

Crossing the Fault Line in Corporate Criminal Law

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The financial crisis left a few individuals responsible for it very rich while its consequences made millions not responsible for it much poorer. If this involves no crime then we have failed to define or prosecute crime appropriately.¹

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1. John Kay, *Prosecutors Must Uphold the Law, Not Cut Deals with the Accused*, FIN. TIMES (May 22, 2013), <http://www.ft.com/cms/s/0/a913569e-bel1a-11e2-9b27-00144feab7de.html#axzz2buPSURb1> (access required).

I. INTRODUCTION	440
II. FINANCIAL WRONGDOING AND UNDISTRIBUTED RESPONSIBILITY	446
A. <i>The Tension Between Personal Culpability and Collective Action</i>	447
B. <i>Corporate and Financial Wrongdoing</i>	449
III. SHARED RESPONSIBILITY	451
A. <i>Benefits-Based Accounts of Shared Responsibility</i>	451
B. <i>Organization-Based Accounts of Shared Responsibility</i>	453
C. <i>Shared Intention Accounts of Shared Responsibility</i>	454
D. <i>Summary</i>	458
IV. SHARED RESPONSIBILITY FOR CORPORATE CRIME	458
A. <i>Executives and Group Action</i>	458
B. <i>The Analytic Structure of a Responsibility Assignment</i>	459
C. <i>Executives' Responsibility for a Group Transgression</i>	460
1. <i>The Object of Responsibility</i>	460
2. <i>The Non-Participating Executive's Connection to the Corporate Crime</i> ...	462
3. <i>The Ground of the Executive's Responsibility</i>	463
4. <i>The Magnitude of the Executive's Responsibility</i>	470
V. TRANSLATING THE EXECUTIVE'S LIABILITY TO BLAME INTO LIABILITY TO PUNISHMENT	473
A. <i>The RCO Doctrine</i>	474
VI. CRIMINAL LIABILITY FOR FAULTLESS CORPORATE EXECUTIVES	475
A. <i>Prosecuting Responsible Corporate Officers</i>	476
B. <i>Punishing Responsible Corporate Officers</i>	478
C. <i>When Should We Impose Criminal Liability on Corporate Officers?</i>	480
VII. CONCLUSION	481

I. INTRODUCTION

Why have there been so few prosecutions in the wake of the financial crisis? Official inquiries have found that rampant mendacity and fraud contributed to the meltdown.² Yet, if anything, the government has adopted a “gentler” response to financial wrongdoing in the last five years.³ Why is this?

2. Adam Liptak, *Stern Words for Wall Street's Watchdogs, From a Judge*, N.Y. TIMES (Dec. 16, 2013), http://www.nytimes.com/2013/12/17/us/judge-raises-questions-on-the-paltry-effort-to-prosecute-wall-street-executives.html?pagewanted=all&_r=0; see also Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/> (asserting that the Great Recession was the product of intentional wrongdoing, at least in part); cf. Neil Irwin, *Why Can't the Banking Industry Solve Its Ethics Problems?*, N.Y. TIMES (July 29, 2014), http://www.nytimes.com/2014/07/30/upshot/why-cant-the-banking-industry-solve-its-ethics-problems.html?_r=0 (“The financial crisis that nearly brought down the global economy was triggered in no small part by the aggressive culture and spotty ethics within the world’s biggest banks.”).

3. Gretchen Morgenson & Louise Story, *As Wall St. Polices Itself, Prosecutors Use Softer Approach*, N.Y. TIMES (July 8, 2011), http://www.nytimes.com/2011/07/08/business/in-shift-federal-prosecutors-are-lenient-as-companies-break-the-law.html?pagewanted=all&_r=0; see also Gretchen Morgenson & Louise Story, *In Financial Crisis, No Prosecutions of Top Figures*, N.Y. TIMES (Apr. 14, 2011), <http://www.nytimes.com/2011/04/14/business/14prosecute.html?pagewanted=all> (“A more aggressive mind-set could have spurred far more prosecutions.”); cf. David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. (forthcoming 2015) (seeking to explain why there has been virtually no judicial response to the financial crisis, even while the other

We are told that the banks themselves are, in what has now become a depressing cliché,⁴ “too big to fail.”⁵ But even to the extent that fear of systemic failure (or a general hostility to holding corporations criminally liable)⁶ explains the lack of entity-level prosecutions, there is still the question of why virtually no *individual* executives at the wrongdoing entities have met the force of the criminal law.⁷

two branches of government acted to implement robust and far-reaching efforts to shore up and reform our financial system); Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP., FIN. & COM. L. 45, 45 (2006) (reporting that, since the conviction of Arthur Andersen, nearly every major “case of corporate misconduct has been resolved without” an indictment); Edward Wyatt, *S.E.C. Is Avoiding Tough Sanctions for Large Banks*, N.Y. TIMES (Feb. 3, 2012), <http://www.nytimes.com/2012/02/03/business/sec-is-avoiding-tough-sanctions-for-large-banks.html?pagewanted=all> (describing “[a]n analysis by The New York Times of S.E.C. investigations over the last decade [that] found nearly 350 instances where the agency has given big Wall Street institutions and other financial companies a pass”).

4. It strains credulity to think that giving banks carte blanche to proceed with impunity actually makes the financial system more, rather than less, stable, but that is a matter for another day.

5. Attorney General Eric Holder stated in testimony before the Senate, “I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if we do prosecute—if we do bring a criminal charge—it will have a negative impact on the national economy, perhaps even the world economy.” *Transcript: Attorney General Eric Holder on ‘Too Big to Jail’*, AMER. BANKER (Mar. 6, 2013, 3:15 PM), http://www.americanbanker.com/issues/178_45/transcript-attorney-general-eric-holder-on-too-big-to-jail-1057295-1.html?zkPrintable=1&nopagination=1. *But cf.* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 854–55 (2014) (arguing that public officials have self-interested incentives to prosecute where success means a large financial reward (which would cause one to expect enforcement actions against banks) and citing as an example a \$25 billion settlement with the nation’s leading mortgage-servicing banks); *A Mammoth Guilt Trip*, THE ECONOMIST (Aug. 30, 2014), <http://www.economist.com/news/briefing/21614101-corporate-america-finding-it-ever-harder-stay-right-side-law-mammoth-guilt> (arguing that there has been a rise in prosecutions of financial corporations based on “obscure” charges ensuing in sanctions whose rationale is often “opaque” such that “it is far from obvious that justice is being done and the public interest is being served”).

6. For a sustained defense of corporate criminal liability that seeks to counter this hostility, see generally Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411 (2012).

7. As one commentator puts it, “While it seems blindingly obvious that a multitude of misdeeds lay behind the meltdown, the federal government has not engaged in a single prosecution.” Mike LaBossiere, *Too Big to Jail?*, TALKING PHILOSOPHY (June 5, 2013), <http://blog.talkingphilosophy.com/?tag=corporate-crime>. LaBossiere’s comment is not entirely accurate. The government sought to prosecute two Bear Stearns employees for hedge fund fraud. The case was supposed to be an easy one, but the government nonetheless failed to secure a conviction, and it appears to have grown gun shy as a result. See Marian Wang, *Why No Financial Crisis Prosecutions? Ex-Justice Official Says It’s Just too Hard*, PROPUBLICA (Dec. 6, 2011, 3:08 PM), <http://www.propublica.org/article/why-no-financial-crisis-prosecutions-official-says-its-just-too-hard> (“[A]ccording to a now-departed Justice Department official . . . the Justice Department has decided that holding top Wall Street executives criminally accountable is too difficult a task.”). But LaBossiere’s general point—that the government hasn’t done as much as it could—is surely right. For example, the government failed to pursue a criminal case against Angelo Mozilo, CEO at Countrywide, who was alleged to have known he was selling toxic mortgages to Fannie Mae and Wall Street, for fear that it didn’t have enough evidence to win the case. See E. Scott Reckard, *U.S. Drops Criminal Probe of Former Countrywide Chief Angelo Mozilo*, L.A. TIMES (Feb. 18, 2011), <http://articles.latimes.com/2011/feb/18/business/la-fi-mozilo-20110219>; see Jesse Eisinger, *Why the SEC Won’t Hunt Big Dogs*, PROPUBLICA (Oct. 26, 2011, 11:56 AM), <http://www.propublica.org/thetrade/item/why-the-sec-wont-hunt-big-dogs> (explaining that after it determined that Citigroup had “misled its own customers in selling an investment it created out of mortgage securities as the housing market was beginning its collapse,” the government went after one—just one—individual at Citigroup, and a low-level banker at that); see also Jason Ryan, *DOJ Will Not Prosecute Goldman Sachs in Financial Crisis Probe*, ABC NEWS (Aug. 9, 2012, 8:38 PM), <http://abcnews.go.com/blogs/politics/2012/08/doj-will-not-prosecute-goldman-sachs-in-financial-crisis-probe/> (excusing lack of prosecution of Goldman Sachs because “[b]ased on the law and evidence as they exist at this

The answer lies, I believe, in our unduly constrained understanding of culpability for crimes in organizational settings like the corporation. Culpability traditionally presupposes fault and, as John Coffee puts it, most of the heads of the wrongdoing banks are not “culpable enough by themselves to compare with [Enron’s] Ken Lay, Jeff Skilling or the WorldCom CEO.”⁸ Judge Jed Rakoff, a federal district court judge in the Southern District of New York who has earned a reputation for standing up to Wall Street,⁹ offers a similar diagnosis, speculating that the Department of Justice (DOJ) may have declined to prosecute high-level bankers because it believes that the bankers were not, or could not be proven to have been, at fault.¹⁰

But fault is not everywhere and always the *sine qua non* of criminal liability. For example, other nations have well-established legal doctrines that allow for the heads of banks to incur criminal liability for wrongdoing in which they did not participate.¹¹ More sweepingly, fault may matter much less, morally and legally, when it is an organization, rather than an individual, that commits a crime. One might even contend that where a corporation has committed a crime, its leader is necessarily a criminal.¹²

Deterrence grounds exist for straying from the fault principle.¹³ Seeing an executive’s head roll might well get corporate America’s C-suites to clean up their acts.¹⁴ At the same

time, there is not a viable basis to bring a criminal prosecution with respect to Goldman Sachs or its employees”).

8. Reckard, *supra* note 7 (quoting Coffee); cf. Floyd Norris, *Fury Builds Over Crisis at Banks*, N.Y. TIMES (Dec. 11, 2008), <http://www.nytimes.com/2008/12/12/business/12norris.html> (contrasting Enron, Tyco, and Worldcom—where executives participated in wrongdoing—with the heads of banks responsible for the financial crisis—who “did not understand the risks they were taking, and were stunned when the losses materialized”—and finding that the latter “may have been stupid but stupidity is not a crime”).

9. See, e.g., Michael Rothfeld, *No More Mr. Nice Guy—Just Ask Wall Street*, WALL ST. J. (Nov. 9, 2011), http://online.wsj.com/news/articles/SB10001424052970203733504577026422455885502?mod=WSJ_Markets_BelowLiveUpdates&img=reno64wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052970203733504577026422455885502.html%3Fmod%3DWSJ_Markets_BelowLiveUpdates (discussing Judge Rakoff and some of his rulings in Wall Street-related cases); Matt Taibbi, *Finally a Judge Stands up to Wall Street*, ROLLING STONE (Nov. 10, 2011), <http://www.rollingstone.com/politics/blogs/taibblog/finally-a-judge-stands-up-to-wall-street-20111110#ixzz1iHrUuQzQ> (referring to Judge Rakoff as a “hero of our time,” at least in part because he refused to approve a settlement between the SEC and Citigroup for financial fraud in which Citigroup would neither admit nor deny wrongdoing).

10. See Rakoff, *supra* note 2 (“[P]roving fraudulent intent on the part of the high-level management of the banks and companies involved has been difficult.”).

11. See, e.g., *Blind Justice: Why Have So Few Bankers Gone to Jail for the Financial Crisis?*, THE ECONOMIST (May 4, 2013), <http://www.economist.com/news/finance-and-economics/21577064-why-have-so-few-bankers-gone-jail-their-part-crisis-blind-justice> (“Germany, Switzerland and Austria, for instance, have an elastic concept called *Untreue*, or breach of trust, which is defined as a derogation of duty that causes real damage to the institution.”).

12. I make this claim in a recent *Washington Post* op-ed. Amy Sepinwall, *Criminal Enterprises and Culpable Leaders*, WASH. POST: ON LEADERSHIP (Nov. 12, 2013), <http://www.washingtonpost.com/blogs/on-leadership/wp/2013/11/12/criminal-enterprises-and-culpable-leaders/>.

13. While the notion of a “fault principle” is a mainstay in torts, it is sometimes invoked in criminal law theory too. For example, John Gardner defines the fault principle in criminal law as “a principle regulating the conditions for the imposition of criminal liability” such that “[c]riminal liability should be imposed only for wrongs that are faultily committed.” John Gardner, *Wrongs and Faults*, 59 REV. METAPHYSICS 95, 109 (2005). I use the term “fault principle” to denote a commitment to the idea that the defendant must have participated in the crime with a culpable mental state, and with no justification or excuse, in order for her to be eligible for criminal liability.

14. See, e.g., Joe Nocera, *How to Prevent Oil Spills*, N.Y. TIMES (Apr. 14, 2012),

time, deterrence alone cannot justify criminal liability: We do not punish innocents solely for the deterrence gains we might thereby reap. This Article seeks to advance and defend the proposition that corporate executives deserve prosecution and punishment independent of their participation in their companies' wrongdoing and simply by virtue of their roles.

The implications of such an analysis go far beyond the financial crisis. The failure to prosecute Wall Street bankers is but one example of the shortcomings of our impoverished conception of criminal responsibility. The larger theoretical ambition of this Article is to advance a novel account of shared criminal responsibility, under which one can be blameworthy even without the traditional hallmarks of culpability or fault. Instead, a member of a longstanding, institutional group may owe it to her fellows to accept blame, and sometimes even punishment, for the group's misdeeds, just by virtue of the loyalty group membership entails. This is especially so in the case of members who are expected to harbor a particularly strong commitment to the group, like a corporation's executives. For this reason, I focus on executive responsibility for corporate crime. The theory that corporate officers should be held responsible for corporate crime can and should reform our thinking about members' responsibility—both moral and legal—for the transgressions of other institutional groups too, like the university, the military, or even the nation-state.¹⁵

The theory of shared responsibility advanced here departs notably from the foundational conception of culpability in Anglo-American common law, where culpability presupposes fault, and where fault is understood to arise only where one has made a causal difference to the occurrence of a wrongful act with a guilty mind.¹⁶ This understanding of culpability is enshrined in our dominant criminal law doctrines. Thus, for example, Blackstone proclaimed that “to constitute a crime against human laws, there must be, first, a vicious will; and secondly, an unlawful act consequent upon such vicious will.”¹⁷ The focus on the individual's act and the individual's state of mind reflects an equally foundational commitment, *viz.* that “guilt is personal.”¹⁸ The understanding of culpability

www.nytimes.com/2012/04/14/opinion/nocera-how-to-prevent-oil-spills.html?_r=0 (arguing that prison sentences for corporate executives would encourage corporations to put safety over profits in a way that no other punishments have); 155 CONG. REC. S2315–16 (daily ed. Feb. 13, 2009) (statement of Sen. Kaufman) (describing the statement of Neil Barofsky, former federal prosecutor and inspector general of the financial bailout funds, who “suggested the best way to clean up mortgage fraud is to pursue licensed professionals in the industry, and make examples of them. ‘They have the most to lose, they’re the most likely to flip, and they make the best examples’ [Barofsky said.]”); *cf.* Irwin, *supra* note 2 (“[T]he banking industry could be made more ethical if the right mix of financial penalties for misbehavior were put in place.”).

15. *Cf.* Amy J. Sepinwall, *Citizen Responsibility and the Reactive Attitudes: Blaming Americans for War Crimes in Iraq*, in ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 231, 235 (Richard Vernon & Tracy Isaacs eds., 2011) (arguing that citizens share blame for war crimes of their nation-state even if they opposed the war).

16. *See, e.g.*, 1 JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW §§ 205–06 (9th ed. 1923) (“Prompting the act, there must be an evil intent . . . [A]n act and evil intent must combine to constitute a crime.”).

17. IV WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 21. In some classic statements of law, the mental state element is foregrounded relative to the act element. *See, e.g.*, BISHOP, *supra* note 16, at § 287 (“There can be no crime, large or small, without an evil mind.”); Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 81 (1908) (“It is a fundamental principle of the criminal law, for which no authorities need be cited, that the doer of a criminal act shall not be punished unless he has a criminal mind.”); *Williamson v. Norris*, [1899] 1 Q. B. 7, 14 (“The general rule of English law is, that no crime can be committed unless there is *mens rea*.”).

18. *United States v. Dotterweich*, 320 U.S. 277, 286 (1943) (Stewart, J., dissenting) (“It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who, like the respondent, has no evil intention or consciousness of wrongdoing.”).

that emerges on the traditional view, then, is thoroughly individualist: One is guilty, and hence punishable, only for what one has done and only if one has done it with a guilty mind.¹⁹ As such, the notion that an individual may be punished for another's crime is one that criminal law doctrine accepts rarely and with resignation²⁰ and that most criminal law commentators meet with vituperation.²¹

The traditional view represents the paradigmatic case of blameworthiness—but it is not the exclusive case.²² It remains to be determined whether, and if so when, blame may be assigned under other circumstances. Elsewhere, I have argued for an expansion of *corporate* criminal liability for actions committed by a firm.²³ Here, I contend it is sometimes appropriate to hold a corporate executive *individually* responsible for the crime of her corporation, even when she made no causal difference to the crime's commission and even when she did not harbor a guilty mind.

That a corporate executive is an appropriate target of blame does not itself establish that her blameworthiness ought to eventuate in criminal liability. But given the moral condemnation that attends the criminal law, I argue that it is appropriate to prosecute and punish at least some corporate executives, whether or not they bear fault for their corporation's crime. The argument is bound to perplex criminal law scholars and practitioners, but it is well-grounded in both legal and ethical theory, as seen in our practices of praising and rewarding (e.g., through contractual bonuses) group members independent of their causal contributions to the group's success and our allocation of credit

19. See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, ¶186 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) ("The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).") (footnotes omitted). See generally Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251, 252 n.6 (2009) (collecting citations describing or endorsing the individualist commitment in criminal law).

20. Compare *Dotterweich*, 320 U.S. at 284–85 (allowing for the criminal liability of a corporate executive who neither participated in nor culpably failed to prevent his company's crime, on the ground that such liability was necessary to protect the public from adulterated medicines), with MODEL PENAL CODE §2.05 cmt. 1 (1962) (defending the Model Penal Code's retrenchment of strict criminal liability by arguing that "[c]rime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable," which, under Section 2.02 of the Model Penal Code means minimally that the defendant acted with *mens rea*).

21. See, e.g., Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 79–80 (1933) ("When the law begins to permit convictions for serious offenses of men who are morally innocent and free from fault . . . , the vitality of the criminal law has been sapped."); Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 447 (2007) ("Vicarious liability is a derivative liability doctrine. . . . As such, it has no place in any punishment scheme linking legal liability to moral blameworthiness."); Paul H. Robinson, *Moral Credibility and Crime*, THE ATLANTIC MONTHLY, Mar. 1995, at 72–78; Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1610 (1997); Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1392 (2009) (deriding the notion that one person may be punished for the crime of another by likening it to the primitive doctrine of frankpledge, under which innocent members of a group could be punished for the wrongful deed of one of their fellows).

22. Cf. Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. & PHIL. 289, 289 (2007) (arguing that the requirement that one make a causal difference is merely the paradigmatic, but not the only, case of blameworthy complicity and contending that one can bear accomplice liability even if one's contribution to the completed crime made no causal difference because for example, the crime was over-determined).

23. See Sepinwall, *supra* note 6, at 454 (arguing why individuals within a corporation should be held criminally liable).

and blame in group contexts more generally.

Once I have argued that it is morally permissible to prosecute senior bankers for crimes to which they did not culpably contribute, I next seek to identify a doctrinal hook for their prosecution. The law provides the government with multiple ways to impose criminal liability upon the executive who *did* commit some individual wrong.²⁴ Importantly, however, none of these laws apply to an executive who neither intended nor knew about his corporation's crime in advance of its commission. And yet, we might ask, doesn't the existence of a corporate crime necessarily implicate the corporation's leaders?²⁵

Following the Article's epigraph, if no existing crime captures the blameworthiness of those who helmed the ships of the wrongdoing entities, then it is high time to redefine our criminal law doctrines. This Article's secondary aim is thus to identify a doctrinal hook for executive liability and to sketch the details of its application to cases of corporate and financial wrongdoing. To that end, this Article reviews the Responsible Corporate Officer (RCO) doctrine, which allows for the criminal liability of executives for corporate crimes they neither participated in nor culpably failed to prevent.²⁶ While the RCO doctrine has traditionally been restricted to the health and welfare context, I argue that it compellingly tracks the understanding of blameworthiness that I advance, and I urge expansion of the doctrine to corporate crime at large.

The idea that someone might be held criminally liable without fault is not without precedent in the criminal law, but the formulation I advance is novel. Strict and vicarious criminal liability are longstanding (though widely reviled and purportedly embarrassing)²⁷ fixtures in our jurisprudence. The species of criminal liability I have in mind, however, is from both of these. Strict liability contemplates a defendant who commits the *actus reus* of a crime without a culpable mental state.²⁸ By contrast, the prosecuted executive here need have performed no criminal act. Vicarious liability contemplates a principal who comes to bear criminal responsibility for the crime of his agent.²⁹ Here, on the other hand, it is the principal—i.e., the corporation—that has committed the crime, and the agent—i.e., the executive—who would be prosecuted and punished.³⁰ Notwithstanding these differences,

24. See *infra* notes 116–18 and accompanying text (giving examples of how individuals were held criminally liable).

25. Cf. *The Troubling SAC Case*, WALL ST. J. (July 26, 2013, 7:35 PM), <http://online.wsj.com/articles/SB10001424127887323610704578627992699861424> (reacting to the indictment of the hedge fund, SAC, and the absence of charges against its owner and head, Steven A. Cohen, with the following rhetorical question: “[c]an a criminal enterprise be run by someone who isn't himself a criminal?”).

26. See *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (setting forth the doctrine).

27. For critiques of strict criminal liability, classic texts include SANFORD H. KADISH, *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 89–91 (1987); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109. For a critique of vicarious criminal liability, see Moore, *supra* note 21.

28. See, e.g., JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 125 (2d ed. 1995) (defining strict liability offenses as “crimes that, by definition, do not contain a mens rea requirement regarding one or more elements of the *actus reus*”). For a survey of different definitions of strict liability, see Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1079–85 (1997). Cf. Douglas Husak, *Strict Liability, Justice and Proportionality*, in *THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS* 152, 160–63 (2010) (distinguishing between formal and substantive strict criminal liability, and arguing that in a case of formal strict criminal liability, the defendant might well have possessed a culpable mental state; it is just that the state does not require that this be proven in order to obtain a conviction).

29. For a classic overview, see Oliver Wendell Holmes, Jr., *Agency I*, 4 HARV. L. REV. 345, 355–62 (1891).

30. Some theorists conceive of the shareholders as a body, rather than the corporation itself, as the principal.

the three doctrines—strict, vicarious, and RCO liability—are spiritual cousins insofar as each challenges the unduly cramped understanding of responsibility in most of criminal law. The theoretical advances this Article provides might well be used to defend the doctrines of strict and vicarious criminal liability, in at least some of their applications.

The Article proceeds as follows. In Part II, I argue the public is right to want to see heads roll on Wall Street because executives share responsibility for their banks' wrongdoing simply by virtue of their role. The theoretical defense for executive criminal liability turns then on a concept of shared responsibility. Accordingly, in Part III, I turn to existing accounts of shared responsibility, and find each of them wanting as grounds for blaming the faultless executive. In Part IV, I articulate my own theory of shared responsibility, which aims to elucidate the rationale for holding executives morally responsible for the crimes of their corporation. With the theoretical foundation for responsibility in place, I then turn, in Part V, to its legal implementation by describing, and urging expansion of, the responsible corporate officer doctrine. The move from theory to doctrine receives further refinement in Part VI, where I propose a series of sanctions that fit the nature and magnitude of the executive's blameworthiness. Part VII concludes.

II. FINANCIAL WRONGDOING AND UNDISTRIBUTED RESPONSIBILITY

The criminal law response to the spectacular calamities of the financial crisis has been spectacularly underwhelming. The public has been clamoring for the government to prosecute individual bankers ever since the financial crisis began,³¹ and the passage of time has, if anything, only heightened the hunger for punishment. In the words of one commentator, "the financial-crisis era . . . saw virtually every major bank and financial company on Wall Street embroiled in obscene criminal scandals that impoverished millions and collectively destroyed hundreds of billions, in fact, trillions of dollars of the world's wealth—and nobody went to jail."³² But we are an evolved society; we do not sacrifice or jail people—even "reviled" Wall Street bankers³³—simply to satisfy the public's bloodlust. We ought to punish banking executives only if they deserve it. I argue that they do.

The next three Parts are devoted to this argument. Here, I aim to counter the traditionalist's commitment to individual culpability and motivate a sharing of responsibility for joint action, especially the joint action of the corporation in a case of financial wrongdoing. Thus, in Part II.A, I argue that the individualist paradigm fails to cohere with the collective nature of corporate acts. Part II.B illustrates the problem through the example of the JP Morgan trading fraud known as the "London Whale."

See, e.g., Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 313 (1976), available at <http://www.sciencedirect.com/science/journal/0304405X/3/4>. For an incisive critique of that conception, see generally LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012).

31. *See, e.g.,* Norris, *supra* note 8 (describing the "Wall Stree backlash" and its potential to lead to criminal prosecutions).

32. Matt Taibbi, *Why Isn't Wall Street in Jail?*, ROLLING STONE (Feb. 16, 2011), available at <http://www.rollingstone.com/politics/news/why-isnt-wall-street-in-jail-20110216#ixzz2ccJEQtE>.

33. Jonathan Macey, *Banks as Bad Guys: How the Banking Industry Went from Respected to Reviled*, FTTPRESS.COM (Mar. 28, 2013), <http://www.ftpress.com/articles/article.aspx?p=2036577> (noting that the public conceives of bankers as "common criminals").

A. The Tension Between Personal Culpability and Collective Action

Our traditional conception of responsibility contemplates the individual in isolation from others. To that extent, our traditional conception of responsibility relies on the notion—some might even say the fiction³⁴—of a fully autonomous self, akin perhaps to Thomas Hobbes’ metaphor of the spontaneously emerging mushroom that owes its creation and subsequent existence to no one else.³⁵ Whatever the cogency of this way of proceeding when it comes to individual action,³⁶ it defies plausibility when applied to the acts of groups. For example, consider first the case of an ephemeral group whose members come together to complete some simple act—e.g., strangers might spontaneously join forces to free a car that is stuck in a snow bank.³⁷ Once the car has been successfully freed, each of the individuals who participated in the effort would be licensed in claiming joint ownership of and credit for the result:³⁸ “We pushed a car out of a snow bank” is not just true; it is also a relevant and helpful way of describing what these individuals together did—far more so than a description in terms of individual contributions would be. (Thus, it would be exceedingly odd if one of the individuals characterized what he had just done as: “I pushed the right-back-corner of the car, and so I am responsible for some part of the forward and leftward displacement of the car”). In short, when we act together, we each come to own the result of our joint action and not just our individual contribution.³⁹

Moreover, this is especially so where we have organized group action rather than that of spontaneously formed ephemeral groups like the car pushers above. The case of mass atrocity provides a useful analogy. Mass atrocity is necessarily carried out by an organized group whose members commit individual acts of assault, killing, or destruction against another, identifiable group with the intention of causing this other group at least pain and suffering (and sometimes obliteration). The defining characteristic of mass atrocity is its systematic, organized aspect. A single individual can intentionally kill as many people as might be targeted in a case of mass atrocity. Thus, for example, someone might intentionally detonate a bomb that killed thousands. Still, the bomber’s act would count as a mass murder but not a mass atrocity. By definition, mass atrocities are the acts of groups, not individuals.⁴⁰

34. See, e.g., Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 321 (1999) (“From the point of view of justice, the attempt . . . to credit specific bits of output to specific bits of input by specific individuals represents an arbitrary cut in the causal web that in fact makes everyone’s productive contribution dependent on what everyone else is doing. Each worker’s capacity to labor depends on a vast array of inputs produced by other people—food, schooling, parenting and the like.”).

35. See, e.g., Peter King, *Thomas Hobbes’s Children*, in THE PHILOSOPHER’S CHILD 69 (1998) (quoting THOMAS HOBBS, DE CIVI 8.1 at 160) (explaining Hobbes’ theory of the fully autonomous self).

36. I present reasons for doubting the individualist conception of responsibility in Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J.L. & POL. 183, 193 (2006) (“The individualist’s account of responsibility presupposes that we can individuate actions and their effects, and thereby determine exactly who caused what. But this conception of agency ignores the fact that no one acts in a vacuum. Others’ actions can influence our own, and their effects can combine with ours to form a product that can no longer be divided into distinct individualized contributions . . .”) (internal footnotes omitted).

37. The example is Avia Pasternak’s. Avia Pasternak, *Sharing the costs of Political Injustice*, 10 POL., PHIL. & ECON. 188, 196–97 (2012).

38. Christopher Kutz refers to this as a form of “inclusive authorship.” CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 107 (2000).

39. *Id.*

40. See, e.g., *Mass Atrocities*, CIVIL-MILITARY FUSION CENTRE (May 26, 2011),

For this reason, assigning responsibility for mass atrocities taxes the traditional, individualist conception of criminal liability. Thus, George Fletcher and Mark Drumbl have each argued that “the first principle of domestic criminal law—personal culpability—may have to be modified or abandoned, if international law is ever to successfully ‘adapt[] . . . the paradigm of individual guilt to the cauldron of collective violence’ epitomized by mass atrocity.”⁴¹ So too our domestic criminal law system must acknowledge and accommodate the unique features of the collective acts undertaken by corporations, as many theorists have realized.⁴²

More specifically, in the face of corporate action, three modes of assigning responsibility, each aligning itself with a different ontological view of the corporation, present themselves.⁴³ Reductionists, who view the corporation as a nexus of contracts, believe that the corporation’s acts are entirely reducible, and hence attributable, to the individuals who constitute it (or some subset thereof).⁴⁴ This is a strictly individualist approach to corporate action, and it presumes the possibility of individuating contributions I suggested were implausible above.

A second approach proceeds from a view of the corporation as a real entity, capable of bearing responsibility for its acts in its own right.⁴⁵ I have elsewhere sought to contest

<https://www.cimicweb.org/cmo/libya/Documents/Human%20Rights/Mass%20atrocities.pdf> (defining a mass atrocity as “the widespread and systematic use of violence by state or non-state armed groups against non-combatants”).

41. Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1768 (2005) (quoting Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295, 1309 (2005), and citing *id.* and George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 THEORETICAL INQUIRIES L. 163, 168–69, 173–74 (2004)); see also Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 542 (2005) (detailing that “a number of selected guilty individual’s squarely are to be blamed for systemic levels of violence”); George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1504 (2002) (analyzing whether it is acceptable to assign guilt to actors collectively and countries collectively).

42. See *infra* notes 45–46 and accompanying text (discussing the importance of collective responsibility as well as individual responsibility in corporate criminal liability).

43. For general overviews of differing theories about the corporate form, see generally David Millon, *New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993), and Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WISC. L. REV. 999 (2010).

44. See, e.g., Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 323 (1996) (describing the different analysis of imposing crimes on third parties in corporations where there exists a myriad of contractual relationships filled with individuals joining together for a mutual economic benefit); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1477–78 (1996) (comparing the “costs and benefits of corporate criminal liability” with the costs and benefits of other liability).

45. See, e.g., PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984); cf. Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171, 177 (2007) (punting on the question of the corporation’s ontological status but nonetheless holding that it can bear responsibility in its own right). Here, too, there is an analogous approach in international criminal law. See, e.g., LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* 246–49 (2005) (advocating collective responsibility as a supplement to individual responsibility in “situations of group-based harm, [where] many members of the society may have chosen to play a role in the climate that has been instrumental in nurturing the harmful conduct”); LARRY MAY, *WAR CRIMES AND JUST WAR* 247–56 (2007) (offering a qualified defense of joint criminal enterprise as a kind of collective responsibility where the responsibility of each member turns on his having an intention to participate in the collective injury); Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1482 (2009) (“[I]mposing criminal liability on corporations makes sense, because corporations are

the notion of corporate (or collective) responsibility,⁴⁶ but will not do so here because even if corporate responsibility proves correct, it does not occlude the third approach, which I seek to elucidate and defend in this Article.

This third approach is compatible with both real and fiction views of the corporation, and it holds that members of the corporation *share* responsibility for its acts. This approach can operate alongside the notion of corporate responsibility for it might be the case that *both* the corporation and its members bear responsibility for the act. The set of members who may be assigned responsibility and the magnitude and ground of the assignment vary among the different theories of shared responsibility, and I will survey this terrain in the next Part. For now, I shall seek to motivate further the excursion into accounts of shared responsibility by arguing that individualism is especially implausible for wrongdoing in the financial crisis.

B. Corporate and Financial Wrongdoing

To make matters concrete, consider the recently announced prosecutions of two JPMorgan traders in the wake of “the London Whale,” billed as “one of Wall Street’s biggest trading blunders of the past few years.”⁴⁷ The two traders are charged with having falsified records in the first half of 2012 in order to cover up losses resulting from a problematically risky bet that the bank made.⁴⁸ Suppose now that the DOJ succeeds in securing convictions against these two bankers. The allegedly criminal acts in which they participated led to \$6.2 billion in losses for JPMorgan. Moreover, it is believed that many people at JPMorgan worked together to hide these losses from investors and regulators,⁴⁹ and an independent report concluded that lax controls and an aggressive profit-seeking culture facilitated the fraud.⁵⁰ On this understanding of the circumstances, it would be a

not, fundamentally, fictional entities. Rather, they are very real and enormously powerful actors whose conduct often causes very significant harm both to individuals and to society as a whole.”).

46. See generally Sepinwall, *supra* note 6.

47. Agustino Fontevicchia, *London Whale And Ina Drew Off The Hook As Two Ex-JPMorgan Traders Face Criminal Charges*, FORBES (Aug. 14, 2013, 1:07 PM), <http://www.forbes.com/sites/afontevicchia/2013/08/14/london-whale-and-ina-drew-off-the-hook-as-two-ex-jpmorgan-traders-face-criminal-charges/>.

48. See, e.g., Peter J. Henning, *U.S. Puts a Helpful Face on Its Fraud Case*, N.Y. TIMES DEALBOOK (Aug. 14, 2013), <http://dealbook.nytimes.com/2013/08/14/u-s-puts-a-helpful-face-on-its-fraud-case/?ref=morganjpcchaseandcompany> (discussing the actions of employees involved in the risky trading practices that cost JPMorgan Chase to lose more than \$6 billion).

49. See, e.g., Stephen Gandel, *Why JPMorgan’s ‘London Whale’ Was Set Free*, CNNMONEY.COM (Aug. 14, 2013 3:31 PM), <http://finance.fortune.cnn.com/2013/08/14/jpmorgans-london-whale-free/> (explaining the role of JPMorgan’s executives aiding the continuance of the accused traders’ risky behavior).

50. REPORT OF JPMORGAN CHASE & CO. MANAGEMENT TASK FORCE REGARDING 2012 CIO LOSSES 7 (2013), available at http://files.shareholder.com/downloads/ONE/2272984969x0x628656/4cb574a0-0bf5-4728-9582-625e4519b5ab/Task_Force_Report.pdf (presenting “the Task Force’s view that responsibility for the flaws that allowed the losses to occur lies primarily with CIO management but also with senior Firm management”). See also Ben Protess & Jessica Silver-Greenberg, *Charges Against 2 Traders Fault JPMorgan for Lack of Oversight*, N.Y. TIMES DEALBOOK (Aug. 14, 2013, 9:56 AM), <http://dealbook.nytimes.com/2013/08/14/government-charges-two-former-jpmorgan-employees/?ref=morganjpcchaseandcompany> (“While just two former London traders . . . were criminally charged . . . the cases intensify the scrutiny of the banks executives . . . where lax controls and the pressure for profits aggravated the problem.”); Fontevicchia, *supra* note 47 (noting that supervisors for the more senior of the two defendants were “breathing down his neck” in an effort to ensure he would ensure his underlings masked the losses).

mistake to view the faulty record-keeping as the rogue act of a couple of traders with intent to conceal their misplaced bets from the rest of the bank. Instead, we should impute the traders' activities to the bank as a whole.⁵¹

But the government's response to the bank itself has been half-hearted. The government chose to respond to JPMorgan through a civil, rather than a criminal, suit. While the SEC made a show of extracting a confession of wrongdoing from the bank, the confession states not that the bank authorized or promoted the fraud but instead that it merely failed to adequately supervise the fraudsters.⁵² Jamie Dimon, the bank's longstanding and much lauded CEO,⁵³ not only escaped responsibility but ended the year with a 74% pay raise, bringing his salary to \$20 million.⁵⁴ Of course, there may well be political or prudential reasons for foregoing a harsher response. But we should also recognize that a more sweeping response would be disfavored regardless, given our criminal law doctrines' rigid and narrow focus on individual culpability.

The problem, in greater detail, is this: If we insist on an individualist assignment of responsibility, we will have to resign ourselves to prosecuting those who actively participated in, or at best instigated or knowingly tolerated, the fraud. But there is a disturbing disconnect between this set of individual prosecutions and a crime that appears to have resulted from a pervasive culture of profit seeking so aggressive that it motivated, and perhaps even mandated, efforts to mislead investors and regulators.⁵⁵ Thus, a legal response limited to a handful of individual prosecutions would leave us with a surfeit of wrongdoing for which no one would be accountable. Call this the problem of *undistributed responsibility*.⁵⁶

Of course, that there is some justice left to mete out does not yet establish that we are licensed in distributing it to senior executives in the bank by indicting them for the bank's crime. But it does provide a rationale for inquiring seriously into whether we *might* be. This undistributed responsibility should prompt us to see whether we can arrive at compelling reasons for thinking that senior bankers, who did not culpably contribute to their bank's crime, nonetheless *deserve* to be prosecuted. I turn now to existing theories of shared responsibility to see whether any might fit the bill.

51. Cf. Beale, *supra* note 45, at 1484 (arguing that bribery at the Siemens corporation was so widespread that "[t]here is nothing wrong with recognizing that it was Siemens, not simply some of its officers or employees, who should be held legally accountable. U.S. investigators found that the use of bribes and kickbacks were not anomalies, but the corporation's standard operating procedure and part of its business strategy").

52. Press Release, U.S. Commodities Futures Trading Commission, CFTC Files and Settles Charges Against JPMorgan Chase Bank, N.A., for Violating Prohibition on Manipulative Conduct In Connection with "London Whale" Swaps Trades (Oct. 16, 2013), *available at* <http://www.cftc.gov/PressRoom/PressReleases/pr6737-13>.

53. For example, in her account of the dynamics precipitating the financial meltdown, Gillian Tett portrays Dimon as a visionary and honorable white knight amid a sea of ruthless and brutish counterparts. See *generally* GILLIAN TETT, FOOL'S GOLD: HOW THE BOLD DREAM OF A SMALL TRIBE AT J. P. MORGAN WAS CORRUPTED BY WALL STREET GREED AND UNLEASHED A CATASTROPHE (2009) (detailing the career and good-standing reputation of JPMorgan's Chief Executive Officer, Jamie Dimon).

54. Dan Fitzpatrick & Joann S. Lublin, *Dimon Gets Raise After Rough Year*, WALL ST. J. (Jan. 24, 2014), http://online.wsj.com/news/articles/SB10001424052702304856504579340313243025826?mod=djem_jiewr_FN_domainid.

55. Cf. Beale, *supra* note 45, at 1484 ("Because of their size, complexity, and control of vast resources, corporations have the ability to engage in misconduct that dwarfs that which could be accomplished by individuals.").

56. I am grateful to Bill Laufer for suggesting this term.

III. SHARED RESPONSIBILITY

Individuals can share responsibility in the sense that the responsibility assignment is to be allocated between them, or they can share responsibility in the sense that the responsibility assignment is common among them. This second sense is analogous to the use of “sharing” when one refers to a shared value, a shared point of view, a shared way of life, and so on, and it is this sense of sharing that shall occupy us here. The claim in need of defense is that executives may all bear some amount of responsibility for their corporation’s crime, independent of the causal role that any of them played. For now, I leave to one side the question of whether, and if so how, the magnitude of responsibility varies among them.⁵⁷

Arguably, there are many ways in which members may come to share responsibility for an act of their group. Some accounts of shared responsibility presuppose that each member proximately caused the act for which responsibility is to be assigned. For instance, Joel Feinberg describes a case exemplifying “group fault distributable to each member”⁵⁸ where a conspiracy to commit a bank robbery and the robbery’s success is due to each of the members, who variously function as perpetrators, abettors, inciters, or protectors.⁵⁹ The accounts examined in this Part are broader in scope in that they do not require that members proximately cause the group transgression. Since the account I advance in the next Part seeks to assign responsibility for a corporate act to officers *independent* of their participation, I consider here only those accounts that are (at least relatively) insensitive to the extent of members’ participation.

Why should executives share responsibility for a crime in which they have not participated? The accounts of shared responsibility I interrogate here locate the ground of shared responsibility in the benefits of membership; the structure or culture of the organizations in which members operate; or the sharing of intentions that group activity requires.⁶⁰ I consider each in turn.

A. Benefits-Based Accounts of Shared Responsibility

Those who ground a sharing of responsibility in the benefits membership accords typically have one of two things in mind—the material benefits arising from a cooperative endeavor, or the positive effects membership confers upon one’s sense of self. In the case of the former, responsibility is alleged to flow reciprocally from the material benefits received.⁶¹ Thus, for example, Eric Posner and Adrien Vermeule argue that “[p]eople enter

57. This question is discussed in Part IV, where I articulate the factors in virtue of which two executives who did not participate in the corporate crime might nonetheless bear differing amounts of responsibility for that crime.

58. Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674, 684 (1968).

59. *Id.*

60. Consent has been proffered as a distinct ground of shared responsibility. R.S. Downie, *Responsibility and Social Roles*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY: MASSACRE AT MY LAI* 63, 70 (Peter A. French ed., 1972). I have elsewhere argued that the fact that an individual has consented to be blamed and punished for a wrong does not entail that we are justified in blaming and punishing her, just as the fact that some individual has offered to die for our sins does not entail that we are justified in killing her. Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371, 395–96 (2014).

61. Janna Thompson also offers a defense of shared responsibility that relies upon material benefits, but her account has a kind of pay-it-forward, rather than pay-it-back, rationale. Janna Thompson, *Collective*

relationships in order to obtain the benefits of collective action; in the process they become blameworthy for the harms that occur as a result of collective action.”⁶² Similarly, Christopher Kutz argues that “[t]he possibility of expanding our powers (or rewards) through cooperation entails the risk that the resulting act will not align with our moral interests,”⁶³ and that we will thereby come to bear accountability for the collective act.⁶⁴ Perhaps most sweepingly, Hannah Arendt claimed that sharing responsibility is the “price we pay” for living in human community.⁶⁵ For the second kind of benefit, responsibility hinges on the member’s pride in the group’s glories, which is held to require, as a matter of psychological consistency, shame in the face of the group’s transgressions.⁶⁶

The general problem with relying upon the benefits of group membership to ground shared responsibility is that benefits do not connect members to the group transgression in the right way. First, as I have argued elsewhere, non-members may benefit from the group in just the way that members do, so benefits alone cannot do the work of grounding shared responsibility.⁶⁷ Further, the rationale for responsibility on a benefits-based account contemplates a species of responsibility distinct from blameworthiness: For benefits-based theorists, responsibility just “comes with the territory” of membership, so to speak. In this way, members are made to pay for group transgressions for just the same reasons that they are made to pay for other group expenses incurred through no fault of their own, or at no benefit to themselves. Thus, all Americans contributed tax dollars for reparations payments made in 1988 to Japanese-Americans interned in World War II, even though many of the taxpayers were not even alive at the time of the internment, just as all residents of a school district pay property taxes to fund the local public schools, whether or not they have school-age children. These mandated contributions are justified simply in virtue of our membership in the relevant polity. Redress payments have no special moral meaning on a benefits-based account. As such, these accounts would have us understand our contributions to efforts to rectify our group’s wrong as demurrals, not acknowledgments, of blame—paying up is just what we do qua members, not just what we ought to do to repair our group’s, and hence our own, wrong. In this way, benefits-based accounts contemplate only a forward-looking kind of shared responsibility and not the backward-

Responsibility for Historic Injustices, 30 MIDWEST STUDIES IN PHILOSOPHY 154, 154 (2006).

62. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 703 (2003). In his defense of collective responsibility, Larry May adverts, but only in passing, to the concrete benefits group membership affords. LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS* 77 (1987). As such, it is not clear that the benefits rationale is intended to carry much weight in his account.

63. KUTZ, *supra* note 38.

64. See, e.g., *id.* at 157 (alluding to how an engineer is accountable for mine sales because of his intentional participation in a collective project).

65. Hannah Arendt, *Collective Responsibility*, in AMOR MUNDI 50 (James Bernauer ed., 1987); see also Cassie Striblen, *Guilt, Shame and Shared Responsibility*, 38 J. SOC. PHIL. 469, 474 (2007) (describing Arendt’s view as having two requirements, “I must be held responsible for something I have not done, and the reasons for my responsibility must be my membership in a group . . .”).

66. See, e.g., Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 986–87 (1992); MARGARET GILBERT, *SOCIALITY AND RESPONSIBILITY* 129 (2000) (describing “membership remorse,” the remorse felt by group members just in virtue of their membership); cf. Posner & Vermeule, *supra* note 62, at 710 (describing a similar phenomenon as “moral taint”).

67. Cf. Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J.L. & POL. 183, 200 (2008) (detailing how non-members of a group can experience a psychological connection that is just as strong as the one members feel).

looking kind that is the hallmark of blameworthiness.⁶⁸ These accounts are not, then, true rivals to the one I will go on to advance.

B. Organization-Based Accounts of Shared Responsibility

A second strand of theory seeks to ground shared responsibility for corporate crime in the corporation's organizational structure or culture,⁶⁹ one or both of which is alleged to have contributed to the crime's commission. Insofar as executives bear responsibility for the corporation's structure or culture, they bear responsibility for any crimes these elements produce. Or so the argument would go.

It is undoubtedly true that a corporation's culture can facilitate or promote wrongdoing. Consider, for example, the 2010 Massey Energy mine explosion that caused 29 deaths.⁷⁰ Each of four separate investigations concluded that the tragedy was attributable to the company's culture that privileged productivity over safety.⁷¹ Yet, notwithstanding the increasing acceptance of organizational bases for criminal liability,⁷² attempts to ground corporate *officers'* responsibility in the structures or cultures of their organizations remains problematic.

More specifically, there is a concern about under-inclusiveness in holding executives responsible for the structure or culture of the corporation that committed a crime. Bureaucratization, a pervasive feature of corporate life, permits culpable ignorance.⁷³ Many corporations share similarly nefarious cultures. Thus, for example, at the turn of the millennium, a "nothing-but-profits-matter" culture infected not just WorldCom and

68. For more on the distinction between forward- and backward-looking conceptions of responsibility, see, e.g., Annette C. Baier, *How Can Individualists Share Responsibility?*, 21 POL. THEORY 228, 243 (1993) (describing how a forward-looking division of responsibility is usually accompanied by a similar backward-looking responsibility).

69. See, e.g., Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1121–46 (1991); cf. AUSTL. MODEL CRIMINAL CODE §§ 501.2, 501.3.1 (2009) (allowing for corporate prosecutions where the corporate culture has contributed to the crime); LARRY MAY, SHARING RESPONSIBILITY 42–52, 73–86 (1992) (assigning shared responsibility for racist hate crimes to all those who are racist, insofar as all "causally contribut[e] to a climate that influences others to cause harm").

70. Peter Galuszka, *How Many Coal Miner Deaths Does It Take To Pass Safety Regulations?*, SLATE (Nov. 14, 2012, 3:31 PM), http://www.slate.com/articles/health_and_science/coal/2012/11/mine_disaster_west_virginia_no_new_safety_regulations_after_massey_s_upper.html.

71. Howard Berkes, *Former Massey CEO Accused of Conspiracy in Court Hearing*, NPR: THE TWO WAY (Feb. 28, 2013), <http://www.npr.org/blogs/thetwo-way/2013/02/28/173178951/former-massey-ceo-accused-of-conspiracy-in-court-hearing>.

72. See, e.g., Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scienter*, 2006 COLUM. BUS. L. REV. 81, 165 (discussing "a clear societal mandate to seek out and eliminate corporate wrongdoing at every level").

73. David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2356–60 (1992).

Enron⁷⁴ but many other American corporations as well.⁷⁵ Yet, only some of these corporations engaged in criminal wrongdoing as a result. Appeals to a corporation's structure or culture fail to elucidate why it is solely the executives in the corporation that act illegally who bear responsibility for an illegal act, rather than all those executives who operate within the same bureaucratic structures that facilitated the corporation's crime, or all those executives who set an aggressive, competitive tone for their employees.

Further, there is a possible concern about over-inclusiveness too: Suppose that a particular corporation promotes an especially hard-hitting attitude among its sales employees but makes it clear that they should nonetheless act within existing legal constraints, and it implements (not merely pretextual) oversight devices to ensure compliance with the law. Nonetheless, given the strong incentives to perform well, some employees break the law to augment sales—indeed, they feel driven to do so by the no-holds-barred culture they sense around them. At the same time, other employees subject to the same pressures nonetheless resist the temptation to act illegally. So the company culture was not itself sufficient to cause these legal violations. If it were, all who were subjected to this company's culture would have broken the law. Instead, perhaps the offending employees were less talented than their upstanding colleagues and so needed to adopt illegal methods to compete, or perhaps their economic circumstances motivated the illegal acts, or perhaps they labored under weakness of will, or so on and so forth. But surely executives in the corporation are not responsible for the factors that prompted some employees to cross the line, or at least not any more responsible for these factors than anyone else. Again, then, why hold these executives responsible for the illegal acts that the culture may have encouraged but did not compel?

The foregoing is not intended to suggest that a group's structure or culture is irrelevant to an understanding of the nature of the executive's responsibility. It is just that these features are epiphenomenal—to the extent that the executive reinforces this culture, that is a sign of, or evidence that supports his commitment to the corporation, which *is* what grounds his responsibility, as we shall see in the next Part. First, though, we should examine one other strand in the shared responsibility literature.

C. Shared Intention Accounts of Shared Responsibility

There has been a steady migration of accounts of shared intention into legal scholarship, as theorists try to make sense of jurisprudence, judging, and joint action by

74. See DENNIS R. BERESFORD ET AL., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF WORLD.COM, INC. 18–19 (Mar. 31, 2003), <http://www.sec.gov/Archives/edgar/data/723527/000093176303001862/dex991.htm> (summarizing investigation into cause of WorldCom's fraud); Abril & Olazábal, *supra* note 72, at 164 (quoting a plaintiff in *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 633 (S.D. Tex. 2002), who described "Enron's 'corporate culture' as characterized by 'a fixation on the price of Enron stock' and on pushing that price ever higher," and went on to state that "many Enron employees believe, 'We're such a crooked company.'").

75. See Bernie Sanders, *Greed, Greed, and More Greed*, SANDERS SCOOP NEWSLETTER (Summer 2002), available at http://www.thirdworldtraveler.com/Political/Greed_MoreGreed_Sanders.html (highlighting that more than 1000 companies have been forced to correct financial statements in the past five years); cf. Haskell Fain, *Some Moral Infirmities of Justice*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY: MASSACRE AT MY LAI* 17, 33 (Peter French ed., 1972) (describing a Harvard poll, conducted shortly after the My Lai massacre, that found that over half of the respondents, representing a cross-section of Americans at the time, would have shot the women, children and elderly of that village had they been ordered to do so).

reference to these accounts.⁷⁶ A shared intention is, roughly, (a) an intention that two or more individuals perform some act together, which entails (b) that each intend to do her part to facilitate fulfillment of that act, in particular by (c) intending to coordinate her part with the others, where (a)–(c) are common knowledge to each of the individuals who share the intention.⁷⁷ Those who invoke shared intentions as a basis of shared responsibility usually have a discrete act in mind, with relatively few participants.⁷⁸ Holding an accessory to a crime responsible for that crime is a typical application of such accounts:⁷⁹ For instance, the driver of the get-away car in a bank robbery, though he did not himself commit the robbery, will nonetheless be held responsible for it if he intended his driving of the get-away car to contribute to the robbery.⁸⁰ The driver shared an intention to commit the robbery, which entailed an intention to do his part in the completion of the robbery (in his case, driving the get-away car) and an intention to coordinate his activities with those of his fellow felons (e.g., by driving the car around to the back of the bank if the robbers decided to change their escape route at the last minute). Moreover, his intention to do his part and coordinate his contribution with the others' is common knowledge to all of them.

The acts that form the subject of this Article are different from the example just described insofar as the Article is concerned with assigning responsibility for financial crimes to corporate executives where at least some of these executives harbored no intention that the crime be committed; some may even have been ignorant of the crime's occurrence. The notion of a shared intention, at least without further qualification, is not likely to be helpful in establishing the responsibility of corporate executives in such cases.⁸¹ For that reason, I do not address the general cogency of the notion of shared intentions here.

There is, however, one set of accounts of shared intentions that warrants attention.

76. See generally SCOTT J. SHAPIRO, *LEGALITY* (2011) (referencing shared intentions as related to analytical jurisprudence); see generally Facundo M. Alonso, *Shared Intentions, Reliance, and Interpersonal Obligations*, 119 *ETHICS* 444 (2009) (discussing shared intention theory); see generally Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 *CHI. J. INT'L L.* 693 (2011) (discussing shared intention theory within the context of international crimes).

77. This is a sketch of the notion of a shared intention that corresponds, at least roughly, with the sometimes highly technical elucidation of the nature of a joint intention. For these more careful and elaborate analyses, see, for example, MICHAEL E. BRATMAN, *FACES OF INTENTION* (1999), especially essays 5–8, as well as KUTZ, *supra* note 38, at 66–112; Raimo Tuomela, *Joint Intention, We-Mode and I-Mode*, 30 *MIDWEST STUDIES IN PHILOSOPHY* 35 (2006); Brook Jenkins Sadler, *Shared Intentions and Shared Responsibility*, 30 *MIDWEST STUDIES IN PHILOSOPHY* 115 (2006).

78. Indeed, even where he explicitly attempts to draw out the implications for responsibility of his theory of shared intention, Michael Bratman, who might be called the father of the shared intention literature, contemplates only small institutional groups, such as a university admissions committee, or collections of individuals who do not constitute a group at all, such as acquaintances who intend to paint a house together. See generally Michael E. Bratman, *Dynamics of Sociality*, 30 *MIDWEST STUDIES IN PHILOSOPHY* 1 (2006).

79. See, e.g., Michael McKenna, *Collective Responsibility and an Agent Meaning Theory*, 30 *MIDWEST STUDIES IN PHILOSOPHY* 16, 16–17 (2006) (finding moral responsibility in a collective that has the shared intention of helping a third party evade police); cf. Dan-Cohen, *supra* note 66, at 986–87 (grounding the get-away driver's responsibility in his identification with the crime rather than his sharing an intention that it be done).

80. Christopher Kutz offers this example as paradigmatic of the way a shared intention entails accountability for each of the parties to it, though his account is intended to cover cases where the shared intention is much broader in scope, and permits much flexibility in how the parties to it may understand and execute their parts in fulfilling it, as we shall see in what follows. KUTZ, *supra* note 38, at 228–29.

81. Cf. Paul Sheehy, *Holding Them Responsible*, 30 *MIDWEST STUDIES IN PHILOSOPHY* 74, 75–76 (2006) (noting the implausibility of extending the notion of shared intentions to large, complex groups).

Some theorists have argued that we should understand the project that unites members of a collective quite broadly. These theorists contend that each member need not intend the transgression in question so long as it is plausible to construe the transgression as a reasonable way for one member to carry out the larger project that all intend for the group to complete.⁸²

Christopher Kutz offers what is perhaps the most elegant account linking shared intentions to shared responsibility, but his account yields both under- and over-inclusive assignments of responsibility. According to Kutz, “a set of individuals can jointly intentionally G even though some, and perhaps all, do not intend that G be realized, or do not even intend to contribute to G, but only know their actions are likely to contribute to its occurrence.”⁸³ Kutz’s conception of a collective act is expansive and so it finds intentional participation not just among those who intend that the collective act be achieved but also among “cognitively vague, alienated or dyspeptic agents.”⁸⁴ All of these agents bear at least some accountability for the collective act, on Kutz’s account, since “[i]ntentional participation provides a special basis for ascribing individual members’ actions to the group as a whole, and to the group members individually.”⁸⁵ Thus, “the actions of each and the actions of all are the actions of the collective.”⁸⁶

Kutz’s account is remarkably sweeping because it allows action stemming from any subsidiary intention that can rationally be related to the shared goal to redound to the group as a whole and hence to its members. As he says: “When we act together, we are each accountable for what we all do, because we are each authors of our collective act.”⁸⁷ The ground for such widespread accountability is for Kutz the way in which our shared goals manifest our will: “We are properly held accountable for the actions of groups (and of individual group members) in which we participate, because these actions represent our own conception of our agency and our projects . . . [Group members] manifest their attitudes through one another’s actions.”⁸⁸ Kutz even offers a “slogan” to capture his thesis pithily: “No participation without implication.”⁸⁹

There are two problems with the structure of accountability on Kutz’s account, both relating to the purported teleological connections between the shared goal and the acts it is alleged to explain. First, the over-arching goal shared by group members may be so grand or diffuse that virtually any act its members pursue can plausibly be said to be in the service of the shared goal. Consider, for example, that both supporters and opponents of the Nazi regime might have shared the goal of glorifying the Fatherland. The problem is that the Fatherland’s glorification did not demand the Nazi program of mass genocide. As such, it is a stretch to say that Germans who opposed the Nazi regime nonetheless provided teleological warrant for the Nazis’ systematic extermination and purification efforts. This is especially so in the case of those Germans who stayed precisely in order to thwart Nazi activities. And yet, Kutz’s theory would hold accountable for the Holocaust both Nazis and

82. See generally KUTZ, *supra* note 38 (arguing that cases of collective action often involve individuals who are isolated from the group’s intended result); Sadler, *supra* note 77.

83. KUTZ, *supra* note 38, at 103.

84. *Id.* at 102.

85. *Id.* at 138.

86. *Id.*

87. *Id.* at 138–46 (defending the claim that participation brings about responsibility).

88. KUTZ, *supra* note 38, at 140–41.

89. *Id.* at 114.

German resistance fighters who opposed the Nazi regime given, again, that both shared the larger ambition of seeking to have Germany flourish.

If appeal to the shared goal sometimes results in too broad an ascription of responsibility, it also often fails to cast responsibility broadly enough. Kutz's account presupposes that groups can be characterized by a unity of purpose. Yet it is a fact, and perhaps even a virtue, of groups that members may diverge in their sense of what the group is about.⁹⁰ Kutz contends that there must be some region of overlap between members' conceptions of the purpose or identity of the group if there is to be a coherent group at all.⁹¹ But the region of overlap may well be dwarfed by the great swaths of imaginative terrain occupied by those who embrace a vision of the group that their fellow members would eschew.⁹² The nineteenth-century American who repudiated the nation's "manifest destiny" might well still bear responsibility for the unjust annexation of Native American lands, just as the twentieth-century American who refused to recognize the nation's exploratory imperative might well still bear responsibility for the nation's extravagant and environmentally damaging space program.⁹³

In sum, Kutz's account is inclined to mislead us, at least in the case of large groups with grand and dynamic *raison d'être*. This is because the teleological connection between shared goal and subsidiary intention provides either an over-inclusive ground of responsibility—as in the case of assigning responsibility for the Holocaust to those who did not support Aryanism—or else an under-inclusive ground of responsibility—as in the case where members disagree about some of the group's over-arching goals. And yet we think it justifiable to assign responsibility to all members for acts undertaken in the service of these goals.

More generally, the problem with deriving shared responsibility from shared intentions is that the more diffuse the group, the more difficult it can be to identify an intention (a) that informs and undergirds the group's act and (b) that *all members share*. Shared intentions serve as a compelling ground of shared responsibility for smaller groups

90. Consider, for example, the following exchange from the film *2 Days in Paris*, as reconstructed in *The New Republic*, in which the film's protagonist expresses the view that Democrats and Republicans essentially belong to two different nations: "Having just arrived in Paris, Jack quickly reduces the line at the train-station cab stand by sending a pack of tourists from the American heartland off with fake walking directions to the Louvre. 'But aren't they your compatriots?' Marion asks. 'My compatriots?' Jack replies, irritably. 'They voted for Bush,'" and, with that, he rests his case. Christopher Orr, *French Roast*, THE NEW REPUBLIC (Aug. 24, 2007), <http://www.newrepublic.com/article/french-roast>.

91. KUTZ, *supra* note 38, at 103.

92. See *id.* at 163–64 (describing how Kutz compellingly addresses the case in which a group member fails, as a result of false consciousness, to view her work as connected to a shared goal that she disavows). The problem I am considering here, however, arises where members genuinely diverge as to the content of the shared goal.

93. See, e.g., Robert R. Schmucker & Klaus R. Wagner, *Do Shuttle Exhaust Gases Damage the Ozone Layer? The Environmental Burden Imposed by Space Travel*, 27 *ASTRONAUTIK* 105 (1990); Ker Than, *Nobel Laureate Disses Manned Spaceflight: Particle Physicist Calls International Space Station an 'Orbital Turkey'*, NBCNEWS.COM (Sept. 19, 2007, 11:39 AM), www.msnbc.com/id/20869407/ (criticizing the manned space program for its environmental impact and cost, as well as its lack of scientific usefulness). If the group actively promoted diversity in its members' conceptions of the shared goal precisely in order to confer immunity on some of them for the acts others undertook on behalf of the group, we might then have a compelling ground for holding all responsible. Cf. Luban et al., *supra* note 73, at 2348 (grounding responsibility of ignorant members of a bureaucracy in the compartmentalization of functions and information whose very aim it is to shelter those members). The responsibility assignment would then be justified in virtue of the structure or strategy facilitating diversity, not the shared goal itself.

with a narrowly defined purpose, and especially for ephemeral groups, which are constituted by the shared act. For those groups, we may legitimately ascribe to each member the intention to carry out the acts of the group. But as the group's size and the scope of its projects grow, the notion that its members share an intention that links each to the group act in a way that licenses a responsibility assignment becomes more and more problematic. If we are to identify a ground of shared responsibility for these large and multi-purpose collectives, we are likely to have to look to something other than shared intentions.

D. Summary

This Article is now in a position to offer a more general diagnosis of the deficiencies of the accounts surveyed in this Part. All of them aspire to justify shared responsibility not just for small groups in which all members participate in each of the group's acts but also for large groups where divisions of labor and divergence of purpose are the norm. We have seen that these accounts fail to make good on that aspiration. In particular, all fail to explain why membership is relevant. We can see the problem with special acuity where members have not acted differently from outsiders (as in the case where both insiders and outsiders benefit, or both insiders and outsiders support the kind of culture that facilitated the wrong), or where members explicitly repudiate the group's wrong (as in cases where members share in the larger group project but oppose the wrongful way some have chosen to carry it out, or share in some subsidiary project, but diverge with respect to the group's larger purpose). None of these accounts, then, provide a compelling justification for sharing responsibility for corporate crime.

IV. SHARED RESPONSIBILITY FOR CORPORATE CRIME

In what sense, then, *do* executives share responsibility for their corporation's crime? I argue here that corporate officers are *causally* responsible for corporate crime because they sustain the corporation's capacity to act, or its *agency*. Their contributions to the corporation's agency thereby provide a necessary causal link between these officers and the corporation's crime that exists independent of their participation in that crime. But these contributions, we shall see, do not *ground* these non-participants' responsibility. Instead, I argue it is corporate officers' expected commitments to their corporations that ground their responsibility.

I begin, in Part III.A, by describing the ways corporate officers contribute to the corporation's agency. To clarify, the role these contributions play in sustaining an assignment of responsibility to executives for a corporate crime in which they did not participate, I offer a novel way of analyzing a responsibility assignment in Part III.B. Part III.C is the centerpiece of the Article's positive account, for it is there that I explicate the justification for assigning responsibility to executives for a crime in which they did not participate. In particular, I articulate a normatively rigorous and expansive conception of an executive's professional role, and I locate the ground of her responsibility therein.

A. Executives and Group Action

Groups have no material existence. Though certain material objects may function metonymically for the group—for example, the icon of the bitten apple for Apple

Computers or the Nike swoosh sign—groups are disembodied. Yet, they are recognizable to us as entities that exist in our midst and act in our world. How can this be?

Two features are required for these disembodied entities to act in, and interact with, the world: Groups must bear a distinct identity that extends through time, and they must have mechanisms for transforming acts of some of their members into acts of the group. Members of an institutional group who take an active part in its day-to-day operations help to create and preserve the group's identity, and elaborate and reinforce its rules for having some member's act count as an act of the group. In this way, these members sustain the causal agency of the group, and they thereby come to bear causal responsibility for the group's acts. Of relevance here, corporate officers participate in the life of their corporation in just this way. As such, they come to be causally responsible for the corporation's agency and so causally responsible, in a meaningful way, for all of the corporation's acts. Nonetheless, it would be a mistake to infer that causal responsibility suffices to ground their moral responsibility for corporate wrongdoing. The account of responsibility I go on to advance is not some kind of transmission function, whereby contributing to the precursors of the corporation's crime—here, the corporation's ability to act—entails responsibility for the crime. Instead, I shall argue that the ground of the executive's responsibility flows from the normative dimensions of his role in the corporation. It is to that argument that I now turn.

B. The Analytic Structure of a Responsibility Assignment

The nature of the relationship of an executive to some corporate wrong gets clearer by analyzing the elements of a responsibility assignment. Theorists typically identify two such elements—the *object* for which one is held responsible, and the *reason* or *basis* for which one's conduct is reproachable.⁹⁴ But it is likely more useful to distill four elements from a responsibility assignment: First, the act or result for which one is held responsible; second, the connection one bears to that act or result; third, the features rendering that connection reproachable; and, fourth, the magnitude of the responsibility assignment. For brevity's sake, I shall refer to these four elements, respectively, as the *object*, *connection*, *ground*, and *magnitude* of one's responsibility.

For example, in the standard case of murder, the object of the killer's responsibility is the victim's death, the connection is her causal relationship to the killing, and the ground of her responsibility is her mental state—*viz.*, her intention to kill the victim. Disentangling the elements of connection and ground from the cruder category of a reason allows us to see that the *magnitude* of a responsibility judgment varies according to the ground, and not the connection. More specifically, the amount of reproach and the severity of the sanction, turn on both the object for which one is held responsible and the ground of blame, but not on the strength of one's connection to the act. Thus, Anglo-American law correctly treats the perpetrator and accomplice who each intend to commit the crime as equally guilty even though the former is more causally responsible for—*i.e.*, she bears the stronger *connection*

94. See, e.g., KUTZ, *supra* note 38, at 4 (distinguishing the “object” of accountability—*i.e.*, “the harm or wrong for which [an individual] is reproached—from the “basis” of accountability—*i.e.*, “the grounds for holding the subject accountable”); cf. Dan-Cohen, *supra* note 66, at 963 (distinguishing between “object-responsibility” and “subject-responsibility” where the former points to an event or result and the latter points to a feature of one's person that caused the event or result); Jeff McMahan, *Collective Crime and Collective Punishment*, CRIM. JUST. ETHICS 4, 6 (2008) (referring to the “bases, conditions or criteria of collective guilt”).

to—the crime’s commission. At the same time, the approach offered here also allows us to see that *both* the ground and the object of responsibility inform its magnitude, rather than merely its ground, as some accounts would maintain.⁹⁵ Accomplices, therefore, are punished more severely than accessories-after-the-fact because even though the ground of culpability is the same for both accomplices and accessories—both intend to aid the perpetrator—the object of the accomplice’s crime is the harm wrought by the perpetrator, whereas the object of the accessory’s crime is the act of assistance itself. Since the act of assistance itself typically wreaks less material harm, it makes sense that the accessory is deemed less culpable than is the accomplice. In other words, the magnitude varies here strictly in light of the differing objects of responsibility as between the accessory and accomplice, given that the ground of their responsibility is the same.

The four-part analysis tracks the law’s treatment of criminal attempts as well: For both attempted and completed crimes, the ground of responsibility is the same—*viz.*, the intention to commit the crime. Yet the law punishes the former far less harshly than the latter. The fact that the object of responsibility differs for each explains the disparity in sentencing: The successful perpetrator caused the harm she intended while the thwarted perpetrator may have caused no material harm at all. In the next section, we shall see that parsing a responsibility assignment in this way allows us to see why the corporation may hold both participating and non-participating executives responsible for the same corporate crime, even though the differing grounds of their respective responsibility assignments entail vastly different magnitudes of responsibility.

C. Executives’ Responsibility for a Group Transgression

Applying the analytic structure of responsibility just articulated, we arrive at the following principle of shared responsibility: The object of responsibility for the executive is the corporate crime, the connection she bears to it is the causal one of creating or sustaining the corporation’s capacity to act, and the ground of her responsibility is her expected commitment to the corporation. And, as I shall argue, consonant with the observations above: The magnitude of the executive’s responsibility varies both according to the egregiousness of the corporate act and the stringency of her expected commitment to the corporation, but not according to how much responsibility she bears for the corporation’s agency.

In this section, I expand on each of the four elements of group-based responsibility just enumerated. Throughout, I contemplate only the executive who neither participated in, nor culpably failed to prevent, her corporation’s crime.

1. The Object of Responsibility

As indicated above, my claim is that the object of the executive’s shared responsibility is the corporation’s crime, whether or not the executive participated in that crime. To establish that claim, I first rule out other possible objects of responsibility, and then offer some comments about our resistance to this object of responsibility.

95. On some Kantian accounts, desert is taken to turn exclusively on what the agent sought to do, and not what she actually managed to do. Subjectivist understandings of criminal attempts, which contend that the law should treat attempts no differently from completed crimes, are representative here. *See generally* R.A. Duff, *Subjectivism, Objectivism and Criminal Attempts*, in *HARM AND CULPABILITY* (A.P. Simester ed., 1996).

When her corporation commits a crime, for what might we hold the executive responsible? One reason is her employment in the corporation. This possible object of responsibility is captured in the common sentiment experienced when one contemplates another's membership in a transgressing group: "How could she possibly have joined, or continued to be a part of, such a group?"⁹⁶ There is nothing illusory about membership as *an* object of the executive's responsibility, and the moral valence of her membership—that is, whether it is good or bad—will indeed turn upon the moral nature of the corporation's acts. But membership is a *personal* object of responsibility: When we judge an individual for her membership in a particular group, we are engaging in a straightforward act of ascribing individual responsibility. Put differently, we are assessing her on the basis of what her membership says about her. Our assessment thus ends with the expressive dimensions of her membership; it does not contemplate a more material role in the group's (or corporation's) transgression.

But perhaps we may hold the executive responsible for more than mere association with a transgressing corporation. Given the role executives play in allowing the group to act—again, through their contributions to the corporation's capacity to act—perhaps the appropriate object of responsibility is the corporation's agency. On this thought, executives would be held responsible not for the corporation's crime itself, but for a causal precursor of the crime—in particular, the corporation's capacity to act. But the corporation's capacity to act is at worst morally neutral; the great enthusiasm for the good society reaps from the existence of corporations suggests that contributing to the corporation's capacity to act is perhaps even laudable. In much the same way that the biological parents of a serial killer do not—at least simply in virtue of their biological contributions—deserve our reproach, so too executives do not, at least solely in virtue of their contributions to the corporation's agency, deserve our indignation.

Can we, then, hold the executive—and in particular, the executive who did not participate directly in the corporation's crime—responsible for the crime itself? The following chain of reasoning would suggest that we cannot: We endeavor to determine the set of individuals responsible for the crime by thinking about what kind of sanctions—both emotional and material—a crime of that severity warrants. We are then led to the correct thought, that those who did not participate in the corporate crime do not deserve *those* sanctions. But we then conclude—and here is where we go wrong—that these non-participants must therefore bear *no* responsibility for the crime. The error arises because we allow our judgments about the nature of the response the crime warrants to govern fully our determination of who ought to be held responsible for the crime. But this is to put the cart before the horse, and to leave something crucial out of the picture.

The missing piece is the executive's relationship to the corporation, which is forged in light of the commitment expected of one who occupies her office. In particular, that relationship *connects* her to the group act and confers upon her a normative status that *grounds* her responsibility, as we shall see in the next two subsections. Further, that relationship cabins the *magnitude* of her responsibility in a way that renders our response to her significantly less severe than that which the direct perpetrator faces. In short, the plausibility of holding an executive responsible for a corporate crime in which she did not

96. *But cf.* John Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 17 BROOK. L. REV. 1177, 1180–81 (2005) (arguing that our judgments of those who belong to corrupt organizations wrongly presuppose that we would have done otherwise were we in the judged individuals' shoes).

participate is an outstanding question—one that cannot be answered before undertaking the explorations to which I now turn.

2. *The Non-Participating Executive's Connection to the Corporate Crime*

Recall that executives contribute to the corporation's agency in two ways: by helping to secure and sustain the corporation's identity, and by elaborating and adhering to the rules that make some employee's act an act of the corporation. These are more important kinds of contributions than are, say, the contributions that the biological parents, or even the actual parents, of an adult serial killer make to the serial killer's agency. For the serial killer is an agent in his or her own right. While during childhood the eventual serial killer's nascent agency was fostered and shepherded by her parents, their role is greatly diminished—if not eradicated—once the serial killer reaches the age of maturity (assuming that she has the mental competencies that qualify her for parental emancipation). The corporation's agency, by contrast, is forever parasitic on the contributions of its members.

Despite the relatively important role that executives play in allowing the group to act, I do not believe that these contributions justify holding executives responsible. My claim is that these contributions serve to *connect* executives to the group act, but they do not themselves constitute the *ground* of executives' responsibility. I defend that claim in two steps: In this subsection, I appeal to intuition in an attempt to demonstrate that executives' contributions to the corporation's agency do not function in the way that they need to if they are to ground a responsibility assignment. In the next subsection, I advance a positive argument for conceiving of executives' obligations of loyalty to the corporation, rather than their contributions to the corporation's agency as the ground of their responsibility.

I indicated earlier that when assigning responsibility to someone, the magnitude of the assignment turns on the egregiousness of the act ascribed to them as well as the nature of the ground for ascribing it, but not on the strength of their connection to that act. If executives' contributions to the corporation's agency were the ground of their responsibility, then we should expect the responsibility of any executive to vary in some direct way based on the magnitude of his or her contributions to the corporation's agency. But a quick appeal to intuitions will disappoint this expectation.

For example, consider the member of the corporation who significantly contributes to the corporation's identifiability, though she does not bear an especially strong relationship to the corporation's crime. For instance, imagine that fraud has been uncovered at the perfume company of the starlet du jour. Though the starlet in question bears primary responsibility for the perfume's identifiability—it bears her name and her image is featured all over its promotional material—it is doubtful that we would think her more responsible for the fraud than, say, the person in a senior management position, even if neither participated in nor knew about the fraud. Conversely, consider the executive whose contributions have little discernible effect on the corporation's identifiability, though she undertakes her role ardently. Perhaps she asserts a vision for the corporation that fails to be taken up. Or perhaps, she is among a chorus of voices heralding the existing character of the corporation and so her voice fails measurably to impact the corporation's identity. I doubt we would deem the causal inefficacy of her contributions a reason to diminish her responsibility, especially if the corporate act for which we seek to assign responsibility is consistent with the vision of the corporation that she endorses.

I do not intend these appeals to intuition to be decisive. Indeed, the reader who rejects the analysis of a responsibility assignment offered above will find that they do no more

than beg the question. In the next subsection, however, I offer independent reasons for thinking that executives' contributions to the corporation's agency are not themselves the ground of their responsibility.

3. *The Ground of the Executive's Responsibility*

To arrive at the ground of the faultless executive's liability to blame, I begin by inquiring into the circumstances when we are, and ought to be, inclined to praise the executive for a feat of his company in which he did not participate. And, to make matters more concrete and less arcane, I consider a case where a veritable outsider comes up with a winning idea that the corporation adopts. As it happens, Frito-Lay's Flamin' Hot Cheetos snack chips represent one such innovation.⁹⁷

Flamin' Hot Cheetos were the brainchild of a Frito-Lay janitor, who concocted the recipe on a whim. With the encouragement of friends and family, he presented it to the company president.⁹⁸ It was love at first bite, and Frito-Lay's best selling product line was born.⁹⁹

When and why might we praise the head of the company for the product's, and so the company's, success?¹⁰⁰ After all, he did not participate in the product's creation. Nor would it make sense to credit the president for delegating effectively. It is not as if he had the foresight to identify and hire the talent that came up with the product—it is highly unlikely that the company president participated in hiring the janitor, let alone that he intuited the janitor's creative genius.¹⁰¹ Of course, he can be credited with having

97. See, e.g., Tania Luviano, *Our American Dream: The Janitor Who Invented Flamin' Hot Cheetos*, FOX NEWS LATINO (Mar. 26, 2012), <http://latino.foxnews.com/latino/community/2012/03/26/our-american-dream-richard-montanez-janitor-invents-hot-cheeto/#ixzz2cRtZDO1L> (discussing a janitor's creation of Flamin' Hot Cheetos and the success of the snack).

98. *Id.*

99. *Id.* Notwithstanding the enthusiastic description of Cheetos contained in the text above, I note that Cheetos is a lightning rod in food justice debates, and rightly so. For one thing, the snack food has been deemed "hyperpalatable" by food scientists and policy wonks, who believe it has been engineered to satisfy the brain's pleasure centers maximally and so become addictive, even while its nutritional status is so poor. See generally Monica Eng, *Flamin' Hot Cheetos Inspire Fanatic Loyalty Among Kids*, CHICAGO TRIB. (Oct. 11, 2012), http://articles.chicagotribune.com/2012-10-11/news/chi-20yearold-snack-with-high-levels-of-salt-and-fat-inspires-fanatic-loyalty-among-kids-20121011_1_ashley-gearhardt-snacks-addiction. Second, as "the rich are getting richer and the poor are getting poorer," Frito-Lay is seeking to "bifurcate" its market, by introducing more healthy snacks in upscale groceries like Citarella, and pushing sales of low-nutritional value chips as a side dish—rather than snack—in bodegas in communities where consumption of fresh produce is already tragically low. Stephanie Strom, *Frito-Lay Takes New Tack on Snacks*, N.Y. TIMES (Jun. 13, 2012), http://www.nytimes.com/2012/06/13/business/frito-lay-strategy-aims-for-top-and-bottom-of-market.html?pagewanted=all&_r=0 (quoting Ann Mukherjee, chief marketing officer at Frito-Lay North America).

100. Frito-Lay is a "perennial rock" in PepsiCo's portfolio, according to a stock analyst at Goldman Sachs, and the Flamin' Hot line of Cheetos is Frito-Lay's best selling snack. Strom, *supra* note 99.

101. On the other hand, the Frito-Lay president might contend that he created the kind of culture that led to Montañez's eureka moment since the president had sent a video message to all of the company's employees encouraging them to act like owners of the company. Luviano, *supra* note 97. Montañez was inspired, and it was not long thereafter that he hit upon the chile-infused Cheetos idea. *Id.* Still, this seems a rather slim basis for giving the Frito-Lay's president credit for the Flamin' Hot line. The video message might have been nothing more than an effort to boost employee morale. Less cynically, even if the president had hoped the message would generate some new ideas, it seems far-fetched that he could have reasonably believed the video stood a good chance of producing a product idea that turned out to be as popular and as lucrative as Montañez's. Thus, the

recognized greatness when he tasted it. But that recognition seems a far cry from authorship or ownership of the idea, given that the creation just fell into the president's lap (or mouth, as it were).

All of that is to say that our schemes for attributing acts or ideas do not readily allow for us to ascribe the new food product in question to the company's president. Nonetheless, once Flamin' Hot becomes a product line for Frito-Lay, it does seem appropriate to bestow praise upon the president for this addition to his company's product line. Why is this?

A few considerations present themselves. First, praise might be useful from a behavioral standpoint. As a reward, praise might encourage its target, and others who witness his enjoyment of it, to try to act in a praise-generating manner in the future. A similar argument might also be advanced to justify an executive bonus, which can be construed as a material, rather than psychological, award.¹⁰² The behaviorist explanation presupposes, though, that the rewarded executive had a hand in the praised performance, and that he and the others whom his reward motivates will have a similar ability to positively influence performance going forward. For the very idea that a reward should function as an incentive turns on the thought that those whom it is intended to incentivize can, and do, make a difference to the company's bottom line.¹⁰³ But it is notoriously difficult to draw a causal relationship between firm performance and executive performance, as the management literature demonstrates.¹⁰⁴ This is especially true in the case of a company president or CEO.¹⁰⁵ So the behaviorist justification seems to overstate, or over-estimate, executive power.

If that is true, however, then desert, at least as traditionally conceived, does not provide the rationale for praise or financial rewards either. Under the traditional conception, one deserves a reward if and only if one has made a discernible positive contribution to some desirable outcome.¹⁰⁶ Therefore, the traditional conception enshrines

video was, at best, a shot in the dark.

102. To see that such plans are explicitly about performance incentives, one need only consult a public corporation's SEC filing detailing its bonus compensation scheme. *See, e.g.,* Yahoo!, Inc., Executive Incentive Plan (Exhibit 10.15), (Feb., 2010), <http://www.sec.gov/Archives/edgar/data/1011006/000119312510043149/dex1015.htm>; Symantec, FY13 Executive Annual Incentive Plan (Exhibit 10.30), (May 5, 2012), <http://www.sec.gov/Archives/edgar/data/849399/000119312512241997/d318934dex1030.htm> [hereinafter Symantec Incentive Plan].

103. Michael C. Jensen & Kevin J. Murphy, *CEO Incentives—It's Not How Much You Pay, But How*, 68 HARV. BUS. REV. (May 1990) (describing "three basic [compensation] policies will create the right monetary incentives for CEOs to maximize the value of their companies").

104. *See, e.g.,* Michael Beer et al., "Do Incentives Work?," AOM Research Paper at 4, available at http://www.hbs.edu/faculty/Publication%20Files/98-078_5de6b935-51b9-42c9-a741-ce36da60073d.pdf ("researchers [have] been unable to establish that incentive compensation is causally related to firm performance").

105. Renee B. Adams et al., *Powerful CEOs and Their Impact on Corporate Performance*, 18 REV. FIN. STUD. 1403, 1429–30 (2005) (research suggesting that CEO power does not affect performance on average, although CEOs have greater effects on performance in firms where the CEO wields a lot of power relative to those where decision-making power is more diffuse). More generally, the great weight of management scholarship holds that CEOs have only a minor, and perhaps even a negligible, impact on firm performance. *See, e.g.,* Joel M. Podolny et al., *Revisiting the Meaning of Leadership*, in 26 RESEARCH IN ORGANIZATIONAL BEHAV. 1 (Barry M. Staw & Roderick M. Kramer eds., 2005); SYDNEY FINKELSTEIN & DONALD C. HAMBRICK, *STRATEGIC LEADERSHIP: TOP EXECUTIVES AND THEIR EFFECTS ON ORGANIZATIONS* (1996).

106. It's possible that the traditional conception is more forgiving than the formulation I offer in the text accompanying this footnote, rewarding the executive just so long as he tried to make a positive contribution, even

a commitment to individual responsibility. But we do not reward executives only when *they* have discernibly contributed to their corporations' successes. Instead, merely occupying their position at a time when the company does well, by whatever metric it chooses to measure its performance, suffices for a reward. Thus, a standard executive bonus plan measures the executive's bonus in light of corporate revenue and/or corporate earnings per share for the fiscal year in question.¹⁰⁷ For example at PepsiCo, Frito-Lay's parent company the CEO receives his bonus just so long as the company meets or exceeds its earnings target.¹⁰⁸

One could, of course, contend that overall firm performance is an effective proxy for the executive's performance, such that the executive can rightly claim responsibility for the firm's success. But that contention would seem to have as its corollary a (troubling) ground for assigning the executive blame for some act of wrongdoing of the firm: If the firm's success is evidence of the executive's positive impact so too the firm's wrongdoing must then be evidence of the executive's negative impact. But the latter claim, that the firm engaged in wrongdoing at least in part because the executive acted in an untoward way, is specious—the we know that many corporate crimes arise without the executive's foreknowledge, let alone his participation.¹⁰⁹ So the claim that the corporation's success arose at least in part because the executive acted in some laudable way need not be true either.

There is a more plausible way of understanding the relationship between the firm's performance and the executive's reward, however, which has little to do with the extent of the executive's causal contribution to the firm's success. As I argued in Part II, it is frequently foolhardy to seek to disaggregate individual contributions in the face of the complex network of interactions that yield corporate action. Even if we can isolate individual inputs, it might be impossible to assign individual causal responsibility for outputs, given the complex ways in which these inputs might combine and influence the contributions of others. And it is not just epistemic complications that should give us pause. The very prospect of seeking to disentangle the causal web is unseemly, as it is antithetical to the joint nature of the enterprise.

Let us begin by considering an employment relationship governed fully by prudential norms. Some such relationships allow both employee and employer to proceed in an entirely self-regarding way. Each is a free agent. The relationship can nonetheless be mutually beneficial, at least while both parties share the same goals. But assuming no contractual terms to the contrary, no justified complaint of disloyalty will lie if the employee walks away, or if the employer terminates the employee, when the relationship ceases to benefit the party that ruptures it.

if his contribution ultimately had no effect. Even still, one would imagine that a reward for effort alone would be rare, arising only when, for example, the executive's attempt would ordinarily have worked yet unusual or unforeseeable circumstances thwarted it.

107. See e.g., Symtante Incentive Plan, *supra* note 102.

108. PepsiCo, Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Form Def. 14A) (Mar. 24, 2006), <http://www.sec.gov/Archives/edgar/data/77476/000119312506062537/ddef14a.htm> ("For the fiscal year 2005, [the CEO's] base salary continued to be capped at \$1,000,000. He was eligible for a 2005 annual incentive award because PepsiCo achieved its pre-approved earnings target which was set to achieve third quartile performance relative to peer companies.").

109. See, e.g., *United States v. Hilton Hotels*, 467 F.2d 1000, 1004 (9th Cir. 1972) (affirming corporate defendant's conviction despite employee's violation of express company policy).

A corporation's executives, by contrast, do not enjoy the purely self-regarding stance that other employees might rightfully occupy. An executive position can be defined by any number of explicit tasks and responsibilities, but this Article contemplates something more diffuse, which goes to the spirit with which the executive should hold his office. The duty of loyalty can be understood to capture this spirit—loyalty to the joint enterprise and to those with whom one pursues it. And this loyalty in turn explains and motivates the attitudes the executive might adopt, and be expected to adopt, in pursuing his tasks and responsibilities—assiduousness, attention to the company's welfare even at a cost to his own, a willingness to view himself as a part of an enterprise larger than him and to conduct himself accordingly. For ease of reference, I refer to the loyalty and the attitudes to which it should give rise as the executive's *commitment*.

We praise or reward the executive when his corporation does well, then, because it is the right way to acknowledge his commitment to the corporation. When it comes to bonuses, for example, we do not require that the executive significantly improve the company's bottom line as a condition of bestowing the reward because proceeding in that way would unduly single the executive out. If the corporation's compensation committee were to try to discern just what role the executive played, or didn't play, in the company's success, it would undermine the sense that all of the corporation's senior officers (and other employees as well) are part of a team, or "in it" together.¹¹⁰ It would fail, that is, to honor the attitudes of loyalty that the corporation should foster.

This is not to say that the executive's conduct can never influence his bonus. The compensation committee might enhance his bonus above the standard amount where the executive has measurably contributed to improving the company's bottom line, just as it might limit or even withhold the bonus amount if the executive has proceeded with a disaffection unsuited to his office. The point, however, is that all else being equal the executive can and should receive some reward just so long as the firm performs well, and independent of whether he proximately caused the improved performance. Rewarding him when the company does well solidifies the sense that his and the company's fortunes go hand-in-hand, and acknowledges that he has internalized this sense of shared fate through his commitment.

If that's right, though, one might wonder why we bestow the reward only when the corporation does well. After all, the executive who maintains his position even as the corporation is faring poorly demonstrates a great commitment to the enterprise too—certainly greater than that of an executive who jumps ship at the first sign of a company's downturn, at any rate. As it turns out, however, withholding a reward during a downturn is entirely consistent with acknowledging the executive's commitment, for the withholding is just another way of underscoring and honoring the fact that the executive's fate is intertwined with that of his firm. In short, just as rewarding the executive when the corporation does well affirms the fact that he is part of a larger entity, and that its welfare and his are aligned, so too does withholding the reward when the corporation does poorly.

With this understanding of the ground of *praise and reward* in hand, we are now in a position to identify the ground of *shared blame*: The corporation has committed a crime, and it is time to assign responsibility for it. The crime's individual perpetrators are, of

110. Cf. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 264 (1999) (stressing the importance of "lateral interaction" among team members as opposed to hierarchical governance, which should have the role of mediating "horizontal disputes" among team members).

course, the most likely and deserving candidates. But just as the executive need not have proximately caused the corporation's success to justly earn his bonus, neither must he have proximately caused the corporation's crime to justly earn our censure. Faced with the complex network of interactions within the corporate web, we are not in a position to discern whether or to what extent the executive's activities facilitated the crime. But even if we were, we would do violence to the norms governing the executive's position if we undertook this effort to individualize responsibility. We blame the executive, independent of whether he is culpable for the crime, as a way of honoring and affirming his commitment. And, if he is suitably loyal, he should see himself as implicated in all of the corporation's acts, and so should recognize that we treat him justly when we see him in this way too.

One might be willing to concede that the executive ought to accept blame but deny that the norms underpinning his acceptance should have any implications for the way that we—outsiders to the corporation—ought to treat him, or at least deny that these norms license our blaming him. And indeed the objection should give us pause. The claim I defend here is not that the norms of the organization are normative for outsiders. Just as the corporation's rules of recognition do not on their own determine when outsiders are licensed in ascribing some act of the corporation's employee to the corporation itself, neither do its norms of loyalty, solidarity and so on determine when and to whom outsiders are licensed in assigning responsibility for the corporation's acts. We should accept the corporation's rules and norms only if we have independent reason to find them valuable. I contend that when it comes to the corporation's norms of loyalty, solidarity, and so on—those norms that obligate the high-level executive to accept responsibility for a corporate wrong (as well as for a corporate success)—we do have such reason.

More specifically, we should want the executive to conceive himself as bound up with the corporation—to see that its acts redound to him. If he conceives himself in this way, he will have a greater incentive to monitor the corporation, by supporting those initiatives that look likely to lead to its success and stymying those that look likely to get it into trouble. But in addition to promoting corporate activity that is good and deterring that which is bad, the relationship of allegiance is valuable in its own right.

Our lives are made better through joint activity, not just because of the products of such activity (the idea behind the saying that “many heads are better than one”) but also because doing things with others is itself a source of value. Relationships within profit-seeking organizations provide many of the same goods that members obtain in groups that are not about profit at all, such as the relationships among members of the same place of worship, or card playing group, or informal sports league, or extended family. Membership in groups of these kinds provides us with a sense of community, a sense of belonging, a sense of being part of something larger than ourselves. To be sure, the member does not experience these goods immediately upon joining the group; they develop out of the time she spends there. And alongside the typical experience of membership—indeed, what makes it possible—is that the member comes to adopt a certain stance toward the group and toward her fellows. She comes to see herself as belonging to, and being involved in something larger than herself.¹¹¹

To occupy this stance, she must internalize a set of norms, and expect these norms of

111. Cf. DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* 97–111 (2012) (offering a similar account of the genesis of the bonds of friendship, and the corresponding obligations that come to obtain between friends).

her fellows, as they expect them of her: Membership gives her a reason to take account of the interests of the group, and the interests of her fellows by extension, in ways she had no reason to before. Membership gives her a reason—when she is in the space of the group—to partake of its practices, even if she would never abide by these outside of the group. For example, a member of a Francophile organization will come to comfortably greet her fellows with a two-cheek kiss, even though the gesture felt strange and strained when she first joined the group, and is one she would never offer outside of the group. And membership gives her a reason to seek to acknowledge and solidify the bonds between members, by acting in ways that reflect her recognition that the group has a hold on her—that she owes it and her fellows loyalty.

Group action that is the subject of judgment—praise or blame—provides occasion for the member to exhibit the solidarity expected of her, by eschewing the prerogative that she enjoys outside the group to be judged in isolation from others. Instead, she should recognize, and the good group member will recognize, that the judgment issued is not about her individually, it is about her qua group member. And so long as the group action is judged correctly, the resulting judgment is at least prima facie correctly assigned to her qua group member. Thus she should, all else equal, see that she is an appropriate object of praise when the group does well, and an appropriate object of blame when the group does wrong—*independent of what she contributed to the particular success or wrong for which the group is being judged*. That she is inclined to see herself in this way is reflective of the norms of solidarity and loyalty that help make group relationships valuable.

Further, given the value in these relationships, we have reason to honor them—to take her acceptance of praise or blame at face value, rather than to seek to judge her on the basis of her own merits. One could state the point by contending that assessing each member on the basis of her own merits would undermine the source of value in these relationships. But there is perhaps a stronger way of putting it, which would involve denying that there is anything like one's own merits when it comes to group action. To be a member is to forsake any notion that one has an identity apart from the group *when it comes to judgment for group action*. Thus, to express our appreciation of the value of membership is to treat the member in a way that respects what has been forsaken, by responding to the member in the way she would have us respond to her.

With that said, I note an important qualification. I have been referring to praise or blame the member deserves independent of her participation *when all else is equal*. It is now time to shed some light on circumstances that make it the case that all else is not equal.¹¹² In particular, consider the dissident group member who sincerely and valiantly protested against (what she perceived to be) a group wrong prior to its commission. In this example, although she did everything she could to prevent the act in question, the group committed the act anyway. We might think her vocal opposition sufficient to exempt her from membership responsibility. When considering this possibility, we might think of two stages. First, a member's commitment to the group furnishes a *presumption* that she is an

112. I note that the assignment of responsibility is prima facie correct, or correct when all else is equal, to allow for the possibility that there may be countervailing considerations that undercut the assignment. Elsewhere, I deal with these considerations at length, focusing in particular on the case of group members who vocally and strenuously opposed the group act for which the group is now judged. See Sepinwall, *supra* note 15, at 231–61. It would be beyond the scope of this Article to undertake an excursion into these considerations. For now, then, we may assume that the generic member contemplated here does not have available to her a set of considerations that would render our judgment of her inapt.

appropriate object of praise for its feats or blame for its wrongs, independent of her participation in either. At a second stage, the member can seek to defeat the presumption in light of countervailing considerations, chief among which is the member's dissent. Various factors will determine whether the member succeeds, including the gravity of the group offense (or the magnitude of its accomplishment), the strenuousness of the member's protest efforts, and the extent to which she otherwise remains a committed group member. I elaborate on the nature and role of these factors elsewhere.¹¹³ For ease of exposition here, however, I assume that no countervailing considerations defeat an assignment of blame for the executive in question. All that we have is a corporate offense that the executive neither participated in nor knew about in advance and the presumption that he bears blame simply by virtue of his role will go unchallenged.

So, all else equal, we may praise or blame the group member just by virtue of what the group has done. More to the point, we may praise or blame the executive by virtue of what the corporation has done, again all else equal. With that said, praising and blaming are a far cry from rewarding and punishing. I seek to make the move from the former to the latter in Parts V and VI. The aim here has been to lay the moral foundation for blame. A couple of clarifications make that foundation more solid.

First, given that I arrive at the account of shared blame by culling insights from our practice of shared praise, one might be tempted to construe the account as just another species of the benefits-based accounts we encountered in Part III, where incurring benefits and burdens from membership were just two sides of the same coin. But, to be clear, the claim here is not: "The executive gets to enjoy rewards when the corporation does well, so it follows automatically, or as a matter of consistency, that he should incur punishment when the corporation does wrong." Instead the claim is more fundamental: The considerations that justify the executive's liability to praise, and also his reward, are the very same ones that justify his liability to blame and also whatever sanctions appropriately flow from it. In particular, the executive's commitment is the common explanation for his sharing responsibility for both the corporation's feats and its crimes. That the relationship between the corporation's acts and the executive's responsibility is mediated through the executive's commitment marks a significant distinction from benefits-based accounts. Those accounts viewed both the benefits and burdens of membership in a group as coming with the territory, as it were. But they left opaque the reason for which any benefits or burdens should come with the territory. They could not explain what it was about membership that licensed assignment of benefits or burdens and for that reason could not justify restricting benefits or burdens to members alone. The account advanced here, by contrast, identifies the executive's commitment as the ground for his justly enjoying praise and incurring blame for the corporation's activities. Since individuals who are not members of the corporation are not expected to harbor a commitment to it, we have a ready way of defending the differential treatment they receive.

In describing the executive's commitment and its role in grounding his liability to praise and blame, I have deployed overtly moral rhetoric, casting matters in terms of commitment, loyalty, intertwining of fates, etc. As a result, one might think the conception of the executive's role operating here implausibly romantic or at least overly demanding. After all, most modern executives acknowledge that they have commitments to their corporation but only up to a point. And there is a separate worry that holding all executives

113. *Id.*

responsible, independent of their contributions to the corporation's crime (or success), will entail that we treat all of these executives equally, subjecting them to equal amounts of censure (or praise). To allay these concerns, we need to add one more piece to the puzzle—an inquiry into the way in which the magnitude of the executive's responsibility varies according to the commitment the corporation demands of her.

4. The Magnitude of the Executive's Responsibility

Not all executives are expected to bear the same amount of loyalty to their respective corporations. Instead, there are (at least) four sources of variation in the stringency of the commitment expected of them and the corresponding amount of responsibility they ought to bear for the corporation's crime. First, the strength of the commitment expected of executives may vary simply on the basis of the kind of corporation in question. For example, a closely held corporation may expect—and be known to expect—a strong commitment on the part of its officers (who will often be its directors as well). It will claim much in the way of officers' time and energy and also demand much in the way of their allegiance to the group. Large, publicly traded corporations may expect its officers to operate at a much greater remove and experience only a very weak sense of allegiance to the group.

Second, there may be much variation in the stringency of the commitment expected even within the same kind of business organization. For example, cultural differences between corporations of similar size may account for disparities in the amount of allegiance they demand. Thus some corporations may demand strong devotion to the corporation's welfare while others permit a greater sense of detachment.

Third, one's rung on the corporate hierarchy and the nature of one's duties likely also inform the strength of the commitment one is expected to bear. Thus, as a general matter, the CEO might be expected to evidence more dedication to the corporation than, say, the VP of marketing. At the same time, the expected strength of commitment need not vary strictly along the corporate ladder. Instead, in some corporations, one's job description—the actual duties and responsibilities one is expected to fulfill—may be far more indicative of the strength of one's expected commitment than is one's job title.

Finally, no matter the level of commitment expected by the company itself, individual officers may vary with respect to the amount of allegiance they expect of themselves. Thus, some executives may view the expected strength of commitment as fully consonant with their strength of attachment to the corporation, and they may contribute no more or less, and exhibit no more or less allegiance, than what the corporation expects. Other executives, as a result perhaps of a sense of dissatisfaction with the corporation, may believe that it expects more of them than it deserves; these executives may contribute less than the corporation expects and insist more upon their separateness from the corporation than is consistent with the expectations attaching to their office. Finally, some executives may willingly exceed the corporation's expected level of commitment; they may throw themselves into the life of the corporation and feel as if their fates and its, are especially strongly entwined.

In articulating these four ways in which the strength of executives' expected commitments may vary within and between corporations, I have assumed that it is possible to measure the extent of expected or actual allegiance. I will not offer a methodology for doing so here, leaving that task instead to sociologists and institutional psychologists. In what follows, I rely on the following two assumptions: First, as someone decides whether

to assume a particular position within the corporation, he or she can gain a feel for the strength of allegiance the position demands; and, second, we can, at least with the help of social science, arrive at least at a relative ordering of the strength of the commitment expected of different positions that allows us to determine the magnitude of a responsibility assignment appropriate to aim at individual executives.

What are the implications, then, of these varying levels of allegiance for the executive's responsibility? In the analysis of the structure of a responsibility assignment I offered above, I noted that the magnitude of an individual's responsibility varies according to the nature of the act for which she is held responsible and the ground of her responsibility. Applying that analysis here, I contend that the executive's responsibility is proportionate to whichever is greater—the strength of the commitment the corporation expects of him *or* the strength of his felt allegiance. I argue, in other words, that the expected strength of the commitment sets the threshold for the executive's responsibility and, further, that enhanced responsibility is in order where his felt allegiance is greater than that which the corporation expects of him. Let us consider in turn the theoretical possibilities that arise once we determine that the executive's commitment to the corporation grounds his responsibility for the corporation's crime.

First, we could adopt a fully psychologized notion of fidelity, in which case the executive's responsibility would vary *strictly* according to the strength of his allegiance. Second, we could reject a psychological conception of fidelity, and restrict the magnitude of the executive's responsibility to the magnitude of the commitment the corporation expects of him. Third, where the executive's felt allegiance diverged from his expected allegiance, we could hold a member to the lesser of his felt or expected allegiance. Finally, we could hold the executive to the greater of his felt or expected allegiance, as I believe we should. Let us consider the cogency of each of these alternatives in turn.

Under the first alternative, the disaffected executive—that is, the executive who experienced a weaker allegiance to the corporation than that expected of him—would be held responsible just to the extent of the strength of his allegiance. If the executive experienced no allegiance to the corporation, he would be off the hook altogether. Something like this lies at the core of accounts of shared responsibility that predicate members' responsibility upon their positive identification with the group.¹¹⁴ However, it is often counterintuitive to absolve or implicate someone solely on the basis of their *felt* connection to the group. After all, as we saw, non-members might strongly identify with the group and, yet, not bear responsibility for the group's acts, while members might psychologically disengage from the group and yet rightly be held responsible. A non-psychologized notion of allegiance helps to justify our intuitions in these cases: If an objective expectation of allegiance underpins the assignment of responsibility, then it makes sense that we should resist holding responsible the outsider whose connection to the group is solely psychological, while seeking to impose responsibility on the member who denies any psychological connection.

Perhaps, then, the way to proceed is to fix responsibility solely to the group's expected level of allegiance. Under this second alternative, executives who experienced an allegiance greater than the expected level would not come to incur any more responsibility than would those whose level of allegiance met or fell below the corporation's threshold.

114. See, e.g., Farid Abdel-Nour, *National Responsibility*, 31 *POLIT. THEORY* 693, 703 (2003) (identifying several examples of positive identification with certain groups).

The problem with this alternative is that it ignores the expressive dimensions of an executive's allegiance. When we contemplate the responsibility of the group member who did not participate in a group crime, we ought to consider not just the fact that his role entailed that he would relinquish, to an extent compatible with the group's expected allegiance, his entitlement to be judged apart from the group; we ought also consider—and I believe we do also consider—the fact that *he* felt an especially strong connection to the group. Thus, for example, we think it proper to respond more harshly to the Nazi supporter than to the indifferent German citizen, even if neither participated in any acts of persecution. Similarly, in contemplating the WorldCom fraud, we think it proper to scorn the WorldCom executive who supported the aggressive culture of profit-seeking instituted by CEO Bernie Ebbers¹¹⁵ while we resist condemning the executive who silently opposed it, even if neither participated in WorldCom's fraud. Part of the disparity in our response may flow from a sense that the supporter bears a stronger causal connection to, say, WorldCom's fraud than does the indifferent or silent employee, since the former's support may have emboldened or otherwise encouraged those who carried out Ebbers' agenda. Part of the disparity in responses, however, likely also stems from a sense that the supporter is a worse person *independent of the effect of his support on the acts in question*. "How could you have felt so loyal to a corporation that would tramp so callously on individuals' interests?" is a question that runs through our minds. The second alternative, in which we operate exclusively with a non-psychologized notion of allegiance, cannot accommodate or make sense of this harsher response.

That being said, neither can the third alternative, in which we hold a member responsible in proportion with the lesser of his actual or expected allegiance. Under the third alternative, if the executive were to feel less committed than he ought, his responsibility would be reduced accordingly—and improperly, as the discussion of the first alternative demonstrated. On the other hand, if the executive were more committed to the transgressing corporation than he was expected to be, his greater allegiance would not earn him extra sanction. As we have seen, this too presents a problem. In short, this third alternative suffers from the problems that caused us to reject both the first and second alternatives.

We are left then, as I believe we should be, with the fourth alternative: We ought to set the threshold for our response to the executive at a level that corresponds to the corporation's expected level of allegiance, for an executive ought not to be exculpated because he *failed* to participate in the life of the group or experience the alignment of interests that lie at the core of a commitment to the joint project. Where the executive experiences an allegiance to the corporation greater than that which the corporation expects, however, it is appropriate to hold him more responsible than we hold the executive whose allegiance is less than or equal to that which the corporation expects of him, for the more committed member expresses a deeper allegiance to the group through his stronger commitment. Through this enhanced commitment, the executive signifies that he is prepared to relinquish his entitlement to be judged apart from the group to an extent greater than that which the group demands of him. While his willingness to incur more

115. See Report of Investigation by the Special Investigative Committee of the Board of Directors of WorldCom, Inc. 18–19 (Mar. 31, 2003), <http://www.sec.gov/Archives/edgar/data/723527/000093176303001862/dex991.htm> (stating that WorldCom's culture of misconduct began at the top, with CEO Ebbers).

responsibility than is required of him, qua non-participating executive, is not itself a reason to hold him more responsible, the support for the group that this willingness communicates *is* such a reason. In other words, he deserves additional reprobation because he expresses, through his stronger allegiance, additional approval of the corporation even as it transgresses. With these pieces of theory in hand, it is now time to return to doctrine.

V. TRANSLATING THE EXECUTIVE'S LIABILITY TO BLAME INTO LIABILITY TO PUNISHMENT

The vast majority of the doctrines allowing for the prosecution of a corporate executive for his corporation's crimes require that the executive play a culpable role in the corporation's crime. Most straightforwardly, an executive who participated in the crime may be prosecuted on a theory of direct liability.¹¹⁶ Thus, for example, Rule 10b-5, promulgated in light of the Securities and Exchange Act of 1934, allows for the prosecution of executives who engaged in willful deceit, manipulation or fraud.¹¹⁷ Similarly, Sarbanes–Oxley requires certain executives to certify the accuracy of their corporation's financial statements, and subjects these executives to criminal liability if the statements are subsequently found to be fraudulent and the executive knew of the inaccuracies at the time he certified them.¹¹⁸

Against a backdrop where the fault principle undergirds most of the ways in which executives come to bear criminal liability for their corporation's crimes, the RCO doctrine is a notable exception. The RCO doctrine permits the prosecution and punishment of a corporate executive who had the authority and power to prevent her corporation's crime and failed to do so.¹¹⁹ Moreover, the doctrine extends to the executive whether or not she knew about the crime in advance; where she did not, she obviously could not have prevented it. But the RCO doctrine allows for her to be prosecuted and punished nonetheless.¹²⁰ Put bluntly, the RCO doctrine permits the state to hold criminally liable executives who, in the traditional conception of culpability, are innocent of their corporation's crime.

No wonder, then, that the RCO doctrine generated outrage at the moment of its announcement,¹²¹ and that scholars continue to decry its use in cases where the prosecuted

116. See RESTATEMENT (THIRD) OF AGENCY § 7.01 (stating that an agent is subject to a third party harmed by the agent's conduct).

117. 17 C.F.R. § 240.10b-5; see Allan Horwich, *An Inquiry into the Perception of Materiality as an Element of Scienter Under SEC Rule 10b-5*, 67 BUS. LAW. 1, 4 (2011) (noting that Rule 10b-5 requires proof that the defendant "willfully" violated the provision).

118. Sarbanes–Oxley Act, 18 U.S.C. § 1350 (2002).

119. *United States v. Dotterweich*, 320 U.S. 277, 282–83 (1943).

120. The Supreme Court later added a defense of objective impossibility. *United States v. Park*, 421 U.S. 658 (1975). That defense still permits conviction of the executive who could not have prevented the corporation's offense because he did not know of it in time, so long as it was within his power to obtain that knowledge. Where this is so, we might say that it was *subjectively* impossible for the defendant to have prevented the crime (how could he stop a crime of which he was ignorant?) but not objectively impossible for him to have done so.

121. *Dotterweich*, which inaugurated the RCO doctrine, was a 5 to 4 decision, with Justice Murphy authoring a vigorous dissent in which he decried the Court's departure from the tenets of individual culpability. *Dotterweich*, 320 U.S. at 286 (Murphy, J., dissenting) ("It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who, like the respondent, has no evil intention or consciousness of wrongdoing."). Justice Murphy also condemned the Court's violation of the principle of legality, writing: "each person, regardless of economic or social status, [is entitled] to an unequivocal warning

executive did not know, and could not have known, of his subordinates' crime, and so could not have prevented it.¹²² We are now in a position to see that their reactions result from an unduly constrained understanding of blameworthiness. The purpose of this Article is to contest and expand that understanding. The last Part advanced the moral arguments for blame. Here, I begin the transposition to law by describing the RCO doctrine. In Part VI, I argue that the account of executive blame licenses our prosecuting and punishing corporate officers under the doctrine.

A. The RCO Doctrine

The RCO doctrine provides for the prosecution and punishment of an executive for a crime of his corporation in which he did not participate and of which he might even have been ignorant. Thus, in the case where the Supreme Court first announced the doctrine, the Court upheld the conviction of a corporate president for his company's misbranding and adulteration of drugs shipped in interstate commerce even though there was "no evidence . . . of any personal guilt on [the defendant's] . . . part . . . [and] no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction."¹²³ In this way, the Supreme Court opened the door to executive criminal liability without fault.

The potentially vast reach of the doctrine emerged some 30 years later in the Court's next RCO case. *United States v. Park* affirmed the conviction of John Park, president and chief executive officer of Acme Supermarkets, for a rodent infestation at an Acme warehouse.¹²⁴ Acme is a national retail food chain that, at the time, had "approximately 36,000 employees, 874 retail outlets, 12 general warehouses, and four special warehouses."¹²⁵ The infested warehouse was located in Baltimore, whereas Park's office was situated in Philadelphia, along with company headquarters.¹²⁶ Further, Park

testified that although all of Acme's employees were in a sense under his general direction, the company had an 'organizational structure for responsibilities for certain functions' according to which different phases of its operation were 'assigned to individuals who, in turn, have staff and departments under them.' He identified those individuals responsible for sanitation, and related that upon receipt of the January 1972 FDA letter, he had conferred with the vice president

from the legislature as to whether he is within the class of persons subject to vicarious liability. Congress cannot be deemed to have intended to punish anyone who is not 'plainly and unmistakably' within the confines of the statute." *Id.*

122. See, e.g., Alschuler, *supra* note 21, at 1359; Brent J. Gurney et al., *The Crime of Doing Nothing: Strict Liability for Corporate Officers Under the FDCA*, 22 ANDREWS LITIG. REP. 2, 2 (2007), available at http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/The_Crime_of_Doing_Nothing.pdf (referring to the doctrine as "alarming"); Jennifer Bragg et al., *Onus of Responsibility: The Changing Responsible Corporate Officer Doctrine*, 65 FOOD & DRUG L.J. 525, 525 (2010) (contending that the doctrine is "at odds with fundamental notions of our criminal justice system").

123. *Dotterweich*, 320 U.S. at 286 (Murphy, J., dissenting).

124. *Park*, 421 U.S. at 679–83. As Richard Singer and Doug Husak note, *Park* has been said to be the first United States Supreme Court opinion that actually embraces strict criminal liability for purposes of conviction. Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 874 (1999).

125. *Park*, 421 U.S. at 660.

126. *Id.* at 660–61.

for legal affairs, who informed him that the Baltimore division vice president ‘was investigating the situation immediately and would be taking corrective action and would be preparing a summary of the corrective action to reply to the letter.’ [Park] stated that he did not ‘believe there was anything (he) could have done more constructively than what (he) found was being done.’¹²⁷

The Court found Park’s claims of innocence unavailing. Given that Acme had violated provisions of the Federal Food, Drug and Cosmetics Act of 1938 by sending into interstate shipment adulterated foods, the Court argued that it was appropriate to hold criminally responsible some of its officers, on the principle that “those corporate agents vested with the responsibility, and power commensurate with that responsibility, to devise whatever measures are necessary to ensure compliance with the Act bear a ‘responsible relationship’ to, or have a ‘responsible share’ in, violations.”¹²⁸ Importantly, the ground of the executive’s criminal liability was, the Court maintained, not in his causal contribution to the offense. Instead, the Court contended that the officer’s position of authority sufficed for blame: “The concept of a ‘responsible relationship’ to, or a ‘responsible share’ in, a violation of the Act indeed imports some measure of blameworthiness.”¹²⁹ The rationale for the conviction lay, then, in the expectations undergirding the role itself. Causal responsibility was not relevant because, in a large corporation, presumably many high-level executives possess the authority and power to prevent, for example, a rodent infestation. If more than one of these high-level executives omits to prevent the infestation, none of them can be said to be a but-for cause of the corporation’s crime. Instead, it must be something about the role itself that is sufficient to implicate the executive. While the Court does not elucidate the lofty but vague concept of a “responsible relationship,” I believe that its best interpretation—the one that represents the law “in the better light”¹³⁰—is the one that I advanced in Part IV, according to which a corporate officer may be blameworthy just in virtue of her role.¹³¹ In light of the financial crisis, we have good reason to urge that the doctrine be put to greater use.

VI. CRIMINAL LIABILITY FOR FAULTLESS CORPORATE EXECUTIVES

Why prosecute the responsible corporate officer? Given that the RCO doctrine is sometimes invoked in civil suits, and given the deep discomfort with faultless criminal liability, one could propose a two-track deployment of the doctrine, with criminal liability reserved for those cases in which the executive could have prevented the corporation’s crime but failed to do so, and civil liability imposed for cases where the executive could

127. *Id.* at 663–64.

128. *Id.* at 671. It may be worth noting that, although Acme was also convicted of the violations, the corporation’s conviction is not a predicate for the conviction of the responsible corporate officer. *See, e.g., Dotterweich*, 320 U.S. at 279 (“Equally baseless is the claim of [the corporate president] that, having failed to find the corporation guilty, the jury could not find him guilty. Whether the jury’s verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial.”).

129. *Park*, 421 U.S. at 673.

130. RONALD DWORKIN, *LAW’S EMPIRE* 53 (1986).

131. *See generally* Sepinwall, *supra* note 60 (I trace the evolution of the doctrine in federal and state law, and argue that, in deviating from the doctrine’s strict liability foundations, these more recent decisions undercut the doctrine’s defensibility.).

not have done so.¹³² Yet because civil liability would fail to track the moral meaning of responsibility on the account of shared responsibility I advanced, I shall seek, in Part VI.A, to defend a more controversial proposal, under which criminal liability would be permissible *whether or not the executive could have prevented the corporation's crime*. Concomitant with this defense, I shall, in Part VI.B, suggest (non-incarcerative) sanctions that reflect the nature of the executive's responsibility as I conceive of it. These sanctions will serve to diminish, if not eliminate, concerns about criminal liability for the defendant who does not meet the hallmarks of individual culpability. In Part VI.C, I seek to round out the account by describing the scope of criminal liability I believe it permits.

A. Prosecuting Responsible Corporate Officers

In Part IV, I sought to articulate a *moral* argument for the propriety of assigning blame to executives. To recap: I argued that the executive is blameworthy in light of her commitment to the corporation, which requires that she see herself as bound up in the corporation and so implicated in its acts. When and why should his liability to blame entail his liability to punishment? Two conditions must each be met, and where they are met, criminal liability is appropriate.

First, there must be a genuine crime *of the corporation*. Much of the consternation about holding group members responsible for crimes of their fellows arises—rightly, in my mind—because mere shared membership in a group does not suffice to ground shared responsibility. Instead, shared responsibility follows only from an act *of the group as a whole*; it does not and was never intended to license transmission of responsibility from the perpetrator of a wrong to some other individual simply because both happen to be members of the same group.¹³³ To be sure, determining when and why we may ascribe some employee's criminal act to the corporation is an exceedingly complicated task, and I do not seek to articulate the necessary and sufficient conditions for doing so here.¹³⁴ Nonetheless, there are clear cases. Widespread fraud within a bank implicating employees at the highest levels of the corporation would seem to be a particularly relevant example.

Assuming we do have on our hands a crime that is plausibly and appropriately considered to be that of the corporation, when and why may we punish the faultless executive? The answer to that question turns on a second condition—*viz.*, that some threshold level of commitment to the corporation be met in order to activate criminal liability. Recall that the magnitude of the executive's shared responsibility will be determined by the egregiousness of the corporate crime as well as the strength of her expected commitment. I assume that a non-negligible commitment is expected of any executive who holds her position in more than name only, and so blame for the corporation's criminal acts may be assigned to her. But the strength of commitment necessary for blame may well be less than the strength of commitment necessary for

132. This two-track scheme is suggested in *Park*, 421 U.S. at 673 (stating that “the Act, *in its criminal aspect*, does not require that which is objectively impossible. The theory upon which responsible corporate agents are held criminally accountable for ‘causing’ violations of the Act permits a claim that a defendant was ‘powerless’ to prevent or correct the violation to ‘be raised defensively at a trial on the merits.’”) (emphasis added).

133. This is the nightmare scenario that those who deem shared responsibility barbaric seem to have in mind, but it is not the scenario that most defenders of shared responsibility contemplate.

134. Others have sought to do so, with more or less success. For an excellent account on this score, see generally, WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS* (2006) (examining the relationship between an employee's criminal act and a corporation's liability for that act).

criminal liability, especially if the corporate crime is not one that has produced substantial harm. Given the stigma of criminal liability, we should require that the amount of warranted blame exceed some baseline before subjecting the blamed executive to prosecution and punishment. It would be difficult to state with any precision just where this baseline is, but the difficulty is not unique to the account of responsibility I advance here. Every society needs to determine for itself how blameworthy an actor must be to render her justly subject to criminal law. Once we have a general sense of the minimal level of blameworthiness required for criminal liability, we may compare the corporate officer's blameworthiness to that of others we think deserving of punishment; where the corporate officer's liability to blame is at least as great as theirs, prosecution and punishment will be warranted. This is just how we proceed anytime we have occasion to ask whether it would be just to criminalize some species of conduct.¹³⁵

Of course, one might contend that no matter the magnitude of the harm caused by the corporation's crime, the executive's commitment will never be strong enough to make criminal liability appropriate. Put differently, given that blameworthiness here turns not on the executive's culpable contribution to the crime but instead on his commitment to the corporation, one might argue that to heap punitive sanctions on top of whatever reproach we might think appropriate far exceeds the treatment the executive deserves.

Two quick points in response to this worry. First, I argued in Part IV that the executive has reason to accept blame, because his doing so is part and parcel of what makes membership in a group like the corporation valuable. And I argue further that we have reason to impose blame because doing so is the appropriate way to acknowledge the value in these relationships. The criminal law can be but another way of affirming and so promoting this value, and a uniquely powerful one at that. To be sure, when one thinks of the traditional reasons for which we punish, we do not do so to affirm relationships we value. Even the standard expressivist theory of criminal law sees punishment as a way of restoring the victim's moral status, or as a way of debasing the defendant whose offense would otherwise signal his superiority relative to the victim.¹³⁶ Expressivists do not typically see punishment as a way of recognizing valuable relationships more generally. At the same time, there is no other branch of law that speaks as compellingly to and for our values as the criminal law does. To the extent one persists in doubting that criminal law

135. The fact that I resist our fixing the level of blame absolutely and instead urge our proceeding comparatively is compatible with the way we typically manage judgments of relative blame and warranted sanction. See, e.g., Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1867–73, 1883–87 (2007) (examining the results of studies wherein participants assigned liability for certain offenses). Moreover, this way of proceeding bears some resemblance to the *Dotterweich* Court's refusal to fix in advance the set of corporate officers who might be held liable under the RCO, leaving this determination instead to the discretion of prosecutors and judges. See *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) ("It would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress, to wit, to send illicit goods across state lines, would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted.").

136. See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1508 (2000) (describing expressivism); Jeffrie C. Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY 25 (Jeffrie C. Murphy & Jean Hampton eds., 1988); see also Jean Hampton, *Forgiveness, Resentment and Hatred*, in FORGIVENESS AND MERCY 128 (1988) (explaining how punishment equalizes a victim's moral status by inflicting on the culprit treatment as bad as that which the victim sustained).

should speak here, I suspect that one objects not to criminal liability for the faultless executive per se but instead to the sanctions one imagines that liability will entail.

This brings us to the second response: I agree that it would be unjust to impose upon the executive convicted under the RCO doctrine the sanctions that typically accompany a guilty verdict. For that reason, the sanctions I propose lack most, if not all, of the material penalties that traditional sanctions involve.

B. Punishing Responsible Corporate Officers

Commentators have predicted,¹³⁷ and regulators have called for,¹³⁸ an increase in RCO prosecutions. In light of the financial meltdown, this could be seen as a welcome development. But we should celebrate it only if RCO liability is itself defensible, and only if the sanctions it occasions appropriately conform to the magnitude and kind of responsibility it tracks. The foregoing has sought to establish that it is at least sometimes appropriate to prosecute executives who did not culpably contribute to their corporation's crime. Here, I sketch the kinds of sanctions that might accompany a guilty verdict.

Most simply, the conviction itself, along with its attendant stigma, might suffice. In this instance, RCO liability is not very different from those cases where it is the corporation that is prosecuted and the corporate executive is made to sit at the defendant's table and to stand so as to receive the judge's or jury's verdict.¹³⁹ However, whereas the executive in the corporate criminal trial is a human stand-in for the disembodied corporation—its public face, as it were—the executive on the account here is herself the target of warranted blame in light of her own role within the corporation.

Let us set bare conviction with no attendant material sanctions as the baseline.¹⁴⁰ Three factors determine when upward departures from the baseline are warranted. Recall that the baseline applies to those executives who are expected to harbor a commitment to the corporation sufficiently great to subject them to criminal liability.¹⁴¹ There may be some members of the corporation who are expected to harbor a greater commitment still. For example, the baseline might be satisfied by a mid-level manager but greatly exceeded

137. Brian Stimson & Kimyatta McClary, "Responsible Corporate Officer": *Business Executives Face Strict Liability Under Novel Criminal Law Doctrine*, 25 WLF LEGAL BACKGROUNDER 1, 1 (2010), http://www.wlf.org/Upload/legalstudies/legalbackgrounder/4-9-20Stimson_LegalBackgrounder.pdf.

138. Letter from Margaret Hamburg, Commissioner of Food and Drugs, to Sen. Charles E. Grassley, Ranking Member, Senate Committee on Finance (Mar. 4, 2010), available at <http://finance.senate.gov/press/Gpress/2010/20prg030410b.pdf>.

139. Jayne Barnard advocates for the CEO's presence at the sentencing of the corporation that has been found criminally liable. Jayne Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CALIF. L. REV. 959, 963 (1999); see also Morton Mintz, *A Crime Against Women: A.H. Robins and the Dalkon Shield*, 7 MULTINATIONAL MONITOR (1986) (describing the courtroom scene in the case against A.H. Robins for knowingly distributing an intrauterine device that posed an undisclosed risk of morbidity and mortality, and that did in fact cause miscarriages and death in some of the women who used it. At the close of the trial, the presiding judge ordered the CEO, general counsel and a senior corporate executive of A.H. Robins—none of whom had been sued individually—to appear in his courtroom, where he proceeded to sear them for their greed and shocking indifference.).

140. Cf. Stephen P. Garvey, *Authority, Ignorance and the Guilty Mind* 35 (Cornell Law School Legal Studies Research Paper Series, No. 14-20, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443864 (identifying conviction with no attendant punishment as a possible response to crimes committed through willful ignorance of the law).

141. See note 135 and accompanying text.

by the corporation's CEO, and the difference might be due entirely to their differing rungs on the corporate ladder. This brings us to the first basis for an upward departure: We may impose harsher sanctions where the expected commitment to the corporation is greater than what the baseline contemplates with the severity of the enhanced sanctions varying in relation to the enhanced strength of commitment (i.e., a slightly stronger expected commitment will yield slightly stronger sanctions, while a significantly stronger expected commitment will yield significantly stronger sanctions). The second basis will arise where the executive's *felt* commitment is greater than that which the corporation expects of her. These two bases of enhancement follow from the comments above about the way in which the ground of the executive's responsibility will inform its magnitude. The third basis corresponds to the nature of the crime, which is the object of the executive's responsibility. Thus, where executives at two different transgressing companies are expected to harbor, and do harbor, commitments of roughly the same strength, but the first company's violation has caused much more harm than the second, it will be appropriate to punish the executive at the first company more harshly than the executive at the second.

Importantly, though, the absolute scale will be quite narrow as compared with the scale for individual guilt, and its uppermost point—its most severe sanction—must respect and reflect the ground of responsibility under the RCO doctrine. Given that commitment to a corporation is not itself opprobrious, it would be unfair for the RCO doctrine to result in sanctions whose severity exceeded some agreed upon upper limit. For the moment, let us stipulate that this uppermost limit includes (i) entry of guilty verdict, and (ii) disgorgement of all incentive-based pay for the period in which the offense occurred to a victim restitution fund, and (iii) a public letter of apology to be printed in those news sources most likely to be read by the victim community. Convictions in cases involving less blame than those that would occasion this maximum penalty—cases in which the object of responsibility was less dire and/or the expected commitment less strong—would involve a correspondingly smaller financial penalty, might forego the mandated apology, or they might impose a creative, non-financial penalty—the harshness of which was agreed to correspond to the relative blameworthiness of the convicted executive. Indeed, given the compressed scale, creativity in crafting sanctions will be at a premium to produce sufficiently fine-grained distinctions that make clear the defendant's relative blameworthiness. All of that by way of a very rough outline.

One might wonder why the object of responsibility should have any role to play in setting the severity of the sanction. We might instead treat the offense as a kind of binary switch: So long as the corporation has committed an offense, any executive with a commitment to the corporation of sufficient strength would be targeted for prosecution; we would then vary the severity of the sanction solely in light of differences in the strength of the convicted executive's commitment. In this way, given executives at two different transgressing companies whose positions demand similar levels of commitment, we would impose upon each punishments of equal severity even if the first corporation's offense involved far less harm than the second's. To see how this would work in practice, consider the following example. In a callous bid for profits, corporation A and corporation B both fail to disclose the full range of risks of the financial products they are peddling. The probability of the undisclosed risks is the same for A and B, but the loss that the counterparty would sustain if the risks were to materialize is far greater for B's financial product than A's. Suppose now that the undisclosed risks do materialize in both A and B. An account that had the executive's sanctions turn only on the ground of her

blameworthiness—for example, the strength of her expected commitment—would have an executive at A and an executive at B incur sanctions of the same severity, assuming that each bears the same strength of commitment to her respective corporation. If this result seems troubling—if we intuitively feel that the executive at B should suffer a greater punishment than the executive at A—we might find support for the intuition in the perspective that the victims of each corporation's offense should adopt. Presumably, the investors who lost the full amount of their investment would be warranted in harboring more resentment toward the officers at the second corporation than the first. If criminal law's response to an offender is to track the amount of resentment warranted on the part of the victim of the offense, then it makes sense to punish the executive at the second corporation more harshly than we punish the executive at the first. Again, however, the maximum penalty is cabined by the nature of the relationship of any of these executives to the crime.

C. When Should We Impose Criminal Liability on Corporate Officers?

To round out the account, it will be useful to articulate the scope of liability that I believe it licenses. First, and most familiarly by now, the account dispenses with individual fault as a prerequisite for blame and hence criminal liability. Executives who are legitimately subject to prosecution on my account need not have culpably omitted to fulfill some duty as a result of which the corporation's criminal violation occurred. Put differently, the account licenses prosecution of even those executives who could, under the doctrine's current operation, avail themselves of an impossibility defense. Thus, the corporate executive may be prosecuted even if it would have been impossible—practically or physically—for her to prevent the corporation's offense. Because her blameworthiness derives from her commitment to the corporation, and not her culpable contribution to the offense, it makes no difference that she could not have prevented the offense even if she had sought to do so. Of course, nothing in the account would foreclose our assigning even more blame to, and imposing more severe sanctions upon, the executive who could reasonably have prevented some offense and yet failed to do so.

Second, because the ground of responsibility on my account is, again, the executive's expected commitment to the corporation, the account does not privilege health and welfare offenses in the way that the traditional RCO doctrine does.¹⁴² Instead, no principled reason exists to refrain from extending RCO liability, on my account, to any kind of corporate criminal offense. In particular, once we have decided that a particular activity portends sufficient harm to warrant its criminalization, then the executive shares responsibility for the activity's occurrence and may, on the basis of the account advanced here, be held criminally liable for it, at least assuming a sufficiently strong expected commitment.

Finally, and perhaps most controversially, the account licenses prosecution and punishment of executives who, at the time of the crime's commission, were not expected to harbor any commitment to the corporation—indeed, they need not even have been in its employ at the time when the crime occurred. Again, the executive's blameworthiness turns

142. *But cf.* Tyler O'Connor, *Prosecuting Executives for Financial Fraud: The Responsible Corporate Officer Doctrine as an Alternative Means of Criminal Liability*, 6–7 (Apr. 1, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243124 (noting that the RCO doctrine is used to implicate executives at pharmaceutical companies but not those at investment firms whose misconduct has caused millions of dollars in losses).

not on her having proximately caused the corporation's crime but instead on the obligations she faces to stand alongside her fellows when the corporation is called to account. Thus, the diachronic case (i.e., the case where the corporation committed a crime at time T1, and it is judged at some later time T2, and the executive joined the corporation after T1 but before T2) appears not to differ, in a morally relevant way, from the garden-variety case of a crime that did occur during the executive's tenure in the corporation but in which she did not participate. The intuition that matters *are* different rests upon the faulty notion that executives have some control over the acts their corporation undertakes during their tenure—but not those it undertakes before—and it is this control that really grounds the executives' responsibility. But I have been contending that executives may bear responsibility for their corporation's act even if there was no possibility that they could have prevented the act's commission. That prevention was made impossible by (1) the fact that the person who now holds the executive's office didn't even belong to the corporation at the time the crime was committed rather than (2) some more mundane fact (e.g., the executive was denied knowledge that the crime was to occur) seems to be without moral import. This is so at least in part because responsibility rests on the executive's commitment, and no reason exists to think that the commitment applies with lesser force between senior and junior members (i.e., those who belonged to the corporation at the time of the crime's commission and those who joined subsequently) than between members of roughly the same vintage. The corporation is the same corporation, and the joint project is the same joint project. The normative pressure on executives to stand with their fellows is no less compelling for the diachronic case than the synchronic one.

VII. CONCLUSION

When we disentangle the elements of a responsibility assignment, we see that there is nothing mysterious, let alone perverse or barbaric, about assigning responsibility for a corporate crime to a corporate officer who did not participate in that crime. The corporate officer incurs responsibility as a result of her commitment to the corporation, and the magnitude of her responsibility will vary according to the greater of the corporation's expected level of commitment or her felt commitment. Moreover, her responsibility might appropriately occasion criminal liability, with sanctions tailored to the magnitude of her blameworthiness.

The corporation is a joint project *par excellence*. A narrow, individualist account is unduly constraining when it comes to assigning responsibility for the corporation's transgressions. Instead, we need an understanding of responsibility expansive enough to track the blame that arises in light of one's relationship to the group and independent of one's contribution to the wrong. We need a legal apparatus that gives a state-sanctioned voice to the varieties of reproach we are licensed in issuing to executives whose corporations commit crimes. We need to acknowledge that there can be culpability without fault and through commitment alone.