").

179. United States v. Alaska Packers' Ass'n, 1 Alaska 217, 220 (D. Alaska 1901).

180. 2 JOEL PRENTISS BISHOP, NEW COMMENTARIES OF THE CRIMINAL LAW UPON A NEW SYSTEM OF LEGAL EXPOSITION § 418 (8th ed. 1892).

181. Goodspeed v. E. Haddam Bank, 22 Conn. 530, 542 (1853).

182. Vance v. Erie Ry. Co., 32 N.J.L. 334, 337 (1867) (emphasis added); *accord McDermott*, 43 N.J.L. at 493.

183. Jordan v. Ala. Great S. R.R. Co., 74 Ala. 85, 88-89 (1883).

184. Scofield Rolling Mill Co. v. State, 54 Ga. 635, 638-39 (1875).

185. Jeffersonville R.R. Co. v. Rogers, 28 Ind. 1, 6-7 (1867).

186. Lyne v. Bank of Ky., 28 Ky. (5 J.J. Marsh.) 545, 559 (1831).

corporate attitudes.[187] In this respect, these courts treated the process of attributing attitudes to corporate persons the same as they did the process of attributing attitudes to individual persons. In doing so, courts appreciated that attribution is an interpretative practice, deriving intentional attitudes from observable actions—a bedrock feature of pragmatic approaches to attitudinal attribution.

In summary, in criminal cases across a variety of jurisdictions, we have seen courts reject the individual-person premise either on its merits or on the basis that the premise had already been debunked in either tort law or contract law. Meanwhile, courts began to recognize that the practices for attributing attitudes to an entity need not differ categorically depending on whether the party was an individual person or a corporate person.

2. Embracing the Pragmatic Conception of Personhood and Genuine Corporate Attitudes

Courts expanding the scope of corporate liability did more than simply reject the individual-person premise. Recall the received wisdom that courts skirted the hard-conceptual questions surrounding genuine corporate attitudes by importing tort law's respondeat superior doctrine into criminal law.[188] However, courts were not uniform in this approach. Rather, courts grappling with the enforcement of regulatory requirements developed, or rather began to develop, methods for attributing genuine corporate attitudes evocative of a pragmatic conception of personhood.

To begin, many courts eschewed straightforward applications of vicarious liability in favor of comparatively more sophisticated attempts to isolate individual intentions that could properly be attributed to the corporation. For example, California and Missouri limited attribution of corporate intentions to those attitudes held by corporate directors provided further that the attitudes concerned actions taken "within the scope of the objects and purposes of the corporation."[189] Arizona adopted a similar rule, albeit focusing on the personal intentions of corporate officers rather than directors.[190] Oth-

187. *See, e.g.*, Reed v. Home Sav. Bank, 130 Mass. 443, 445 (1881) (holding that "proof of want of probable cause will warrant the jury in inferring malice" in the same manner against a corporation as an individual); State v. Sec. Bank of Clark, 51 N.W. 337, 338 (S.D. 1892) ("[W]hatever evidence will justify either an indictment or a presentment against an individual will justify an indictment or a presentment against a corporation.").

188. *See supra* Sections II.A-B.

189. Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 57 (1867), *cited with approval in* Gillett v. Mo. Valley R.R. Co., 55 Mo. 315, 321-22 (1874).

190. Grant Bros. Constr. Co. v. United States, 114 P. 955, 957 (Ariz. 1911) ("[A] corporation, as well as an individual, is capable of forming a guilty intent and capable of having

er courts focused on the type of conduct that might merit attribution. For example, the Alaska Supreme Court concluded that "[n]ot every misfeasance which would be indictable in an individual is so in a corporation. It must be within, or not too far outside of, the corporate duty."[191] Separately, Maryland limited attribution of an intentional attitude to only those cases where an employee, committing the underlying misconduct, acted with express authority.[192] These historical approaches resonate today. For example, the attributive framework advocated by Arizona foreshadows the Model Penal Code's method of attributing to a corporation only those intentional attitudes demonstrated by "high managerial agent[s]."[193] That is not to say that any of these approaches fully isolate genuine corporate attitudes; for example, they all run the risk of conflating individual attitudes with corporate ones.[194] Nevertheless, they represent efforts to standardize corporate attribution in a more principled manner than the doctrine of respondeat superior.

More importantly, many courts, from the moment they began expanding corporate liability for intentional torts, recognized the role of organizational structure in producing genuine corporate attitudes. They did so, in part, by appropriating the rhetoric of the individual-person premise while identifying structural counterparts capable of producing corporate intentional attitudes. For example, early tort cases identify as the corporate "mind" the set of interactions between directors or managers.[195] Consider this reasoning by a district court—a reasoning eventually endorsed by the U.S. Supreme Court—with respect to a corporation's capacity to satisfy the elements of malicious prosecution:

> [Petitioner argues] that a corporation is incapable of malice, and technically that may be true; but is it really and practically so? There must be a controlling and governing power in every corporation. This is usually found in a board of directors who are chosen by the members or stockholders, and this board in some way selects the officers and employés of the corporation. *It is not true that a corporation has no mind. Its mind is the joint product of the minds of its officers and directory in a united organization*, and in

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the knowledge necessary, provided the officers of the corporation capable of voicing the will of the corporation have such knowledge or intent.").

191. United States v. Alaska Packers' Ass'n, 1 Alaska 217, 222 (D. Alaska 1901).

192. Carter v. Howe Mach. Co., 51 Md. 290, 298 (1879).

193. MODEL PENAL CODE § 2.07(1)(c) (AM. LAW INST. 1962).

194. *See* Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1187-90 (1983) (discussing various attempts at corporate mens rea that conflate individual attitudes with corporate attitudes).

195. Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 55 (1867); Lyne v. Bank of Ky., 28 Ky. (5 J.J. Marsh.) 545, 559 (1831).

> point of fact corporations bring into their service the highest order of ability and the best executive talent in the country.[196]

Contra appeals to respondeat superior, this analysis does not conflate the attitudes of a director, manager, or employee with the attitudes of the corporation. Rather, it recognizes that the attitudes of directors and managers, *mediated through the corporate structure* through which these individuals interact, produce genuine corporate intentional attitudes.

The approach articulated by the Michigan Supreme Court is a paradigmatic, contemporary example of a court isolating genuine corporate attitudes against the backdrop of a pragmatic conception of personhood. Faced with a plaintiff seeking exemplary damages against a newspaper corporation for libel, the court affirmed that a corporation could be so held liable.[197] However, the court explained that "no amount of express malice in his employés" would suffice to expose a corporation to exemplary damages where the corporation implemented "the establishment and habitual enforcement of such rules as would probably exclude [libelous] items" of publication.[198] On the other hand, a poorly managed publication—for example, one with a "frequent recurrence of similar libels"—risked exemplary damages.[199] In other words, a malicious act of libel should not be attributed to a corporation when the corporate structure implies that libel occurred because of a rogue employee. By contrast, malice should be attributed to a corporation when the corporate structure creates a libelous environment. This approach neatly distinguishes between attitudes properly attributed to a corporation and attitudes that should be attributed instead to an individual inside the corporation. Indeed, as the next Section indicates, inasmuch as federal courts still rely on respondeat superior, adopting this approach articulated by the Michigan Supreme Court would vastly improve the extent to which legal doctrine picks out genuine corporate attitudes.

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196. Copley v. Grover & Baker Sewing-Mach. Co., 6 F. Cas. 517, 519 (C.C.S.D. Ala. 1875) (emphasis added), *cited with approval in* City of Salt Lake City v. Hollister, 118 U.S. 256, 262 (1886).

197. Detroit Daily Post Co. v. McArthur, 16 Mich. 447, 453-55 (1868).

198. *Id.*

199. *Id.*

C. How to Improve Our Current Practice Using Lessons from History

1. Changes Made to Corporate Law Undermined the Intrinsic Conception of Personhood

Start with the skeptical challenge to the very possibility of corporate-criminal liability that first motivated this discussion. We can see now that while skeptical arguments against corporate capacities may be internally consistent, thereby compelling theoretical arguments, taking them seriously would be ruinous to modern corporate law and the commercial corporation it has empowered.

What are the consequences of taking skepticism seriously? On the account above, corporate-criminal liability is underwritten by a principled expression of a pragmatic conception of personhood, and an attendant rejection of the inward-looking, structural form of regulation that took as its conceptual touchstone the intrinsic conception of personhood. The pragmatic turn is thus of a piece with the shift away from a regulatory regime—namely, corporate law—that bore an intrinsic bent.

Moreover, the law's shift away from the intrinsic conception of personhood should not be dismissed as arbitrary, thoughtless, or unfounded. Rather, it reflected the fact that regulatory implications of these conceptions—the polices licensed and made manifest by the conceptions underlying them—proved inadequate to the task. This inadequacy reflects an increasing mismatch between an expectation based on what corporations used to be and the reality of what corporations have become (or at least were becoming). It is this change in the nature and function of the entity itself, driven by economic forces and corporate law, that rendered the intrinsic conception of personhood anachronistic. The individual-person premise may have explained the universe of corporations before and up to 1800, but certainly it failed to do so by the end of that century.

Moving to the twenty-first century, nothing has occurred to think that corporate law has reverted or even moved in the direction of its old tricks. It is the liberalization of corporate law, and the changing economic and commercial climate, that made the intrinsic conception unworkable but also created the framework for the modern corporation. If anything, corporate law has fully embraced its role as enabling the private organization and pursuit of collective, predominantly commercial, activity. Indeed, although most corporations retain

broadly similar foundational structures,[200] nevertheless today many of corporate law's organizing rules are at least formally optional defaults.

It is in this world that the skeptic finds himself and his invocation of the individual-person premise. The skeptic's implicit embrace of an intrinsic conception of personhood may be internally consistent as a matter of theory, but the implications are devastating. Taken seriously, it does more than call into question the possibility of just corporate-criminal liability; it threatens the bedrock arrangement of corporate regulation that establishes corporate law as an enabling, rather than regulating or sanctioning, system.

2. Modern Practice as a Second-Best Approach to Corporate-Criminal Liability, or a Template for Reform

None of this is to say that the system of corporate-criminal liability that we have is perfect. In particular, the skeptic is right (though far from alone) to criticize the federal government's continued adherence to a tort-style imputation of vicarious mens rea made famous in *New York Central*. It has the effect of sidestepping genuine corporate attitudes. This approach is overinclusive because it implies that any member's personal attitudes can be attributed to the corporation.[201] To return to a previous example, this would be like saying that any single Senator's comments are always attributable to the Senate itself. Yet relying on respondeat superior is also *under*inclusive insofar as it requires that at least one employee have the relevant attitude in order for corporate attitudinal attribution to occur.[202] However, as has been demonstrated, a corporation can hold an attitude not held by any member. More likely, there is no reason to expect that the corporation's attitudes be instantiated by the same member carrying out the corporate act.[203] In this respect, our continued use of corporate-criminal liability would stand on a better conceptual footing if we were to abandon a doctrine based on vicarious liability that never fully reflected a pragmatic conception of personhood, but that crowded out nascent state-court innovations along the way.

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200. *See generally* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001) (arguing for broad internal adoption of the modern American model of corporate law).

201. Arlen, *supra* note 34.

202. Scholars argue that *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987), establishes a court's ability to let juries stitch together the partial knowledge of individual employees to satisfy statutory requirements. However, this interpretation is inconsistent with the opinion itself, as well as with subsequent case law interpreting it. Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210, 227 (1997). Perhaps for this reason, mention of the so-called "collective knowledge doctrine" by courts is exceedingly rare.

203. *See* David M. Uhlmann, *Crimes on the Gulf*, 53 L. QUADRANGLE 31, 32 (2010).

On the other hand, it is a mistake to evaluate our modern practice of corporate-criminal liability solely by reference to Supreme Court doctrine. Prosecutors and sentencing courts, operating in the shadow of *New York Central*, have taken up the mantle of pragmatic innovation seen by the likes of the Michigan Supreme Court. The result represents at least a second-best solution to a system of corporate-criminal liability depending on genuine corporate attitudes. More promising, it provides a clear template for doing what courts in the nineteenth century encourage—*viz.*, turning the issue of ascertaining corporate attitudes over to the jury.

a. The Divergence Between Corporate-Criminal Doctrine and Practice

Although the federal *doctrine* of corporate criminal liability remains unchanged since *New York Central*, two modern revisions to the criminal justice system have drastically altered federal *practice*—to the point that, arguably, "the administration of justice is no longer ruled by existing principles of vicarious liability" when it comes to corporate-criminal responsibility.[204]

First, although federal prosecutors exercise broad discretion in deciding which cases to charge, in 1999 the Department of Justice (DOJ) adopted formal policies regarding when to prosecute a corporation. Then-Deputy Attorney General Holder first articulated these principles for corporate prosecutions; in doing so, the DOJ unilaterally disclaimed much of its authority to prosecute corporations based on respondeat superior theories of liability.[205] William Laufer describes the Holder Memo as "an explicit renunciation of vicarious liability by the [DOJ]."[206]

The DOJ continues to refine its position towards corporate prosecutions through a series of memos and through revisions to the United States Attorneys' Manual.[207] That said, the general tenor of DOJ's approach to corporate crime is to prosecute cases that reflect a sense of "institutional responsibility."[208] For example, prosecutors are instructed to consider whether the corporation had embedded in its structure an effective compliance program that could have prevented

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

205. *See* Memorandum from Deputy Att'y Gen. Eric H. Holder, U.S. Dep't of Justice, on Bringing Criminal Charges Against Corporations to All Component Heads and United States Attorneys (June 16, 1999).

206. LAUFER, *supra* note 14, at 37.

207. Four additional memos have modified the treatment of corporate prosecutions: the McNulty Memo, the Thompson Memo, the Filip Memo, and the Yates Memo.

208. Buell, *supra* note 39, at 485.

the alleged misconduct, or whether instead corporate compliance was ineffective or non-existent.[209] Prosecutors weigh the corporation's prior offenses as evidence of institutional responsibility.[210] They assess the "pervasiveness of wrongdoing within the corporation."[211] And they evaluate whether the prosecution of individuals would be adequate to address the misconduct.[212]

Even when DOJ decides to prosecute a corporation, the manner in which it does so can evince an effort to establish robust institutional fault not captured by vicarious liability. For example, the federal government's infamous, ultimately existential prosecution of Arthur Andersen should have proved a relatively simple one given the facts of the case and the flexibility afforded by the doctrine of corporate crime to impute most acts and intentions of any employee to the corporation.[213] Nevertheless, both sides spent considerable efforts prosecuting and defending the notion that Andersen's misconduct actually reflected institutional fault, as opposed to misconduct by a few individual bad apples working at the firm.[214]

Second, Congress created the U.S. Sentencing Commission, which then provided federal courts with a framework for considering how to sentence a convicted corporation.[215] The sentencing considerations for organizations are contained in Chapter Eight of the U.S. Sentencing Guidelines. Many considerations listed in Chapter Eight—especially those concerning the magnitude of the corporate fine to impose—mirror prosecutorial considerations about whether to indict a corporation. For example, both investigate whether criminal misconduct occurred in spite of, or in the absence of, a compliance program designed to detect individual misconduct.[216] Both consider the corporation's prior offenses as circumstantial evidence of institutional fault.[217] And both consider the "pervasiveness" of criminal activity

209. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.800 (2015) [hereinafter U.S. ATTORNEYS' MANUAL].

210. *Id.* § 9-28.600.

211. *Id.* § 9-28.500.

212. *Id.* § 9-28.200.

213. BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 30-36 (2014). Technically, Arthur Andersen was a partnership. For these purposes, the lesson remains the same.

214. Buell, *supra* note 39, at 484-86.

215. While the U.S. Sentencing Guidelines have been rendered advisory, *United States v. Booker*, 543 U.S. 220 (2005), they continue to carry significant weight at sentencing.

216. U.S. SENTENCING GUIDELINES MANUAL §§ 8D1.4(b), 8C2.5(f) (U.S. SENTENCING COMM'N 2014); U.S. ATTORNEYS' MANUAL, *supra* note 209, § 9-28.800.

217. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(c); U.S. ATTORNEYS' MANUAL, *supra* note 209, § 9-28.600.

within the corporation.[218] In the sentencing context, these considerations provide grounds for increasing the sentence that would otherwise be imposed against a corporation.

These two innovations—factors to prosecute and sentencing considerations—have created "[a] richer version of entity liability . . . in the shadow of respondeat superior."[219] Through such an approach, the criminal justice system recognizes that an institution's structure produces collective intentional attitudes autonomous from its members. Both prosecutorial and sentencing guidelines seek to isolate corporate intentions by looking to the corporate structure to rule out interpretations of corporate illegality that would be more aptly attributed only to individuals. In doing so, the modern practice of corporate-criminal liability embraces a meaningful sense of genuine corporate attitudes, like intention, while recognizing that collective intentions can sometimes be difficult to identify insofar as they overlap with the attitudes of individual members.

b. Federal Practice as a Template for Improving Federal Doctrine

Just as argued by courts in the nineteenth century, the same considerations developed by sentencing courts and prosecutors can and should be put before a jury. In short, the jury should be presented with the same sorts of considerations to decide whether to attribute the requisite mens rea to a corporation. The idea of attributing attitudes to an organization would not place an unreasonable demand on jurors. Sherman and Percy conclude that with respect to high-entitative groups like corporations, "the inference of group-level intentionality, and thus causality, ought to be similar to such inferences for an individual actor."[220] There is no reason to suspect that this activity is beyond a jury's capacity. Indeed, the Andersen trial suggests that juries may be surreptitiously considering the factors of their own accord.[221] The sorts of considerations currently analyzed by sentencing courts and prosecutors—whether the misconduct is better attributed to identifiable individuals, the corporation's past misconduct, and the corporation's efforts to prevent misconduct—should guide a jury's deliberations.

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218. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(b); U.S. ATTORNEYS' MANUAL, *supra* note 209, § 9-28.500.

219. Buell, *supra* note 33, at 487.

220. Sherman & Percy, *supra* note 169, at 156; *accord* Thomas F. Denson et al., *The Roles of Entitativity and Essentiality in Judgments of Collective Responsibility*, 9 GROUP PROCESSES & INTERGROUP REL. 43 (2006).

221. *See* Buell, *supra* note 39, at 488.

To be clear, the current shadow approach to corporate-criminal liability by itself does not redeem the federal doctrine. With respect to sentencing, courts are dealing with corporations that have already been sentenced; at best, judicial consideration ameliorates the excesses of an already unsound approach to liability. With respect to prosecutorial discretion, voluntary renunciation is no substitute for genuine corporate attitudes. For one thing, a prosecutor's discretion does not alter the burden of proof. For another thing, a prudent corporation must take into account that a prosecutor may push his or her doctrinal advantage in any particular case. Finally, recall that a respondeat-superior approach to corporate-criminal liability is underinclusive as well as overinclusive.[222] Modern innovations cannot expand the scope of liability to account for these missed cases of genuine corporate attitudes; prosecutors have the discretion to shrink, but not expand, the space of eligible cases beyond that allowed by the doctrine.[223] Accordingly, complete reform would require not just giving juries the power to determine corporate mens rea, but further replacing the current respondeat superior doctrine with those considerations.

In short, reforming the current doctrine of corporate-criminal liability would place the practice on solid footing. Put another way, it would focus corporate-criminal liability on cases where genuine corporate attitudes existed to satisfy the applicable eligibility requirements. A template for this reform exists in current practice. The considerations already being weighed by prosecutors and sentencing courts operating in the shadows of an indefensible respondeat superior doctrine should be passed to juries. Doing so would support a practice of holding corporations criminally responsible that is required by our existing corporate- and criminal-law practices.

V. WHY CORPORATIONS BECAME PERSONS FOR PURPOSES OF THE CRIMINAL LAW

Up to this point, I have demonstrated how corporations became eligible for criminal liability in the latter part of the nineteenth century. Part V now explains why liability developed.

A. The Insufficiency of Deterrence as an Explanation

Deterrence might seem an odd final target to take on. As I noted in Part II, some courts appealed to deterrence rationales when expanding criminal liability to corporations. Most notably, the Supreme

222. *See supra* notes 201-04 and accompanying text.

223. *Cf.* Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 371 (2010) ("Police and prosecutors should not have free rein to decide what conduct to criminalize and how severely to punish it.").

Court blessed the practice on the rationale that a combination of private civil suits against a corporation and criminal indictments of corporate employees would not adequately deter corporate misconduct.[224] Moreover, Part III demonstrated the shift to criminal law coincided with the abandonment of corporate law as a regulatory strategy. In doing so, I made explicit that criminal law could better serve as a regulatory tool than could corporate law. So why am I criticizing the standard story that corporate-criminal liability developed in order to deter corporate misconduct?

Appeals to deterrence alone cannot explain the development of corporate-criminal liability. Two problems arise. To begin, the use of criminal law as a means to control corporate activity was not new. As Part III demonstrated, a species of strict criminal liability existed for corporations since at least the early 1800s.[225] Moreover, these early courts provided an identical rationale as that advanced by the Supreme Court in 1909—namely, that "[a]n indictment and an information are the only remedies to which the public can resort for a redress of their grievances."[226] Thus, more needs to be said to explain why corporate-criminal liability expanded not just to include crimes, but further to include crimes involving intentional attitudes.

Separately, even if a need to deter corporate misconduct explains the development of *some* method for the states to hold corporations accountable, this fact alone does not suffice to explain the development of corporate-*criminal* liability. For example, why did states not rely on civil suits or regulations, rather than criminal statutes, to minimize corporate misconduct? In response, Brickey and Khanna suggest that, at the time, it was not possible for the states to bring civil suits.[227] However, under the circumstances, the suggestion that corporate-criminal liability arose because other methods of regulation were not available rings hollow. Lest it be overlooked, centuries of legal precedent affirmed and reaffirmed the impossibility of finding a corporation guilty of a general-intent crime. What led states to abandon one impossibility instead of the other? In short, although deterrence can help explain the development of corporate-criminal liability, it is at best a partial explanation that stands to be augmented.

224. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495 (1909).

225. *See supra* notes 110-11 and accompanying text.

226. People v. Corp. of Albany, 11 Wend. 539, 543 (N.Y. Sup. Ct. 1834) (emphasis omitted).

227. *See supra* Section II.A.

B. Fairness to Individuals as the Original Expressive Rationale Motivating Courts to Develop Corporate-Criminal Liability

Courts developed corporate-criminal liability in the face of longstanding legal and conceptual obstacles. Integral to this development was a commitment to some cluster of fairness norms; courts, in expanding corporate-criminal liability, were not solely or even predominantly concerned with deterring corporations. In particular, courts reiterated the position that the law should not discriminate against individual persons in favor of corporate persons. Implicit, and sometimes explicit, to this rationale is a view that corporate personhood exists to serve the interest of individuals within society; failing to hold corporations legally responsible, in a similar manner to the ways that we hold individual persons legally responsible, is unfair to individuals.

1. Fairness as Fittingness

Part IV furthered the explanation for corporate-criminal liability's development by establishing that corporations became eligible for criminal liability. It is a prerequisite for extending criminal liability to an entity that the entity be capable of satisfying criminal law's requirements. However, though eligibility is necessary, it is not sufficient. We need some further reason to consider why the practice of criminal liability should be extended to corporations. Now I shift attention from a corporation's eligibility for criminal liability to considering the appropriateness of doing so. Courts developing corporate-criminal liability recognized that corporations had become fitting targets for criminal responsibility.

I take fittingness to be subtly, but importantly, different from mere eligibility. In discussing eligibility, the focus is on whether an action or attitude could be attributed to a corporation. Fittingness concerns whether an action or attitude should be attributed to a corporation. Particularly relevant in the corporate context is whether an action or attitude is better attributed to the corporation, or whether instead it should be attributed to an individual within the corporation.[228] Fittingness, in other words, concerns finding the right interpretation. This interpretive practice is not unique to the criminal context. For example, courts had long understood "[w]henever a corporation makes a contract, it is the contract of the legal entity . . . and not the contract of the individual members," notwithstanding the

228. *See* LIST & PETTIT, *supra* note 55, at 160-72.

fact that executing the contract may require a physical act to be performed by one of the individual members.[229]

The same interpretive challenge arises with respect to criminal responsibility. It became difficult to maintain a prohibition with respect to corporate responsibility when doing so meant denying the possibility of attributing to corporations attitudes that courts already were attributing to corporations in contract law. Consider, for example, the Supreme Court of Georgia's response to the suggestion that employees operating a corporation's train, rather than the corporation itself, deserved to be the target of criminal liability:

> It is well known that freight trains are frequently run on the Sabbath day; the physical operation being the charge of the conductor and engineer and their assistants, but the actual running of the train being ordered and directed by those higher in authority and having the company's business directly in charge. The servants who operate the train might greatly prefer to observe the Sabbath as a day of rest, but to retain their situation and the good will of their employers they have no option but to obey their orders.[230]

Again, the timing of these observations matches the history provided in Part III. When corporations were small organizations similar to general partnerships, the idea that the entity itself might be better suited than any given set of individuals held less sway. However, as corporations grew and became more sophisticated, it became less plausible to reduce an act of misconduct to the contributions of an individual or set of individuals. Meanwhile, the individuals causally involved in misconduct became more removed from the decisionmaking process, making them less apt targets for enforcement.

To say that corporations may be fitting for criminal liability is not to disregard the individual; courts proved willing to hold individual members criminally responsible alongside corporations.[231] What fittingness seeks to rule out is a categorical prohibition on attributing responsibility to a corporation. Among other things, one court noted, to reduce accountability to individual contributions would be to expose unfairly individuals to the consequences of corporate commands:

> The individual today, as a natural person . . . . is simply the officer, agent, employe[e] or servant of the corporation; and if the corporation is not amenable and responsible to and punishable by the

229. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 587 (1839).

230. S. Express Co. v. State, 58 S.E. 67, 69 (Ga. 1907) (crime of furnishing alcohol to minors); *see also* LIST & PETTIT, *supra* note 55, at 161-63 (discussing conditions under which a group agent is fit to be held responsible for the actions of an individual member).

231. *E.g.*, State v. Belle Springs Creamery Co., 111 P. 474, 477 (Kan. 1910) (noting that both a corporation and an individual can be held criminally responsible).

> state and nation for the doing of such mischief, the individual will, in addition thereto, become merely the slave of such corporation.[232]

Melodrama aside, a regime without corporate-criminal liability forced individuals to choose between criminal punishment and unemployment, while simultaneously inoculating the corporation from answering for its role in creating this situation. A categorical prohibition on corporate-criminal liability might well have resulted in criminally punishing individuals for actions that should be properly understood to be those of the corporation.

2. Fairness as Reciprocity

The second dimension of fairness responded to the growing powers and opportunities available to corporations. Courts explained that a corporation's exposure to legal liability served to complement the expansion of its legal rights and powers.

Reciprocity is on display in the Supreme Court's early recognition that a corporation could commit libel, which has as an essential component—an intentional attitude. In response to the observation that corporations had once been immune to liability, the Court noted that "a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives[] is the recognition of a corporate responsibility for the acts of those representatives."[233] Decades later, the Supreme Court of Missouri would enforce the same lesson when it recognized that a corporation could commit a tort of malicious prosecution:

> That a corporation, in all cases within the scope of its legitimate functions, may act as a natural person may act, and the rule of corporate responsibility has kept even pace with the growth of their powers, and the enlargement of their spheres of action, not only in regard to the enforcement of contracts, but also in making them amenable to personal actions for their torts, and holding them to the same measure of responsibility in these respects to which natural persons are held.[234]

The reciprocal relationship between legal powers and legal responsibilities has long been a feature of corporate law. We saw it articulated, for example, during the special-charter era, where corporate authority to perform quasi-state functions entailed an implied

232. State v. Gen. Fire Extinguisher Co., 9 Ohio N.P. (n.s.), 438, 443-44 (Ct. Com. Pl. 1910) (crime of antitrust).

233. Phila., Wilmington, & Balt. R.R. Co. v. Quigley, 62 U.S. 202, 210 (1858).

234. Boogher v. Life Ass'n of Am., 75 Mo. 319, 324-25 (1882) (quoting Fenton v. Wilton Sewing Mach. Co., 9 Phila. 189 (Pa. D. 1874)); *see also* Bushel v. Commonwealth Ins. Co., 15 Serg. & Rawle 173, 176 (Pa. 1827).

duty to perform said functions.[235] Admittedly, a commitment to reciprocity will not uniquely predict corporate-criminal liability; there is no one legal power whose reciprocal counterpart is criminal responsibility. Nevertheless, the steady expansion of corporate liability, including the development of corporate-criminal liability, mirrors the steady increase in the corporation's legal powers.

3. Fairness as Parity

If reciprocity motivated the expansion of corporate responsibility, then parity gave that expansion content. Throughout the nineteenth century, courts repeatedly stated that the treatment of corporate persons should resemble, as nearly as possible, the treatment of individual persons. With respect to corporate liability, that meant exposing corporations whenever possible to the same tort and criminal responsibilities that individuals faced. Indeed, well before the Supreme Court ostensibly extended the Fourteenth Amendment's Equal Protection Clause to corporate persons we see several state supreme courts articulating a norm of parity as reason to expand intentional-tort liability to corporations.[236] The sentiment stretches back to the early history of criminal nuisance cases.[237] Courts offered the same rhetoric when developing corporate-criminal liability.[238]

Courts enforcing equal treatment of corporate and individual persons—in particular, by expanding corporate liability to be commensurate with individual liability—appealed explicitly to the interests of individuals. For example, the Supreme Court of Indiana refused to exempt corporations from exemplary damages on the basis that "whatever rule of damages would apply in a suit against a natural person, ought to apply in a suit against a corporation. *Any discrimi-*

235. *E.g.*, People v. Corp. of Albany, 11 Wend. 539, 542-43 (N.Y. Sup. Ct. 1834).

236. *E.g.*, S. & N. Ala. R.R. Co. v. Chappell, 61 Ala. 527 (1878) (negligence); Owsley v. Montgomery & W. Point R.R. Co., 37 Ala. 560, 562-63 (1861) (false imprisonment); Goodspeed v. E. Haddam Bank, 22 Conn. 530, 538 (1853) (malicious prosecution); Jeffersonville R.R. Co. v. Rogers, 28 Ind. 1, 7 (1867) (exemplary damages); Pa. R.R. Co. v. Vandiver, 42 Pa. 365, 370 (1862) (trespass to person); Wheless v. Second Nat'l Bank, 60 Tenn. 469, 473 (1872) (malicious prosecution); Murfreesboro & Woodbury Turnpike Co. v. Barrett, 42 Tenn. (2 Cold.) 508, 510 (1865) (negligence). The U.S. Supreme Court first suggested that corporations are persons for purposes of the Fourteenth Amendment in 1886. *See* Cty. of Santa Clara v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

237. *E.g.*, Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. (2 Gray) 339, 345 (1854) (crime of public nuisance) ("[T]he tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them, as far as possible, in their legal duties and responsibilities, to individuals.").

238. *E.g.*, State v. Belle Springs Creamery Co., 111 P. 474, 477 (Kan. 1910) (crime of mislabeling butter); State v. Rowland Lumber Co., 69 S.E. 58, 58-59 (N.C. 1910) (identifying a host of specific-intent crimes).

nation in that regard would shock the public sense of impartial justice."[239] Likewise, the Tennessee Supreme Court specified that holding corporations criminally responsible the same as individuals was necessary to secure the interests of individuals:

> By our Code, natural persons and corporations are entitled to like benefits in resorting to the ordinary and extraordinary process provided for the enforcement of their rights. . . . It results from [the exemption of corporations from liability] that the law secures rights and exemptions to corporations which are withheld from natural persons. This is wholly inconsistent with the genius and spirit of our State Constitution, which was intended to secure equal and exact justice to all.[240]

Again, the timing of corporate-criminal liability's expansion reflected the proliferation and increasing sophistication of the commercial corporation. Thus, explained the Supreme Court of New Jersey:

> In early days, when corporate bodies were few, it was a matter of comparatively small consequence whether such an action could be maintained. In these days, however, when the great concerns of business are carried on chiefly through these artificial persons, it would be most oppressive to hold that they are not amenable to answer for such wrongs as subject natural persons to prosecution.[241]

Of course, it would be a mistake to conclude that courts treated corporate persons as identical to individual persons for purposes of the criminal law. On the one hand, corporate persons did not receive all the same criminal-procedure protections. For example, in *Hale v. Henkel*, the U.S. Supreme Court extended limited Fourth Amendment protections, but not Fifth Amendment protections, to corporations.[242] On the other hand, corporations were not exposed to the full

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239. *Jeffersonville R.R. Co.*, 28 Ind. at 7 (emphasis added).

240. *Wheless*, 60 Tenn. at 473; *Murfreesboro & Woodbury Turnpike Co.*, 42 Tenn. (2 Cold.) at 510 ("Corporations are becoming so numerous, it is the policy of the state to attach to them the same liabilities, to which natural persons are subject and liable. This principle must be enforced; *the rights of the citizen require it.*") (emphasis added); *see also Belle Springs Creamery Co.*, 111 P. at 477 (crime of mislabeling butter) ("That the individual who, after the passage of the act . . . should be guilty of a crime, and that a corporation might conduct the practice with impunity, seems revolting to all ideas of justice.").

241. State v. Passaic Cty. Agric. Soc'y, 23 A. 680, 681 (N.J. 1892) (crime of private nuisance); *cf.* Hussey v. King, 3 S.E. 923, 926 (N.C. 1887) (malicious prosecution) ("The rights, the powers, and the duties of corporate bodies have been so enlarged in modern times, and these 'artificial persons' have become so numerous, and entered so largely into the everyday transactions of life, that it has become the policy of the law to subject them, as far as practicable, to the same civil liability for wrongful acts as attach to natural persons . . . .").

242. 201 U.S. 43 (1906). The Court has since abandoned for all persons the Fourth Amendment doctrine it initially declined to extend to corporations. *See* Warden v. Hayden, 387 U.S. 294, 304-06 (1967) (renouncing the mere evidence rule).

gamut of crimes.[243] Similarly, corporations were not exposed to all the same punishments as were individual persons—in particular, corporations were not imprisoned—although the unavailability of prison terms did not preclude criminal liability.[244]

C. Situating Fairness into Our Modern Practice

What are the upshots of this historical analysis? First, deterrence is not the only rationale—perhaps not even the central rationale—motivating the expansion of corporate-criminal liability. Accordingly, even if we were to concede that there now exist other legal forums that better deter corporate misconduct than the criminal law, it may still be the case that there is a principled reason to maintain our current practice.

Specifically, the cluster of fairness norms provides an independent basis to justify holding corporations criminally responsible. This does not amount to arguing that corporations are full-fledged moral agents capable of shame and eligible for retribution; my account does not appeal to retributive rationales to defend corporate-criminal liability. But neither is the practice capricious or without normative foundation. I have identified reasons for the states to hold corporations criminally responsible, consistent with principled limits and constraints on the corporate criminal liability. In particular, corporations, like any other criminal defendant, should be held responsible when there exist genuine corporate attitudes sufficient to satisfy a criminal statute's specific mens rea requirements.

What does this mean for our current practice? For starters, we should amend our practice so that corporate-criminal liability applies only where it is fitting to attribute the requisite mens rea to a corporation. This means, in particular, abandoning the practice of federal courts to employ respondeat superior in the criminal context. Ideally, we would adopt instead an interpretive approach similar to that articulated by the Michigan Supreme Court and in Section IV.C.

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243. *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494 (1909) (noting, without enumeration, "that there are some crimes, which in their nature cannot be committed by corporations"); United States v. John Kelso Co., 86 F. 304, 306 (N.D. Cal. 1898) (identifying bigamy, rape, and murder); People v. Rochester Ry. & Light Co., 88 N.E. 22, 23 (N.Y. 1909) (recognizing that a corporation can commit a crime involving intent, but suggesting that "there are many crimes so involving personal, malicious intent and acts so ultra vires that a corporation manifestly could not commit them").

244. *E.g.*, State v. Ice & Fuel Co., 81 S.E. 737, 738 (N.C. 1914) ("The corporation should not be wholly exempted from punishment because it cannot be imprisoned."); *accord* United States v. MacAndrews & Forbes Co., 149 F. 823, 836 (C.C.S.D.N.Y. 1906) (discussing corporate imprisonment); State v. Gen. Fire Extinguisher Co., 9 Ohio N.P. (n.s.) 438, 447 (Ct. Com. Pl. 1910) (same).

Contrary to the conventional wisdom, the states' motivation for holding corporations criminally responsible is stronger today than ever before. All three fairness considerations—fittingness, reciprocity, and parity—apply today. As to fittingness, the likelihood of tracing a corporate action or attitude back to the causal contribution of its individual participants has become vanishingly small.[245] In our multinational economic environment, corporations have developed exponentially more sophisticated internal structures; for example, today an internal compliance system meant to detect and prevent criminal misconduct is an essential feature of any major corporation.[246] With respect to reciprocity, corporate rights have only expanded since the early 1900s—most prominently, in recent years, with respect to protecting a corporation's rights of participation in noncommercial spheres.[247] Finally, improved methods of investigation and punishment improve the feasibility of holding corporations criminally responsible in a manner suggesting parity with individuals. In short, there is no reason to think that the same overriding commitment to fairness at the core of corporate-criminal liability's development has lost its applicability today. If anything, debunking the myth of corporate-criminal liability's development has opened the door to new reasons—or at least resurrected old reasons—for why the states ought to hold corporations criminally responsible.

VI. CONCLUSION

There is a prevailing story about how and why corporations came to be held criminally responsible. This just-so story is mostly wrong, or at least seriously incomplete. The purpose of overturning this story is not historical accuracy for its own sake. By reconsidering how and why corporate-criminal liability developed, we can improve the conceptual and normative foundations of our modern practice of holding corporations criminally responsible.

Courts expanding corporate-criminal liability did so along principled lines and out of a commitment to a constellation of fairness norms—one that refuses to favor corporate persons over individual

245. LIST & PETTIT, *supra* note 55, at 76-78 (identifying reasons why an "easy reduction," if possible even in theory, could not be executed in practice).

246. U.S. SENTENCING GUIDELINES MANUAL §§ 8B2.1, 8D1.4(b) (U.S. SENTENCING COMM'N 2014) (establishing as a requirement of probation the establishment of an internal compliance program). The presence (or absence) of an effective compliance program also affects the magnitude of a convicted corporation's fine. *See id.* § 8C2.5(f).

247. *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2756 (2014) ("Any suggestion that for-profit corporations are incapable of exercising religion because their purpose is simply to make money flies in the face of modern corporate law."); Citizens United v. FEC, 558 U.S. 310, 365 (2010) (striking down restrictions on political expenditures by corporations).

persons. Whereas modern regulatory strategies may challenge corporate-criminal liability's usefulness for deterring wrongdoing, commitment to these fairness norms is as relevant in our modern experience with corporations as it was at the turn of the twentieth century. At the very least, we should resist the skeptical impulse behind the development of corporate-criminal liability and appreciate both the theoretical coherence and continued desirability of our practice of holding corporations criminally responsible.