Corporate Coverture

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I. INTRODUCTION

This Article primarily addresses the first of two questions at the heart of the debate on corporate criminal responsibility: First, when is a criminal act of a member of the corporation attributable to the corporation? And second, in situations where we can accurately say that the corporation has committed a crime, what individual or entity should the law target, and on what grounds?

Federal law answers the first question through an appeal to vicarious liability. The corporation is criminally liable for a crime committed by an employee in the scope of employment for the benefit of the corporation.[1] But that answer is notoriously unsatisfying.[2] It would hold the corporation criminally liable even if the employee acted against the express policy of the corporation.[3] Section 2.07 of the Model Penal Code (MPC), adopted in many states, offers a more direct route to criminal liability: an

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1. *See, e.g.*, N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493 (1909) (holding that a corporation is criminally liable where "the [criminal] act is done for the benefit of the principal, while the agent is acting within the scope of his employment").

2. Here is a radically incomplete list of critics of the doctrine: H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279, 288 (1995); Brent Fisse, *Restructuring Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1183 (1983) (referring to the confused jurisprudence around corporate criminal liability as "the blackest hole in the theory of corporate criminal law"); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1329 (2009); *see also* Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 57 (2007) ("[T]he basic rule of corporate criminal liability has few friends.").

3. For cases with this structure, see, for example, United States v. Ionia Mgmt. S.A., 555 F.3d 303, 309–10 (2d Cir. 2009) (affirming corporate conviction for a criminal offense committed by a low-level employee in direct contravention of corporate policy); United States v. Hilton Hotel Corp., 467 F.2d 1000, 1004, 1008 (9th Cir. 1972) (finding corporate liability for employee's actions that were contrary to corporate policy).

employee's crime becomes a crime of the corporation if, but only if, the crime was ordered, authorized, or recklessly tolerated by a high-ranking manager.[4] Yet, if the federal approach sweeps too broadly, one might worry that the MPC approach fails to sweep broadly enough. The MPC makes the executive's knowledge of the crime at the time of its occurrence an element of the crime, whereas it may be that something less than knowledge should suffice.[5]

In this Article, I seek to offer a different alternative to federal law's vicarious liability rationale and the MPC's executive knowledge criterion, which I cull from what may well seem an unlikely place—the now discredited doctrine of marital coverture. Under coverture, the marital union of a man and woman created a single juridical unit—the husband.[6] As a result, all the wife's possessions became the husband's alone, and so too did most of the wife's legal claims—e.g., her ability to sue in tort or enter into a contract. Still, this arrangement was not an unmitigated good. It saddled husbands with legal liabilities in addition to newfound wealth and power by making husbands liable for their wives' torts and crimes.[7] Coverture was rightly jettisoned from the law for its obvious sexism.[8] I shall argue, however, that the grounds of liability it presupposed aptly capture the ways liability should operate within the institutional setting of the corporation.

More specifically, we can recover two different theories that supposedly justified holding a husband liable for the crimes or torts of his wife—one based in unity and the other based in hierarchy. The marital unity theory, advanced in Part I, saw the wife's acts as attributable to her husband because all of her acts were in the service of their joint project—viz., their marriage or shared life together. Now the fact of marital unity ought to have entailed that the wife would be held responsible for the crimes of her husband, too. But the fact that coverture did not contemplate that husband and wife share equally in the joint project of the marriage does not mean that its theory for attributing the wife's acts to the husband did not contain a kernel of shared agency that we can usefully recover and put to more egalitarian ends.

The hierarchical theory, deployed in Part II, picked up on the husband's domination of his wife. She acted under his direction. Importantly, "direction" under coverture was understood in far broader terms than, say, MPC §2.07 contemplates. There need have been no specific directive or even knowledge of her act. The husband's direction could instead be diffuse, but it was also omnipresent and backed by sanctions from which she could not readily escape. As a result, it would have been unfair to hold the wife criminally responsible for the acts she committed within this coercive relationship. In what follows, I argue that each of these theories—the shared responsibility of marital unity; the transferred

4. *See* MODEL PENAL CODE § 2.07(c) (AM. L. INST. 2020). While the MPC provides other grounds for ascribing an employee's criminal act to the corporation, they are not relevant here.

5. For persuasive alternative accounts, see, for example, Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1121–46 (1991); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 493–97 (2006); William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 648, 716–18 (1994); *cf.* Mihailis Diamantis, *Corporate Essence and Identity in Criminal Law*, 154 J. BUS. ETHICS 955, 957–65 (2018) (developing a diachronic theory for attributing criminal acts to the corporation).

6. *See infra* notes 7–26 and accompanying text.

7. *See, e.g.*, Hess v. Heft, 3 Pa. Super. 582, 584 (1897) ("At common law, the husband was liable for the torts of his wife, whether committed before or during coverture.").

8. In his essay, John Stuart Mill rightly condemned coverture for imposing a "yoke tightly riveted on the necks" of women. John Stuart Mill, *The Subjection of Women* (1869), *in* ESSAYS ON SEX EQUALITY 137, 159–60 (Alice S. Rossi ed., 1970).

responsibility of the hierarchical account—provides a compelling path for attributing employee crimes to the corporation.

Some theorists of corporate criminal liability stop at this point: Once they have identified what they take to be a compelling connection between the crime and the corporation, they conclude that the law ought to prosecute and punish the corporation. But I think that conclusion is too hasty. In Part III, I argue that coverture's grounds of liability do not provide a decisive defense of corporate criminal law, but they do offer compelling considerations in its favor. I end by identifying ways that the account advanced here might be felicitous for combatting corporate crime and vindicating our responses to it.

II. COVERTURE'S UNITY THEORY OF LIABILITY

Prior to the 20th Century, marriage entailed the almost total subsumption of a woman's legal personality to her husband. As Blackstone wrote:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called … a *femme-covert*; and her condition during her marriage is called her coverture.[9]

"Marital coercion" describes the dimension of coverture that made a husband liable in tort and crime for most of his wife's transgressions.[10] But "coercion" is a misleading term in two respects. For one thing, the element influencing the wife need not have been threatening at all; she may instead have been in the grip of romantic love and spousal fidelity. For another, whatever coercion there was need not have involved an imminent threat, which is how many contemporary moral philosophers define the term[11] and how the law defines duress.[12] We have, then, two grounds of liability under coverture—

9. 1 WILLIAM BLACKSTONE, COMMENTARIES *430 (footnote omitted).

10. *See* Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 29 (1994) (noting that the marital coercion defense was only available to married women); 4 WILLIAM BLACKSTONE, COMMENTARIES *27–28 ("[I]f a woman commit theft, burglary, or other civil offices the laws of society, by the coercion of her husband; or merely by his command, which the law construes a coercion; or even in his company, his example being equivalent to a command; she is not guilty of any crime . . . ."). There were exceptions: A woman remained criminally responsible for many violent crimes, because of their dangerousness; for the operation of a brothel, because "the intrigues of the female sex" would have uniquely suited her for the role, and for joint treason with her husband, because the husband "has no right to that obedience from a wife, which he himself as a subject has forgotten to pay." *Id.*

11. *See, e.g.*, Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD 440–72 (Sidney Morgenbesser, Patrick Suppes & Morton White eds., 1969); ALAN WERTHEIMER, COERCION 217 (1987).

12. *See, e.g.*, MODEL PENAL CODE § 2.09 (AM. L. INST. 1962) ("It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist."); *see also* Heather R. Skinazi, *Not Just a "Conjured Afterthought": Using Duress as a Defense for Battered Women Who "Fail to Protect"*, 85 CALIF. L. REV. 993, 1035 (1997) (noting duress exists when, under the totality of the circumstances, the threat or use of force was such that the defendant genuinely believed they could not resist); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1335 (1989) (noting duress is an extremely vague and elusive concept in the law).

attachment and (diffuse) coercion.[13] This Part addresses the first of these, and Part II addresses the second.

One can recover in the conjugal liability cases a rationale for ascribing the wife's transgression to her husband rooted in a romantic conception of a married couple as a unit.[14] The doctrine of conjugal unity was biblical in origin:[15] Since woman originated from man—she is the flesh of his flesh—the marital union was taken to effect a reunion, restoring the two to "one flesh."[16] In what follows, I aim to draw out criminal law's ample evidence of this unity. While the examples come from discrete criminal law doctrines, the unity on which they rely bears not merely a family resemblance to coverture; instead, it is coverture itself that grounds this unity.[17]

Under common law, neither spouse could commit larceny against the other since the marital property was held in one person.[18] One might think this rule uninteresting. After all, if a husband takes ownership of all of his wife's property, then there is nothing for either of them to steal—he cannot steal what is his own, and she who cannot own cannot steal. But the cases have the rule rest not on the property relations that existed between them but instead on "the unity of husband and wife which marriage created; the community of interest in the social institution of marriage."[19] As one court expounded, the husband's "ownership and control of [the wife's] personal property was not alone sufficient to justify the doctrine as to her immunity. Something more was needed to protect her, and that was the unity of the social relationship of marriage, giving the word 'social' its broadest meaning."[20] That statement was echoed in *People ex rel. Felmere v. Rapp*: "[T]he common law rule that a wife cannot commit larceny by appropriating her husband's property rests

13. Sometimes, a third rationale for marital coercion is adduced—namely, to promote societal harmony. *See, e.g.*, Coughlin, *supra* note 10, at 46 (observing that women were encouraged to marry to avail themselves and society of the protections that a husband's superior influence could provide); *cf.* State v. Phillips, 97 N.E. 976, 977 (Ohio 1912) (noting that "peace and sanctity of the home and family" are the ultimate reason for the common law larceny rule); State v. Arnold, 235 N.W. 373, 374 (Minn. 1931) (observing that peace and sanctity of home and family is the reasoning behind the common law rule).

Whatever the merits of that rationale, it seems like it cannot be the full explanation. After all, one would want to know what it is about marital coercion that facilitates societal harmony. I suspect that the two rationales on which I focus here play a large part in answering that question.

14. One commentator insists that "household unity" in fact offered a far more compelling explanation for the cases involving married women defendants than did marital coercion. Marisha Caswell, Married Women, Crime, and Questions of Liability in England, 1640–1760, (Feb. 2012) (Doctoral dissertation, Queen's University).

15. Note, *The Effect of Marriage on the Rules of the Criminal Law*, 61 COLUM. L. REV. 73, 73 (1961).

16. *Genesis* 2:21–24. Interestingly, the verses can be read to suggest that it is the man who is the vulnerable party, the party who needs a mate to be whole, who becomes whole only by clinging to his partner. "[A] man leaves his father and his mother and cleaves to his wife, and they become one flesh." *Id.* at 2:24 (Revised Standard Version); *see also Mark* 10:7–8; *Matthew* 19:5–6.

Hamlet uses this unity to comic, and perhaps even emasculating, effect when he implies that Claudius, his mother's new husband, is now subsumed into her person. WILLIAM SHAKESPEARE, HAMLET act 4, sc. 3, l. 52–55. After saying goodbye to his mother, he excuses his refusal to bid Claudius farewell too with this cheeky syllogism: "[F]ather and mother is man and wife; man and wife is one flesh; and so, my mother." *Id.*

17. *See* Caswell, *supra* note 14.

18. *Arnold*, 235 N.W. at 374. "At common law such a crime could not be committed by the wife, nor could a husband commit larceny of his wife's personal property. The theory was that the unity of the spouses in the marriage status precluded the larceny." *Id.*

19. *Id.*

20. *Id.*

not alone upon the doctrine that his property and possessions are hers but upon the sacred unity of husband and wife which the marriage created."[21]

A wife who harbored her husband after he had committed a criminal act could not be prosecuted as an accessory after the fact. Importantly, courts recognized that "the woman's participation in the criminal activity was prompted, not by fear of victimization by her husband, but by her desire to protect him from apprehension."[22] Far from being coerced, then, she operated on "a motive that the contemporary culture, the common law judges, and, possibly, the woman herself might construe…as affection for the husband and fidelity to his interests."[23] While the rule originally exempted only wives from criminal liability for harboring their husbands, an egalitarian version of the policy persists to the current day.[24]

We can view the spousal privilege in testimony in a similar vein. That a wife could not be called upon to testify against her husband was largely due to their supposed unity. As Lord Coke wrote, "a wife cannot be produced either against or for her husband, quia sunt duae animae in carna una [who are two spirits in one flesh]. . . ."[25] But the couple's merger into a single legal person was not the only rationale. Instead, "the protection of marital confidences [was] regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entail[ed]."[26]

Closely related was the idea that slander could not be spoken as between a husband and wife.[27] The language for this idea speaks tellingly in favor of marital unity: "[w]hen husbands and wives talk to each other alone, the conversation differs but little from the process of talking to one's self, or, as it is sometimes called, 'thinking aloud.'"[28] There is, of course, an offensively sexist reading of this language if one supposes that courts assumed that no genuine dialogue occurs between man and wife. But a more romantic conception, and almost surely a more accurate one, is that long-term partners enjoy such a communion of thought that each can fully inhabit the perspective of the other. As such, we might say that exchanges often involve role reversals. Or, more romantically still, roles dissolve. There may persist two different ways of looking at an issue, or even looking at the world, but each is so familiar to the partners that it comes to bear only a faint hint of its progenitor, and either member can slip into either perspective and feel that it is their own.

The common law approach to conspiracy between husband and wife relies on romantic unity too. Thus, a husband and wife could not conspire with each other, again,

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21. 180 Misc. 839, 840–41 (N.Y. Sup. Ct. 1943).

22. Coughlin, *supra* note 10, at 36; *see also id.* at 36 n.176 (collecting cases).

23. *Id.* at 36–37*; see also* AUSTRALIAN REFORM L. COMM., CRIMINAL LIABILITY OF MARRIED PERSONS 14–15 (1975), https://www.ojp.gov/pdffiles1/Digitization/57842NCJRS.pdf [https://perma.cc/PF9D-WJ97] ("By the first principles of nature, a wife is bound to protect, defend and cherish her husband in all circumstances, and not the less because he has been involved in crime, and has no refuge but in her affection and fidelity.").

24. *The Effect of Marriage on the Rules of the Criminal Law*, *supra* note 15, at 97; *see, e.g.*, MASS. GEN. LAWS ANN. ch. 274, § 4 (West 2022); FLA. STAT. ANN. § 777.03 (West 2022).

25. SIR EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND *f. 6b; *see generally* 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW (T. & J.W. Johnson & Co. ed., 1876); 1 BLACKSTONE, COMMENTARIES; 1 WILLIAM HAWKINS, A TREATISE TO THE PLEAS OF THE CROWN (3d ed. 1739).

26. Wolfle v. United States, 291 U.S. 7, 14 (1934) (dictum).

27. *See, e.g.*, Sesler v. Montgomery, 78 Cal. 486 (1889).

28. *Id.* at 488.

because they were viewed as one person, and a person cannot conspire with herself.[29] One feature that supports a romantic explanation for the wife's immunity, rather than her supposed moral immaturity, emerges when one considers that this immunity was not extended to other members of the household who were equally under the master's thumb. Thus, children and servants could be prosecuted for conspiring with the head of the household.[30] A wife differed from these other household members because only she could genuinely engage in shared projects with him. The doctrine persisted until the middle of the Twentieth Century, and it was rejected by the Supreme Court only over a vigorous and stirring dissent by Justice Warren in *United States v. Dege*. He insisted that the doctrine was not predicated upon women's supposedly diminished autonomy.[31] Instead, "the concept of the 'oneness' of a married couple may reflect an abiding belief that *the communion between husband and wife is such that their actions are not always to be regarded by the criminal law as if there were no marriage*."[32]

This is the core idea: for the most part, partners in a marriage do not act alone. Most of what each does is informed or motivated or facilitated or sustained by the other partner. Accordingly, their actions are joint and so attributable to both of them. Moreover, this notion of a shared partnership is not merely descriptive—it represents an ideal that the law has reason to promote.[33] Again, as the *Dege* dissenters urged, there are things other than "virile law enforcement . . . in American life which are also of great importance, and to which even law enforcement must accommodate itself. One of these is the solidarity [in the] relationship of marriage."[34]

Now, one might find reason to be skeptical of the law's promotion of marital unity. One could see it as a mere pretext—a romanticization masking women's subordination.[35] Perhaps that was the unconscious, or even deliberate, motivation of the jurists who embraced marital unity. But whatever their, or the law's, motivations, the important point is that this unity is worthy of promotion—at least where those who are expected to partake of it enjoy equal standing with respect to each other.

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29. *See* William HAWKINS, A TREATISE TO THE PLEAS OF THE CROWN bk. I, ch. lxxii, sect. 8, at p. 192 (4th ed. 1762); Dawson v. United States, 10 F.2d 106, 107 (9th Cir. 1926), *cert. denied*, 271 U.S. 687 (1926); People v. Miller, 82 Cal. 107, 107–08 (Cal. 1889).

30. Coughlin, *supra* note 10, at 37 n.177 ("[N]either a son or a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master.").

31. United States v. Dege, 364 U.S. 51, 57 (1960) (Warren, C.J., dissenting).

32. *Id.* at 58 (emphasis added). A Pennsylvania court offered a more florid (and sexist) version of this sentiment in roughly the same period:

> While a married woman may not be her husband's chattel and while instances could possibly be found where a wife may dominate her husband and where others may be bold enough to stand up to their husbands, we have not yet reached the point where we decry the nobility, dignity or grace of a wife's deference to her husband's desires. Chivalry alone would call for this explanation of a married woman's participation in her husband's crime.

Commonwealth v. Jones, 1 Pa. D. & C.2d 269, 275 (Quarter Sess. 1955).

33. The "ideal to which marriage aspires [is] that of equal partnerships between spouses who share resources, responsibilities, and risks." Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms*, *in* DIVORCE REFORM AT THE CROSSROADS 191, 199 (Steven D. Sugarman & Herma Hill Kay eds., 1990). Rhode and Minow here echo John Locke's take, envisioning "[c]onjugal society" as a "voluntary compact between man and woman," one that "draws with it mutual support and assistance, and a communion of interests." JOHN LOCKE, *Concerning the True Original Extent and End of Civil Government*, *in* TWO TREATISES OF GOVERNMENT 105, 138 (1823).

34. *Dege*, 364 U.S. at 58 (Warren, C.J., dissenting).

35. I am grateful to Brian Berkey for raising this concern.

There is a cadre of actors in the corporation for whom this unity is and should be true.[36] I have in mind those individuals who (1) have reason to see themselves as part of the corporation's enterprise—its mission and aims—and (2) who have the requisite power and authority to enjoy a genuine opportunity to influence that mission and aims. The first of these considerations coincides with the ground of their responsibility: a person who has reason to see herself as implicated in the corporation's enterprise is a person we would have reason to praise or blame for the corporation's acts. This is not the place to offer a full account of what this reason might consist of (though I have done so elsewhere).[37] The basic idea is that there is a set of members of the corporation who, as a matter of loyalty and solidarity, owe it to each other and to the corporation to see their fates entwined with the corporation's—such that its successes, as well as its transgressions, are theirs.

The second consideration—enjoying some amount of power and authority—is not meant to provide a ground for the member's responsibility. The idea is not that the member's power or authority produced the corporate act (e.g., because they ordered or authorized it). Nor is it that the member had it within her control to prevent the corporation from malfeasance, and her failure to prevent the wrong is the reason we hold her responsible. In fact, I deny that mere power or authority provides any direct justification for assigning the member responsibility. Instead, power and authority are relevant as *pre-conditions* for establishing whom we may praise or blame for a corporation's actions.[38] At bottom, the thought is that employees deprived of the requisite level of power or authority are those the corporate structure effectively excludes from its enterprise. Accordingly, the unity or shared project rationale that we can distill from coverture does not apply to them. Instead, that rationale applies only to those whom the corporate structure and culture genuinely permit to participate in the shared project. In short, it is the *expectation* of participation in the shared project (consideration 1), combined with genuine opportunity to participate (consideration 2), that delineates the set of members for whom the unity rationale holds.

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36. *Cf.* Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 119 (1993) ("[S]upport for a partnership model can be drawn from the many de facto similarities between a marriage and a handshake partnership.").

37. *See* Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371, 403 (2014) [hereinafter *Responsible Shares*] ("[I]t is appropriate to have the executive's fate track that of the corporation—she is expected to harbor an attachment to the corporation that causes her to see her fate as entwined with that of the corporation—and we are licensed in treating her in accordance with the corporation's performance. Institutions like the corporation (and the athletic team) have been organized as settings where individualized assessment is both ill-suited and unseemly because norms of solidarity are expected to govern. Executives deserve to bear responsibility for corporate acts because that is the way desert works in the team setting."); Amy J. Sepinwall, *Crossing the Fault Line in Corporate Criminal Law*, 40 J. CORP. L. 439, 464 (2015) [hereinafter *Fault Line*] ("When and why might we praise the head of the company for the product's, and so the company's, success?"). For an account of the corporation congenial to the one I offer, see Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 263–65 (1999) ("Our break with previous work is to stress the importance of the coordination that happens not from the top down, but in the lateral interaction among team members.").

38. *Cf. Responsible Shares*, *supra* note 37, at 410–11 (explaining why merely holding the title of a high-level executive is insufficient for bearing responsibility).

Members of the corporation who satisfy these two conditions are those whom we are licensed to see as part of the corporation's joint project.[39] For ease of reference, I shall adopt the term "control group" to refer to them.[40] Together, members of the control group constitute the legal person that is the corporation. We might say, on the basis of the unity that goes along with being a part of a joint project, that the acts of any one of them pursued as part of the joint project are ascribable to each of them in their own person.[41] But I suspect that one needs more than coverture's conception of unity to establish as much. What that conception does establish, though, is that it is appropriate to ascribe the acts of a member of the legal person to the legal person. Put another way, marriage under coverture was believed to have created a new legal person—located in the husband but now representing both husband and wife.[42] Her transgressions were then ascribed to this new legal person. Unity licenses the ascription in the marital case, as this section has endeavored to show. Further, unity obtains among the relevant members of the corporation.[43] So unity should also license the ascription of the acts of one of these members of the corporation to the joint person they embody—viz., the corporation itself. Since it is the corporation that unites them—it is the embodiment of their joint project—impairing or damaging the corporation strikes at the heart of what they share.

Now, one might worry that to imagine that something like marital unity operates among members of the corporation's control group is to overly romanticize the corporate workplace. There are, to be sure, discontinuities between the relationship between spouses and the relationship among members of the control group—e.g., marriage is for life, at least ideally; traditionally, spouses take the same last name; under coverture, the husband stood in the docket in place of his wife, whereas the law will frequently prosecute the corporation alongside the individual offender. But I am not convinced that these discontinuities undercut transposition of the unity rationale from the marital to the corporate context.

Taking each of the supposed discontinuities in turn: Why shouldn't individuals, like control group members, be subject to a norm that they will faithfully proceed with devotion to the corporation's interests while they occupy their positions, just as spouses should be

39. To be clear, my claim is not that they are the *only* members who can be part of the joint project. But if other members are part of the joint project, or part of a subset of the joint project, it will be for reasons different from the ones I adduce here.

40. I do not mean to be adopting whole-hog the definition of "control group," as that term is used in the caselaw—e.g., "officers and agents . . . responsible for directing [the company's] actions in response to legal advice." Upjohn Co. v. United States, 449 U.S. 383, 391 (1981) (internal citations omitted). I suspect that in many instances, members of the corporation who satisfy the two criteria I adduce above will also satisfy the legal indicia for membership in the *Upjohn*-type "control group." But for my purposes, one cannot substitute the control group test for my two criteria.

41. This thought might provide an additional justification to the one that Coffee offers in proposing "modified 'frankpledge.'" *See* John C. Coffee, Jr., *Crime and the Corporation: Making the Punishment Fit the Corporation*, 47 J. CORP. L. 963, 970 (2022).

42. One might instead have thought that the law did not create a new person; it just denied the wife's legal existence leaving the marriage with only one legal person—namely, the husband. But it would be hard to square that understanding with the notion that coverture entailed "*the legal fiction* that a husband and wife were one legal person." *Marriage: When Two Remain Two*, LEGAL FEMINIST (July 2, 2020), https://legalfeminist.org.uk/2020/07/02/marriage-when-two-remain-two/ [https://perma.cc/55AX-VB92] (emphasis added); *see also* SUZANNA GEISER, LEGAL FICTIONS, LITERARY NARRATIVE, AND THE HISTORICAL TRUTH: THE JURISPRUDENCE OF MARRIAGE IN THE LONG EIGHTEENTH CENTURY 92–93 (2018). The husband's legal personhood was no legal fiction, so the fiction must pertain to the person resulting when husband and wife become one.

43. *See supra* note 37 and corresponding text (referencing loyalty, solidarity, and team-like nature of corporate leadership).

devoted to their union while they are married? As I have argued elsewhere, I think it not undue to expect something like "punctilio[us] honor" (or, more flat-footedly, loyalty and dedication) not merely of business partners but also core members of the corporation too, including those who constitute the control group.[44] I am not sure what to make of the fact that spouses traditionally bore the same name, whereas there is no analogous practice in the corporate world. The fading prominence of the practice among spouses may be reason enough not to countenance this as a meaningful discontinuity. At the same time, businesses are as keen as ever to foster employee identification with the corporation.[45] One way they do so is by extending credit for a given success beyond the employees who centrally produced it—a practice common in marriages too, where it is common to congratulate one spouse on the other's achievement. So too, in the corporation, we find, for example, that executive bonuses are awarded on the basis of improved corporate performance, even if the executive receiving the bonus made no discernible contribution to the improvement.[46] I turn finally to the fact that men supplanted their wives as criminal defendants, whereas corporate criminal liability need not preclude prosecuting individual employees for the same crime. This would be a disquieting divergence only if the prosecution of both the corporation and the individual offender somehow undermined the unity among members of the control group that I argue obtains in the corporate setting. But we might instead see the parallel prosecutions as fostering that unity: the individual offender does not escape sanction in his own right; at the same time, his fellows endure the cost of his crime by having the project they share with him impaired by the corporate punishment. One might then ask why there could not have been parallel prosecutions in the marriage context. The answer might lie in the wife's supposed moral immaturity. (To acknowledge this is not to betray the unity rationale; if moral immaturity fully explained her immunity from punishment, there would have been no justification for prosecuting and punishing her husband in her stead.) And I would venture, though not here seek to defend, the controversial proposition that today, it might not be undue for the criminal law sometimes to target both spouses for the crime of one of them.[47]

III. HIERARCHY IN THE RELATIONSHIP

The romantic underpinnings of coverture's conjugal liability, which were the focus of Part II, are but a minor strand in the doctrine. The more straightforward rationale for holding a husband liable for his wife's crime undoubtedly lay in the law's conception of women as less than full moral agents. This conception was especially salutary for husbands

44. Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 444, 444 n.164 (2012).

45. Denise Lee Yohn, *Engaging Employees Starts with Remembering What Your Company Stands For*, HARV. BUS. REV. (Mar. 30, 2018), https://hbr.org/2018/03/engaging-employees-starts-with-remembering-what-your-company-stands-for [https://perma.cc/MSK9-X9CN]. Samuel Buell, in this collection, leverages the social psychological fact that people identify with their corporation to draw out one way that corporate criminal law—its stigmatizing effect in particular—enjoys deterrence advantages relative to civil sanctions. *See* Samuel W. Buell, *A Restatement of Corporate Criminal Liability's Theory and Research Agenda*, 47 J. CORP. L. 937 (2022).

46. *See Responsible Shares*, *supra* note 37, at 399–401.

47. For more on this possibility, see Amy J. Sepinwall, *Faultless Guilt: Toward a Relationship-Based Account of Criminal Liability*, 54 AM. CRIM. L. REV. 521 (2017).

since a woman's supposed intellectual and volitional weaknesses would permit her husband to use her as a tool in the furtherance of his plans.[48]

Coercion was presumed whenever a wife committed a crime in her husband's presence;[49] in some jurisdictions, the presumption was irrebuttable.[50] Further, the presumption applied even in cases where the courts found the husband's "'constructive presence' sufficient."[51] And while not uniformly presumed when the wife's crime occurred in her husband's absence, coercion could nonetheless be exculpatory when it was established.[52]

But what was the source of this coercion? In some of the cases, coercion seems to have functioned very much like duress: husbands enjoyed a right to physically discipline their wives,[53] and the looming presence of a husband with such power was presumed to pose the imminent threat of physical harm that is central to duress.[54] But duress was hardly the *sine qua non* of conjugal liability.[55] "[N]o threat of death or serious bodily harm need[ed to] be shown."[56] Instead, coverture operated with a much more diffuse notion of coercion—one that will prove especially fruitful when we turn to the context of the corporation.

To begin, note that a wife need not have worried that her husband would beat her if she did not play her part in their joint crime in order for her to have been coerced. For there was the persistent background threat born of the wife's total economic dependency on her husband and the difficulty she would face in sustaining herself were she to leave the marriage.[57] In this respect, the wife's immunity was "unique in the law of duress, in that

48. *Cf.* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2027, 2029 (1993) ("[T]he value of a 'wife's work'-her household labor-remained a husband's by marital right.").

49. "Where a married woman commits a misdemeanor in the presence of her husband, the presumption of law, nothing to the contrary appearing, is that she acts under the threat, command, or coercion of her husband." United States v. Terry, 42 F. 317, 319 (N.D. Cal. 1890). *See also* Benjamin Paul, *The Doctrine of Marital Coercion*, 29 TEMPLE L.Q. 190, 190 (1956); U.S. Tr. Co. of New York v. Sedgwick, 97 U.S. 304, 308 (1877) (noting the rule that a wife who acts in the company of her husband is "conclusively presumed" to have been coerced). *Cf.* Benjamin Thorpe, *Laws of King Ine*, *in* ANCIENT LAWS AND INSTITUTES OF ENGLAND 60 (1840) (describing laws of the Anglo-Saxon kings that often recognized that the duty of obedience owed by the wife might be sufficient to excuse her from liability, provided she had not shared in the enjoyment of the proceeds of crime).

50. *See, e.g.*, *Effect of Coverture Upon the Criminal Responsibility of a Woman*, 4 A.L.R. 266 (originally published in 1919) (quoting Rex v. Knight (1823) 171 Eng. Rep. 1, 1126, 1 Car. & P. 116 (Eng.)) ("[T]he modern practice is, on finding by the evidence that the offense was joint, for the court to direct the acquittal of the wife, without at all considering or inquiring how far she was or was not the principal actor or inciter of the offense.").

51. Rebecca D. Cornia, *Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes About Women*, 8 UCLA WOMEN'S L.J. 99, 106 (1997)*; see also* Paul, *supra* note 49, at 191.

52. *See, e.g.*, Commonwealth v. Murphy, 68 Mass. 510, 511, 2 Gray 510 (1854).

53. *See* Coughlin, *supra* note 10, at 41–42 (discussing the so-called right of chastisement and noting that it would be a mistake to construe that right as a form of duress); *see also* Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 213 (1995) ("Perhaps the most egregious failure to recognize women's inviolability was Lord Hale's often-repeated idea that because a woman consented to matrimony, she gave her consent to sexual relations, and therefore could not be raped.").

54. *See supra* note 10.

55. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1013 n.161 (1932).

56. *Id.* at 1012.

57. For this reason, some courts declined to presume coercion once the Married Woman Acts restored the wife's property rights. *See, e.g.*, King v. City of Owensboro, 187 Ky. 21 (1920). But other courts insisted that coercion was still a factor even after states recognized the wife's legal personhood. *See, e.g.*, Braxton v. State, 17 Ala. App. 167, 169 (Ala. Crim. App. 1919); *see also* Marjorie F. Knowles, *The Legal Status of Women in*

the defense [could] be maintained without a showing of actual or threatened physical violence."[58]

Nor is it even clear that coercion explained the transfer of liability so much as it *rationalized* it. Given that coverture "assigned many wives to the economic dominion of their husbands, . . . the marital coercion doctrine was a sympathetic and rational response by the criminal law to the predicament of a woman whose husband directed her to join his illegal endeavor."[59] It is possible then that the doctrine operated with a forfeiture rationale: having deprived women of a genuine opportunity to fend for themselves, the law could hardly hold them responsible for what they did, or were made to do, in that compromised state.[60]

Turning now to the corporate context, it behooves us to notice that rank-and-file employees operate under disabling conditions similar to those of the feme covert.[61] In *Private Government*, Elizabeth Anderson seeks to make vivid the compromised position of corporate employees: "Under the employment-at-will baseline, workers, in effect, cede *all* of their rights to their employers, except those specifically guaranteed to them by law, for the duration of the employment relationship. Employers' authority over workers . . . is sweeping, arbitrary, and unaccountable—not subject to notice, process, or appeal."[62] In most employment contracts, employers unilaterally set workers' allowance (their wages), and they may exert their authority oppressively since the right of exit, though formally available, is costly to exercise and unlikely to provide genuine relief—a worker leaving one such arrangement cannot hope to do much more than enter another, equally oppressive, one.[63]

What is striking in Anderson's description is how closely the employee's situation parallels that of the feme covert. To rehearse the latter's disabilities succinctly, consider this summary: "Upon marriage the woman's personal property was vested absolutely in her husband, any earnings she might secure in the future were his, his interest in her real property were almost as extensive as his rights in her personality, and divorce was difficult, costly, and, in many cases, impossible, to secure."[64]

Alabama, II: A Crazy Quilt Restitched, 33 ALA. L. REV. 375, 378 n.18 (1982) (noting that Alabama began recognizing married women's property rights in 1846). Thus, for example, in a 1908 Pennsylvania case, the court announced that while the "married person's Act of June 8, 1893 . . . allows a married woman to be sued alone, yet it does not modify her husband's liability for her torts." Deardorff v. Pepple, 36 Pa. Super. 224, 227 (1908). *See also* Henley v. Wilson, 137 Cal. 273, 274 (1902) (emphasizing the common law rule that the husband's liability for the tort of his wife is not changed by the fact that under the statutes, she may have a separate estate); McElfresh v. Kirkendall, 36 Iowa 224, 227 (1873) ("[T]he limiting of the liabilities of the husband is not a corollary of the extending of those of the wife."). The persistence of the husband's liability in these states may stand as further evidence supporting the marital unity rationale.

58. *The Effect of Marriage on the Rules of the Criminal Law*, *supra* note 15, at 85; *see also* Coughlin, *supra* note 10, at 44 ("[T]he husband could be convicted even though there was no evidence that he had threatened or influenced his wife in any way.").

59. Coughlin, *supra* note 10, at 36.

60. *Cf.* Paul, *supra* note 49, at 193 ("This economic position in the family, this looking to the husband in material matters naturally sways the courts to take cognizance of the tremendous influence a husband necessarily exerts over the affairs of his wife.").

61. This is the contemporary spelling, different from Blackstone's. *See supra* text accompanying note 9.

62. ELIZABETH ANDERSON, PRIVATE GOVERNMENT 105–06 (2017).

63. *Id.* at 105, 110–11, 114.

64. Coughlin, *supra* note 10, at 36. On the difficulty of divorce, see also Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 107 (2016) ("Until the middle- to late-nineteenth century, both in England and America, the lack of real exit opportunities was a defining feature of marriage.").

There are at least two reasons for which a person, whether a wife or a worker, subject to another's almost limitless authority, might be absolved of transgressions they commit in the context of the subordinating relationship. First, it is hard to see how anyone so vulnerable to another's power would feel they had genuine and full freedom to decide what to do. Any instruction or command is backed by the master's prerogative to sanction (e.g., by assigning more, or more unpleasant, tasks), along with the ultimate threat of expulsion (divorce or firing), with few prospects of landing a better situation.[65] Second, there might even be circumstances where employee-initiated corporate crime is not merely excusable but also rational. For example, one might say it is rational if the only feasible way for an employee to break free from the tyranny of their master is by getting a promotion (e.g., to a managerial position), but the promotion's conditions are nearly impossible to obtain within the scope of legal activity.[66]

Second, even if the wife or worker would have freely undertaken the transgression in the absence of any coercion,[67] the relationship itself might foreclose an assignment of responsibility as a matter of fairness. One thought here is akin to the forfeiture thought in coverture: The higher-ups have no license to pin the corporation's crime on their underlings, even if the crime originated with these employees. Having effectively treated the employees as if they were fit subjects for oppressive governance, the higher-ups cannot, at the moment of reckoning for the crime, point the finger at those same employees, now recognizing the moral agency they denied for so long.

Now, that rationale would forbid only what the higher-ups may do by way of responding to corporate crime. But a related rationale might apply to the state, too. For one thing, the employers' boundless authority is facilitated by the state.[68] So the state too might be estopped from viewing the crime as ascribable only to the employees who carried it out. The history of coverture provides further support for this thought: scholars agree that coverture's implications for liability emerged as a response to the "benefit of clergy" that men, but not women, enjoyed.[69] That is, men could readily attain clergy status, and clergymen were immune from the strictures of secular law.[70] This created "the anomalous situation . . . that when husband and wife engaged in a criminal act, the husband was beyond prosecution, while the wife was subject to the severe penalties of those days,

65. *Cf.* Coffee, *supra* note 41, at 35 (stating that "[a]bsent corporate criminal liability, senior managers can find discreet ways to threaten or reward their juniors to run legal risks").

66. WorldCom was convicted for its employees' fraud on precisely this ground: the aggressive profit-seeking culture promoted, or even perhaps mandated, illegal acts to meet the company's targets. *See* DENNIS R. BERESFORD, NICHOLAS KATZENBACH & C.B., ROGERS, JR., 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 [https://perma.cc/3Y65-EGNU] (summarizing investigation into the cause of WorldCom's fraud).

67. One is reminded here of the passage in *Oliver Twist* where Mr. Bumble indignantly insists that if the law presumes that *he* had the power to coerce his wife (such that he should be liable for her theft), then "the law is a ass—a idiot. If that's the eye of the law, the law is a bachelor." CHARLES DICKENS, OLIVER TWIST 461–62 (Peter Fairclough ed., Penguin Books 1966) (1837-1839).

68. Anderson argues as much. And we might see the state-facilitated erosion of labor unions as a further piece of evidence. *See, e.g.*, Janus v. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

69. Commonwealth v. Jones, 53 Som. L.J. 146, 273 (Quarter Sess. 1955).

70. *See, e.g.*, Lord Nicholas Wilson, Justice, Sup. Ct. of the U.K., The High Sheriff of Oxfordshire's Annual Law Lecture: Out of His Shadow: The Long Struggle of Wives Under English Law 8 (Oct. 9, 2012), https://www.supremecourt.uk/docs/speech-121009.pdf [https://perma.cc/VPF3-8T53] (detailing the ruse through which a husband who has committed a crime could ascend to the role of a clergyman and thereby escape prosecution).

including death for most crimes. The presumption that a wife was acting under the coercion of her husband when acting in his presence was a device to relieve her from this prejudicial situation."[71] Today, of course, clergy have no role to play in legal absolution. But we might think that the executive's ready recourse to fancy defense attorneys, or the cronyism tying together executives and members of the judiciary,[72] confers upon executives something like the immunity the church granted men. These are advantages that rank-and-file employees do not enjoy. Again, the law might presume employee coercion as a "device to relieve [them] of this prejudicial situation."[73]

In short, the understanding of coercion under coverture is particularly felicitous for thinking about the corporation's responsibility for its employees' crimes. For one thing, coercion under coverture need not have been the product of an immediate threat, or even an immediate or specific command. Instead, the hierarchical circumstances of the marriage already undercut the wife's agency, allowing us to construe her acts as not her own, or not hers alone. Similarly, a hierarchical workplace might undercut the agency of the dominated actor, also allowing us to construe his acts as not his alone.[74] Second, even if we could be certain that the wife (or the employee) would have committed the transgression in the absence of coercion, we might still think that the compromised situation of each person makes it unfair for those responsible for that situation to blame and punish the wife (or again the employee). On this forfeiture rationale, coercion is a mere pretext—a hook to explain why the law looks past the wife to her husband—and not an explanatory factor in its own right. So, too, the law could and should look past the employee, or at least target both the employee and the corporation, because of the oppression the law allowed the employee to endure. An employee who commits a crime in the service of the corporation *because of the dismal pressures he faces* acts for the corporation. His crime is the corporation's crime.

Importantly, the predicate for ascribing an employee's crime to the corporation is the presence of *actual* coercion. To be sure, and as an evidentiary matter, it might make sense for courts to presume that the hierarchical workplace is coercive. A corporate defendant could then defend against the ascription by providing evidence sufficient to establish that the offending employee was not coerced. Two notable features here. First, the presence of actual coercion importantly distinguishes this species of ascription from the logic of *respondeat superior* enshrined in federal corporate criminal law, which imputes to the corporation any criminal act of an employee performed in the scope of her work and for the benefit of the corporation. In other words, federal law is insensitive to, and thus not predicated on, employee coercion.

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71. *Id.*; *see also* Paul, *supra* note 49, at 193; Sayre, *supra* note 55, at 1012.

72. *See, e.g.*, Julie O'Sullivan, *Is the Corporate Criminal Enforcement Ecosystem Defensible?*, 47 J. CORP. L. 1047 (2022); *cf.* Thomas Bourveau, Renaud Coulomb & Marc Sangnier, *Political Connections and White-Collar Crime: Evidence from Insider Trading in France*, 19 J. EUR. ECON. ASS'N 2543 (2021) (uncovering some evidence that an individual with political connections is "more likely to engage in suspicious insider trading").

73. Wilson, *supra* note 70.

74. To be clear, the idea is not to assign all of the coerced employee's acts to the corporation; it is only to assign those of his acts committed while on the job. This is analogous to the law under coverture, where a wife could be convicted of a crime that she committed in her husband's absence, "when she was free from his immediate influence and control." Annotation, *Effect of Coverture Upon the Criminal Responsibility of a Woman*, 4 A.L.R. § 266(I)(c) (1919); *see also The Effect of Marriage on the Rules of the Criminal Law*, *supra* note 15, at 90 ("The nature of the evidence required to rebut the presumption is that which would show that the wife was to some extent an independent agent.").

Second, the ground of liability adduced here is not defeated by a corporate compliance program. Currently, the corporation can evade criminal liability if it can demonstrate that it has instituted robust measures to deter corporate crime.[75] Under corporate coverture, such a showing might be necessary, but it would not be sufficient. For instance, it does no good for the corporation to threaten sanctions for employees who break the law, all the while implicitly sanctioning them with demotions or expulsions if they do not. The corporation can evade criminal liability for an employee's crime, then, only if it can show that the employee who committed the crime enjoyed working terms and conditions that would not count as coercive.

It would exceed the scope of this Article to provide an account of what elements a job must possess if it is to count as non-coercive even while performed within a hierarchical setting. Lest one think that coercion and hierarchy are inextricably linked, consider that universities are organized hierarchically; yet, because of tenure and the academic freedom it provides, the professoriate is not subject to the kind of coercion that licenses corporate liability here.[76] Suffice it to say that a corporation that meets Anderson's description would undoubtedly count as coercive, and I suspect, though I do not seek to establish, that far weaker forms of oppression would count, too.

IV. THE COVERED CORPORATION AND CRIMINAL LAW

I have aimed to identify two routes through which we may justify ascribing employees' criminal acts to the corporation. Higher-ups in the corporation act to further a joint project of which they are part; their acts are the corporation's acts because their agency is subsumed into a single legal person—the corporation—as a result of the *unity* that is, and should be, part and parcel of their corporate role. Rank-and-file employees are not expected to be part of this unity; many of them may even be excluded from it for all practical purposes. Still, the *hierarchy* under which they labor provides a different route for ascribing their acts to the corporation. That hierarchy can be relentlessly oppressive, so much so that it has a genuinely coercive effect, undermining the employee's agency. The employee's acts are then, necessarily, the acts of the corporation since its structures and pressures supply the motivation—perhaps even the irresistible motivation—to perform them. And even if the employee did not act as a result of coercion, the presence of coercion may foreclose higher-ups, along with the state, from proceeding as if the crime is the employee's and not the corporation's (too). On this thought, the higher-ups and the state should be hamstrung because they bear responsibility for the coercion. Together these two rationales entail that, where an executive or employee commits a crime, we may ascribe that crime to the corporation.

Does it follow that the corporation should be held morally or criminally responsible for that crime? I do not believe it does, and a mundane analogy shows why: a parent can determine that his child committed a wrong, and yet there is a further question of whether the child possesses the level of moral agency that our practices of blaming presuppose. A similar question should arise regarding the moral agency of the corporation. On a

75. *See, e.g.*, U.S. Dep't of Just., Just. Manual § 9-28.800 (2019) (providing guidance that prosecutors may choose not to indict a corporation where it has an effective compliance program); *cf.* Buell, *supra* note 45 (defending the rationality of including something like this kind of carrot alongside *respondeat superior* liability).

76. I am not suggesting that employees everywhere should enjoy the protections of tenure. At the same time, I suspect that something more protective of employees than employment-at-will is necessary to ensure a non-coercive workplace.

retributive justification for state punishment, our practices of state punishment also presuppose that the criminal law's targets qualify as moral agents. One is a fit object of retribution only if one deserves it, and one can deserve it only if one can be morally responsible for what one does.[77] So, knowing only that the corporation committed a crime does not get us to corporate criminal liability any more than knowing only that a three-year-old intentionally hit her brother gets us to juvenile criminal liability.

Whether the corporation should be prosecuted and punished for its crimes depends on factors separate from those that coverture-style liability transmission adduces. In particular, we must know what the rationale for punishing a corporation is—what is the theory of punishment we are seeking to enact? And we must then know whether the corporation is the kind of entity for which that rationale for punishment makes sense.[78]

I have argued elsewhere that retributive aims cannot be fulfilled by prosecuting and punishing corporations unless doing so is a proxy for punishing their members—*e.g.*, by impairing the joint project that the members pursue. I reason that retribution aims to induce a robust acknowledgment of guilt on the part of the offender, but corporations lack the capacity for emotion necessary for that acknowledgment.[79] So corporations are not appropriate targets of a retributive criminal law. Perhaps there are other rationales that could sustain corporate criminal liability—an expressive theory of punishment seems especially promising insofar as punishing the corporation could convey that the acts the corporation committed are not ones the moral community will tolerate,[80] and that the victims of those acts deserved better treatment.[81]

77. *See, e.g.*, Sepinwall, *supra* note 44, at 435.

78. For a compelling account that corporations are not effective targets of criminal deterrence see Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996).

79. Sepinwall, *supra* note 44.

80. *See, e.g.*, Susana Aires de Sousa & William S. Laufer, *The State's Responsibility for Corporate Criminal Justice*, 47 J. CORP. L. 1109, 1110 n.5 (2022) (citing Henry M. Hart, Jr. for the claim that a conviction stands as "a formal and solemn pronouncement of the moral condemnation of the community"); *cf.* John C. Coffee, Jr., *"No Soul to Damn: No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 424–25 (1981) (noting the particularly stigmatizing effect of the criminal law); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 854 (2000) ("[O]nly criminal liability is understood against the background of social norms, codified by the criminal law, as conveying the particular moral condemnation that expressive retribution contemplates.").

81. *See generally* JEAN HAMPTON & JEFFRIE G. MURPHY, *Forgiveness, Resentment and Hatred*, *in* FORGIVENESS AND MERCY 35, 46 (1998); Vikramaditya S. Khanna, *What Rises from the Ashes?*, 47 J. CORP. L. 1027, 1033 n.24 (2022) (collecting sources that identify the message-sending function of criminal law). Even though Khanna has famously critiqued corporate criminal liability on the grounds that it is inefficient, see Khanna, *supra* note 78, here, he allows that its expressive elements warrant further exploration. Khanna, *What Rises from the Ashes*, *supra*, at 1043.

Some of the excellent contributions in this volume cast corporate criminal liability as an embarrassment—some, because it is too lax;[82] others, because it is too harsh.[83] Some exponents of each camp have argued for decriminalizing corporate wrongdoing.[84] Whatever the ultimate merits of that proposal,[85] I want now to contest three of the grounds on which they advance it.

I begin with those who argue that corporate criminal liability punishes innocents.[86] I have noted elsewhere that the worry begs the question: it is compelling only if one holds a narrow individualist conception of moral responsibility (and I do not).[87] But even if the worry is right, one wonders what practical upshot it is meant to entail. A shift to civil sanctions? The procedural safeguards there are notably less demanding, and so the likelihood that (supposed) innocents would bear the costs of the corporation's wrong becomes much more likely.[88] To take the worry about punishing innocents seriously would then seem to risk corporate impunity, a state of affairs we should take to be intolerable.

A second proposal urges that we jettison corporate criminal liability to avoid the embarrassing reality that it is, and perhaps always will be, radically underenforced,

82. See, for example, the contribution by Diamantis and Thomas and that of O'Sullivan, each of which powerfully renders the astonishing scope of corporate crime alongside the criminal law's abrogation of any meaningful response. Together, their papers paint a dire picture. O'Sullivan describes the radical under-enforcement of the corporate criminal law we have. *See* O'Sullivan, *supra* note 72. Diamantis and Thomas compellingly argue that the corporate criminal law we have, even when it is deployed, is too watered down to deserve the name "criminal." *See generally* Mihailis E. Diamantis & W. Robert Thomas, *But We Haven't Got Corporate Criminal Law!*, 47 J. CORP. L. 991 (2022). Miriam Baer is gravely concerned about laxity too, which she attributes in part to emerging trends involving prosecutorial distrust. *See generally* Miriam H. Baer, *Forecasting the How and Why of Corporate Crime's Demise*, 47 J. CORP. L. 887 (2022). While the distrust emerges as a warranted response to criminal law's racial disparities, she predicts that white-collar criminals will illicitly enjoy its fruits. *See id.* She also compellingly draws a similar prediction from the Supreme Court's increasing willingness to recognize corporate personhood. *See* Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035 (2008).

83. *See, e.g.*, John Hasnas, *The Forlorn Hope: A Final Attempt to Storm the Fortress of Corporate Criminal Liability*, 47 J. CORP. L. 1009 (2022).

84. Among those who argue for the abolition of corporate criminal liability because it is too harsh, see, for example, *Id.*; *see also* Stephen F. Smith, *Corporate Criminal Liability: End It, Don't Mend It*, 47 J. CORP. L. 1089 (2022). For the view that we should retreat from corporate criminal liability, at least at the federal level, because it is too lax, see Baer, *Forecasting the How and Why of Corporate Crime's Demise*, *supra* note 82, at 909–10; *cf.* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (arguing that corporate criminal law might do no more than drive corporate crime underground).

85. I note that Jennifer Arlen provides compelling reasons for thinking that we would lose a powerful deterrent tool were we to jettison corporate criminal liability. *See* Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, 47 J. CORP. L. 861 (2022).

86. Hasnas makes the claim forcefully when he writes, "[C]orporate criminal punishment is a form of collective punishment in which the innocent are intentionally targeted for punishment." Hasnas, *supra* note 83, at 1014; *see also* Smith, *supra* note 84; *see generally* William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71, 74, 75 nn.11–12 (2017) (collecting sources discussing the "unjustifiable externalities" corporate criminal liability risks imposing); *cf.* Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1771–72 (2005) (critiquing the "overenforcement" endemic to corporate criminal liability, which results from its collateral consequences).

87. *See, e.g.*, Sepinwall, *supra* note 44, at 435; *see also id.* at Part II.

88. Coffee makes this point in his contribution to this volume. *See* Coffee, *supra* note 41, at 966 ("Civil liability also punishes the innocent in the corporate context, and civil courts probably impose the vast majority of the penalties imposed on corporations (as well as the largest).").

especially as compared with our aggressive (more accurately, oppressive[89]) "war on [street] crime"[90]—all the more so when the accused is a person of color.[91] The thought seems to be that we can avoid the disparity if we rule out corporate criminal liability in the first place. An analogous argument might have motivated the abolition of coverture's criminal liability: we can avoid the embarrassment of a legal regime protecting men's proprietary orientations to their wives by eliminating doctrines that would hold men liable for their wives' crimes. But the response in the coverture context might instead have gone the other way: eliminate inequality not by having neither spouse bear responsibility for the other, but by having each spouse do so. Analogously, we should confront a criminal law that is already too lax when it comes to corporate crime not by abolishing corporate criminal liability, but by imposing it at least as forcefully as we impose criminal liability for street offenses[92] (or again, by overhauling our criminal law as it applies to street offenses, to make it much more even-handed and race-neutral, and much less punitive).[93]

Extending, rather than retracting, liability is worth considering not simply as a matter of the best response to crime, but as a matter of the best response to joint activity, whether in the spousal or corporate context. Coverture undoubtedly deserved to be abolished. Still, one can endorse that fact while also lamenting the loss that its abolition produced. Without coverture or spousal liability, we are consigned to a vision of marriage that sees members of a married couple atomistically rather than as a unit. But unity is, as I have argued, a great good of intimate relationships—one the law has reason to promote. And versions of that great good can be had not just in the romantic sphere but also in other spheres, where we join forces and ideas and spirits to get things done together. Casting the corporation as a crucial and fruitful space of joint activity represents the corporation in its best light. Casting it in this way also makes sense of, and perhaps even mandates, entity-level liability. Corporate crime is not just the crime of discrete individuals. Here, too, there are reasons to want the law to recognize that. Perhaps those reasons should give way in the face of the critiques that many of the other authors in this volume advance. I hope to have shed light on the magnitude of that loss so that we can adequately take it into account.

V. CONCLUSION

At the end of the day, my aim here has not been to justify corporate criminal liability; it has been to secure one of its predicates—specifically, to identify grounds for imputing the acts of a corporate agent to the corporation itself. I take that to be an important aim in its own right, whatever the implications for corporate criminal liability. Knowing that the crime is the corporation's doing is a necessary first step in responding to the crime, whether through civil or criminal sanctions. And knowing *how it is* that the crime is the corporation's—which is what the account here is meant to illuminate—can yield two

89. *Cf.* John Braithwaite, *Maximal Accountability with Minimally Sufficient Punishment*, 47 J. CORP. L. 911 (2022) (critiquing much criminal law for embodying the sins of "domination," as civic republicans understand that term).

90. *See, e.g.*, Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001).

91. *See, e.g.*, Smith, *supra* note 85; O'Sullivan, *supra* note 72. *Cf.* John Braithwaite, *supra* note 89, at 914.

92. By calling our attention to the justice our corporate criminal law leaves undone—the "missing victims"— Susana Aires de Sousa and Bill Laufer provide a stirring defense for retaining corporate criminal liability. De Sousa & Laufer, *supra* note 80. For the problem of the missing victim across all of criminal law, see generally William S. Laufer and Robert C. Hughes, *Justice Undone*, 58 AMER. CRIM. L. REV. 155 (2020).

93. *See, e.g.*, O'Sullivan, *supra* note 72, at 1067–68; *cf.* Laufer, *supra* note 85.

further benefits. First, it can shed light on the social practice of blaming corporations, which many theorists have found puzzling, if not also incoherent.[94] The public is right to identify the corporation as the culprit for the reasons adduced here, even if the public may be wrong to think that a corporation is an appropriate object of blame. And there is a further benefit in knowing how the corporation committed a crime: Where hierarchy, rather than unity, grounds the ascription, our identifying the crime as a crime of the corporation calls attention to the unfair lot of the rank-and-file employees—a pervasive feature of modern life that perhaps in due time will, like coverture, be recognized as the injustice it is.

94. *See, e.g.*, Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1359 (2009) (comparing corporate criminal punishment with the ancient legal practices of deodand and Frankpledge); Susan Wolf, *The Legal and Moral Responsibility of Organizations*, 27 CRIM. JUST. 267, 268 (1985) (questioning whether corporations can be morally blameworthy themselves given that they "are, after all, composed of individuals").