Why Personhood Doesn't Matter:
Corporate Criminal Liability and Sanctions

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I. INTRODUCTION

Contemporary corporate criminal law is modelled on individual criminal law. Substantive bases of liability, evidence, procedure and rationale have been constructed initially for individuals. Over the years, doctrine has been transposed to corporations. The model contains two features. One is an identification of persons as the subjects of criminal law. The other feature is an assumption that the elements of criminal law applicable to individuals also apply to all persons. There is a notable exception. Recently proposed federal sentencing guidelines for organizations explicitly recognize the difference between individuals and corporations. But predominant practice remains individualistic: corporations are treated as persons in the way that individuals are treated. Constitutional protections of corporations, often analyzed in terms of individual persons, illustrate the practice.

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judicial findings which move from facts about legal personhood to claims about persons to a conclusion ascribing criminal liability to corporations. Hence the frequent charges of anthropomorphizing the corporation or uncritical use of metaphor.\(^4\)

We deny that corporate criminal liability is best modelled on individual criminal law. In what follows we argue that the model is unnecessary: imposition of corporate criminal liability does not require reference to persons or features peculiar to individuals. Judicial practice which treats corporations as persons can be preserved although such treatment is inessential. Section II briefly identifies the role of personhood in federal and state corporate culpability requirements. Section III considers and rejects an often-made claim denying personhood to corporations: that persons and corporations differ radically in kind. It also argues that, for some purposes, individuals themselves can be treated as corporations. An argument is presented in section IV justifying imposition of criminal liability without use of premises mentioning personhood. Section V offers some limits to the form of organizational sanctions based on conclusions reached in sections II-IV. Sections II-IV are conceptual and constructive in nature. Together they justify the existing practice of the imposition of corporate criminal liability. Section V is normative in force. It argues for morally justified limits on the priority given to particular forms of organizational sanctions. Throughout we assume that criminal sanctions are appropriate mechanisms for controlling corporate misconduct.\(^5\)

II.

Ascribing corporate criminal liability obviously requires an entity to which the ascription applies. Decisional law uniformly treats that entity as a person. This treatment is required by statutory directives concerning culpability. Legislative intent, not ontology, is at issue. Hence judicial practice typically is an exercise in statutory construction. Three sorts of statutory barriers to imposing corporate criminal liability exist. A penal code may either not define "person" to include cor-


9. A third logical and physical possibility is that the corporation itself acts. For two opposing views as to this possibility, compare May, Vicarious Agency and Corporate Responsibility, 43 PHIL. STUD. 69, 79-80 (1983), Wolf, The Legal and Moral Responsibility of Organizations, in NOMOS XVII: CRIMINAL JUSTICE 268-71 (R. Pennock & J. Chapman eds. 1985) with M. Dan-Cohen, supra note 4, at 46-49. We ignore this possibility because of the unlikely set of facts required for the possibility to become actual.
corporation directly. The role of the corporation as a person is derivative in the first case. It is direct in the second case. Federal corporate criminal law uses the corporation as a person in its derivative role. State corporate criminal law typically uses the notion in both roles.

Under federal common law the corporation’s criminal liability is vicarious. The mens rea of employees, where required, is attributed to the corporation. A corporation is criminally liable for the conduct of employees acting within the scope of employment or apparent authority. The conduct must be intended to benefit the corporation. An intent to benefit the corporation in part need only be present. Actual benefit to the corporation is unnecessary. The status of the employee engaged in criminal misconduct is irrelevant. Even the misconduct of low-ranking employees acting within the scope of their employment will be imputed to the corporation. Further, corporate criminal liability can be imposed if corporate officers and directors are ignorant of the employee’s misconduct. Criminal liability will be imputed even if the misconduct violates express instructions forbidding the act. Notice here the place of personhood in the imposition of corporate liability. To say that the corporation is vicariously liable simply is to say that it will be held liable for the misconduct of another. A person is held liable for the acts of another. Doing so does not justify the assignment of liability. Nor is it to say or imply the cor-


12. See, e.g., Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945); Standard Oil Co. v. United States, 307 F.2d 120, 128 (5th Cir. 1962).


14. See, e.g., United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir. 1946); Standard Oil, 307 F.2d at 127.

15. See, e.g., United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972); United States v. Bausch, 596 F.2d 871 (9th Cir. 1979); United States v. Armour & Co., 168 F.2d 342, 343 (3d Cir. 1948); United States v. Automated Medical Laboratories, 770 F.2d at 407. But cf. Holland Furnace Co. v. United States, 158 F.2d 2 (6th Cir. 1946); John Gund Brewing Co. v. United States, 204 F. 17 (8th Cir. 1913).
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Corporation acts or is at fault in any way. Corporate policy and behavior can be exemplary.\(^1\) The culpable conduct can be proscribed expressly. Liability is assigned to the corporation because the employee stands in a particular relation to it. The employee, of course, stands in relations to other entities, including other corporations or individuals. Vicarious corporate criminal liability assigns liability to the employer-corporation by selecting among those relations. Since liability is assigned without corporate conduct or fault, the role of personhood is derivative.

The role of personhood in state corporate criminal law is distinct. It is both direct and derivative. Of the states that have principles governing corporate criminal liability, most approximate pertinent provisions of the Model Penal Code.\(^17\) The Code bases corporate liability either on the type of offense or the status of the corporate employee. Under section 2.07(1)(a), a corporation is liable for (roughly) non-Code penal offenses by any agent acting within the scope of his employment for the corporation's benefit. The agent's status is irrelevant. Conviction requires that a legislative purpose to impose corporate liability clearly appear.\(^18\) Corporate liability under section 2.07(1)(c) is vicarious. Hence the role of personhood is derivative, as under federal corporate criminal law. Unlike federal criminal law, a due diligence defense is recognized. The corporation therefore is exonerated if a high managerial agent employed due diligence to prevent commission of the offense.\(^19\)

Personhood enters directly in section 2.07(1)(c). Under section 2.07(1)(c), the corporation is criminally liable for penal Code offenses only if their commission was in some way approved by a high managerial agent. The definition of "high managerial agent" is very general.\(^20\) A high managerial agent is a corporate officer or agent having such responsibility that "his conduct may fairly be assumed to represent the policy of the corporation."\(^21\) The corporation acts by in some way approving commission of an offense. Its liability is non-

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\(^{16}\) See Fisse, supra note 10, at 1187.
\(^{17}\) See Model Penal Code § 2.07 at 340, 340 n.18 (Revised Comments 1985); Brickey, Rethinking Corporate Liability Under the Model Penal Code, 19 Rut.-Cam. L. J. 593, 629-30 (1988).
\(^{19}\) Id. at § 2.07(5).
\(^{21}\) Model Penal Code § 2.07(4)(c).
vicarious. Liability is based on the corporation's misconduct. No due diligence defense is available under section 2.07(1)(c).

Few states have adopted section 2.07 without change. There is also substantial variation among state analogues of the section. Some states do not exclude penal statutes from the scope of section 2.07(1)(a). These statutes impose liability vicariously for selected penal code crimes. A number of jurisdictions do not recognize a due diligence defense under the subsection. Section 2.07(1)(c) has been altered too. Only a minority of jurisdictions construe "high managerial agent" as narrowly as the Model Penal Code prototype. A majority of states define the term to include any employee or agent acting in a supervisory capacity. And even states adopting the section 2.07(1)(c) analogue without significant change have construed the term broadly. For instance, a foreman has been held to be a high managerial agent. Since subsection (1)(c) remains more restrictive than subsection (1)(a), the difference between federal and state corporate criminal liability also remains.

III.

Some commentators deny that corporations are persons. Judicial practice may treat corporations as criminally liable, they admit. And corporations are deemed legal or statutory persons. But, doctrinal unity aside, they are not in fact persons. Corporations cannot feel. They are not subject to biological constraints under which individuals labor. They do not act. Since corporations lack features of individuals, some commentators conclude that they cannot be persons. Being legal persons, corporations are not persons, as the adjective signals. Corporations instead are distinct entities. The issue is ontological. To treat corporations as persons for extra-legal purposes is anthropomorphic or metaphorical. In neither case is the treatment justified.

22. MODEL PENAL CODE § 2.07 at 339 (Revised Comments 1985).
23. For a survey of the differences among states referred to below, see Brickey, supra note 1, at 629-34.
25. See, e.g., Ladd, Morality and the Ideal of Rationality in Formal Organizations, 54 Monist 488 (1970); M. DAn-Cohen, supra note 4; Cressey, supra note 4; Keeley, Organizations as Non-Persons, 15 J. Value Inq. 149 (1981). Cf. In re Clarke's Will, 284 N.W. 876, 878 (Minn. 1939) ("A corporation is not a person, but has a legal and real individuality... It is in simple fact a legal unit—a very real one—endowed by a creator with many of the rights and attributes of persons").
The charge, although frequently made, is wrong. Corporations and individuals both can be persons. The two entities do not differ radically in kind. The above denial assumes that if corporations lack features of individuals, they cannot be persons. The assumption is unsound. Left open is the possibility that the class of persons could include entities other than individuals. An argument is required to demonstrate that corporations are not members of that class. Suppose, however, that the assumption is sound: that an entity cannot be person unless it shares features possessed by individuals. Corporations still can be persons. To begin with, appropriate features of individuals must be selected. For individuals differ with respect to each other as to some features. Physical characteristics and capacities, as well as affective abilities, vary among human beings. Hence the favored features identified must be common, or at least prevalent, among individuals. Of course, biological criteria could be selected: say, being a member of the same species. But such criteria arbitrarily limits personhood to human beings. The criteria do not identify features important for an entity to be a person. Given criteria identifying such favored features among individuals, it is an open question as to whether corporations possess those features.

More important, whether corporations are persons is an empirical matter. The issue does not depend on whether it makes sense to say that corporations act or have intentions. Well-formed sentences supported by everyday linguistic practice, at best, is weak evidence. Thus barefoot lexicography will not do. Instead, the matter depends on whether successful predictive or explanatory theories make ineliminable reference to corporations. Theories explaining behavioral phenomena by reference to a corporation’s acts or constraints underwrite the existence of corporations as persons. For instance, consider a non-criminal behavioral phenomenon: the separation of security ownership and control in a corporation. An influential theory explains

26. For a denial of this possibility, see Wiggins, The Person as Object of Science, as Subject of Experience, and as Locus of Value, in PERSONS & PERSONALITY 56-754 (A. Peacocke & G. Gillett eds. 1987).


the phenomenon by conceiving of the firm as a nexus of contracts among owners of different factors of production. Equity ownership and risk bearing are explained as the outcome of a complex equilibrium process involving different factor markets. The explanation requires no reference to the firm as an entity. Or consider the familiar puzzle concerning the dividend policy of firms. Firms pay out dividends while also raising capital in bond markets. One explanation appeals to agency costs. Paying out dividends forces managers to obtain debt investors. Debt investors, such as bondholders, monitor managerial investment behavior and maintain firm risk as represented by the debt-equity ratio. Dividend policy is explained here by the interaction among three different classes of individuals: shareholders, bondholders and managers. As above, explanatory reference to the firm as an entity is eliminated. A fortiori resort to the corporation as a person is unnecessary. Again, personhood is a theory-dependent empirical matter.

Comparison of personhood with rational choice is instructive. For attributions of personhood at least partly depend on attributions of rational choice to an entity. And rational choice can be ascribed to entities other than individuals. Notionally, corporations, like households and committees, are taken to have preferences. Analysis proceeds by representing such preferences as indifference curves subject to budgetary constraints. Subject to such constraints, a corporation selects among commodity bundles such that its preference over them is maximized. Here rational choice is attributed to the corporation by reference to its preference and information set. Obviously the corporation’s choice is the outcome of the aggregate choices of individual employees. But not only can the corporation’s choice differ from the choice of any individual or set of individuals. Inquiry into the underlying mechanism generating the choice is unnecessary. Correspondingly, failure to attribute a consistent preference ordering and beliefs to a corporation undermines the ascription of rationality to it. Attribution of personhood is no different: Finding that an entity is a person does not require

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investigation into the entity's underlying "hardware." A finding of rationality constrains the attribution.

The same is true with respect to individuals. Personhood is attributed to individuals only if their choice behavior exhibits rationality. The attribution requires reference to an individual's preferences and beliefs. Ascriptions of personhood to individuals is justified when it serves to explain or predict choices. The justification does not require an inquiry into individuals' underlying "hardware" any more than in the case of corporations. It might be objected that individuals exhibit rational choice because they in fact have desires and beliefs. Corporations only can be treated as if they do. The objection gets things backwards. Individuals in fact have preferences and beliefs because the attribution of rationality explains or predicts their behavior. It is because an individual's behavior is describable as exhibiting rational choice that desires and beliefs are taken to have representational content. The attribution of desires and beliefs is parasitic on successful prediction or explanation, not vice versa. Individuals in this respect again are no different from corporations.

In fact, for some purposes, individuals can be considered corporations. We are not referring to the pickwickian sense in which an incorporated sole proprietorship is an individual. That sense at best is strained. Instead, we refer to instances in which an individual herself can be treated as a firm: a set of loosely allied decision making units or, more weakly, units with preferences. As Schelling has suggested, sometimes, for some decisions, individuals are like small collectivities. Since conflicting preferences may occur within a single col-

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Some commentators have taken a capacity for second-order cognitive or affective attitudes to be a necessary condition of personhood. See, e.g., D. Dennett, supra note 27, at 273; Meyers, The Corporation, Its Members and Moral Accountability, 3 BUS. & PROF. ETHICS J. 33, 35 (1983); cf. Frankfurt, Freedom of the Will and the Concept of a Person, 68 J. PHILO. 5 (1971). An entity is a person only if it has hopes, desires, beliefs and the like about the hopes, desires, beliefs (and the like) of other entities. Individuals possess this capacity. But so do corporations. For a firm's productions and marketing decisions depend on its anticipation of consumer demand. Such demand obviously is sensitive to changes in price and taste. Further, a firm must anticipate the research, production and marketing decisions of other firms in response to its own decisions. Both sorts of expectation concern the beliefs of other entities. So firms can exhibit second-order cognitive and affective attitudes. For a response to an objection that the ascription is merely a façon de parler, see text supra pp. 8-11.

lectivity, comparison of an individual to a firm is appropriate. Consider in this regard the following schema:

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1 2 3
a b c
b c a
 c a b
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The schema is used to illustrate the familiar intransitivity yielded by a simple majority collective choice rule. Here a three-unit firm is depicted (1-3), each unit of which has an ordinal preference profile for three alternatives (a-c). A simple majority rule generates the intransitive collective choice: a b c a. Observe that the same schema, suitably reinterpreted, can depict intransitive individual choice. Here a single individual ranks three alternatives (1-3), each distinguished by the ordering of associated attributes (a-c). Alternatives are ranked ordinally according to which has the majority of attributes. As in the interpersonal case, this majority decision rule generates an intransitive individual choice: 1 2 3 1.

The comparison of individual to interpersonal choice remains merely that: an analogy. Intransitive individual preferences do not by themselves show that the individual in fact is engaged in a collective choice. Alternative hypotheses are available. Individuals, like firms, on occasion simply may act irrationally. Or the imputed intransitivity may be explained away (e.g., as the product of framing effects). Or preferences may change. Other behavioral phenomena therefore are needed. Intrapersonal and intertemporal choice behavior suggests that treatment of an individual as a firm sometimes is possible. Take each in turn. An individual simultaneously may both pay for cigarettes and a payment to stop smoking. Or an individual may mow his neighbor’s lawn for $20 conditional on the neighbor donating the money to charity but refuse to donate $20 to charity himself. The former example, given stable preferences, suggests different preference orderings—different individuals. Decision therapy may eliminate inconsistent preferences, but this only demonstrates the malleability of preferences.


37. The first example is borrowed from Ainslie, Beyond Microeconomics: Conflict Among Interests in a Multiple Self as a Determination of Value, in J. Elster ed., supra note 35, at 136. The second example is a variation of the one given by Elster. Id. at 27. Cf. Thaler, The Positive Theory of Consumer Choice, 1 J. Econ. Organ. Behav. 39 (1980).
not their initial nonexistence. The latter example suggests two distinct individuals: an "economic" individual who presenting options under a "benevolent" description ("mowing for charity") and a "benevolent" decision maker who selects the options as described.\textsuperscript{38}

Intertemporal choice behavior is even more suggestive. An individual may adopt strategies intended to limit or preclude choices which otherwise would be made later. An earlier self is strategically manipulating a later self. This can be done directly, through pre-commitment, or indirectly, through institutional devices.\textsuperscript{39} Talk of intertemporal choices here is unjustified unless earlier and later selves interact. Elster states the requirement: where "two or more parts of a person are really engaging in mutual manipulation, there would seem to be good grounds for referring to several selves."\textsuperscript{40} Since selves do not exist contemporaneously, strategic manipulation may seem impossible. Manipulation at best is apparently asymmetrical, running only from the earlier to later self. But in fact it can be symmetrical. Schelling suggests an institutionally created possibility: the appointment of attorneys to represent each self.\textsuperscript{41} Once appointed, representatives could bargain with each other on behalf of their respective clients. Another possibility is slightly less remote. A self can limit or preclude choices available to another self. Given a prospect of repeated sequential choice situations, a later self could use this capacity as a basis for bargaining indirectly with an earlier self. Contemporaneous existence is not required. Hence both eventualities justify the possibility of treating the individual as comprised of discreet decision making units. The conclusion should be apparent: If individuals are persons, and individuals can be considered to be firms for some purposes, then firms can be considered to be persons for some purposes. Both firms and individuals have ontological status as persons.

IV.

Determining the ontological status of the corporation is unnecessary. For the assignment of corporate criminal liability does not re-

\textsuperscript{38} Cf. J. Coleman, Foundations of Social Theory 504-5 (1990). Id. at 504 ("Ultimately the unitary actor must be regarded as a structure composed of parts if the malfunctioning of the actor is to be studied").


\textsuperscript{40} Elster, supra note 36, at 10.

\textsuperscript{41} T. Schelling, supra note 33, at 94.
quire that determination. Corporations can be held criminally liable without deciding whether they are persons. Indeed, their status as moral persons can be left open. Agnosticism on both counts is justified for the same reason: criminal responsibility, whether of individuals or corporations, does not take personhood into account. To be sure, judicial practice requires a finding of personhood, as noted in section I. But, as also noted, this is a legislatively imposed requirement. Criminal liability can survive without an inquiry into personhood. Decisional law implicitly recognizes as much by considering personhood a minor barrier to the assignment of liability.\textsuperscript{42} Personhood functions in such reasoning more as a conclusion than as a premise. Where it functions as a premise, the premise is expendable.

To see this, compare the approach many commentators discussing corporate accountability take. Corporate accountability is presented as a general issue of rights, whether criminal, civil or moral. Rights in turn are held to depend on the ascription of corporate personhood.\textsuperscript{43} Commentators take sides on the appropriateness of the ascription. Schematically, the arguments are of the following simple form:

\begin{enumerate}
\item (Moral) persons are entities having rights.
\item An entity has rights if and only if it possesses property \( p \).
\item Corporations possess \{cannot possess\} property \( p \).
\item Therefore, corporations are \{cannot be\} (moral) persons.
\item Therefore, corporations are \{cannot be\} (moral) persons.
\end{enumerate}

Now the argument, although valid, is otherwise defective. For one thing, reference to rights is unhelpful. For there may be properties of entities which are necessary or sufficient conditions of having some sorts of rights but not others. Conditions of criminal, civil and moral right may differ. Also, the force of the argument as formulated is limited. This is because mention of responsibilities, whether criminal, civil or moral, is omitted. Corporations may have responsibilities even if they lack corresponding rights. Conditions for having responsibilities may be distinct from those for having rights. These are minor

\textsuperscript{42} See supra p. 3; cf. Tur, The "Person" in Law, in PERSONS & PERSONALITY, supra note 26, at 121-22, 128.

points. Clearly the omissions and limitations identified in the argument can be repaired.

The argument, even when repaired, still would be defective. For notice the place of personhood in them. Personhood is irrelevant to the arguments. Corporations may or may not have rights or responsibilities, as step (4) has it. But whether corporations do does not depend on their being (moral) persons. It depends rather on their possessing the favored property p. If (and only if) an entity, whether an individual or corporation, has property p, it has rights or responsibilities. Hence premise (1), the premise mentioning personhood, can be deleted without loss. And because it can be deleted, step (5) must be deleted too: that corporations are [cannot be] (moral) persons. In short, personhood is irrelevant. Its inclusion additionally is unnecessary since, unlike judicial practice, there is no need to labor under statutorily mandated references to personhood.

Reference to personhood is not needed to ascribe criminal liability, statutory mandates aside. Consider how such an exercise often proceeds. An individual suffers harm. Assuming that the harm is such that criminal liability can be assessed, a criminally responsible entity is sought. Inquiry focuses on whether an entity causing the harm acted voluntarily with a wrongful state of mind and in the absence of excusing conditions. An entity satisfying these conditions is held criminally accountable for the harm. Why need or should inquiry settle the issue as to whether that entity is a person? Or a moral agent? Indeed, why need the question as to the entity’s status be asked at all? Of course, persons are entities which sometimes voluntarily cause harm with a wrongful state of mind and with legally recognized excuse. So they are tolerably good proxies for those entities. But it is not in virtue of being a person that criminal liability attaches. It is in virtue of possessing the complex relational property of causing harm-voluntarily-with a wrongful state of mind-without excuse. Sanctions imposed consequent upon liability is another matter; we take it up in section IV below.

44. Cf. MODEL PENAL CODE § 2.01(1) (voluntary act required); § 2.05(1) (a wrongful state of mind required unless eliminated by material elements of a substantive offense); e.g., § 2.09 (in the absence of duress). The requirement that a wrongful state of mind accompany the act is dropped below. It is imposed here for illustrative purposes only.

45. For a similar point in the context of ascribing moral blame, see Manning, Corporate Personality and Corporate Personhood, 3 J. Bus. ETHICS 77, 78 (1984).
The point can be generalized. Finding moral responsibility and criminal liability does not depend on first determining whether an entity is a person. That determination is not required at all. Rather, conditions for the ascription of both sorts of liability are needed. Liability is assigned to an entity when those conditions are satisfied. Personhood plays no part in the assignment. It would be convenient were the conditions for moral responsibility and criminal liability to coincide. In particular, it would be convenient if a necessary condition of criminal liability included a requirement of mens rea. But there is no such requirement. Although there is a presumption that culpability requires mens rea, some federal statutes have been interpreted to create strict liability offenses. Some states adopting the analogue of section 2.07(1)(a) of the Model Penal Code also have created strict liability corporate crimes. Hence legal liability is not coextensive with moral blameworthiness. Still, although not coextensive, both sorts of liability require reference to standards of culpability, not of personhood. Corporations, no less than individuals, can satisfy both sorts of liability.

Wolf denies this conclusion. According to her, a necessary condition of moral responsibility is the capacity to achieve an emotional understanding. Emotional understanding apparently involves a capacity for sympathy and respect for others. Because organizations lack this capacity, Wolf contends, they cannot be held to be moral responsible. Therefore, since moral responsibility is "associated" with criminal law, organizations cannot be criminally liable. Even putting decisional and statutory law aside, Wolf's argument is unsound. The notion of an emotional understanding is so vague as to be difficult to assess. Do precatory or mandatory statements concerning treatment of customers and employees evidence the requisite emotional capacity? There is no reason to exclude such evidence on a priori grounds. If so, corporate codes of conduct may satisfy Wolf's necessary condition of moral responsibility. Further, the stipulated "association" of moral


48. See, e.g., 18 PA. CONS. STAT. § 307(1)(a) (1982); cf. § 106(c). See also supra p. 6.


50. Wolf, supra note 9, at 278-80.

51. Id. at 268.

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responsibility and criminal law at best is a loose one. The presence of strict liability offenses shows as much.

Wolf's candidate necessary condition of moral responsibility itself is eminently questionable. As above, inquiry into the moral responsibility for a harm does not require determining an individual's emotional capacity. Being subject to constraints imposed by moral norms instead is to be determined. A capacity to conform one's behavior to moral norms is required.\(^3\) This can be accomplished simply by guiding behavior by reference to the interests of others. A capacity for awareness of the existence and nature of the norm itself therefore is needed.\(^4\) A capacity to sympathize or reciprocate is unnecessary. For attributions of moral responsibility are not withheld upon discovering that an individual has failed to take a moral norm to heart. Condemnation is appropriate if an individual is aware that her act caused the death of another and, by doing so, violates a norm against unjustified killing. That she lacks an ability to feel for her victim does not remove the basis for condemnation. Discovering a lack of a capacity for awareness is a circumstance justifying withholding the attribution. So too does the finding that the offender lacked volitional capacity to conform to a norm. The individual's behavior is excused as a consequence. A feature of the individual other than her emotional capacity provides the basis for excuse. The entity from which the ascription of moral responsibility is withheld once more is irrelevant. Since corporations can conform to known moral norms, talk of moral responsibility is appropriate. And assuming that moral responsibility is "associated" with the criminal law, so too is criminal liability.

V.

Considered separately, the conclusions of the arguments in sections I-III are modest. Corporations, no less than individuals, can be considered persons: the two do not differ radically in kind (section II). But it does not follow that they have the same status as persons. Conditions of criminal and moral responsibility do not require reference to personhood. Reference to other features of entities alone instead is needed (section III). But it does not follow that the favored features identified are the same as between individuals and corporations. Con-

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54. Cf. Model Penal Code § 4.01(1), (2); § 2.08(4).

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sidered together, however, arguments with stronger conclusions can be presented. Our argument is this: If personhood is irrelevant for criminal or moral responsibility, and if conditions of criminal or moral responsibility refer to features of entities alone, then there must be some reason for differentiating between corporate and individual responsibility-generating features. Personhood, by assumption, cannot provide a reason. Nor can reasons supplied by substantive federal or state criminal law (section I) or moral principle (section III). So there is no reason to assign liability differently as between corporations and individuals.

Elementary comparative justice supports this conclusion. If two relevantly similar offenses are committed under similar circumstances, the same liability should be assigned. Of course, corporations seldom commit traditional common law offenses. They do not rape and very infrequently are convicted of manslaughter, theft or obscenity. Such abstention is not a logical necessity, only an unsurprising but significant regularity. Liability still would be assigned if corporations committed traditional common law crimes. Decisional law is consistent with this point. Federal criminal statutes have been construed to include organizations despite statutory silence. Persons are equally liable for committing relevantly similar offenses in relevantly similar circumstances. As qualified, the statement is an obvious truth.

Another conclusion is not obviously true: Offenders criminally liable for relevantly similar offenses should receive the same form of punishment. This may be a matter of comparative justice. But its truth is not entailed by any assertions about equal liability. Liability is a distributive notion. It separates those who have engaged in blameworthy conduct from those who have not. Punishment is a punitive notion. It applies only to the former class. But members of the former class still may be subject to different forms of punishment. We shall argue for a weaker claim: namely, that criminally liable corporations and individuals should be subject to the same mix of forms of sanction. Ours is a claim about remedial justice. Since considerations about liability cannot by themselves yield evaluations about punishment, premises concerning sanctions must be introduced.

55. See Model Penal Code § 2.07 at 338 (Revised Comments 1985); Cohen, Ho, Jones & Schleich, Organizations as Defendants in Federal Court: A Preliminary Analysis of Prosecutions, Convictions, and Sanctions, 1984-1987, 10 Whittier L. Rev. 103, 114 (Table 1) (1988).

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To begin with, clarification of the claim is worthwhile. The full range of sanctions includes monetary sanctions such as fines, restitution and forfeiture, quasi-monetary sanctions such as equity fines, and non-monetary sanctions such as imprisonment, probation, notice to victims, adverse publicity, community service, disqualification and capital punishment or corporate dissolution. Forms of sanctions simply are particular punishments from within this range: say, fines or probation. A mix of sanctions is a selection of punishment from within each type of sanction: for example, monetary or quasi-monetary sanctions. Offenders are subject to different mixes of sanctions when priority is given to one type of sanction over another. Hart draws a much-cited distinction between four elements of a remedial system: the definition, general justifying aim, entitlement and amount of punishment. Forms of sanction and their mix concern none of these elements. They constitute a distinct element of a remedial regime.

Federal sentencing law limits the range of sanctions. Under the Sentencing Reform Act three forms of sanction are authorized for individuals: fines, probations and imprisonment. Two forms of sanction are authorized for organizations: fines and probation. An organizational analogue of imprisonment was rejected. Forfeiture, restitution and notice to victims are authorized for both individual and organizational sanctions. Enabling legislation directs the United States Sentencing Commission to adopt presumptive sentencing guidelines consistent with the goals and policies of the Sentencing Reform Act. Those goals include traditional general justifying aims, in no order of priority. Some limit on the proportional amounts of punishment is statutorily prescribed. Hence remedial elements other than the range of forms of sanctions are legislatively prescribed. Only the forms of sanctions are relevant here.

Next consider the relationship between forms of sanctions and punishment. Forms of sanctions are modes of punishment. Punish-
ment is distinct from penalties. Both punishments and penalties involve the deliberate imposition of harm. Punishment but not penalties, however, are necessarily connected to the notion of wrongdoing. And, crucially, the presence of a further feature is required: that the imposition of harm for a wrongdoing be expressive. Feinberg succinctly identifies the expressive element in punishment when he notes that what distinguishes punishment from other modes of response "is that it is a form of deliberately hard treatment that expresses blame and condemnation." The conventional expression of condemnation in part distinguishes punishment from penalties. Forms of punishment express blame for wrongdoing. A penalty need not be attached to wrongdoing nor need it be expressive of any attitude toward a violation. Further, the condemnation expressed by punishment is not itself a sanction. Condemnation and blame can exist independently of its conventional expression. The point is that, without its condemnatory aspect, deliberate imposition of harm is not punishment. At most it is a penalty.

Punishment, as sometimes noted, is a piece of communicative behavior. The presence of a conventional expression of condemnation shows as much. Three aspects of the communication can be identified:

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65. See Oberdick, The Role of Sanctions and Coercion in Understanding Law and Legal Systems, 21 AM. J. JURIS. 71, 76-77 (1976). There is some empirical evidence supporting this claim. Blumstein and Nagin found that the threat of conviction had more of a deterrent effect than did imposition of a subsequent sanction on middle class draft evaders. See Blumstein & Nagin, The Deterrent Effect of Legal Sanctions on Draft Evasion, 29 STAN. L. REV. 241 (1977). Williams and Hawkins hypothesize, in a critique of panel studies, that the information conveyed by imposition of a legal sanction is that others condemn an act. They conjecture that perception of conduct, not the imposition of a sanction, may have a deterrent effect. See Williams & Hawkins, Perceptual Research On General Deterrence: A Critical Review, 20 L. & Soc'y Rev. 545, 558-61 (1986). The results of both studies are consistent with the claim that condemnation can exist independently of punishment, the semantic vehicle of its expression. Cf. Coffee, "No Soul to Damn, No Body to Kick": An Unscandalized Inquiry Into The Problem of Corporate Punishment, 79 MICH. L. REV. 386, 425 (1981).
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the sender, recipient(s) and the content of the communication.66 Feinberg emphasizes the condemnatory expression of the sender above. Others emphasize the recipient or recipients.67 Two points about pertinent communicative content are important. First, all accounts agree that the communicative content include an expression that the action performed is wrong. Second, particular types of sanctions also can convey particular communicative content: that the wrong caused is of a specific sort or extent. For instance, barring an offender from trading on securities exchanges conveys not simply that a wrong was committed. The particular sort of wrong committed, violation of certain securities laws, is conveyed by the sanction.68 Without expressing that the act was wrong, deliberate imposition of harm is not punishment. Without expressing the particular wrongfulness of an act, a sanction often fails to convey the sort or extent of its wrongfulness.

Observe, crucially, that both points are neutral with respect to competing justifications of punishment. For both concern the nature of punishment, not the use to which imposition of punishment is put. “Theories” of punishment differ with respect to justificatory rationales. They need not differ as to the communicative nature of the punishment itself.69 Deterrence, retributive and rehabilitative theories, and their variants, each can incorporate into competing justifications recipients’ recognition of why punishment was imposed. Of course, competing theories may be incompatible with specifications of richer communicatory content. Rehabilitative justifications, for example, may be undermined by conveying the message that a particular authority will increase the sanction should the offense be repeated. But both points

66. See R. Nozick, supra note 63, at 371 (1981). For an enumeration of necessary and jointly sufficient conditions for the presence of a communicative aspect to retributive punishment, see id. at 368-70. The statement above detaches the communicative aspect of punishment from any particular “theory” of punishment. A justification for doing so is presented at text infra pp. 24-25.

67. See Morris, supra note, at 264 (1981); Hampton, supra note 63, at 212; R. A. Duff, Trials and Punishments 235-36 (1986); Burgess-Jackson, Bad Samaritanism and the Pedagogical Function of Law, 8 CRIM. JUST. J. 1, 3-4 (1985).

68. Factorial survey data concerning differentiation of sanctions according to types and seriousness of offense is consistent with the second point. See Rossi, Simpson & Miller, Beyond Crime Seriousness: Fitting the Punishment to the Crime, 1 J. QUANTITATIVE CRIMINOLOGY 1 (1985); cf. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 218-19 (1988); Blumstein & Cohen, Sentencing of Convicted Offenders: An Analysis of the Public’s View, 14 L. & SOCY REV. 223 (1980).

The minimal communicative content is that the act was wrong and a wrong of a certain sort. Traditional justifications can appeal to this content even if in different ways. Since justifications for imposing sanctions are not at issue here, only the points about the minimal communicative nature of punishment are relevant. Again, absent its condemnatory aspect, deliberate imposition of harm is not punishment. Absent its specific condemnatory aspect, a sanction often fails to convey the sort or extent of wrongfulness.

The conclusion affects proposals for preferred forms of organizational sanctions. One such proposal advocates the use of adverse publicity, a non-monetary sanction. French finds its basis in the notion of shame. Shame is a feeling of having failed to satisfy what is expected of the occupant of a role or status. A shame-based penal system is desirable, according to French. And adverse publicity is an appropriate corporate sanction associated with that system. It forces a corporation to confront its own inadequacies. Important details of French's proposal are weak. There is little evidence showing what precisely are the expectations associated with being a corporation such that they could induce shame. Extant data apparently suggest that publicity about corporate offenses does not cause the offender's stock prices to decline. Details aside, in a penal context shame depends on commission of an offense. Sanctions are to be applied conditional on its commission. But unaccompanied by an expression of condemnation, judicially imposed harm cannot function as a sanction. At best a penalty is being imposed. Shame in a penal context therefore would be inappropriate. Hence, to constitute punishment, imposition of harm

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70. See French, Publicity and the Control of Corporate Conduct: Hester Prynne's New Image, in Corrigible Corporations and Unruly Law 162-63 (B. Fisse & P. French eds. 1985); French, Principles of Responsibility, Shame and the Corporation, in Guilt, Shame and the Corporation, supra note 52, at 44-48.

71. See French, Publicity and the Control of Corporate Crime: Hester Prynne's New Image, supra note 65, at 162.

72. Corporate codes of conduct usually are cast in broad, precatory terms. Most codes base contained prescriptions on legal liability, not ethical principle. See Mathews, Codes of Ethics: Organizational Behavior and Misbehavior, in 9 Research in Corporate Social Performance and Policy 107, 115 (W. Frederick & L. Preston eds. 1987). Also, without evidence of their prevalence, inferences as to expectations created by corporate codes are unjustified.

73. See Coffee, supra note 64, at 422-23. Cf. B. Fisse & J. Braithwaite, The Impact of Publicity on Corporate Offenders 11-12, 231-32 (1983) (identifiable stock market reactions apparent only in a minority of cases studied; effect on stock prices open to doubt).
must be appropriately expressive. If it ceases to express condemnation, imposition of harm cannot constitute punishment.

This familiar analytical point has a normative implication. If a sanction loses its force as a conventional expression of condemnation, it ceases to function as punishment. Harm may be imposed, but its character is not that of a penal sanction. Conduct is not being deemed wrongful. Instead, absent an expression of condemnation, a penalty is imposed. Since wrongfulness is implied by assessing a penalty, there need be no violation of a legal rule. A price attached to conduct merely is being assessed. For this reason, without a conventional expression of condemnation, criminal sanctions lose their normative status. It is not that the force of criminal sanctions is weakened. Rather, it is that their status as criminal sanctions is lacking. Without their condemnatory expression of wrongfulness, criminal sanctions cannot be distinguished from liability rules in tort.

The normative implication places limits on the mix of sanctions. For combinations of forms of sanctions which lack the conventional expression of condemnation cannot serve as punishment. Instead they serve as prices attached to conduct as taxes. To take an extreme case, suppose an absolute priority is given to monetary sanctions as the preferred form of sanction. All other types of sanction are excluded. Offenders then could be assessed a fine equal to the expected social cost of the their behavior.\textsuperscript{74} Criminal laws state prohibitions against engaging in particular sorts of conduct. But an exclusive use of fines would not express this prohibition. Its use instead simply would raise the cost to the offender of engaging in particular conduct. No blameworthiness would be communicated by imposing a fine. As above, a tax on conduct would be imposed.\textsuperscript{75} The conduct would be deemed permissible, for a price.

Limits also are placed on the \textit{comparative} mix of sanctions as between individuals and organizations. And for the same reason. To take a slightly less extreme example: Suppose monetary sanctions are

\textsuperscript{74} Assuming, of course, that the defendant is solvent. For a sentencing proposal close to this, see Parker, supra note 2. Cf. Posner, Retribution and Related Concepts of Punishment, 11 J. LEGAL STUD. 71, 74 (1982); R. Posner, THE PROBLEMS OF JURISPRUDENCE 361-62 (1990) (crimes in effect are torts “because if all criminals could pay the full social costs of their crimes, the task of deterring antisocial behavior could be left to tort law”).

given absolute priority for organizations and nonmonetary sanction are
given absolute priority for individuals. Suppose too that both com-
mitted the same sort of offense. The condemnatory force communi-
cated by both sanctions is likely to be diminished or eliminated. For
the conventional expression of blameworthiness is altered and made
ambiguous. Is an organization permitted to engage in the behavior
conditional on bearing the expected social cost of its commission while
an individual is forbidden from committing the offense? Or are both
permitted to engage in the same behavior conditional on each bearing
the expected social cost but in different mediums of payment? Or
are both forbidden from committing the offense, payment again being
made in a different mediums? If both are forbidden from committing
the offense, is it less wrongful for the corporation to do so? All are
possible communicative content. The possibilities even affect the
description of the act performed ("cost-incurring behavior," "offense").
That all are possibilities detracts from the conventional nature of the
expression: that which is being communicated by the intentional im-
position of harm on the organization and individual.

The above are effects of differences in the comparative mix of
sanctions. The argument for limitations on the comparative mix of
sanctions is based on comparative justice. In particular, it relies on a
claim of equal liability as between individuals and corporations. The
argument is this: If two relevantly similar offenses are committed
under relevantly similar circumstances, the same liability should be
assigned. Different forms of punishment are permissible. However,
such differences must be such that the same liability is preserved, both
in type and extent. But forms of sanctions, as noted, convey com-
mmunicative content concerning liability. Therefore that content must
be preserved. Absent the expression of wrongfulness of the same sort
for the same offense, the communicative content conveyed by sanctions
is altered. This can occur in two ways. Either deliberately imposed
harms fail to express wrongfulness at all. Or different mixes of sanc-
tions express different types and extents of wrongfulness. Alteration
in communicative content occurs in both instances. Given an alteration
in content, different liability is assigned for the commission of the same
offense. Hence individuals and corporations receive unjustifiably dis-

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76. Cf. Lott, A Transaction-Cost Explanation for Why the Poor Are More Likely to Commit Crime,
19 J. LEGAL STUD. 243, 254 (1990) ("The criminal justice system may thus be viewed as allowing
individuals to borrow against their future human capital. A criminal receives the use of the item now,
but pays for that use later if caught and imprisoned.").

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parate treatment. The requirement of equal liability constrains permissible variations in comparative mix of sanctions.

Comparison of proposed federal organizational sentencing guidelines with adopted sentencing guidelines for individuals is instructive. The Sentencing Reform Act, as indicated, excludes an organizational analogue of imprisonment. Hence the range of available organizational sanctions is truncated. Differences between available forms of individual and organizational sanctions also are apparent under sentencing guidelines. Imprisonment, fines and the punitive use of probation are available for individuals.\(^77\) Restitution, fines and probation are available for organizations under proposed organizational sentencing guidelines. Roughly, restitution is given priority over fines and probation.\(^78\) Probation operates as a supplementary remedial device in conjunction with restitution and the punitive use of fines.\(^79\) Since restitution and probation are compensatory devices here, only fines can serve a punitive purpose. Clearly, as between individuals and organizations, different mixes of sanctions exist.

The possible normative consequence of this difference is important. The possible consequence is that the requirement of assigning equal liability is violated. Take, for example, theft. Suppose an individual and a corporation both commit a theft under relevantly similar circumstances. Even suppose that both are co-defendants and that both are convicted of theft. Under adopted sentencing guidelines, depending on offense and offender characteristics, the individual is subject to a term of imprisonment.\(^80\) Instead, the corporation can be ordered to compensate its victims for the value of their loss. A fine also can be assessed. Probation can be ordered if the corporation lacks sufficient liquid assets to pay the assessed fine.\(^81\) Arguably the mix of corporate sanctions is remedial in nature. A price simply is attached to the

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\(^{79}\) See Discussion Draft, supra note 2, at § 8D2.1(a). Community service and notice to victims, where appropriate, are both remedial measures, serving as restitutionary devices. See 18 U.S.C.S. § 3555; Discussion Draft, supra note 2, at § 8D2.5, § 8D1.1(b) at 8.42; Chapter Eight, supra note 2, at 8B1.3, 8B1.4.

\(^{80}\) See United States Sentencing Commission Guidelines Manual § 2B1.1, at 2.17 (1989); id. at 5.2 (Sentencing Table).

\(^{81}\) See Discussion Draft, supra note 2, at § 8D2.1; Chapter Eight, supra note 2, at § 8D1.1.
corporation's theft. That price is the sum of restitutionary payments, fines and discounted payments over the term of probation. Arguably the mix carries no implication of wrongdoing on the corporation's part. No implication that theft is forbidden is conveyed. This is not true in the individual's case. And this even though, by assumption, the individual and corporation committed the same sort of theft under relevantly similar circumstances. Different liability effectively is being assigned.

Specifying the precise comparative mix of sanctions is difficult and speculative. An absolute equality in mix is not required, obviously. Nor is a requirement of absolute equality in mix feasible at present. Lacking are precise techniques for assigning sanction values to forms of sanctions. And there are well-rehearsed reasons for preferring different forms of sanction as between individuals and organizations. In fact, different mixes of sanctions may be justified as between types of organization. Factors concerning ownership and management structure, extent of harm and the value of organizational assets are important. Our point is an analytic one: namely, that constraints exist as to the disparity in types of sanctions applied to individuals and organizations. In practice its effect may or may not be significant. The constraints are set by the requirement that liability be equal between organizations and individuals. Differential diminution or elimination of a sanction affects the condemnatory force of punishment. Diminution alters a sanction's condemnatory force; its elimination transforms

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83. See Coffee, supra note 64; Parker, supra note 2.


For example, two traditionally significant factors are ownership and managerial structures of a corporation. A study of organizational convictions in federal courts between 1984 and 1987 found that only 10% of convicted firms had over $1 million in annual sales and 50 employees, and less than 3% had traded stocks. See Cohen, Ho, Jones & Schleich, supra note 54, at 107, 112. Most of the convicted firms therefore were small and closely-held. Smallness reduces the risk of sanctions creating large externalities. The characteristic of being closely-held reduces the cost of the convicted firm monitoring its owner-managers or employees. Particular non-monetary sanctions (e.g., court-ordered dissolution, imposed compliance schemes) appropriate for such firms may be inappropriate for large, publicly traded corporate offenders.
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a sanction into a penalty. If either effect is desirable, sentencing is not the appropriate place in which to achieve it. Assignment of liability is the appropriate locus.

VI. Conclusion

We have attempted neither a restatement nor a reconstruction of substantive corporate criminal law in this paper. A clarification of several central foundational elements of existing corporate criminal liability instead has been offered. Our arguments have been either analytical or normative in force. Personhood is a dispensable justificatory ascription for corporations. Although personhood can be ascribed to corporations, doing so is unnecessary for the assignment of criminal or moral responsibility. Assigning criminal or moral responsibility only requires reference to features of entities, whether individual or corporate.

Nothing follows concerning a justifiable form of sanctions from an assignment of criminal liability. We instead argue for a weaker claim: that there are limits to discrepancies in the comparative mix of types of sanction between individuals and corporations. The argument is based on the expressive nature of condemnation necessary to punishment. Justifiable discrepancies in the comparative mix in types of sanction are constrained by the nature of punishment. Sentencing commissions are charged with deciding upon determinate sanctions for individuals and corporations. Attention therefore should be given to the precise limits of disparities in types of sanction between the two.