The Phantom Menace of the Responsibility Deficit

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I. Introduction

At least since the publication of Peter French’s seminal work, *The Corporation as a Moral Person*¹ in 1979, academic debate has raged over whether it is appropriate to attribute moral responsibility to corporations² as collective entities. Most theorists who consider the matter argue that corporations can bear moral responsibility,³ but powerful arguments to the contrary

¹The author wishes to extend his sincere thanks to Eric Orts and Craig Smith for inviting him to the conference on *The Moral Responsibility of Firms: For and Against?* at INSEAD at which this paper was originally presented and to Michael Bratman, Philip Pettit, and Kendy Hess, for their helpful critical comments. The author also wishes to thank Ann C. Tunstall of SciLucent LLP for her comments on a draft of this article and Annette Hasnas of the Burgundy Farm Country Day School and Ava Hasnas of the Montessori School of Northern Virginia for providing first hand experience regarding the injustice of collective punishment.

²For purposes of concision, I will employ the term 'corporation' to refer not merely to businesses that have gone through the formal process of incorporation, but to business organizations generally, regardless of their legal form. With regard to the attribution of moral responsibility to collective entities, there is nothing special about corporations and no reason to distinguish them from partnerships or other forms of business organizations. I employ the term 'corporation' in this generic sense purely for purposes of expressive convenience.


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have been produced by the minority who disagree.\(^4\)

In my judgment, the strongest argument for the conclusion that corporations should be held morally responsible for their actions has been advanced by Philip Pettit. Pettit provides a forceful and lucid two step argument for this conclusion; arguing first that corporations are fit to be held morally responsible, and second that, given this fitness, they should be.\(^5\)

Virtually all discussion of Pettit’s argument has concerned its first step. The debate has almost exclusively focused on whether corporations are the type of entities that can bear moral responsibility.\(^6\) In this chapter, I propose to focus on the second step of the argument. I will assume that Pettit has established that corporations can be held morally responsible, and then ask whether they should be. I will argue that the answer to this question is a resounding no. Given the criteria that Pettit himself supplies for making this decision, it would be inappropriate to ascribe moral responsibility to corporations.

II. Pettit's Argument

Pettit provides a clear and concise account of the argument for corporate moral responsibility, 14 ETHICAL THEORY AND MORAL PRACTICE 223 (2011).


\(^5\)See Pettit, supra note 3, at 172.

\(^6\)This is not unique to Pettit's argument. Virtually all debate over all arguments in support of corporate moral responsibility has been over whether corporations can bear moral responsibility. Little, if any, has concerned whether they should.
responsibility in his article, *Responsibility Incorporated*. Using this as a source, let's examine both steps in the argument.

A. Step 1: Corporations' Fitness to Be Held Responsible

Pettit identifies three conditions that must be met for a person or entity to be a bearer of moral responsibility—conditions he calls value relevance, value judgment, and value sensitivity.\(^7\) Value relevance requires that the person or entity be "an autonomous agent [that] faces a value-relevant choice involving the possibility of doing something good or bad or right or wrong."\(^9\) Value judgment requires that the person or entity have "the understanding and access to evidence required for being able to make judgments about the relative value of such options."\(^10\) Finally, value sensitivity requires that the person or entity have "the control necessary for being able to choose between options on the basis of judgments about their value."\(^11\) For purposes of concision, Pettit's three conditions could be condensed into the statement that moral responsibility requires a person or entity to possess autonomy, judgment, and the capacity for self-control.

Pettit contends that corporations satisfy the value relevance condition because they can act autonomously. They can *act* because groups qualify as agents "when members act on the

\(^7\) Pettit, *supra* note 3.
\(^8\) *Id.* at 175.
\(^9\) *Id.*
\(^10\) *Id.*
\(^11\) *Id.*
shared intention that together they should realize the conditions that ensure agency."\textsuperscript{12} And they can act \textit{autonomously} because the attitudes of corporations "cannot be a majoritarian or nonmajoritarian function of the corresponding attitudes among individuals, and, as follows under some plausible assumptions, . . . they cannot even be fixed by a mix of such functions."\textsuperscript{13} Thus, the autonomy of the corporation "is intuitively guaranteed by the fact that on one or more issues the judgment of the group will have to be functionally independent of the corresponding member judgments, so that its intentional attitudes as a whole are most saliently unified by being, precisely, the attitudes of the group."\textsuperscript{14}

Pettit further contends that corporations satisfy the value judgment condition because their internal structure specifies a deliberative decision-making procedure. "A group will form a judgment or other attitude over a certain proposition when the proposition is presented for consideration and the group takes whatever steps are prescribed in the constitution for endorsing it; . . ."\textsuperscript{15} Thus, a corporation "will be able to form a judgment over any proposition that members are capable of presenting for consideration and of adjudicating by means of a vote or something

\textsuperscript{12} \textit{Id.} at 179. Pettit explains that groups act as an agent when the members "each intend that together they mimic the performance of a single unified agent."\textit{Id.} In such cases, [t]hey will each intend to do their bit in the pattern of coordination required for this performance. They will each be motivated to do this by the belief that others intend to do their bit too. And all of that will be above board, as a matter of shared awareness: each will believe that those conditions obtain, believe that each believes this, and so on. \textit{Id.}

\textsuperscript{13} \textit{Id.} at 184.

\textsuperscript{14} \textit{Id.}

\textsuperscript{15} \textit{Id.} at 186.
Finally, Pettit contends that corporations can satisfy the value sensitivity condition—that corporations can exercise self-control as collective entities. He recognizes that to establish this, he must overcome the problem raised by the fact that "[w]hatever a group does is done by individual members on behalf of the group and is done intentionally by those individuals." This makes it appear that control of corporate actions lies not with the collective entity, but "entirely with . . . the members who act in its name [and] have exclusive control over what is done and exclusive responsibility for doing it." However, Pettit argues that corporate control is compatible with individual control in the sense that the corporate body controls the programming that produces the individually controlled actions that implement that programming. The corporation "can share in that control, so far as it relates as a programming factor to the implementing factor represented by the active individual." Thus, the corporation may control in a reason-sensitive way for the performance of a certain action by some members . . . by maintaining a constitution for the formation and enactment of its attitudes, arranging things so that some individual or individuals are identified as the agents to perform a required task, and other individuals are identified as agents to ensure that should the performers fail, there will be others to take their place as backups.

Through this chain of reasoning, Pettit has constructed a strong argument for the

\[\text{\textsuperscript{16} Id. at 187.}\]
\[\text{\textsuperscript{17} Id. at 188.}\]
\[\text{\textsuperscript{18} Id.}\]
\[\text{\textsuperscript{19} Id. at 191.}\]
\[\text{\textsuperscript{20} Id. at 192.}\]
conclusion that corporations can be the bearers of moral responsibility. Nevertheless, several serious objections to its basic premises have been raised. For example, Manuel Velasquez has argued forcefully that corporations can neither act nor have intentions, and David Rönneberg has produced an interesting analysis designed to show that they cannot possess autonomy. However, it is not my intention to attempt to resolve such matters here. For purposes of this chapter, I will assume that Pettit has established that it makes sense to ascribe moral responsibility to corporations. On that assumption, the question now becomes whether we should.

B. Step 2: The Point of Holding Corporations Morally Responsible

Having claimed to show that corporations can bear moral responsibility, Pettit realizes that his job is not done. As he explains,

[t]he argument so far shows that group agents can meet the three conditions for being thought and held responsible. But it is one thing to say that there is no bar to holding group agents responsible, given that they can satisfy the conditions reviewed. It is quite another thing to argue that there is a point to this exercise. Someone might maintain, after all, that so long as we hold members responsible for their individual contributions to the doings of a group agent, there will be no practical gain, and there may even be a disadvantage, in going on to hold the group as a whole responsible as well.

To show that "there is a point to this exercise"—that we should assign moral responsibility to corporations,—Pettit argues that doing so is necessary to avoid the "danger of a responsibility

\[21\text{See Velasquez, Debunking Corporate Moral Responsibility, supra note 4.}\]
\[22\text{See Rönneberg, supra note 4.}\]
\[23\text{Id. at 192-93.}\]
deficit." He explains that
even when all the relevant enactors in a group action have been identified and held
responsible, still it may be important to hold the group agent responsible as well. The
reason for this, very simply, is that it is possible to have a situation in which there is
ground for holding the group agent responsible, given that it satisfies the three
conditions listed, but not the same ground for holding individual enactors
responsible. The responsibility of enactors may leave a deficit in the accounting
books, and the only possible way to guard against this may be to allow for the
corporate responsibility of the group in the name of which they act. 25

A responsibility deficit can arise whenever a corporation takes an action for which no set
of individuals bear full responsibility. Thus,
collections of agents may act in a way that predictably brings about bad results,
without the members of the collection being individually or distributively culpable,
or at least not in a serious measure. It may be that the individuals are ignorant, and
blamelessly ignorant, of the harm that they together bring about. It may be that they
each take themselves not to make a pivotal difference to a harm done, as with the
firing squad in which members each treat the behavior of the others as fixed. It may
be that they take themselves to make a difference, but not the right sort of difference,
in particular not the sort that increases the harm; for example, each driver in a group
of dangerously speeding cars may see that he or she dare not slow down, for fear of
making a bad outcome worse. Or it may be that while each is aware of the harm
done, and aware of making a difference, even the right sort of difference, still they
each act under such felt pressure—perhaps pressure from one another—that they
cannot be held fully responsible for the contribution they make to a bad outcome;
they can each reasonably argue that the circumstances mitigate the degree of their

24 This phrase is taken from Pettit's remarks and their accompanying handout at the
conference on The Moral Responsibility of Firms: For or Against? held at INSEAD on
December 13, 2013. (Handout on file with the author.)

25 Pettit, supra note 3, at 194. Pettit is not the first to support corporate moral
responsibility to remedy the responsibility deficit. See, e.g., Patricia H. Werhane, Corporate and
("My aim is to account for moral responsibility when it is not redistributable to the collection
of individuals who cause an action, create a policy, or develop a practice. One needs to ascribe
moral responsibility and thus moral liability to corporations as well as individuals, particularly
when an action or practice is no longer traceable to its creators. Otherwise corporations, and in
particular, their practices and policies, are let off the "moral hook" . . . ").
personal responsibility.\textsuperscript{26}

Pettit finds such responsibility deficits—such "[s]hortfalls of individual responsibility"—to have "a distressing aspect in the case of the unincorporated collection, since they mean that although the individuals do something bad together, there is no one to hold responsible."\textsuperscript{27} He regards it as fortunate that this untoward result may be avoided in the case of corporations.

But the failures of individual responsibility in the case of the incorporated group may leave us with someone to hold responsible: the group agent itself. . . . And the fact that enactor responsibility can fall short in the ways illustrated means that there may be very good reason to hold the group responsible in addition to holding the enactors responsible.\textsuperscript{28}

This is especially important because the failure to impose a regime of corporate responsibility can expose individuals to a perverse incentive. Let human beings operate outside such a regime, and they will be able to incorporate, so as to achieve a certain bad and self-serving effect, while arranging things so that none of them can be held fully responsible for what is done.\textsuperscript{29}

Pettit illustrates the danger of the responsibility deficit with the case of the \textit{Herald of Free Enterprise}, a ferry that sank in the English Channel in 1987, drowning nearly 200 people. In that case, the company operating the ferry failed to exercise proper safety precautions and "was extremely sloppy, with poor routines of checking and management."\textsuperscript{30} Pettit complains that in that case "the courts did not penalize anyone in what might seem to be an appropriate measure"

\textsuperscript{26}Id. at 195.

\textsuperscript{27}Id. at 196 (emphasis added).

\textsuperscript{28}Id. (emphasis added).

\textsuperscript{29}Id.

\textsuperscript{30}Id. at 171.
because they were unable "to identify individuals in the company or on the ship itself who were
seriously enough at fault."\textsuperscript{31}

Thus, Pettit concludes that the ascription of moral responsibility to corporations is
justified by the need to counteract the perverse ramifications of the responsibility deficits that
would otherwise result.

I conclude that not only is it going to be possible to hold group agents responsible,
as their satisfaction of our three conditions ensures, it is also likely to be desirable. Let group agents be freed from the burden of being held responsible, and the door
will open to abuses: there will be cases where no one is held responsible for actions
that are manifestly matters of agential responsibility.\textsuperscript{32}

III. The Phantom Menace

As much as I admire the quality of Pettit's reasoning, the second step of his argument
does not establish its conclusion. Pettit himself recognizes that even under the assumption that
"there is no bar to holding group agents responsible," it is possible that "there will be no practical
gain, and there may even be a disadvantage" in doing so. This is precisely the case. As a practical
matter, the responsibility deficit poses no danger that needs redressing—it produces no perverse
incentives that are not already adequately addressed and does not open the door to the type of
abuse that Pettit fears. Hence, there is no practical gain to be had from assigning moral
responsibility to corporations. There is, however, an extremely serious \textit{ethical} disadvantage to
doing so because the consequences it entails are antithetical to the fundamental tenets of
liberalism. Contrary to Pettit, I contend that the ascription of moral responsibility to corporations
should be eschewed as an unnecessary, dangerous, and highly illiberal safeguard against a

\textsuperscript{31}\textit{Id.}

\textsuperscript{32}\textit{Id.} at 196-97.
phantom menace.

A. No Practical Gain

Let us begin by examining why the responsibility deficit does not pose the danger that Pettit thinks it does. Keep in mind that the responsibility deficit is a deficit of moral responsibility. Hence, it can have no effect on any potential safeguard against corporate wrongdoing that does not require moral responsibility for its implementation.

Pettit's fear is that the failure to impose a regime of corporate responsibility can expose individuals to a perverse incentive. Let human beings operate outside such a regime, and they will be able to incorporate, so as to achieve a certain bad and self-serving effect, while arranging things so that none of them can be held fully responsible for what is done. . . . Let group agents be freed from the burden of being held responsible, and the door will open to abuses: there will be cases where no one is held responsible for actions that are manifestly matters of agential responsibility.  

This would certainly be a problem if the inability to assign moral responsibility to corporations precluded the assignment of any kind of responsibility to corporations. But this is patently not the case. Moral responsibility is not a prerequisite for the assignment of civil, administrative, or "metaphorical" responsibility.

Consider civil liability, which holds corporations responsible for providing financial restitution for harm that results from the wrongdoing of their employees. Restitution does not require the party making the payment to be morally responsible for the harm suffered by the recipient. One who finds a lost item or innocently receives stolen property is obligated to return it to its owner even though he or she is not responsible for the owner's loss. Our system of civil

\[^{33}\text{Id.}\]

\[^{34}\text{When the wrongful acts are committed within the scope of the actor's employment.}\]
liability requires parties that do not exercise the required level of "reasonable" care to pay compensation to those they have injured even though they have done the best that they personally can to avoid the harm and are not morally blameworthy.\textsuperscript{35} For harm caused by commercial products and by certain abnormally dangerous activities, compensation is required even though the manufacturer or individual actor is completely blameless.\textsuperscript{36} Employers are required to pay compensation for the harm done by their employees even though the employer had no part in causing the harm and was not at fault in hiring the employee. Indeed, \textit{respondeat superior} liability guarantees that corporations will have to pay restitution for the wrongs done by their employees regardless of whether they are morally responsible entities.

Further, corporate moral responsibility is not necessary for corporations to be liable for exemplary damages—payments beyond those necessary to compensate the injured party—in civil lawsuits. Although exemplary damages are frequently referred to as punitive damages, they are not punitive in the sense of requiring a finding of morally blameworthy conduct to be awarded. Exemplary damages are regulatory in effect, and are awarded to create an incentive for corporations to undertake efforts to prevent their employees from engaging in recklessly dangerous behavior or acts of intentional wrongdoing.

Next consider administrative responsibility. Corporate moral responsibility is not required for corporations to be subject to sanctions for violating administrative regulations. Administrative regulations are imposed on individuals and businesses to cause them to behave in

\textsuperscript{35}Vaughan v. Menlove, 132 ENG. REP. 490 (1837); OLIVER WENDALL HOLMES, THE COMMON LAW 108 (1881).

\textsuperscript{36}Rylands v. Fletcher, 159 ENG. REP. 737 (1865); RESTATEMENT (SECOND) OF TORTS § 402A.
ways that the regulators believe to be conducive to the common good. To be effective—to successfully regulate the market to achieve the desired social outcome,—administrative regulations must apply to all market actors, not merely those that are capable of bearing moral blame. Thus, corporations will be restrained by administrative regulations whether they are morally responsible entities or not.

Finally, and perhaps most importantly, actual corporate moral responsibility is not required for corporations to be subject to what may be called metaphorical responsibility. Human beings (with the possible exception of those who would read a book like this) routinely anthropomorphize corporations. The general public (including the media) continually speaks as though corporations were corporeal entities capable of acts of judgment and will in the same manner as ordinary human beings. As a result, whenever the employees of a corporation are negligent or otherwise engage in wrongdoing, the public excoriates the corporation as though it were the author of its employees' actions. Regardless of what philosophers think about whether corporations are morally responsibility entities, corporations are always subject to such metaphorical ascriptions of responsibility. But metaphorical corporate responsibility is just as damaging to a corporation's reputation and just as destructive to its financial bottom line as actual moral responsibility would be. Thus, market forces provide a strong financial incentive for corporations to do all that they can to curtail wrongdoing by their employees—one that cannot be enhanced by conjoining the actual ascription moral responsibility to the metaphorical one.

Given that corporations are subject to civil, administrative, and metaphorical responsibility with their corresponding threats of damage payments, administrative fines, and market sanctions, it is difficult to see how a deficit of moral responsibility will enable individuals
"to incorporate, so as to achieve a certain bad and self-serving effect, while arranging things so that none of them can be held fully responsible for what is done" or that "there will be cases where no one is held responsible for actions that are manifestly matters of agential responsibility." Especially in the contemporary legal environment in which there is an insistent call for tort reform—in which the civil liability system is under attack for placing unreasonable demands on corporations to behave responsibly—a concern that the absence of corporate moral responsibility will produce irresponsible behavior seems out of place.

Indeed, Pettit's own chosen example of the Herald of Free Enterprise belies his point. This was not a case in which the responsibility deficit allowed a corporation to escape deserved liability. Pettit's characterization of the case as one in which "the courts did not penalize anyone in what might seem to be an appropriate measure, failing to identify individuals in the company or on the ship itself who were seriously enough at fault" is, at best, somewhat misleading. Both the negligent employees and the company that operated the ferry, P&O European Ferries (Dover) Ltd. (P&O), were subject to civil liability for the wrongful death of the passengers. Further, P&O was liable to criminal punishment for any and all crimes committed by its employees. The only controversial aspect of the case was whether P&O could be convicted of manslaughter even though none of its employees had the mental state necessary for such a offense.\textsuperscript{37}

At the time, British criminal law attributed the crimes of a corporation's employees to the corporation, but lacked the "collective knowledge doctrine" of United States federal criminal law that allowed the facts known to individual employees to be aggregated into the knowledge of the

\textsuperscript{37}Eric Colvin, \textit{Corporate Personality and Criminal Liability}, 6 CRIM. L.F. 1, 17 (1995). I cite this source because it is the source cited by Pettit as the basis for his assertion.
corporation. As a result, the manslaughter prosecution against P&O was dismissed.\footnote{See Mark Pieth & Radha Ivory, \textit{Chapter 1 Emergence and Convergence: Corporate Criminal Liability Principles in Overview}, in \textbf{CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK} 27 (Mark Pieth & Radha Ivory, eds. 2011).} This feature of British law was subsequently changed by the Corporate Manslaughter and Homicide Act of 2007,\footnote{Corporate Manslaughter and Homicide Act, 2007, c. 19, § 1 (Eng.).} which greatly expanded the basis for corporate criminal liability.\footnote{See Sara Sun Beale, \textit{A Response to the Critics of Corporate Criminal Liability}, 46 AM. CRIM. L. REV. 1481, 1495-96 (2009).}

This is all beside the point, however. The inability to convict P&O of manslaughter was due to the U.K.'s legal definition of corporate criminal liability, not to any deficit in moral responsibility. Further, even if P&O had been subject to criminal conviction for manslaughter, its punishment, which in the case of corporations necessarily consists in a financial penalty, would have been an order of magnitude lower than the expected civil damages. It is unreasonable to believe that the absence of a relatively small criminal fine in the presence of a massively large civil damage award constitutes a situation in which the corporation is "freed from the burden of being held responsible" such that "no one is held responsible for actions that are manifestly matters of agential responsibility."

In sum, given the existence of several overlapping and effective mechanisms for ensuring that corporations are held responsible for any and all wrongdoing on the part of their employees, it is unreasonable to believe that a deficit in moral responsibility can have a pernicious impact on corporate behavior. Hence, I believe it is clear that there is no \textit{practical} gain to be derived from attributing moral responsibility to corporations.
B. The Disadvantage

Corporate moral responsibility is not necessary for us to hold corporations civilly, administratively, or metaphorically responsible for the actions of their employees. What, then, would be the effect of remedying the responsibility deficit? What would change in the world if we decide to treat corporations as morally blameworthy entities?

I contend that only one thing would change. It would be proper to subject corporations to criminal punishment.\(^{41}\)

Moral responsibility is a prerequisite for blame.\(^{42}\) Blameworthy action is action that merits punishment. The point of asking whether a person or entity is morally responsible is usually to determine whether that person or entity is liable to punishment. Indeed, the reason why the corporate moral responsibility debate is such a lively one is that most of the advocates of corporate moral responsibility believe that it is important to be able to impose punishment on corporations as collective entities, and they recognize that moral responsibility is necessary for such punishment.

Punishment is the infliction of a harm or penalty on a party in response to a transgression. In most circumstances, inflicting harm on others is a wrong. When punishment is involved, this is not the case. Punishment implies that the infliction of harm is justified, and hence not wrongful. The thing that justifies the punishment is the claim that the party being punished is a ________________

\(^{41}\)Corporations are, as a matter of fact, subject to criminal punishment at present. This fact does not imply that it is proper to subject corporations to criminal punishment any more than the fact that Jim Crow laws mandated the segregation of African-Americans implied that it was proper to segregate African-Americans.

\(^{42}\)It is, of course, also a prerequisite for praise, but that is not relevant in the present context, and so will be ignored.
morally responsible agent who has engaged in prescribed conduct. Punishment is not designed to compensate injured parties or facilitate the achievement of some social good. It is designed to balance the moral account books.

Criminal punishment consists of the imposition of a penalty prescribed by law for the commission of a criminal offense. A just legal system imposes criminal sanctions only on morally responsible agents. Therefore, moral responsibility is (or should be) a prerequisite for criminal punishment. If corporations are morally responsible agents, then they are properly eligible for criminal punishment; if they are not, then, in justice, they should not be.

Pettit himself explicitly recognizes that corporate moral responsibility is a necessary condition for the application of the criminal sanction to corporations as collective entities, stating

I argue that corporate bodies are fit to be held responsible in the same way as individual agents and this entails that it may therefore be appropriate to make them criminally liable for some things done in their name; they may display a guilty mind, a mens rea, as in intentional malice, malice with foresight, negligence, or recklessness.\(^{43}\)

This helps explain his selection of the *Herald of Free Enterprise* case as his illustrative example because the only conceivable responsibility deficit in that case was the court's dismissal of the criminal manslaughter charge against P&O on the ground that British criminal law did not recognize the existence of an independent corporate mens rea. Indeed, Petit's selection of this case suggests that he, like most other commentators, sees the main point of assigning moral responsibility to corporations to be to ensure that corporations are subject to criminal punishment as collective entities.

But here we confront the disadvantage of assigning moral responsibility to corporations.

\(^{43}\)Pettit, *supra* note 3, at 176.
For to the extent that doing so renders corporations liable to criminal punishment as collective entities, it contravenes the most fundamental principles of a liberal society.

To see why, consider what it means to punish a corporation. A corporation is not a thing that can experience harm or pain in itself. Rather, it is a complex network of constantly changing human beings who are related to each other through certain formal and informal arrangements. The difficulty in attempting to punish a corporation is that there is no definite object present to absorb the punishment. Any punishment directed toward a corporation necessarily passes through its nominal facade to fall on some set of human beings.

As mentioned above, any criminal punishment directed toward a corporation is necessarily financial in nature. Corporations cannot be incarcerated. They may be fined, which constitutes the direct application of a financial penalty. They may have licenses revoked or otherwise have their freedom to transact business restricted, but such measures merely constitute the indirect application of a financial penalty—they are punitive only to the extent that they reduce the corporation’s profitability. They may be liquidated, which can be thought of as a corporate death sentence. But since corporations are not literally living things, any “execution” is entirely metaphorical. Liquidation is to be feared only because of the financial losses that result from it.

Who pays when any such punitive financial loss is imposed upon a corporation? To the extent that the loss can be passed along through increases in the price of the corporation’s products, it is the consumers who pay. To the extent that the corporation can assimilate the loss by reducing labor costs, it is the employees who pay. And to the extent that the corporation is unable to pass along the loss to either of these groups, it is the owners of the corporation, the
shareholders, who pay.

The characteristic that all of these stakeholder groups share is that their members are innocent of personal wrongdoing. Consumers obviously play no role in any wrongdoing by corporate agents. The employees who lose their jobs due to corporate retrenchment may have had nothing whatever to do with the wrongdoing and been completely unaware of it. And given that the defining characteristic of the modern corporation is the separation of ownership and control, the shareholders had no knowledge of or control over the behavior of the employees who engaged in the wrongdoing. Corporate punishment necessarily falls indiscriminately on the innocent as well as or, more frequently, in place of the guilty. Corporate punishment is inherently vicarious collective punishment.

It should be clear that such punishment is inherently unjust. As noted above, the thing that distinguishes punishment from the naked infliction of harm is that punishment is deserved. Punishment is punishment only when it is imposed in response to some transgression on the part of the party being subjected to it. Unless this is the case, “punishment” is nothing more than coercion. That is why, on the international level, collective punishment is considered a human rights violation and is banned as a war crime by the Geneva Convention. Although the wrong of imposing financial collective punishment on a corporation’s stakeholders may be an order of


\[ \text{See Art. 33(1), Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949).} \]
magnitude less severe than that of the war crimes addressed by the Geneva Convention, it is not distinguishable from it in principle.

Consider that a handful of the employees at Arthur Andersen engaged in conduct that the United States government believed to constitute obstruction of justice. Each of these employees was subject to indictment, conviction, and punishment for the offense as individuals. The government nevertheless chose to indict the firm as a collective entity. The result was the collapse of the company, which cost 85,000 employees in 390 offices around the world their jobs. Virtually all of these employees were personally innocent of wrongdoing. It is difficult to see how assigning punishment to corporations can be ethically justified if the practical consequence of doing so is that secretaries in France get fired for the conduct of executives in Texas.

Advocates of corporate moral responsibility often attempt to justify punishing corporations as collective entities on deterrent grounds. They argue that the ability to impose criminal punishment on corporations can motivate managers to institute compliance programs and make efforts to maintain a good corporate ethos that can reduce wrongdoing by employees. Now, it is far from clear that this is correct. Given the existence of potentially massive civil


47Pettit himself seems to make this argument since the ability to apply the "deterrent regulation" of the criminal sanction to group agents is one of his main reasons for advocating that corporations be held morally responsible. See Pettit, supra note 3, at 175-76. Pettit defines deterrent regulation as "the imposition of sanctions, whether rewards or penalties, with a view to shaping the choices that an agent makes. The most salient form, of course, is the penal regulation of the criminal law, which seeks to shape the behavior of citizens by the threat of legal penalty." Id. at 175.
damages, administrative fines, and loss of public good will that corporations suffer as a result of wrongdoing by their employees, it is difficult to see how the threat of additional, comparatively small criminal penalties would add any noticeable deterrent effect. But even under the assumption that it would—even under the assumption that there are circumstances in which the desire to avoid the stigma associated with a criminal conviction is a stronger motivation than the desire to avoid economic loss—deterrence cannot justify collective punishment.

This is because the objection to collective punishment has nothing to do with its effectiveness. Indeed, the threat of collective punishment usually is an effective way to motivate people to suppress undesirable conduct by others. That is almost always its purpose. The problem with collective punishment is not that it is not effective. It’s that it is unjust.

Deterrence can, of course, be a legitimate purpose of punishment. There is nothing ethically objectionable about imposing punishment on a wrongdoer to discourage others from behaving in a similar way. By associating punishment with transgression, we hope to cause others to refrain from transgressing for fear of a similar sanction. But this form of deterrence is distinct in kind from the form that consists of threatening to punish those who are innocent of wrongdoing to pressure them into suppressing the undesirable conduct of their fellow citizens.

The world would be a better place if we could more effectively deter crimes committed by teenagers. And we undoubtedly could do so by threatening to punish the teenagers’ parents for their children’s offenses. We do not do so because we recognize that such punishment is no different in principle from the more venal and obviously unacceptable practice of the Nazis who sought to deter acts of resistance by punishing innocent members of the communities in which such acts occurred. Threatening the innocent stakeholders of a corporation with punishment for
the wrongdoing of culpable employees in order to force corporate managers to engage in more intensive self-policing is not ethically distinct from threatening to punish the innocent members of a family or a community for the wrongdoing of their relatives or fellow community members.

Note that the punishment that falls on the innocent stakeholders as a result of punishing the corporation is not some unfortunate side effect, but the very point of the exercise. The situation we are considering is not analogous to one in which a parent's conviction of a crime imposes financial and emotional hardships on his or her innocent children. Children suffer harm when their parents are punished. But such harm is incidental to the punishment of the parent, and is regarded as a regrettable byproduct that should be minimized as much as possible. In contrast, when a corporation is punished, the harm falls on innocent stakeholders as principals, not as third parties. They are the first to feel the effects of the punishment, not the dependents of others who are being properly punished for wrongdoing. Further, this is the intended, not a regretted, result. Inflicting punishment on the corporation’s stakeholders is the whole point of punishing the corporation. The purpose of threatening such punishment is to motivate the corporation to engage in greater efforts at self-policing. No effort will be made to minimize the harm suffered by the innocent corporate stakeholders because doing so would defeat the purpose of imposing the punishment in the first place.

The "disadvantage" of attributing moral responsibility to corporations is that, to the extent that it authorizes the punishment of corporations, it authorizes vicarious collective punishment. But collective punishment is inherently unjust. And such punishment cannot be redeemed by arguing (counter-factually) that it has deterrent value. For collective punishment involves
punishing the innocent to attain a desired societal end, and as such is incompatible with the Kantian insight that lies at the heart of any liberal society—that individuals may not be used merely as means to the ends of others or of society as a whole.

I submit that introducing such an illiberal protection against the non-existent danger of the responsibility deficit is no small disadvantage. Rather, it is an overwhelmingly strong reason for concluding that even if there is no logical inconsistency in attributing moral responsibility to corporations, we should not do so.

C. An Important Caveat

My argument against attributing moral responsibility to corporations rests on the inherent injustice of collective punishment. But it is worth noting that although the existence of corporate moral responsibility authorizes the punishment of corporations, it does not mandate it. It is perfectly consistent to argue both that the attribution of moral responsibility to corporations is important because it authorizes the moral condemnation of corporations as collective entities and that corporations should nevertheless not be subject to punishment. Blameworthiness does not entail liability to punishment, and it makes perfect sense to say that although corporations have acted in a blameworthy manner, they should not be punished for it. Thus, if there were some way of ensuring that the attribution of moral responsibility to corporations would not lead to corporate punishment, corporate moral responsibility would be ethically unobjectionable.

Note, however, that even if this were the case, corporate moral responsibility would still carry no practical significance. As noted above, corporations are always subject to metaphorical responsibility— they will be treated by the public as though they are morally responsible entities whether they are or not. If the first step in Pettit's argument establishes its conclusion, it would
provide a reasoned grounding for this common practice. But it would not enhance or augment the practice itself. In the current cultural milieu, corporations will be subject to moral censure as collective entities regardless of the state of academic debate over corporate moral responsibility.

But, of course, there is no way of ensuring that the attribution of moral responsibility to corporations will not lead to corporate punishment. The point of Pettit's selection of the *Herald of Free Enterprise* as his illustrative case was to argue for an expanded definition of corporate criminal liability. The number of theorists who argue for corporate moral responsibility in order to be able to blame *but not punish* corporations must be vanishingly small.\(^48\) Although it is not logically necessary, in the contemporary environment, blaming corporations for the actions of their employees inevitably leads to calls to inflict punishment on them. Sufficient evidence for this assertion can be supplied simply by pointing at BP. If we are to avoid the illiberal consequences that can arise from attributing moral responsibility to corporations, prudence cautions us to refrain from attempts to draw subtle distinctions between blameworthiness and punishability, and eschew corporate moral responsibility entirely.

IV. Conclusion

In the much derided first episode of the Star Wars saga, *The Phantom Menace*, the freedom of the Galactic Republic is lost when its representatives are persuaded to adopt illiberal measures due to their fear of a non-existent threat. This is an apt analogy for the situation in which we contemplate attributing moral responsibility to corporations. The responsibility deficit we fear is a non-existent threat—a phantom menace. Yet to protect ourselves against it against, we

\(^{48}\)Small, but not zero, because Michael Bratman indicated his willingness to adopt this position at the conference at which this paper was originally presented.
contemplate authorizing a form of collective punishment that targets the innocent as a means of expressing our outrage over the actions of the guilty. But collective punishment—imposing punishment on a group for the wrongdoing of one or more of its members—is antithetical to the respect for the individual that lies at the heart of a liberal society.

The question addressed by the first step in Pettit's argument—the question of whether corporations are the type of thing that can bear moral responsibility—is the subject of a contentious and ongoing debate among ethical philosophers. However, we need not await a definitive resolution of that debate to know the answer to the question addressed by the second step in Pettit's argument—the question of whether we should attribute moral responsibility to corporations. Because doing so provides no practical benefit while furnishing a ground for punishing the innocent, the answer is a resounding no.