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RESPONSIBLE SHARES AND SHARED RESPONSIBILITY: IN DEFENSE OF RESPONSIBLE CORPORATE OFFICER LIABILITY

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Dear Law and Humanities Workshop Participant,

What follows is an early draft of a paper that seeks to defend the responsible corporate officer doctrine, a doctrine that imposes criminal liability upon corporate executives for crimes of their corporation that they neither committed nor culpably failed to prevent. The paper cobbles together various strands of prior research and aims to extend them to this new context.

The paper proceeds in four parts, the first two of which engage with the existing literature, while the latter two advance the paper's positive account. While I welcome comments on all parts of the paper, I will be especially grateful for comments on the paper's positive account. More specifically, I am especially concerned about an attempt to justify the responsible corporate officer doctrine by way of an extended analogy to the project of joint parenting. I think I can make good on the claim that shared responsibility is appropriate for those who parent together (i.e., parents bear joint and several liability for the ways in which either of them screws up their kid), though you will let me know if/why you remain unconvinced. The (greater) problem arises in seeking to transpose the insights from the joint parenting context to the context of the corporation. I vaguely attempt to acknowledge the difficulties in the transposition, and adapt the account accordingly, but I still worry that the two contexts are so dissimilar as to make the argument – which is intended to do a good deal of work – positively bizarre.

A second concern goes to my focus on the RCO doctrine altogether. That doctrine is a relatively minor one – not all that frequently applied, and nowhere near as prominently discussed in the literature as is, say, the prosecution and punishment of corporations. At the same time, the paper contains a good deal of theoretical work, and I fear that embedding that theoretical work within the context of a minor doctrine may cause the theoretical contributions here to be largely overlooked. So I would be grateful for suggestions about reframing or repackaging with an eye to bolstering wider interest in the project.

I will end my outpouring of anxiety there and leave you to discover the paper's remaining deficiencies ☺. I very much look forward to your comments and suggestions.

All best,
Amy

RESPONSIBLE SHARES AND SHARED RESPONSIBILITY: IN DEFENSE OF RESPONSIBLE CORPORATE OFFICER LIABILITY

ABSTRACT

When a corporation commits a crime, whom may we hold criminally liable? One obvious set of defendants consists of the individuals who perpetrated the crime on the corporation's behalf. But according to the responsible corporate officer (RCO) doctrine – a doctrine that is growing more widespread – the state may also prosecute and punish those corporate executives who, although perhaps lacking “consciousness of wrongdoing,” nonetheless have “a *responsible share* in the furtherance of the transaction which the statute outlaws.” In other words, the RCO doctrine imposes criminal liability on the executive who need not have participated in her corporation's crime; nor need she even have known about it at the time of its occurrence. Just so long as the executive in question had the authority to prevent the crime and failed to do so, she may be targeted in a criminal suit.

The RCO plainly poses a challenge to a conception of criminal law that has individual culpability stand as the sine qua non of any prosecution and punishment. Thus, RCO liability, while representing the most common instance of strict criminal liability, has been deemed “at odds with fundamental notions of our criminal justice system,” and likened 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. On the other hand, corporate crimes have, as others have argued, an irreducibly collective aspect. If we take this aspect seriously, as this paper does, then departures from the individualist paradigm may well be warranted. In particular, we may be justified in assigning responsibility not just to the corporate crime's immediate perpetrators but also to those who held prominent positions within the corporation at the time of the crime's occurrence, and this responsibility may license just the kind of criminal liability that the RCO doctrine contemplates. This paper seeks to determine the circumstances under which this extension of responsibility is permissible, and the grounds of its permissibility.

I shall contend that existing justifications of the RCO doctrine do not help, as they seek to defend the doctrine on the basis of its deterrent value, or its ability to ensnare corporate executives against whom there is insufficient evidence to convict on a direct liability offense. In this way, these justifications fail to establish that the officers whom the RCO was designed to target – i.e., those who did not participate in the offense -- in fact *deserve* prosecution and punishment. A burgeoning philosophical literature on shared responsibility, while promising in spirit, is ultimately unavailing too, I shall argue. What is needed is a novel defense of the doctrine – one that elucidates the blameworthy features of the corporate officer that ground her criminal liability – and that is what this paper aims to provide.

INTRODUCTION

Helen Florence Weber was a housewife in Honolulu, HI, when she found herself convicted of seventeen counts of violating PHR Ch. 43, Sec. 7, a statute prohibiting open fires.¹ Mrs. Weber was nominally the president and treasurer of her husband’s car wrecking business, Kailua Auto Wreckers, Inc. (KAW). In 1976, the year in which the offenses occurred, KAW openly burned between 10,000 and 15,000 cars, as captured on film by neighbors, and notwithstanding repeated oral and written warnings from the Hawaii Public Health agency.² Mrs. Weber’s role in the company was merely titular – in some years, she attended the annual directors’ meeting, in other years she did not; on rare occasions, she ran errands for the company. Mrs. Weber did not take an active part in the business, she did not issue orders regarding business operations, and she never set company policy.³

Mrs. Weber’s conviction was based on a common law doctrine known as the “responsible corporate officer (RCO)” doctrine. First expounded in a 1943 Supreme Court opinion involving the misbranding of drugs in violation of the Federal Food, Drug and Cosmetic Act (FFDCA), the RCO doctrine permits the prosecution and punishment of those corporate executives who, although perhaps lacking “consciousness of wrongdoing,”⁴ nonetheless have “a *responsible share* in the furtherance of the transaction which the statute outlaws.”⁵ In other words, the RCO doctrine imposes criminal liability on those executives who need not have participated in their corporation’s crime; nor need they even have known about it at the time of its occurrence. Just so long as the executive in question had the authority to prevent the crime and failed to do so, he may be targeted in a criminal suit.⁶

The RCO plainly poses a challenge to a conception of criminal law that has individual culpability stand as the sine qua non of any prosecution and punishment.⁷ Departures from this individualist stance

¹ PHR Ch. 43, Sec. 7(a) states, in relevant part, “no person shall ignite, cause to be ignited, permit to be ignited or maintain any open fire.”

² Case at 224.

³ *Id.* at 231.

⁴ *United States v. Dotterweich*, 320 U.S. 277, 284 (1943).

⁵ *United States v. Dotterweich*, 320 U.S. 277, 282-83 (1943) (emphasis added).

⁶ *See infra* Part I.A.

⁷ *See, e.g.*, *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,

have been called “barbaric,”⁸ “tribal,”⁹ and “gag”-worthy.¹⁰ RCO liability, while representing the most common instance of strict criminal liability,¹¹ has been deemed “at odds with fundamental notions of our criminal justice system,”¹² and likened 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.¹³ The ABA disparagingly refers to the doctrine as “[t]he crime of doing nothing.”¹⁴ On the other hand, corporate crimes have, as others have argued, an irreducibly collective aspect.¹⁵ If we take this aspect seriously, as this paper does, then departures from the individualist paradigm may well be warranted. In particular, we may be justified in assigning responsibility not just to the corporate crime’s immediate perpetrators but also to those who held prominent positions within the corporation at the time of the crime’s occurrence, and this responsibility may license just the kind of criminal liability that the RCO doctrine contemplates. Yet the circumstances under which this extension of responsibility is permissible, and the grounds of its permissibility, remain to be uncovered.

Existing justifications of the RCO doctrine do not help, as they seek to defend it on the basis of its deterrent value, or its ability to ensnare corporate executives against whom there is insufficient evidence to convict on a direct liability offense. In this way, these justifications fail to establish that the officers whom the RCO was designed to target – i.e., those who did not participate in the offense -- in fact *deserve* prosecution and punishment. A burgeoning philosophical literature on shared responsibility, while promising in spirit, is ultimately unavailing too. What is needed is a novel defense of the doctrine – one

has no evil intention or consciousness of wrongdoing.”); Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 435 & n. 110 (2012).

⁸ See, e.g., H.D. Lewis, *The Non-Moral Notion of Collective Responsibility*, in INDIVIDUAL AND COLLECTIVE RESPONSIBILITY 119, 121 (Peter A. French ed., 1972).

⁹ DANIEL WARNER, AN ETHIC OF RESPONSIBILITY IN INTERNATIONAL RELATIONS 65-66 (1991). Cf. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 25-28 (1961) (referring to the tribalist assignment of collective responsibility as primitive).

¹⁰ Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1359 (2009).

¹¹ CFIF.org, *The Criminalization of Responsibility: Making Corporate Officers Guilty for the Acts of Their Employees*, May 30, 2003.

¹² Jennifer Bragg, John Bentivoglio & Andrew Collins, *Onus of Responsibility: The Changing Responsible Corporate Officer Doctrine*, 65 FOOD & DRUG L.J. 525, 525 (2010).

¹³ Alschuler, cite.

¹⁴ http://apps.americanbar.org/cle/programs/t12cdn1.html?sc_cid=CET2CDN-B.

¹⁵ Cite – Pettit, French.

that elucidates the blameworthy features of the corporate officer that ground her criminal liability – and that is what this paper aims to provide.

The paper is part of a larger project seeking to expand traditional conceptions of culpability. Earlier work has urged an enlarged understanding of the circumstances under which one can be said to have participated in a wrong.¹⁶ This paper takes a different tack, by seeking to disrupt the traditional equivalence between culpability and blameworthiness. More specifically, on the traditional view, one is blameworthy if and only if one meets the criteria for individual culpability, where the latter consist in one's having made a causal difference to the occurrence of a wrongful act with a guilty mind.¹⁷ The traditional view, I believe, represents the paradigmatic case of blameworthiness, *but it is not the exclusive case*.¹⁸ Instead, I shall understand “blameworthy” to mean, flat-footedly, just that one is worthy of blame – or, equivalently, just that one would be appropriately subject to blame by others. I take the question of just when one is blameworthy to be an open one -- it remains to be determined whether, and if so when, one may be blamed outside of the circumstances that the traditional conception requires. Here, I seek to argue for one non-standard answer to the question of blameworthiness – in particular, I shall contend that it is sometimes appropriate to blame a corporate executive 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 with respect to its occurrence.

¹⁶ Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251 (2009) (advancing an account according to which military commanders who fail to punish atrocities of their troops that they neither ordered nor even knew about in advance nonetheless can be said to have participated in an atrocity if they fail in certain circumstances to punish their subordinates' offense); Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J.L. & POL. 183 (2006) (arguing that contemporary Americans participate in an extended symbolic harm that has its roots in slavery and persists so long as the United States fails to offer slavery reparations).

¹⁷ See, e.g., II William Blackstone, *Commentaries on the Laws of England* *20–21 (“to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.”); 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.”); 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.”).

¹⁸ Kutz, *Causeless Complicity* (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).

In this way, the paper seeks to provide not only a novel justification for the responsible corporate officer doctrine as it currently operates, by articulating a conception of responsibility that allows for blame in the absence of individual culpability. The paper also envisions a broader scope of application for the RCO doctrine. As we shall see in Part I.A, that doctrine has evolved to contain an implicit causation requirement: the executive may defend against a conviction by establishing that it would have been “objectively impossible” to prevent the corporation’s crime. The circumstances leading to the corporation’s crime, then, must have included an omission on the defendant’s part without which the crime could not have occurred. The doctrine renders this omission culpable in light of the executive’s role – it is only because (1) the executive had the responsibility and the authority to prevent the crime, (2) it would have been possible for her to prevent the crime, and (3) she failed to do so that she may be found guilty under the RCO doctrine as it now operates. Yet on the conception of responsibility I shall advance, the executive may – in circumstances I shall go on to specify – be blameworthy even where there is nothing she could have done to prevent the crime.

Of course, to find the executive blameworthy even where she could not have done otherwise is not yet to justify the state’s prosecuting and punishing her. Her blameworthiness, that is, does not necessarily establish her criminal liability. Given that the RCO doctrine is sometimes invoked in civil suits, 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 not have done so.¹⁹ Yet because civil liability would fail to track the moral meaning of responsibility on the account I shall advance, I shall seek 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 suggest (non-incarcerative) sanctions that reflect the nature of the executive’s responsibility as I conceive of it. It

¹⁹ This two-track scheme is suggested in *United States v. Park*, 421 U.S. 658, 673 (1975) (“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).

is hoped that these sanctions will serve to diminish, if not eliminate, concerns that criminal liability for the defendant who does not meet the hallmarks of individual culpability is unduly draconian.

The paper proceeds as follows: In Part I, I offer a critical overview of the RCO doctrine, which aims not only to present the doctrinal elements but also to expose the inadequate justification – both within the case law and commentary – that the doctrine has received. I end Part I by arguing that the doctrine can be justified, if at all, only by an account of responsibility that transcends the constraints of the individualist paradigm. In Part II, I turn to existing accounts of shared responsibility, to see if they might supply the needed justification, and I find each of them wanting – whether on their own terms or as applied to the RCO doctrine. In Part III, I articulate an alternative account of shared responsibility that aims to elucidate the rationale for holding executives criminally responsible for crimes of their corporation. The account proceeds by way of an extended analogy to the project of joint parenting, wherein it is appropriate, I shall argue, to blame each parent for the failings of the other no matter the efforts of the one to reform the other. The account receives refinement in Part IV, where I also undertake to propose a series of sanctions that fit the nature of the executive’s crime.

One note before proceeding: Given the existing contours of the RCO doctrine, I contemplate here only the responsibility of the corporate officer. Nonetheless, I believe the account I go on to advance would apply *mutatis mutandis* to anyone who is expected to harbor a genuine commitment to the corporation. Thus, I leave open the possibility that some directors and controlling shareholders might be appropriate targets of criminal liability, though I do not pursue that possibility here.

I. RESPONSIBLE CORPORATE OFFICER DOCTRINE: INDEFENSIBLE?

In this Part, I first present the doctrine as it has evolved principally through two Supreme Court cases. I then turn to the justifications that jurists and scholars have proffered for it, and argue that none of these is persuasive.

A. Doctrinal Elements

While, in some cases, the responsible corporate officer doctrine is used to prosecute and punish an executive who carried out the corporation’s crime,²⁰ the standard case involves a corporate officer who, like Helen Weber, neither participated in nor perhaps even knew about the corporation’s criminal conduct.²¹

The seminal case in this regard is *United States v. Park*, a 1975 Supreme Court case in which the Court affirmed the conviction of John Park, president and chief executive officer of Acme Supermarkets, for a rodent infestation at an Acme warehouse. Acme is a national retail food chain that, at the time, had approximately 36,000 employees, 874 retail outlets, twelve general warehouses, and four special warehouses.²² The infested warehouse was located in Baltimore, whereas Park’s office was situated in Philadelphia, along with company headquarters. 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 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.”²³

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 (FFDCA) 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

²⁰ Cite – Higgins (“Unlike *Park*, this matter does not involve holding an unaware corporate executive accountable for vermin in a warehouse. ...Higgins’ case stands apart from other *Park* doctrine cases because the criminal conduct at issue is his own.”).

²¹ See, e.g., *Dotterweich*, 320 U.S. at 285-86 (Murphy, J., dissenting) (“There is no evidence in this case of any personal guilt on the part of the respondent. There is 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. Guilt is imputed to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation.”).

²² *United States v. Park*, 421 U.S. 658, 660 (1975).

²³ 421 U.S. at 663-64.

with the Act bear a ‘responsible relationship’ to, or have a ‘responsible share’ in, violations.”²⁴ The Court identified an act element in the responsible officer’s omission, and culpability in light of the grave harm that resulted therefrom. Thus, the Court described the elements of the offense as follows:

[T]he Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. The failure thus to fulfill the duty imposed by the interaction of the corporate agent’s authority and the statute furnishes a sufficient causal link. The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability.²⁵

Recognizing the potentially draconian nature of RCO liability,²⁶ the Court in *Park* articulated an affirmative defense of “objective impossibility,”²⁷ under which the defendant could rebut the government’s prima facie case if he could establish that it would have been objectively impossible for him to have prevented the underlying violations. Thus, the RCO doctrine holds “criminally accountable the persons whose failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of,”²⁸ though it allows these persons to avoid liability where they can establish that it would have been impossible for them to have prevented the violation. Applying this framework to *Park*, the Court held that his conviction was acceptable because he had the responsibility and authority to remedy the rodent problem. Thus his failure to have done so was sufficient to ground his conviction under the RCO doctrine.

B. Attempts To Defend the Doctrine

Several rationales have been adduced to support criminal liability for the non-culpable corporate officer. Painting in broad terms, we can group these into four categories – first, those that understand

²⁴ *Park* 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.*, *United States v. Dotterweich*, 320 U.S. 277, 279 (1943) (“Equally baseless is the claim of Dotterweich [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.”).

²⁵ *Park* at 673-74.

²⁶ CITE.

²⁷ *Park* at _____. *See also* *United States v. New England Grocers Supply Co.*, 488 F.Supp. 230, 235 (D. Mass., 1980) (discussing impossibility as an affirmative defense).

²⁸ *United States v. Park*, 421 U.S. 658, 671, 95 S. Ct. 1903, 1911, 44 L. Ed. 2d 489 (1975).

RCO liability as a kind of negligence; second, those that focus on the unique nature of corporate conduct, which necessarily requires human participation; third, those that support RCO liability as a tool to target executives who culpably participated in the corporation’s crime but against whom there is insufficient evidence for a conviction; and, finally, those rationales that rest upon the officer’s willing assumption of the risk of liability inherent in her office. I address each in turn.

1. *RCO Liability as Negligence*

The Court has argued that criminal liability for the corporate officer in the wake of a statutory violation is appropriate where the magnitude of the harm that the statute is intended to deter is very great.²⁹ This is especially so, the Court has added, where the regulated activities “touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.”³⁰ Thus, “[i]n the interest of the larger good, [the law] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.”³¹

It is undoubtedly true that the corporate executive can more readily prevent or remedy a health or environmental violation of her corporation than can a member of the public. The question, though, is whether she may be charged criminally where she fails to do so. The Court seems to think that the magnitude of the harm that would otherwise result justifies dispensing with the standard requirement that one incur criminal liability only if one has operated with “consciousness of wrongdoing.”³² At the same time, the Court seems unwilling to dispense with culpability altogether, implicitly charging the defendant

²⁹ 320 U.S. at 280-81. *See also id.* at 284-85 (“Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.”); *Smith v. California*, 361 U.S. 147, 152 (1959) (“the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors.”).

³⁰ *United States v. Dotterweich*, 320 U.S. 277, 280, 64 S. Ct. 134, 136, 88 L. Ed. 48 (1943).

³¹ *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S. Ct. 134, 136, 88 L. Ed. 48 (1943). *See also id.* at 285 (“Balancing relative hardships, Congress has preferred to place [the burden] upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.”).

³² 320 U.S. at 280–81 (In the interest of the “larger good” of keeping impure and adulterated food and drugs out of the channels of commerce, the statute “dispenses with the conventional requirement for criminal conduct-awareness of some wrongdoing.”).

with negligence, since it imposes RCO liability only if the defendant could have failed to prevent the offense but failed to do so.³³

Still, even if the defendant was negligent, and so not completely innocent of wrongdoing, it remains unclear why her negligence should eventuate in criminal, rather than civil, liability. Deterrence can be secured at least as readily – and more cheaply, as scholars have argued in other contexts³⁴ – through a civil suit. One might attempt to defend the use of criminal liability by pointing to the moral meaning that the criminal law portends. It was for this reason that the Court, in its first encounter with the RCO doctrine, insisted that criminal liability was necessary lest the Court otherwise encourage a view of the FFDCA's criminal penalties as a “license fee for the conduct of an illegitimate business.”³⁵ But the concern about moral meaning should be allayed just so long as the corporation itself, and/or those of its members who participated culpably in its offense, were to face criminal liability. And there is a concern on the other side, that imposing criminal liability in the face of mere negligent fault risks diluting the force of the criminal law.³⁶

In any event, we have reason to doubt whether the corporate executive really could have prevented her corporation’s violation. The impulse to lend a negligence construction to the RCO doctrine is understandable, because negligence imports a measure of culpability that strict liability lacks, and thereby renders criminal liability more palatable. The doctrine permits this construction, given that criminal liability under the doctrine is not simply status-based but depends on the officer’s “responsible relationship” to the violation,³⁷ and given that officers can defend against liability if they can establish that they could not have prevented the crime no matter what they did. Nonetheless, negligence rings hollow as a justification for prosecuting or punishing the corporate executive who operates at several

³³ See, e.g., Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 *Sup.Ct.Rev.* 107, 109 (1962) (arguing that punishment without reference to the actor’s state of mind has no deterrence value).

³⁴ See, e.g., Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 *J. LEGAL STUD.* 319, 323 (1996); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 *J. Legal Stud.* 833 (1994); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 *HARV. L. REV.* 1477 (1996).

³⁵ 320 U.S. at 282-83.

³⁶ Cite.

³⁷ *Friedman* at 111 (“As made clear by the Supreme Court, it is simply not the case that a defendant can be convicted of a misdemeanor under the responsible corporate officer doctrine based solely on his position within the corporate hierarchy.”)

layers of remove from the individuals participating in the offending conduct, as John Park attempted to argue in contesting his conviction for Acme’s rodent infestation. Of course, Park *could have* intervened to remedy the rodent infestation, but do we really expect the president of a very large corporation to be laying rat traps and bait stations? (By way of analogy, we might say that it is undoubtedly true that President Obama has the power and authority to prevent drug deals from occurring on the streets of D.C., but he also presumably has better things to do with his time.) The RCO doctrine ignores the reality of the large, decentralized modern corporation and the economic benefits that go along with its decentralization, and it holds the corporate executive criminally liable on the basis of a set of purported expectations – that the high-ranking executive will indeed monitor all facets of the company’s operation – that few of us in fact harbor. The corporate executive may well be blameworthy – and I shall argue in Part III that she is – but it seems an undue stretch to locate her blameworthiness in her failure to have prevented the kind of offenses that the RCO doctrine paradigmatically contemplates. Negligence, that is, fails to track the nature of the corporate officer’s responsibility.

2. The Ineluctable Human Contributions to Corporate Crime

This rationale focuses on the corporation’s unique ontology, as a result of which corporate action necessarily requires human execution. Since the corporation can act only through its members, the argument goes, its crime necessarily redounds to them. Thus, for example, the Hawaii Supreme Court justified Helen Weber’s conviction on the ground that Kailua Auto Wreckers’ violations of Hawaii’s anti-burning statutes could have occurred only at the hands of the company’s human members.³⁸

In response to this ontological argument, one might well wonder whether too much is being made of the corporation’s parasitic reliance upon its human members. The fact that the corporation can act only through individuals is compatible with the corporation’s nonetheless bearing a guilty will. This is especially true in those cases where no one individual who participates in carrying out the corporation’s

³⁸ State v. Kailua Auto Wreckers, Inc., 62 Haw. 222, 230, 615 P.2d 730, 736 (1980). *See also* *Dotterweich*, 320 U.S. at 281 (“The only way in which a corporation can act is through the individuals who act on its behalf.”) (citing *New York Central & H.R.R.R Co. v. United States*, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613 (1909));

crime satisfies the mental state elements of the crime though, together, these various individuals do. This was the fact pattern in *United States v. Bank of New England*,³⁹ in which the First Circuit affirmed the bank’s conviction for violating a reporting requirement where no one employee possessed all of the information prompting the requirement, and so no one employee knew that reporting was required. The Court stated that it was acceptable to aggregate the knowledge of several individuals and impute this collective knowledge to the corporation as a whole, thereby finding that the corporation satisfied the crime’s knowledge requirement, again even though no one individual possessed the requisite knowledge. Now, the collective knowledge doctrine has been ridiculed⁴⁰ – rightly, to my mind – but we need not be detained by its implausibility here. The point for our purposes is that the fact that corporations cannot carry out acts on their own does not establish that the humans who act on their behalf necessarily come to bear culpability as a result, just as the individual employees in *Bank of New England* did not bear culpability for having failed to produce the required report.

Further, even if it were the case that those individuals who together carried out the corporate crime were necessarily guilty of that crime (or for their contribution to it), we would still not have arrived at a justification for RCO liability. After all, the RCO doctrine is typically invoked precisely when the executive has not participated in the crime; if she had, she could be prosecuted on a direct liability theory. Of course, one could respond that the executive’s omission was a but-for cause of the corporation’s crime and, in this way, the executive prosecuted under the RCO doctrine did contribute to the crime’s commission. But this proffered justification for RCO liability has nothing to do with the corporation’s unique ontology – the executive would be liable not because the corporation can act only through humans but because she had failed to fulfill her duty to prevent criminal violations, a duty she bears with respect to her individual subordinates’ conduct just as much as the corporation’s. In other words, it is not the corporation’s inability to act on its own that would then ground liability but instead the executive’s

³⁹ Cite.

⁴⁰ Cite – Luban.

purportedly culpable omission that would do so. This is a negligence account of RCO liability and we have already seen that that account is wanting.

3. An End-Run Around the Evidentiary Burdens of Direct Liability

Some commentators have sought to defend RCO liability not as a response to an executive's negligence, and less still as a justified use of strict liability. Instead, these supporters see the RCO doctrine as a tool a prosecutor can use to target corporate executives who are believed to have participated in the corporation's crime yet against whom the prosecutor would be unlikely to secure a conviction – in the standard case, because insufficient evidence exists to connect the executive to the crime.⁴¹ To take an example sympathetic to this line of defense, imagine that police uncover the most convincing of smoking guns, establishing that a CEO directed the corporate crime, and perhaps even helped to carry it out, but the evidence in question was acquired illegally and so is inadmissible. In such a case, RCO liability provides a prosecutor with an alternative route to criminal sanctions – to be sure, one that carries lesser penalties than would a conviction as an accomplice to the crime but nonetheless one that ensures that the executive does not escape liability altogether.

Satisfying as this outcome may be, it does nothing to bolster the case for RCO liability. Our desire to see the executive pay for her crime would not license our convicting her falsely, or through some other process involving a miscarriage of justice. The justifiability of convicting her as a responsible corporate officer turns then on the justifiability of RCO liability itself. If RCO liability is a travesty of justice, as some jurists and commentators have argued,⁴² then we are no more within our rights in seeking her conviction under the doctrine than we would be in seeking her conviction for some trumped up charge. So defenders of the RCO doctrine need a justification independent of its ability to ensnare guilty executives who would otherwise be off the hook.

⁴¹ Cite – Kushner.

⁴² See *supra* note ____.

4. *Consent to RCO Liability*

A final justificatory strand points to the corporate officer's willing assumption of the risk. For example, as various courts have noted, the obligations of foresight and vigilance that the corporate officer bears, and the corresponding liability she would come to incur if she were to neglect to fulfill these, are known to the officer in advance of her assuming her position, and we can therefore infer her at least tacit consent to the liability scheme.⁴³ We are justified in prosecuting and punishing her for her lapses on this line of argument, then, because she willingly consented to the risk of liability when she assumed her officer position.

In response, it should be noted that consent can furnish no more than a necessary pre-condition for the imposition of liability, and not a justification for it: Liability for the corporate officer who had not participated in her corporation's crime would indeed be deeply problematic if she had been conscripted or otherwise compelled to hold her position in the corporation.⁴⁴ But the fact that she came to hold the position freely, knowing – let us assume – the exposure to liability that the position entailed, would not itself justify the state in imposing the liability to which she had (implicitly or explicitly) consented. To put the point bluntly, the fact that someone is willing to die for the sins of the rest of us does not make killing him permissible. By the same token, more than the executive's consent is necessary to justify responsible corporate officer liability.

C. Summary

⁴³ See, e.g., *United States v. Park*, 421 U.S. 658, 672 (1975) (“The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority.”); *Morissette*, 342 U.S. at 256 (“The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.”).

⁴⁴ There is a more general version of this concern – viz., that shared responsibility will entail that individuals who share religious, ethnic or racial ties will come to bear responsibility for one another's acts – that likely accounts for a good part of the resistance to the notion of shared responsibility. To be clear, the account I advance here is intended to apply only to those groups one joins freely, and in which one enjoys a genuine right of exit. See Sepinwall, *Citizen Responsibility*.

None of the four proffered rationales serves to justify prosecuting and punishing executives for corporate crimes in which they have not participated. It is nonetheless notable that each of the four rationales attempts to shoehorn the doctrine into the traditional understanding of criminal liability as rooted in personal guilt. Thus the negligence rationale focuses on the corporate executive's purported fault; the corporate ontology rationale seeks to identify a culpable act element in the executive's omission; the prosecutorial tool rationale presupposes the executive's complicity; and the consent rationale foregrounds a kind of voluntarism especially congenial to the individualist paradigm.⁴⁵

It is easy to understand the impulse to assimilate the responsible corporate officer doctrine to the prevailing paradigm of criminal responsibility. Punishing someone who is blameless is a disquieting prospect, to say the least. Where the existing rationales go wrong, however, is in presupposing that blame is warranted only in the face of personal guilt. What is needed is not a rationale that explains how the RCO doctrine is really a species of culpability as conventionally understood, but instead an account that elucidates the reasons for which one may be blameworthy even if one does not meet the hallmarks of guilt on the individualist paradigm. What is needed, that is, is a compelling theory of shared responsibility. I turn now to existing theories of shared responsibility to see if any of them fits the bill.

II. SHARED RESPONSIBILITY

For more than 100 years, debate has raged over whether it is ever appropriate to subject corporations to criminal liability.⁴⁶ To the extent that this debate turns on questions of whether the corporation is a moral person, it contemplates the possibility of collective responsibility.⁴⁷ Under a theory of collective responsibility, it is appropriate to assign blame (or praise) to a collective entity (nation-state,

⁴⁵ Cf. Samuel Scheffler, *Relationships and Responsibilities*, 26 PHIL. & PUB. AFF. 189 (1997).

⁴⁶ The first case affirming corporate criminal liability for specific intent crimes was decided in 1909. *See* *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909). Prior to that case, U.S. courts had permitted corporate convictions only for crimes of nonfeasance and misfeasance. *See, e.g., State v. Morris and Essex Railroad Co.*, 68 Mass. (2 Gray) 339 (1854). Cf. John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability* 46 AM. CRIM. L. REV. 1329 (2009).

⁴⁷ Cite – Dan-Cohen.

university, church, corporation, etc.) itself, where the assigned blame is taken to be *non-distributable*.⁴⁸

The buck stops with the collective entity, as it were. While the assignment of responsibility to the collective might entail a derivative assignment of responsibility to some of the collective's members or a set of sanctions that are transmitted to these members, there is, on a theory of collective responsibility, some amount of responsibility that the collective itself bears in the first instance.

Whatever the cogency of theories of collective responsibility, the focus in this Part is distinct. Here, we are concerned with the grounds upon which one might hold group members responsible – a concept, as we saw in the Introduction, referred to as *shared responsibility*. More specifically, this Part surveys existing accounts according to which members are deemed to share responsibility for acts of their groups (with a special focus on the corporation), and finds each of these accounts wanting.

Now, 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. Here, I am concerned with the second sense of sharing: The claim in need of defense is that executives may bear some amount of responsibility for a crime of their corporation, independent of the causal role these executives played. For now, I leave to one side the question of whether, and if so how, the magnitude of responsibility varies among them.⁴⁹

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, as an example of a case exemplifying “group fault distributable to each member,”⁵⁰ a conspiracy to commit a bank robbery where the robbery's success is due to each of the members, who variously function as perpetrators, abettors, inciters or protectors.⁵¹ The rival accounts I will be examining in this chapter are broader in

⁴⁸ Cite – Feinberg.

⁴⁹ I take up this question in Part IV, where I seek to 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.

⁵⁰ Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674, 684 (1968).

⁵¹ *Id.*

scope in that they do not require that members proximately cause the group transgression. Since the account I advance in the next two Parts seeks to assign responsibility for a corporate act to officers *independent* of their participation, I consider here only those accounts that, like mine, 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.⁵² 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.⁵³

In the case of the former, responsibility is alleged to flow reciprocally from the material benefits received.⁵⁴ Thus, for example, Eric Posner and Adrien Vermeule argue that “[p]eople enter relationships

⁵² Consent has been proffered as a distinct ground of shared responsibility. See, e.g., Feinberg; R.S. Downie, *Responsibility and Social Roles*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY: THE MASSACRE AT MY LAI* 63, 70 (Peter French ed., 1972). Since I addressed what I take to be the deficiencies of consent-based accounts in Part I, I will not return to these accounts here.

⁵³ See generally Sepinwall, *Reparations*.

⁵⁴ 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. See Janna Thompson, *Collective Responsibility for Historic Injustices*, *MIDWEST STUDIES IN PHILOSOPHY* 154 (2006) (hereinafter Thompson, CR). More specifically, citing the importance of “long-term and ‘lifetime-transcending’ interests and projects,” *id.* at 165, such as being provided for in old age, or ensuring that one’s culture persists, Thompson argues that “citizens of a political society ought to support institutions and practices that enable such [interests] ... to be fulfilled,” *id.*, and her argument derives its appeal from the thought that future generations will incur a collective responsibility to seek to fulfill the long-term and lifetime-transcending interests of *our* generation, *see id.* at 165-66; JANNA THOMPSON, *TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORICAL INJUSTICE* (2002). There are two things to note in response to her account. The first is the illicit extension from supporting the interests of past generations to incurring responsibility for their transgressions. Thompson lumps together keeping commitments of past generations and making recompense for their failures to fulfill their own obligations, and she argues that we have an “intergenerational collective responsibility” to do both. CR, *supra* at 166. But while intergenerational reciprocity could ground the fairness of making each generation underwrite the commitments of the generation before it, it would not ground the fairness of making each generation repair the failures of the generation before it, because the current generation might not breach any of its obligations; after all, a commitment to lifetime-transcending projects might be an ineluctable, and indeed desirable, feature of social groups, but debts and transgressions are neither. Secondly, even if every generation could be counted on to bequeath some transgression(s) to its successors, Thompson’s account would be inapposite: The responsibility Thompson has in mind is of the forward-looking variety – specifically, it is a duty to discharge the debts of one’s forbears, not an acknowledgment of blame for their breached obligations. Since the dissertation is concerned with backward-looking accounts of responsibility, I do not consider her account further.

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.”⁵⁵ 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,”⁵⁶ and that we will thereby come to bear accountability for the collective act.⁵⁷ Perhaps most sweepingly, Hannah Arendt claimed that sharing responsibility is the “price we pay” for living in human community.⁵⁸

For the second kind of benefit, responsibility results as a corollary of the member’s identification with the group’s positive acts, and the corresponding feelings of pride the member enjoys.⁵⁹ Shame, and thus liability, follow from this positive identification not as a matter of reciprocity, as in the first understanding, but instead as a matter of psychological consistency.⁶⁰

While one can experience pride, and hence shame, in connection with any group to which one belongs, national pride is a favorite source of justification for national responsibility. Thus, Meir Dan-Cohen notes that “[t]here must be a group of objects and events – the space shuttle and the Vietnam War are perhaps good examples – that are so prominently linked to American identity that virtually every American sees herself as the author of at least some of them and feels pride or shame with regard to them. Denying responsibility for all such objects and events is tantamount to repudiating one’s American

⁵⁵ 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, see 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.

⁵⁶ CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 156 (2000).

⁵⁷ See, e.g., *id.* at 157.

⁵⁸ Hannah Arendt, *Collective Responsibility*, in AMOR MUNDI 43, 50 (James Bernhauer ed., 1987). See also Cassie Striblen, *Guilt, Shame and Shared Responsibility*, 38 J. SOC. PHIL. 469, 474 (2007).

⁵⁹ See, e.g., Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992); Seana Shiffrin, *Reparations for Slavery and Justice over Time* (manuscript on file with the author).

⁶⁰ Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 987 (1992). See also MARGARET GILBERT, *SOCIALITY AND RESPONSIBILITY* 129 (2000) (describing “membership remorse,” the remorse felt by group members just in virtue of their membership); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 710 (2003) (describing a similar phenomenon as “moral taint”); Seana Shiffrin, *Reparations for Slavery and Justice over Time*, at 7 (manuscript on file with the author). Stanley Bates offers an evocative statement of the phenomenon when he quotes a Vietnam veteran who, upon learning of the massacre at My Lai, exclaimed, “I wanted to get those people. I wanted to reveal what they did. My God, when I first came home, I would tell my friends about this and cry – literally cry. As far as I was concerned, it was a reflection on me, on every American, on the ideals that we supposedly represent.” Stanley Bates, *My Lai and Vietnam: The Issues of Responsibility*, in INDIVIDUAL AND COLLECTIVE RESPONSIBILITY 143, 158 (Peter A. French ed., 1972). Alasdair MacIntyre makes an even stronger claim when he argues that individuals are partially constituted by the histories of their families and cultural groups, so that liability follows not as a matter of a self-chosen identity but instead as a matter of metaphysics. ALASDAIR MACINTYRE, *AFTER VIRTUE* 220 (1984).

identity altogether.” Similarly, Farid Abdel-Nour contends that “national responsibility is actively incurred by individuals with every proud thought they have and every proud statement they make about the achievements of their nation.”⁶¹ Stanley Bates puts the point baldly when he asserts that the “possibility of pride and the liability to guilt and shame are two aspects of one situation – a fundamental involvement in the life of the nation.”⁶²

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, it is not just members but also outsiders to the group who can materially or psychologically benefit from it. Permanent residents of the United States may benefit from federal tax cuts, just as American Italiophiles may reap pride from Italy’s World Cup victory in soccer. Yet only members are to bear responsibility for group transgressions, so something more than benefiting from the group must be at work.

But suppose that there are group benefits that only members enjoy. Most straightforwardly, suppose that the benefit grounding shared responsibility just *is* the benefit of belonging to a group. On this supposition, we would have found a principled basis for distinguishing members (e.g., Italians) from non-members (American Italiophiles). Yet we still would not have arrived at a compelling justification for shared responsibility. For we should want to know why know members of transgressing groups ought to bear responsibility for transgressions of their group in which they did not participate while members of groups that do not commit transgressions are off the hook. After all, it may simply be a matter of bad luck that one’s group engages in transgressions while others’ groups do not. If all benefit from group membership, why shouldn’t responsibility for one group’s transgressions be shared by everyone who belongs to a group (or at least everyone who belongs to a similar group, making, say, every citizen of a nation-state responsible for any one nation-state’s transgression)? Again, we are left with a puzzle about why shared responsibility be borne by only one set of non-participants (i.e., members of the transgressing

⁶¹ Farid Abdel-Nour, *National Responsibility*, 31 *POLIT. TH.* 693, 703 (2003) (italics omitted).

⁶² Bates, *supra* note ____ at 157.

group), rather than all similarly situated sets, given that all enjoy the benefit that purportedly grounds shared responsibility.

The difficulties with benefits-based accounts are especially acute when we turn specifically to psychological benefits. It may be entirely contingent that a member experiences pride in her group. Indeed, Abdel-Nour explicitly allows members of the nation to pick and choose the contents of their national identities, and to restrict the scope of their national responsibility accordingly. Members' national responsibility, he writes, "*only extends to the actions that have historically brought about the objects of their national pride.*"⁶³ But why should a member's share of responsibility turn on the nature or extent of her positive identification with the group? To assign blame strictly in accord with members' guilt or shame is to commit a naturalistic fallacy, by unduly punishing those who experience irrational guilt or unjustifiably absolving those who claim false innocence.

Finally, it is not just that benefits fail to provide a compelling ground of responsibility; they also misconstrue the basis for it. If group members are to be proper objects of blame for group transgressions, whether they participated in these or not, then the feature in virtue of which they are blamed should bear some connection to the transgression. But those who invoke benefits-based accounts typically do not rely upon this kind of connection.⁶⁴ Instead, for them, responsibility just "comes with the territory" of membership, so to speak. To see this, consider that most of us believe that the government is justified in imposing taxes upon all U.S. citizens to defray costs related to Hurricane Katrina or the September 11th damage. But our tax obligations do not signify that we bear any responsibility for hurricanes or acts of foreign terrorists. Instead, they are justified simply in virtue of our membership in the nation-state (perhaps with a tacit appeal to the benefits we actually receive from the government, or the benefits we would receive if it were we who needed such assistance). But this is just the rationale that benefits-based accounts advance for sharing responsibility. On this understanding of the origins of the group member's responsibility, the obligations we come to bear in virtue of membership do not carry the expressive

⁶³ Abdel-Nour, *supra* note ____ at 703 (italics in original). [ADD – Enoch]

⁶⁴ *But see* McGary, *supra* note ____.

dimensions of a responsibility assignment. As such, the assignment of responsibility is not so much an acknowledgment as a demurrer of blame. In this way, the most that the benefits rationale can do is to ground a forward-looking assignment of responsibility; for the reasons advanced in this section, they cannot sustain a claim of backward-looking responsibility.

B. Organization-Based Accounts of Shared Responsibility

Some theorists seek to ground shared responsibility for corporate crime in the corporation's organizational structure or culture,⁶⁵ 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 in which these elements eventuate, or so the arguments go.

Notwithstanding the increasing acceptance of organizational bases for criminal liability,⁶⁶ attempts to ground corporate *officers'* responsibility in the structures or cultures of their organizations are under-inclusive. The bureaucratization that permits a kind of culpable ignorance is a pervasive feature of corporate life.⁶⁷ Similarly, many corporations share similar, and similarly nefarious, cultures. Thus, for example, a nothing-but-profits-matter culture infected not just WorldCom and Enron,⁶⁸ but much of corporate America as well.⁶⁹ Yet only some of these corporations engage 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 acts illegally who bear responsibility for the illegal act, rather than all those executives who operate within the same bureaucratic structures that facilitated the one corporation's crime, or all those executives who set an aggressive, competitive tone for their employees.

⁶⁵ Cite – Luban; Bucy. Cf. Larry May, SR, at 42-52 & 73-86 (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.”).

⁶⁶ See, e.g., Abril & Olazabal, *supra* note ___ at 165.

⁶⁷ Luban, Strudler & Wasserman, *supra* note ___ at 2356-60.

⁶⁸ See, e.g., CITE – EBBERS; Abril & Olazabal, *supra* note ___ 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.””’)

⁶⁹ CITE. Compare Haskell Fain, *Some Moral Infirmities of Justice*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY: THE 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).

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 it makes 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 under its sway 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 are epiphenomenal – to the extent that the executive reinforces them, they are signs of, or pieces of evidence that support, her commitment to the corporation, which *is* what grounds her responsibility, as we shall see in the next Part. First, though, we should examine one other strand of account 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 reference to these accounts.⁷⁰ 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)

⁷⁰ Cite—Shapiro, Bland-Ballard, Alonso, Ohlin, etc.

intending to coordinate her part with the others, where (a)-(c) are common knowledge to each of the individuals who share the intention.⁷¹

Those who invoke shared intentions as a basis of shared responsibility usually have a discrete act in mind, with relatively few participants.⁷² Holding an accessory to a crime responsible for that crime is a typical application of such accounts:⁷³ 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.⁷⁴ On the accounts in question, 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 decide 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 paper are different from the example just described, insofar as the paper is concerned with assigning responsibility for corporate crimes to executives where at least some of these executives harbored no intention that the crime be committed – some may have been ignorant of, and others may have protested vehemently against,⁷⁵ the crime's occurrence. The notion of a shared intention, at least without further qualification, is not likely to be helpful in establishing the

⁷¹ 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 ____ at 66-112; Raimo Tuomela, *Joint Intention, We-Mode and I-Mode*, *MIDWEST STUDIES IN PHILOSOPHY* 35 (2006); Brook Jenkins Sadler, *Shared Intentions and Shared Responsibility*, *MIDWEST STUDIES IN PHILOSOPHY* 115 (2006).

⁷² 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 Michael E. Bratman, *Dynamics of Sociality*, *MIDWEST STUDIES IN PHILOSOPHY* 1 (2006).

⁷³ See, e.g., Michael McKenna, *Collective Responsibility and an Agent Meaning Theory*, *MIDWEST STUDIES IN PHILOSOPHY* 16, 16 (2006). Cf. Meir Dan-Cohen, *supra* note ____, (grounding the get-away driver's responsibility in his identification with the crime rather than his sharing an intention that it be done).

⁷⁴ Christopher Kutz offers this example as paradigmatic of the way a shared intention entails accountability for each of the parties to it, KUTZ, *supra* note ____, at 228-29, 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.

⁷⁵ On the latter, see *Hilton Hotels* – cite.

responsibility of corporate executives in such cases.⁷⁶ 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. Some theorists have argued that we should understand the project that unites members of a collective quite broadly, such that the transgression in question need not have been intended by each member so long as it is plausible to construe the transgression as a reasonable way for one member to carry out the larger project.

Christopher Kutz offers what is perhaps the most sophisticated and elegant account linking shared intentions to shared responsibility but, as I shall now argue, his account yields both under- and over-inclusive assignments of responsibility. According to Kutz, a “set of individuals jointly G when the members of that set intentionally contribute to G’s occurrence by doing their particular parts, and their conceptions of G sufficiently and actually overlap.”⁷⁷ We can begin to appreciate the ambitious nature of Kutz’s project when we consider the negative formulation of his understanding of a shared intention: “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.”⁷⁸ Thus, Kutz’s conception of a collective act is minimal enough to accommodate intentional participation not just by those who intend that the collective act be achieved but also “by cognitively vague, alienated or dyspeptic agents.”⁷⁹ All of these agents bear at least some accountability for the collective act, on Kutz’s account.

Kutz’s account relies on a distinction between the acts stemming from over-arching versus subsidiary intentions: While the scope of the shared goal, or over-arching collective act, is only as great as the overlap between participants’ conceptions of the shared venture,⁸⁰ the subsidiary acts ascribable to all group members consist of any act a member carries out that is a plausible means to fulfillment of the

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

⁷⁷ Kutz, *supra* note ____ at 103

⁷⁸ *Id.*

⁷⁹ *Id.* at 102.

⁸⁰ *Id.* at 109 (“Clearly, the collective intention can only be as well defined as the plan of action upon which individuals converge.”).

shared goal.⁸¹ Consider Kutz’s example of a picnic outing. The shared goal provides a causal and teleological explanation for the acts that the picnic participants undertake in making the picnic happen. Thus, “[m]y buying cheese and your picking out wine can be ascribed to us as a group, in virtue of the explanatory role played by our shared goal. They are our actions, because they are explained by our shared intention, which is causally efficacious through our individual participatory intentions.”⁸² Though I do not personally buy wine, and you do not personally buy cheese, Kutz believes that “[i]ntentional participation provides a special basis for ascribing individual members’ actions to the group as a whole, and to the group members individually.”⁸³ Thus, each of us is an *inclusive* author of the acts the other performs in preparing for and engaging in the picnic – the statement, “we bought wine and cheese” is true of us.⁸⁴ As such, “the actions of each and the actions of all are the actions of the collective.”⁸⁵

Kutz’s account of inclusive authorship is remarkably sweeping because it allows action stemming from any subsidiary intention that can be rationally related to the shared goal to redound to the group as a whole and hence to its members. Moreover, Kutz explicitly holds that *all* inclusive authors of a group act may legitimately be held responsible to at least some degree: “When we act together, we are each accountable for what we all do, because we are each authors of our collective act.”⁸⁶ The ground for such widespread accountability is, for Kutz, as it was for Sadler, 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.”⁸⁷ Kutz even offers a “slogan” to pithily capture his thesis: “No participation without implication.”⁸⁸

⁸¹ See *id.* at 138-39.

⁸² *Id.* at 139.

⁸³ *Id.* at 138.

⁸⁴ While the picnic participants are united in an ephemeral group, Kutz intends for his account to extend to institutional groups as well, with but a minor modification. In institutional groups, there will likely be formal limits on the scope of the members’ authority to act on behalf of the group. Thus, inclusive authorship arises only for those who satisfy the group’s membership criteria, and only for acts that are “consistent with the particular powers and limitations on the ... role” of the member performing it. *Id.* at 107.

⁸⁵ *Id.*

⁸⁶ *Id.* at 138; see also *id.* at 138-46.

⁸⁷ *Id.* at 140-41.

⁸⁸ *Id.* at 114.

The problem with Kutz’s account is that it tends to either unjustifiably implicate or unwarrantedly exculpate non-participants in the group act. To be sure, Kutz appreciates that the kind and degree of responsibility borne by direct actors is typically greater than that borne by members who do not directly participate in the collective act.⁸⁹ But the claim I shall press against Kutz is that it is sometimes problematic to assign *any* responsibility to non-participants on the grounds that his account does; at other times, his account fails to assign responsibility broadly enough.

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 members of a group 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 citizens of Nazi Germany who did not support the Nazi regime may nonetheless have chosen not to emigrate out of a devotion to the Fatherland, glorification of which could be said to be the goal shared by German Nazi supporters and opponents alike. The problem is that the Fatherland’s glorification did not demand the Nazi program of mass genocide. The relationship between “purification” and promoting Germany’s glory is perhaps a rational one – at least if one believes in the connection between Germany and the Aryan race – but it is hardly a necessary one. Indeed, given the countless other ways in which one could, without engaging in any human rights violations, seek to bring Germany glory, the Nazi purification program seems like an idiosyncratic one, at best. 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.

If appeal to the shared goal sometimes results in too broad an ascription of responsibility, as in the example just presented, 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

⁸⁹ As Kutz writes, “Though I am accountable in some form for the actions and events inclusively ascribable to me, inclusive authorship constitutes a fundamentally different responsive position from exclusive authorship.” *Id.* at 139.

virtue, of groups that members may diverge in their sense of what the group is about.⁹⁰ Kutz is surely right 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. 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.⁹¹ 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.⁹²

In sum, Kutz's account is inclined to mislead us, at least in the case of large groups with grand and dynamic *raisons d'être*, 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 – and it is a problem that afflicts both Sadler's and Kutz's accounts – is that the more diffuse the group, the more

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, *The Bitter Hilarity of 2 Days in Paris*, THE NEW REPUBLIC, Online Edition (posted Aug. 24, 2007).

⁹¹ 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. See *id.* at 163-64. The problem I am considering here, however, arises where members genuinely diverge as to the content of the shared goal.

⁹² See, e.g., Ker Than, *Nobel Laureate Disses Manned Spaceflight: Particle Physicist Calls International Space Station an 'Orbital Turkey.'* at www.msnbc.com/id/20869407/ (last updated Sept. 19, 2007); 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).

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. David Luban, Alan Strudler & David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 *MICH. L. REV.* 2348 (1992) (grounding responsibility of ignorant members of a bureaucracy in the compartmentalization of functions and information whose very aim it is to shelter those members). But the responsibility assignment would then be justified in virtue of the structure or strategy facilitating diversity, not the shared goal itself.

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 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

We are 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, contributing to the culture or structure of one's corporation, or sharing intentions with one's co-venturers, is a ground for shared responsibility only where there is, respectively, a homogeneity of values or unitary conception of the group's goal. Yet these features rarely, if ever, exist in a large and long-standing institutional group like the corporation. The two remaining features that theorists adduce – consent to membership (along with its shared responsibility scheme), and the benefits of membership – do not serve to *justify* shared responsibility. Consent to membership, as we saw in Part I, is a probative, though insufficient, condition for the justifiability of shared responsibility; the enjoyment of benefits, whether material or psychological, is an effect of group membership, not a ground of members' responsibility. Neither, then, provides a compelling ground for sharing responsibility.

III. SHARED RESPONSIBILITY FOR CORPORATE CRIME

In what sense, then, do executives share responsibility for a crime of their corporation? 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 do so.

I begin, in Part III.A, by describing the ways in which corporate officers contribute to the corporation's agency. To get clear on 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 paper'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 whoosh sign --, groups are disembodied. And 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. I have elsewhere termed the group's identity its *calling card*, and its mechanisms for having some members' acts count as acts of the group its

*rule of recognition.*⁹³ I here briefly describe the way in which corporate executives contribute to these elements.

Executives bear a special relationship to the corporation insofar as they are *expected and empowered to contribute to both the group’s calling card and rule of recognition* in uniquely powerful ways. More specifically, a corporation must possess a calling card – *i.e.*, some set of discernible characteristics – if we are to be able to identify the corporation at all, which we must, if we are to attribute action to it. Thus, for example, Volvo has created a powerful association with safety;⁹⁴ Apple, Inc., brands itself as edgy and hip;⁹⁵ and Target has created a niche by providing high-fashion products at a budget price.⁹⁶ Officers secure the corporation’s continued identity by articulating, preserving and enacting the corporation’s mission and vision.⁹⁷

The rule of recognition is a principle or procedure that governs ascriptions the group makes internally: The group counts some act of its members as its own where that act conforms to the group’s rule of recognition.⁹⁸ I borrow the term “rule of recognition” from H.L.A. Hart, who defines it as a second-order rule of a legal system dedicated to specifying the condition(s) that first-order rules – those that dictate conduct – must possess in order to count as valid.⁹⁹ Hart’s concern is thus to describe a kind of rule whose purpose is to identify when some other rule(s) promulgated by members of the group ought

⁹³ Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J.L. & POL. 183 (2006).

⁹⁴ See, e.g., *2010 Car Brand Perceptions Survey – Safety, Quality, Value*, CONSUMER REPORTS, Jan. 2010, available at <http://www.consumerreports.org/cro/cars/new-cars/news/2010/01/2010-car-brand-perceptions-survey/most-important-factors/brand-perceptions-most-important-factors.htm> (reporting that 73% of consumers surveyed identified Volvo as the safest carmaker of all).

⁹⁵ See, e.g., Arik Hesseldahl and Stanley Holmes, *Apple and Nike, Running Mates*, BUSINESS WEEK (May 24, 2006). Apple has launched an entire advertising campaign foregrounding the hip nature of Mac users relative to their (purportedly) stodgy Microsoft counterparts.

⁹⁶ Thus Target’s motto, “design for all.” See, e.g., Pilar Viladis, *Coming Soon: John Derian for Target*, T MAGAZINE BLOG, April 28, 2008, at <http://tmagazine.blogs.nytimes.com/2008/08/28/coming-soon-john-derian-for-target/>.

⁹⁷ Cf. Jayne Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 991 (1999) (“directors play an essential role in establishing a company’s core values.”).

⁹⁸ Importantly, the rule of recognition is not intended to be authoritative for outsiders to the group. Our schemas for action attribution typically require that the author of an act bear some causal relationship to that act; where no such relationship can be found – where, for example, a terrorist group claims to be behind a suicide bombing that was not performed on its behalf and that it did not order or knowingly assist --, we have no reason to take the group’s asserted authorship as fact. By the same token, the fact that the group *disclaims* some act as its own does not entail that outsiders must go along with the group’s disavowal. From the external point of view, then, the group’s rule of recognition (as I use that term) is merely probative, but not determinative, of what acts ought to be attributed to the group. Cf. H.L.A. HART, *THE CONCEPT OF LAW* 179 (1994) (discussing the internal and external points of view in the context of rules of recognition).

⁹⁹ HART, *supra* note ____ at 94 (“a ‘rule of recognition’ ... will specify some feature or features possessions of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.”).

to be considered authoritative for the group. My use of a rule of recognition is different to the extent that the purpose of a rule of recognition, as used here, is to determine when some *act(s)* committed by members of the group ought to be considered acts of the group.¹⁰⁰ Nonetheless, like Hart, I believe that the rule of recognition can be articulated formally or informally and that, where the group has multiples rules of recognition, these will be organized hierarchically, with an ultimate rule sitting atop the hierarchy. In a corporation, we can conceive of the corporate charter and bylaws together as the corporation’s ultimate rule.

Directors will have an opportunity to contribute to the corporation’s ultimate rule, by articulating, amending or implicitly affirming its charter or bylaws. But officers will not always be empowered to affect the contents of these foundational documents. Nonetheless, I take it that, in practice, officers may have opportunities to do so. The general counsel, for example, is positioned to propose amendments to the corporation’s bylaws. Moreover, while officers may not always be able to influence the content of the corporation’s charter or bylaws, they have a greater hand in the corporation’s day-to-day activities, and this might entail determining a greater number of the corporation’s subsidiary rules of recognition, and ones of more practical significance at that.

In short, officers’ contributions to the corporation’s calling card and rule of recognition are significant enough to render them 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 the executive’s acceptance of a rule of recognition entails her acceptance of, and hence responsibility for, the acts eventuating from that rule. Instead, I shall argue that the ground of the executive’s responsibility flows from the normative dimensions of her role in the corporation. It is to that argument that I now turn.

¹⁰⁰ In his account of collective responsibility, Peter French invokes the notion of “recognition rules,” which he likens to Hart’s rules of recognition. PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 43 (1984). French’s recognition rules form one part of what he calls the “Corporation’s Internal Decision Structure,” (or “CID”) which is the corporation’s apparatus for intentions. *See, e.g., id.* at 48. French’s project is, then, to identify a set of acts and intentions appropriately ascribed to the corporation, and thus to yield an assignment of responsibility to the *corporation*. He does not use his notion of a rule of recognition to infer anything about *corporate officers’* responsibility, as I do here.

B. *The Analytic Structure of a Responsibility Assignment*

We can begin to get clearer on the nature of the relationship of an executive to some corporate wrong 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 (or laudable, as the case may be).¹⁰¹ 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 the sake of brevity, I shall refer to these four elements, respectively, as the *object*, *connection*, *ground*, and *magnitude* of one’s responsibility.

To begin with the first three elements: In the standard case of murder, the object of the killer’s responsibility is the killing, 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. Similarly, in cases of an employer’s vicarious liability for her employee’s negligently caused harm, the object of responsibility is the harm caused, the connection is the employment relationship, and the ground of responsibility is the employee’s negligence.¹⁰²

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 nature of the act 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

¹⁰¹ See, e.g., Kutz, *supra* note ____ 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. Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 963 (1992) (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*, CRIMINAL JUSTICE ETHICS 4, 6 (2008) (referring to the “bases, conditions or criteria of collective guilt”).

¹⁰² See PROSSER AND KEETON ON TORTS 499 (5th ed. 1984) (“The foundation of the action [against the employer] is still negligence, or other fault, on the part of [the employee]; and all that the law has done is to broaden the liability for that fault by imposing it on an additional, albeit innocent, defendant.”).

who each intend a crime as equally guilty though the former is more causally responsible for – i.e., she bears the stronger *connection* to -- the crime’s commission. On the other hand, accomplices are treated more severely than are accessories-after-the-fact, and the four-part analysis can make sense of this disparity too: Though the ground of culpability is the same for both accomplices and accessories – both intend to aid the perpetrator – the object of 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 also allows us to make sense of sentencing practices in the law of attempts. The ground of responsibility is the same for both the successful and thwarted perpetrator of the same crime, yet the law punishes the former far more harshly than the latter. The disparity in sentencing can be explained by the fact that the object of responsibility differs for each – the successful perpetrator has caused the harm she intended, while the thwarted perpetrator may have caused no material harm at all. Finally, the four-part analysis extends as well to civil law assignments of responsibility. For example, an employer’s vicarious liability turns on the extent of the employee’s negligence (thus the employer may invoke a defense of contributory negligence on the part of the plaintiff), and not on the extent or adequacy of the employer’s oversight.¹⁰³

In the next section, we shall see that parsing a responsibility assignment in this way allows us to see why both the participating and non-participating executives may be held responsible for the same corporate crime, but the differing grounds of their respective responsibility assignments entail vastly different magnitudes of responsibility.

C. Executives’ Responsibility for a Group Transgression

¹⁰³ See *id.* (stipulating that the employer may be “innocent” and may even have done “all that he possibly can to prevent” his employee’s negligence). Cf. *United States v. Hilton Hotels*, 467 F.2d 1000 (9th Cir. 1972) (affirming defendant’s conviction despite the fact that employees’ act violated express company policy).

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 in turn 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 executive’s crime.

a. *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.

Where her corporation commits a crime, for what might we hold the executive responsible? One candidate 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?”¹⁰⁴ 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

¹⁰⁴ *But cf.* John Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 17 BROOK. L. REV. 1177, 1180-81 (2005) (describing 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).

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 transgression.

But perhaps there is more for which we may hold the executive responsible 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 calling card and rule of recognition -- perhaps the appropriate object of responsibility is the corporation's agency. On this thought, executives would be held responsible not for the corporate crime itself, but instead 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 thought, correct though it is, 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 warranted by the crime 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, forged through her fiduciary duties. 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 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 group’s agency in two ways – by helping to secure and sustain the group’s calling card, and by participating in the group’s rule of recognition. 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, at least, 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.¹⁰⁵

But despite the relatively important role that executives play in allowing the group to act, I do not believe that these contributions justify our holding executives responsible. My claim, then, 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 sub-section, 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 sub-

¹⁰⁵ It may be worth noting that the claim under consideration here is distinct from the claim assessed in Part I.B, involving the corporation’s unique ontology. There, the thought was that the corporation, in committing its crime, was acting through the very officers who were subject to liability – in other words, it was claimed, they played a proximately causal role in the corporate crime. Here, by contrast, we are assessing the relevance of the officers’ contributions to the corporation’s agency more generally.

section, I advance a positive argument for conceiving of executives' fiduciary duties 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 our response will turn 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 group's agency were the ground of their responsibility, then we should expect the responsibility of any executive to vary in some direct way according to the magnitude of his or her contributions to the corporation's agency. But a quick appeal to intuitions will disappoint this expectation.

Consider, for example, 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 is doubtful 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, along with others, endorses.

These appeals to intuition are not intended 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 sub-section, however, I offer independent reasons for thinking that executives' contributions to the corporation's agency are not themselves the ground of responsibility for these executives.

3. The Ground of the Executive's Responsibility

We can begin to comprehend the nature of the relationship between executive and group act if we liken it to the relationship between a parent and the acts of his or her child. At first blush, the normative architecture of the parent-child relationship may seem so foreign to the corporate context that any analogy between the two will appear bizarre, if not perverse. I am not alone however in drawing lessons for criminal liability for corporate crime from the parenting context.¹⁰⁶ Further, the parent-child relationship has elsewhere been described in terms of fiduciary duties,¹⁰⁷ and these are at the heart of the considerations marshaled in this sub-section.

The parenting analogy requires a fairly long digression, but I believe that it is sufficiently instructive to warrant the detour. I begin with joint parenting, and then synthesize the two contexts by transposing the insights about shared responsibility from the former to the latter.

a. Shared Responsibility in Joint Parenting

A parent always bears a forward-looking responsibility for harms caused by his young child. Thus, for example, consider the parent of a young child who accidentally breaks a neighbor's vase. Even if the parent has exercised due care, he will incur an obligation of repair. But the very duty of care evidences his responsibility for what his child does in the here and now, and not just after the fact. Put another way, a child's agential (and moral) immaturity entails that the child's acts are not entirely her own; her parents are charged with ensuring that she acts within certain constraints and, where they fail to do so, moral responsibility accrues.

The example is helpful because it illuminates not just the *connection* parents bear to the acts of their child but also the *ground* of their responsibility. It is true that parents, in virtue of their relationship

¹⁰⁶ See, e.g., FISSE AND BRATHWAITE, *supra* note ____ at 134 (likening parents' disciplinary strategies to those instituted by good managers). Cf. Teemu Ruskola, *Conceptualizing Corporations As Kinship: Comparative Law and Development Theory from a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000) (describing the parallels between traditional chinese corporations and the Confucian ideal of family); Jeremiah A. Ho, *What's Love Got To Do with It? The Corporations Model of Marriage in the Same-Sex Marriage Debate*, 28 WHITTIER L. REV. 1239, 126-86 (2007) (likening marriage to the corporation); Laura Weinrib, *Reconstructing Family: Constructive Trust at Relational Dissolution*, 37 Harv. C.R.-C.L. Rev. 207 (2002) (advocating transposition of the notion of fiduciary duties within the context of constructive trust to the family context).

¹⁰⁷ See, e.g., Elizabeth S. Scott & Robert E. Scott, *Parents As Fiduciaries*, 81 VA. L. REV. 2401 (1995); Comment, *The Rights of Children: A Trust Model*, 46 FORDHAM L. REV. 669 (1978). *But cf.* Judith G. Greenberg, *Insider Trading and Family Values*, 4 WM. & MARY J. WOMEN & L. 303 (1998) (arguing that family norms are inimical to the market context, including the construction of fiduciary duties).

with their child, are causally responsible for their child’s capacity to act: Most parents provide the biological materials and conditions that lead to their child’s creation, and nurture and sustain the child’s growth and development. Further, their causal responsibility for their child’s capacity to act entails causal responsibility – albeit more distant – for what their child does. But the ground of a parent’s responsibility resides not in her having furnished her child with the prerequisites for action – after all, the biological parent who gives her child up for adoption furnished some of these too, and yet won’t be held responsible for harms the child subsequently causes -- but instead in the expectations that emerge from the social role of parent. In our society, parents are the surrogate authors or owners of their children’s acts, at least until their children become autonomous agents.

What of a parent’s backward-looking responsibility? When is it appropriate to *blame* a parent for her child’s conduct? And, more to the point, when should we conclude that a child’s parents share responsibility for the child’s conduct. In a two-parent household, I believe that it is appropriate to conceive of child rearing as a joint enterprise undertaken by the two parents together. Now, imagine a household consisting of parents P and Q and their child, C. P is unduly lenient – P fails to establish and enforce the kinds of boundaries that minimally acceptable parenting requires; Q, on the other hand, adopts a balance between rigidity and indulgence that is, at least when viewed in isolation from P’s practices, perfectly acceptable. Imagine further that C is unruly, and that an omniscient child psychologist can tell us that C’s unruliness is the direct result of P’s lenience. Although P and Q’s union is perfectly egalitarian,¹⁰⁸ and each partner is generally disposed to hear constructive criticism from the other, suppose finally that Q has had no success in reforming P’s disciplining practices despite repeated urgings.

¹⁰⁸ The egalitarian nature of P and Q’s union is invoked here as a simplifying assumption. The crucial point is that P and Q should each be entitled to critique the other’s parenting, and to have the other genuinely consider that critique. I am concerned that this entitlement will be significantly undercut if the joint parenting relationship is inequalitarian. In particular, there may be all kinds of insidious effects on Q’s willingness to seek to reform P’s conduct if Q occupies a subordinate position relative to P. But in the corporate setting, for which P and Q’s union is an analog, power disparities need not undermine less powerful members in the way that they do less powerful partners. As such, it need not be the case that each member possess an equal say regarding the corporation’s calling card, rule of recognition, or course of conduct in order to secure the entitlement of dissenters to be heard. In any event, the account contemplates principally members who sit atop the corporate hierarchy so fear of insolence would not hinder their voicing their opposition.

The question now is, would it be appropriate to hold Q responsible, in the backward-looking sense, for acts (or harm) caused by C's unruliness?¹⁰⁹ I believe that it would be. First, what is at issue here is whether Q is responsible for C's acts, not whether Q is a good parent. The latter question goes to Q's individual responsibility, and warrants a positive response (at least on the bare facts I have given). But the answer to the former question depends not on the nature of the practices Q alone adopts but on those that both parents adopt, *either singly or together*.

Now, one might think that Q incurs responsibility for P's parenting practices as a result of epistemic barriers that the typical onlooker faces in trying to divine parental responsibility: Deprived of the opportunity to see what goes on within the household, the onlooker has no reason to ascribe responsibility to one parent rather than the other (assuming that a hypothetical onlooker has already correctly surmised that the child's unruliness is attributable to the parenting the child receives). But even if we could know that P alone bore proximate causal responsibility for the child's unruliness, we would still have reason to blame Q, for the parent's partnership entails that neither is *entitled* to the kind of individualized assessment that would inculcate P while absolving Q. To appeal for such an assessment would be to contravene the nature and spirit of the enterprise.

More specifically, the *nature* of joint parenting is such that it would likely be impossible to conclude that P bore exclusive causal responsibility for the child's unruliness. On the hypothetical as described, P's laxity *is* a significant contributor to the child's unruly conduct -- our omniscient child psychologist can tell us that, had P not been so lenient, the child would be significantly less unruly. But P's laxity, or its effect on C's conduct, may well result from other factors for which Q bears responsibility. For example, perhaps P's laxity carries more sway over C's conduct because P undertakes a greater share of the childcare burdens, on the basis of a division of labor to which both P and Q have agreed; or perhaps Q has undermined his credibility in C's eyes (as a result, say, of hypocrisy or inadequate love), so that C is inclined to place greater trust in the (far more capacious) limits that P sets;

¹⁰⁹ I do not consider whether Q is responsible for P's conduct since their union does not constitute a super-entity on behalf of which each partner acts. In this respect, the parent-child relationship diverges from the member-group relationship, though I cannot see that this divergence impugns the force of the analogy in any way.

or, again, perhaps Q represents P as the more dominant parent, and so C deems P's guidance more authoritative. More generally, joint parenting consists of a complex network of interactions, and though we may be able to determine that the absence of some feature would entail the absence of some trait in the child, we need not – and, indeed, likely ought not -- conclude that its presence is the sole cause of that trait. P's contribution may be crucial, but that it is not to say that it is alone sufficient.

Further, the *spirit* of joint parenting renders unseemly calls for an individualized assessment. Having embarked upon the joint endeavor of parenting, P and Q have joined their fates. No longer is each a free agent (to invoke the sports metaphor, not the libertarian's understanding of personhood); no longer may each exist just for himself. To be sure, each chose to undertake this joint project with the other and each can, in principle, withdraw from parenting jointly, and thereby regain his status as a distinct object of evaluation. But, in the day-to-day life of parenting, not only withdrawal, but even its contemplation, constitutes a nuclear option, for the endeavor cannot persist, at least on solid ground, if its participants conceive of exit always as a live and compelling possibility. Nor can it persist if P or Q insists upon a defensive posture, wherein each heaps recriminations upon the other, and publicly disclaims responsibility for the other's parental failings. P and Q do not parent C severally and sequentially, but together, at once, and as one.

To return to the terms in which I analyzed the structure of a responsibility assignment above, we may say that the features constituting the *nature* of joint parenting partly comprise the *connection* Q bears to C's unruliness and the acts manifesting it, while the features constituting the *spirit* of joint parenting form the *ground* of Q's responsibility. More specifically, Q is connected to C's unruliness and the harm it causes -- although it is P, and not Q, that is the proximate cause of this unruliness -- for Q plays an integral role in the network of interactions that facilitate or otherwise create the conditions for P's laxity. But the ground of Q's responsibility for the harm C creates by being unruly does not lie in Q's contributions to P's laxity. (Consider, for example, that there may be other individuals – extended family members or paid childcare workers --who influence C's environment in such a way as to allow P's laxity to play the role it does, and yet we would likely exempt them from blame.) The ground of Q's

responsibility lies instead in the normative position Q occupies relative to C and relative to P. Put another way, Q’s responsibility lies in the commitment Q bears to C -- which, as we saw above, grounds a forward-looking responsibility -- and in the commitment Q bears to the project of joint parenting with P -- which grounds a backward-looking responsibility.

b. Joint Parenting and Shared Responsibility for Corporate Crime

The relationship of an executive to the corporation is like the relationship of a parent to his child in the sense that the executive’s obligations include her contributions to the corporation’s agency, and these connect her to the group’s transgression – whether or not she participated in that transgression – in much the same way that Q’s contributions to C’s agency and to the joint endeavor of parenting connect Q to C’s harmful acts. But the ground of the executive’s responsibility, like the ground of Q’s responsibility, lies not in her helping to furnish the causal precursors for the corporation’s wrongful act. Instead, the ground lies in her professional role within the corporation, which, like the role of the joint parent, demands a kind of *deindividuation*, or an obligation to step away from, or soften, an insistence upon the boundaries between herself and her fellow members.¹¹⁰ This obligation permits us to assign responsibility to her for what the corporation does, we shall now see.¹¹¹

More specifically, both executives and joint parents bear an obligation that requires the participant in the joint venture to forsake her claims to act for herself and only herself, and this is so in

¹¹⁰ Early research on conformity and obedience articulated an anti-social conception of deindividuation, according to which individuals in group settings were believed to become more inclined to engage in “group think,” eschew personal responsibility, and adopt the sentiments and activities of the “mob.” See, e.g., Leon Festinger et al., *Some Consequences of De-Individuation in a Group*, 47 J. ABNORMAL AND SOCIAL PSYCH. 382 (1952); Phillip Zimbardo, *The Human Choice: Individuation, Reason, and Order Versus Deindividuation, Impulse, and Chaos*, in NEBRASKA SYMPOSIUM ON MOTIVATION 237 (W. J. Arnold and D. Levine eds., 1969). More recently, scholars have reacted against the overly individualistic conception of the self underpinning early deindividuation theory. These scholars contend that individuals can harbor conceptions of themselves qua individuals alongside conceptions of themselves as members of a group, with the former reining in any anti-social propensities in the latter. More generally, they argue that deindividuation can have positive or negative effects on the individual’s choices and sense of responsibility. See, e.g., S. Reicher, R. Spears, & T. Postmes, *A Social Identity Model of Deindividuation Phenomena*, 6 EUR. REV. OF SOCIAL PSYCH. 161 (1995).

This is an interesting debate, but it is not directly relevant for the notion of deindividuation that I employ. I am interested in deindividuation not as a psychological experience but instead as a normative expectation. Specifically, by “deindividuation,” I mean the obligation each group member has to step away from, or soften, an insistence upon the boundaries between herself and her fellow members.

¹¹¹ The description of the obligations borne by the executive follows that advanced in Sepinwall, *Guilty by Proxy*, *supra* note

three respects. First, executives, as well as co-parents, are legitimately subject to pressure by their co-venturers to act in the best interests of the joint venture. Thus corporate stakeholders may seek to insist that executives act with a certain regard for the corporation to which they all belong -- this just is the duty of good faith¹¹² -- and thus Q may urge P to adopt better parenting practices. The executive who neglects to view the way in which her corporation-related activities might influence the way the corporation is perceived may rightly be charged with a kind of egocentrism incompatible with the loyalty demanded by her role.

Second, although executives, like joint parents, always retain a genuine right of exit, the smooth operation of the corporation, and perhaps its success as well, require that executives psychologically suspend their insistence upon this right; the executive should not proceed with one foot always outside the door but instead with two feet planted firmly within the office she holds.¹¹³

Finally, righteous indignation is foreclosed to the executive, just as it is to the joint parent, notwithstanding the absence of participation in the wrongful act or event. The corporate executive must stand instead with the crime's perpetrators, in recognition not just of their shared membership in the entity on behalf of which the crime was committed but also of their shared contributions and commitment to that entity.¹¹⁴

¹¹² See generally Leo E. Strine, Jr. et. al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629 (2010).

¹¹³ See Callahan, *supra* note **Error! Bookmark not defined.**

¹¹⁴ This way of putting the obligation to stand in judgment alongside one's fellows bears resonance with Larry May's account, which posits solidarity as the ground of members' shared responsibility. It will thus be worth calling attention to points of divergence between my account and his here: First, May treats informal groups, like mobs, separately from institutional groups, like the corporation, and he invokes the notion of solidarity only in his treatment of the former. More specifically, he argues that whereas there are formal structures within institutional groups that transform the intentions or actions of some members into intentions or actions of the group, the notion of solidarity is needed to transform the intentions or actions of mob members into intentions or actions of the group. See LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS* (1987). Second, May's goal is to justify ascribing to the mob *as a whole* actions of only some of its members, and he does this by way of relations of solidarity among members. Importantly, then, solidarity is a ground of *collective* responsibility, not *shared* responsibility. Indeed, May explicitly disavows the project of inferring members' responsibility from an assignment of collective responsibility. See *id.* at 82 & 83. Finally, May presumes that collective responsibility accrues only if each member of the collective acted culpably, and he thus seeks to find a way of interpreting the individual acts of the mob's members as either direct or indirect contributions to the mob's harmful acts. He locates the necessary interpretive device in mob members' solidarity:

[T]he solidarity felt by each member creates either reflective or pre-reflective intentions within the mob members that enable these mob members to engage in concerted action. Here we have the intentional basis for the contributions of each member of the group to any harmful result for which the group is collectively responsible, that is, *the solidarity*

In sum, executives, like joint parents, are subject to three forms of normative pressure – pressure to act with an eye to the joint project’s best interests; pressure to put the possibility of exit out of one’s mind; and pressure to stand with one’s co-venturer(s) when the product of one’s joint project is judged by others. These forms of joint pressure represent different aspects of a call to deindividuation that flows from one’s participation in a joint endeavor: To pursue a project with others is to recognize, and respond appropriately to, the fact that in enlarging your agency you become beholden to these others, and they to you. It is to acknowledge and make manifest a *commitment* to the joint project and, derivatively, to those with whom it is shared.

We might say that the nature of the responsibility at issue then is *normative*, in the sense that executives are obligated to accept it. But that responsibility is also *moral*: the executive’s contributions to the corporation reflect the way in which her agency is bound up with the corporation’s. Her role effects, or at least ought to effect, a transformation in her identity insofar as her position within the corporation comes to be among the salient features defining who she is.¹¹⁵ Accordingly, outsiders are licensed in seeing the executive *in* the corporation’s crime, again independent of her participation in the crime.

Again the parenting context allows us to see more clearly the rationale for casting blame upon the non-culpable member of a joint endeavor: Returning to the example of P, Q and the unruly C above, suppose that C’s teacher, T, who has seen a good amount of P and Q’s parenting styles, pulls Q aside one day in an effort to assure Q that she (the teacher) recognizes that it is P’s laxity that is causing C’s unruliness and that, as far as the teacher is concerned, Q is blameless. Q might well be taken aback, offended even. T’s aside violates the unity that should exist between P and Q. If Q is aggrieved by T’s comment, as I believe he is entitled to be, this need not be simply because T has criticized someone whom

relationships that allowed each member to aid others in joint action. Even those members who do not directly cause or indirectly facilitate the harmful act, share in the collective responsibility for it because they could form a subgroup to prevent the ensuing harm by withdrawing their aid or actively opposing the others.

Id. at 81 (emphasis added). On May’s account, then, each member contributes to the harm, by commission or culpable omission; on my account, by contrast, paradigmatic members may have done everything in their power to oppose the group transgression and yet may still share responsibility for it.

¹¹⁵ Cf. KUTZ, *supra* note **Error! Bookmark not defined.** at 141 (arguing that the will of each participant is manifested in their shared project; thus each participant bears a kind of responsibility for anything untoward committed in the course of pursuing the shared project); David Enoch, *Being Responsible, Taking Responsibility, and Penumbra Agency* at 30 (unpublished manuscript, on file with author) (arguing that authentic membership in a group requires that the member “incorporate [the group’s] actions into her agency by taking responsibility for them.”).

Q holds dear. It may just as well be because T has implied that T believes Q to be the kind of person who would welcome T's remark and the opportunity to escape shared responsibility that it affords. T's remark implies, that is, that Q is the kind of person who would shirk his duty to recognize that the consequences of the joint parenting project are P and Q's together, and that they should therefore be judged for these consequences together.

All of this suggests that it would be wrong for C's teacher to seek to recruit Q into a scheme of individualized assessment – wrong because it fails to respect the allegiance Q owes P in virtue of their joint project and the obligations it entails. Put differently and in more general terms: Where all else is equal, it is permissible to assign responsibility to members of a joint project because doing so recognizes them by recognizing their commitment to the joint project. Indeed, in some cases, it would be wrong not to hold an individual responsible for an act of her group, because her commitment to the group demands no less than that she be held responsible. This is true in the context of joint parenting, where we honor the nature of the relationship between P and Q by insisting upon the shared responsibility that the relationship entails. And it is true as well for the executive in the corporate context, where we honor the nature of her role, I believe, by insisting upon the shared responsibility that her position entails.

Now, with all of that said, doubts about the relevance of joint parenting woes to corporate wrongdoing might remain. In particular, one might be inclined to think that only an overly demanding conception of the executive's fiduciary relationship could sustain the parallel between parents and executives. After all, P and Q's relationship is imbued with a love and depth of commitment, and these features sustain the normative pressure on each to achieve alignment with the other, and abandon requests for an individual assessment. But love and abiding commitment are not features one typically finds in the relationship between a executive and her corporation. A hasty objection would note that executives move between companies every 6.1 years on average, and argue that this great mobility undercuts the force of any purported commitment to the corporation in which the executive happens to find herself. By way of

riposte, one might invoke the fact that 33% of marriages end after 10 years, and respond that spouses are not therefore any less entitled to demand a commitment of each other during the tenure of the marriage.¹¹⁶

But the more general concern is not so easily dismissed: The extent of deindividuation demanded by the joint parent might, perhaps, be analogized to that demanded of the adherent of a cult or ultra-nationalistic group, but it seems a stretch to conceive of a similar demand being placed upon the officer of the large corporation. To allay this concern, 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 group demands of her.

4. The Magnitude of the Executive’s Responsibility

In describing above the ways in which both acting as a corporate officer and acting as a joint parent involve deindividuation, I identified three forms of normative pressure to which each was subject in virtue of their commitments – again, pressure to act with an eye to the corporation’s best interests; pressure to put the possibility of exit out of one’s mind; and pressure to stand with the corporation when it is judged by others. In this subsection, I argue that the magnitude of these pressures when applied to the executive need not be as great as the magnitude of the pressure exerted upon the co-parent (or at least that of the parent who is in a long-term committed relationship with her co-parent);¹¹⁷ moreover, the magnitude of these pressures need not be the same across all corporations.

In particular, there are four sources of variation in the stringency of the commitment expected of executives, 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

¹¹⁶ Cite, GBP, note 165.

¹¹⁷ Former intimates who have separated or divorced after a child is in the mix may well be entitled to exert, and subject to incur, far less pressure than what they exerted or incurred during the course of their intimate relationship. Indeed, the parents’ separation will likely necessitate a negotiation of the extent to which parenting will continue to be a joint venture, whereas parenting before the separation was likely presumed by both parties to be a joint venture, attendant with the normative pressures I have described.

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 fiduciary duties expected even within the same kind of enterprise. Cultural differences between corporations of similar size may account for disparities in the amount of allegiance they demand.

Third, one's rung on the corporate hierarchy, as well as 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 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. (It is precisely on this basis, as we shall see in the next Part, that Helen Weber, the nominal president of Kailua Auto Workers, should have been understood to owe the corporation only a very weak commitment, and her responsibility should have been reduced accordingly.)

Finally, no matter the level of commitment expected by the enterprise 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 are especially strongly entwined with that of the corporation.

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 (if not an absolute measure of them) 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 her or the strength of her felt allegiance.*

I shall argue, in other words, that the expected strength of the commitment sets the threshold for the executive's responsibility and, second, that enhanced responsibility is in order where her felt allegiance is greater than that which the corporation expects of her. To that end, let us consider in turn the theoretical possibilities that arise once we determine that the executive's commitment to the corporation grounds her 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 her 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 her. Third, where the executive's felt allegiance diverged from her expected allegiance, we could hold a member to the lesser of her felt or expected

allegiance. Finally, we could hold the executive to the greater of her felt or expected allegiance, as I believe we should. Let us consider the cogency of each of these alternatives in turn.

On the first alternative, the disaffected executive – that is, the executive who experienced a weaker allegiance to the corporation than that expected of her – would be held responsible just to the extent of the strength of her allegiance. If she experienced no allegiance to the corporation, she 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.¹¹⁸ But 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 responsibility assignment, 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. On this second alternative, executives who experienced an allegiance greater than the expected level would not thereby come to incur any more responsibility than would those whose level of allegiance met or fell below the corporation's threshold. The problem with this possibility is that it ignores the expressive dimensions of an executive's allegiance. When we contemplate the responsibility of the group who did not participate in the group crime, we ought to consider not just the fact that her role entailed that she would relinquish, to an extent compatible with the group's expected allegiance, her entitlement to be judged apart from the group; we ought also to consider – and I believe we do also consider -- the fact that *she* felt an especially strong connection to the group. Thus, for example, we think it correct to respond

¹¹⁸ See, e.g., Dan-Cohen, *supra* note 101 (locating one's identification with the group's successes as a basis for responsibility for the group's transgressions).

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 Ebbers,¹¹⁹ 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. But part of the disparity in responses likely stems as well from a sense that the supporter is a worse person *independent of the effect of her 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. But nor can the third alternative, in which we hold a member responsible in proportion with the lesser of her felt or expected allegiance.

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 group's expected level of allegiance, for an executive ought not to be exculpated because she *failed* to participate in the life of the group or experience the alignment of interests that lies at the core of a commitment to the joint project. But where the executive experiences an allegiance to the corporation greater than that which it expects, it is appropriate to hold her more responsible than we hold the executive whose allegiance is less than or equal to that which the corporation expects of her, for the more committed member expresses a deeper allegiance to the group through her stronger commitment. Through this enhanced commitment, she signifies that she is prepared to relinquish her entitlement to be judged apart from the group to an extent greater than that which the group demands of her. While her willingness to incur more responsibility than

¹¹⁹ See Report of Investigation by the Special Investigative Committee of the Board of Directors of WorldCom, Inc. 18-19 (March 31, 2003).

is required of her, *qua* non-participating executive, is not itself a reason to hold her more responsible, the support for the group that this willingness communicates *is* such a reason. In other words, she deserves additional reprobation because she expresses, through her stronger allegiance, additional approval of the corporation even as it transgresses.

With these pieces in hand, we can now return to the RCO doctrine, in an effort to bolster its theoretical foundations in light of the foregoing discussion.

IV. RESPONSIBLE CORPORATE OFFICER LIABILITY REVISITED

The last Part sought to articulate a *moral* argument for the propriety of assigning blame to executives. I argued that the executive is blameworthy, first, in the sense that her commitment requires her to accept blame. But she is also blameworthy in virtue of the way her commitment causes her will to become bound up with the will of the corporation such that she cannot separate herself from it. Her moral responsibility will be enhanced to the extent that she experiences an allegiance greater than that expected of her, because this additional allegiance reveals that her identity is especially invested in the corporation.

On the one hand, the foregoing serves to explicate the impulse behind the RCO doctrine. While jurists and commentators have attempted to defend the doctrine by construing it in terms that fit it within the individual culpability paradigm, we have seen that these defenses ultimately fail to persuade. Yet the tenacious efforts to defend the doctrine might well reflect a sense -- however inchoate -- that crime committed in the corporate setting is relevantly different from street crime: Once we are licensed in imputing the criminal act to the corporation as a whole, we might well wonder why the only individuals who deserve to be blamed for it are those who participated in it or culpably failed to prevent it. Might it not be the case that those who are especially implicated in the corporation itself ought to incur some blame for its misdeeds, even if they have not contributed culpably to its misdeeds? In other words, might the doctrine's supporters have intuited that corporate executives are on the hook for something like the reasons advanced in the last Part?

Of course, even if an intuition about shared responsibility both justifies our blaming the corporate officer and explains continued support for the RCO doctrine, there remains the question of when, and why, executives' blameworthiness licenses *criminal* liability. In Part IV.A, I seek to elucidate the circumstances under which it would be permissible to prosecute the executive who has not participated in her corporation's crime. In Part IV.B, I propose a series of sanctions that comport with the nature and magnitude of the executive's blameworthiness.

A. Prosecuting Responsible Corporate Officers

As we saw in the last Part, the ground of the executive's shared responsibility lies in her commitment to her corporation, and the magnitude of that responsibility turns on the strength of the commitment expected of her. It follows that those executives from whom virtually no commitment is expected bear little if any blame for a crime of the corporation with which they are associated (assuming, that is, the typical RCO fact pattern in which the targeted executive did not culpably contribute to the corporation's crime). It is for this reason that Helen Weber's conviction strikes us as unfair. Mrs. Weber was president and treasurer of KAW in name only. To the extent that she was subject to obligations of allegiance that the typical executive bears – obligations, that is, to act with an eye to the corporation's best interests and to stand in solidarity with her fellows as they are judged – these could be explained far more readily by her marital bonds than by her role within the corporation. Thus she would have borne these obligations even if she had no formal role in KAW, and merely because it was her husband's company.¹²⁰

¹²⁰ The following analogy may seem far-fetched, but I believe it instructive. Consider the press conference of the public figure whose marital affair(s) or other sexual misconduct has just been made public. These gatherings have garnered an almost meme-like quality, as the disgraced figure surrounds himself always with his wife, sometimes with his kids, in a tableau of family unity. Why, commentators have wondered, does the betrayed wife debase herself by standing at her husband's side? By my account, she must do so – not as the philanderer's partner in marriage but as the philanderer's partner in work. This is most obviously true in cases of high political office: Bill Clinton's presidency, and Elliot Spitzer's governorship, made Hilary and Hilda, respectively, First Ladies. The transgression redounds to the First Family as a whole, and so neither woman is entitled to join the public chorus of reproach, no matter the license each has to heap recriminations upon her husband in private. Instead, each must stand alongside her fellow participant in the joint project that is their First Coupledome. And even where the husband's position does not confer a formal role upon his wife, his job imposes upon her a set of informal obligations of support (just as her job imposes these obligations upon him). So it is that, at least *prima facie*, each should accompany the other at least occasionally to professional events to which spouses are invited, so it is that each should seek to accommodate the other's work schedule, and so it is that each should display support for the other in public, whether at awards ceremonies or at the modern-day analogs of public stonings.

But a marriage does not create a super-entity to which one spouse's act can be ascribed, and from there responsibility for that act assigned to the other spouse.

The corporation, on the other hand, is such a super-entity – criminal acts of its employees may, under suitable circumstances, be imputed to the corporation itself. And, when they are, blame for them may redound to any member of the corporation who is expected to harbor a genuine commitment to it. Since such a commitment is expected of any executive who holds his position in more than name only, blame for the corporation's criminal acts may, in particular, be assigned to him.

Insofar as criminal liability is the legal avenue through which society channels its blame, it is the appropriate vehicle through which to express our responses to the blameworthy executive. The special moral meaning of the criminal law makes it appropriate to subject the blameworthy executive to criminal, rather than (merely) civil, liability.

Now one might object that extending criminal law in this way risks diluting the criminal law's moral force. But the concern about dilution has traction only if we subject individuals who are not blameworthy to criminal liability, while the point of the last Part was to establish that the executive, in light of his expected commitment, *is* blameworthy. Of course, the objector could respond that the threat of dilution arises just so long as criminal liability is imposed upon anyone who fails to qualify as culpable, as culpability is understood on the traditional, individualist paradigm. But that response would do no more than beg the question. Put another way, we all agree that we preserve and respect the criminal law's moral meaning if we restrict prosecution and punishment to those who are blameworthy. If I am right that one can be blameworthy even if not individually culpable then we do no violence to the moral meaning of the criminal law in prosecuting and punishing those who are blameworthy but not individually culpable.

Skepticism may nonetheless remain and, to the extent it does, I suspect it results from the rapidity with which our minds move from verdicts to sanctions. So far, I have argued only that it would be appropriate to subject the corporate executive to criminal liability, along with its attendant moral condemnation. I have not sought to defend imposition of the sanctions that typically accompany a guilty

verdict and indeed the sanctions I shall go on to propose lack most, if not all, of the material penalties that traditional sanctions involve.

Before turning to a description of these sanctions, though, it will be useful to articulate the scope of liability that I believe the account 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 have prevented 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 doctrine does. Instead, there is no principled reason 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.

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 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 of a crime that occurred before the executive's tenure in the corporation) 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, I believe, 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 an act of their corporation even if there was no possibility that they could have prevented the act's commission. The fact 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 there is no reason 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.

B. Punishing Responsible Corporate Officers

Commentators have predicted,¹²¹ and regulators have called for,¹²² an increase in RCO prosecutions. In light of the financial meltdown, unsafe manufacturing practices that have led to

¹²¹ "Responsible Corporate Officer": Business Executives Face Strict Liability Under Novel Criminal Law Doctrine, By Brian Stimson and Kimyatta McClary, Washington Legal Foundation: WLF Legal Backgrounder, http://www.wlf.org/publishing/publication_detail.asp?id=2153note 1 (collecting citations).

¹²² 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> (last visited Mar. 13, 2010).

unprecedented numbers of product recalls,¹²³ and an oil spill that constituted the worst environmental disaster in U.S. history,¹²⁴ 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 gesture to 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 but the corporate executive is made to sit at the defendant's table, and stand so as to receive the judge's or jury's verdict.¹²⁵ At the same time, whereas the executive in the corporate criminal trial is a human stand-in for the disembodied corporation – its public face – 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 for those executives whose commitments are sufficient to ground blame – i.e., for all those executives who are expected to harbor a genuine commitment to the corporation. Two factors determine when upward departures from the baseline are warranted: First, we may impose harsher sanctions where the expected commitment to the corporation is greater than what this threshold 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

¹²³ See, e.g., *FDA may prosecute executives over violations*, Chicago Tribune, Aug. 24, 2010, available at http://articles.chicagotribune.com/2010-08-24/business/sc-biz-0825-fda-recalls-20100824_1_fda-manufacturing-violations-prosecutions; Parija Kavilanz, *Drug Recalls Surge*, CNNMONEY.COM, Aug. 16, 2010, at http://money.cnn.com/2010/08/16/news/companies/drug_recall_surge/index.htm (describing the skyrocketing number of drug recalls over the last year, including a four-fold increase in recalls relative to the previous year).

¹²⁴ See, e.g., Shadi Bushra, *America's Worst Environmental Disaster in History: A Reason to Sink Climate-Change Legislation?* STANFORD PROGRESSIVE, June 2010, at <http://www.stanford.edu/group/progressive/cgi-bin/?p=575>.

¹²⁵ 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. CAL. L. REV. 959 (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.).

commitment will yield significantly stronger sanctions). The second factor licensing an upward departure will be the magnitude of the harm caused by the criminal offense – what I described in the analysis of a responsibility assignment as the *object* of responsibility. Thus, where executives at two different transgressing companies occupy positions demanding roughly the same strength of commitment 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 this uppermost limit as entry of guilty verdict + disgorgement of all incentive-based pay for the period in which the offense occurred to a victim restitution fund (or a clean-up fund in the event of an environmental offense, or reasonable analog for some other kind of victimless offense) + 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, that is, in which the object of responsibility was less dire and/or the expected commitment less strong – would involve a correspondingly smaller financial penalty, or they 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 offense. Indeed, given the compressed scale, creativity in crafting sanctions will be at a premium, in order to produce sufficiently fine-grained distinctions that make clear the relative blameworthiness of the convicted executive. All of that by way of 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 have treated the offense as a kind of binary switch: So long as the corporation has committed an offense, any executive with a genuine commitment to the corporation may 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. Thus, for example, even if corporation A's offense involved nothing more than a failure of respect (e.g., the company, in a callous bid to maximize profits, declined to disclose the full range of side effects from a drug it distributed where these side effects were annoying but not harmful) while corporation B's offense led to the serious disfigurement of some of the users of its products, corporate executive A would bear the same punishment as corporate executive B. 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 disfigured victims would be licensed in harboring more resentment toward the officers at the second corporation than the first. If the criminal law's response to an offender is supposed 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.

V. 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 responsibility.

Corporations are joint projects par excellence. It is time that our responsibility apparatus expand to account for the kinds of blameworthiness that arise therein, and that our legal apparatus extend to give a state-sanctioned voice to the varieties of reproach we are licensed in issuing to corporate officers.