

# How to Justify Holding Corporations Responsible

## ABSTRACT:

The literature on corporate moral responsibility (CMR) is largely focused on the question of whether corporations are the kinds of things that can be morally responsible. The assumption is that if we judge corporations to be responsible, then we ought to hold them responsible by punishing them both socially and criminally. However, opponents have long emphasized the high costs and few benefits of this punishment. Because of the apparent harm to stakeholders, some have even argued that we are not justified in holding corporations responsible even if they technically are. Here, I respond to these concerns. By contextualizing the harm to stakeholders that does occur and emphasizing what is lost in our failing to adequately punish corporations, I show why a proponent of CMR should presumptively take us to be justified in holding corporations responsible.

KEYWORDS: Corporate moral responsibility, corporate personhood, corporate criminal liability

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The central question in the debate over corporate moral responsibility concerns whether corporations are the kinds of things that can be morally responsible for what they do. Is the car manufacturer itself morally responsible for non-functioning brake pedals, or does the responsibility fall entirely onto certain employees? Is the oil company responsible for the oil spill, or is no one responsible if no individual was acting negligently?

Proponents of corporate moral responsibility (CMR) such as Peter French, Tom Donaldson, Philip Pettit, Christian List, Carol Rovane, David Copp, Denis Arnold, Kendy Hess, and others have argued that corporations are sophisticated entities liable for moral obligations. The central claim is that corporations can be morally responsible distinctly from and typically in addition to the morally responsibility borne by managers and other employees.

On the other hand, opponents such as Manuel Velasquez, Michael Keeley, David Rönnegard, John Hasnas, and others argue that corporations cannot be morally responsible. Managers and employees are responsible for apparent corporate wrongdoing or no one is, certainly not the corporation itself. Corporations do not exist as the right kinds of things to be responsible, or they are not autonomous, or they cannot understand their actions. For any of a long list of reasons, opponents argue that corporations cannot satisfy what is required to be a morally responsible agent.

While proponents of CMR have recognized and responded to many of the objections, there is a kind of challenge that proponents have so far failed to adequately address. The heart of the challenge is that it is just a bad idea to punish corporations; it's more trouble than it's worth. And this is true *even if* corporations are morally responsible for committing egregious wrongs. In our levying large fines as criminal punishment, say, we are just going to end up harming employees, customers, communities, or even shareholders who had nothing to do with the wrongdoing. And for what? These harms will surely outweigh whatever paltry satisfaction we receive from ensuring that corporations get their just deserts.

In the literature, a number of authors have raised concerns about the costs of holding firms responsible. Velasquez (1983) and Maitland (2017) have highlighted how emphasizing *corporate* moral responsibility risks underappreciating *managerial* moral responsibility.<sup>1</sup> Others suggest that matters are much worse: holding corporations responsible necessarily wrongs innocent parties. Hasnas (2009; 2012; 2017) and Velasquez & Rönnegard (2017) argue that punishing corporations inevitably harms either employees or shareholders. And this is not an accident. The threat of these harms befalling stakeholders is the whole point of corporate punishment. As such, our punishing corporations constitutively wrongs stakeholders.

At least for Hasnas (2012), whether corporations are *in fact* morally responsible for what they do (as a matter of the metaphysics) is beside the point.<sup>2</sup> The whole reason for having this debate about corporate moral responsibility is to determine whether we should *hold* corporations responsible. If these authors are right, however, then holding corporations responsible involves committing dramatic injustices. It is not just a bad idea; we are obligated not to do it.

The challenge to corporate moral responsibility is thus practical: If we cannot justify *holding* corporations responsible, then whether or not corporations *are* morally responsible is practically

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<sup>1</sup> This paper primarily focuses on the question of the harm befalling stakeholders, rather than considering every cost of holding corporations responsible. I grant that there are finite resources for monitoring, attending to, and punishing crime, and so a focus on corporate criminal liability risks failing to pursue cases against guilty individuals. It is also true that even if corporations *can* be responsible, they surely will not be in all cases. Managers may shift blame onto the corporation. (However, if corporations are responsible, then this might mitigate the responsibility of employees indoctrinated in the corporate culture [Phillips 1995].) Addressing these challenges involves delimiting the wrongs perpetrated by firms and developing mechanisms for recognizing them. On this, see Laufer (2006) and Quaid (2018).

<sup>2</sup> Other authors may not be committed to this hardline claim. Velasquez (*op. cit.*) and Maitland (*op. cit.*) raise issues of the costs of focusing on corporate responsibility, but it is consistent with their claims that these costs would be worth bearing if corporations were morally responsible.

irrelevant. In either case, we should act as if they are not responsible. Meeting this challenge involves not only showing that it is *worth* holding corporations responsible, that the benefits exceed the cost, but that it is even morally permissible to hold them responsible. Here, I aim to meet this challenge. I will argue that if corporations are morally responsible, then the presumption should be in favor of holding them responsible.

After laying out the kinds of practices at issue in holding corporations responsible, I consider why engaging in them is taken to wrong stakeholders. Many have argued that punishing the firm is unjust insofar as it aims at harming stakeholders as a means of encouraging positive corporate change. I agree, but I argue that this aim is ill-suited to the task. Instead, proponents of corporate moral responsibility should take the aim of corporate punishment to involve directly influencing corporate conduct/incentives and perhaps even at harming the corporation itself.

Still, even if punishing corporations does not aim at harming stakeholders, it risks their being harmed. This alone threatens the justification of corporate punishment. I argue that the punishment can be justified if we take steps to avoid or compensate for this harm. Moreover, to demonstrate that we are at times actually justified in holding corporations responsible, I argue that the cost of this apparent harm is overestimated and overemphasized. Someone who thinks that corporations can deserve punishment should not think that stakeholder harm is inevitable or that negative effects for stakeholders always constitute harms. Moreover, the eventual harms may fail to give us reasons not to punish. The harms may have been consented to; it may be improper to expect these harms to follow; or it may be unfair to consider these harms in our deliberations.

Having argued against the apparent wrong of punishing corporations and against the apparent high cost of punishing them, I move on to show how someone who accepts corporate moral responsibility will find many benefits to holding corporations responsible, and think that we are even be obligated to do so. Holding corporations responsible is not simply something that we

would like to do if we can afford it. It is something of deep value in society, something that we *owe* to ourselves and to corporations. As such, failing to hold corporations responsible has much higher costs than is often appreciated.

## HOLDING CORPORATIONS RESPONSIBLE

When corporations fail in their responsibilities, or act in culpable ways, a number of responses may be appropriate. There may be demands for a public apology. There may be customer boycotts, employee walkouts, divestiture campaigns, and the like as stakeholder responses to corporate wrongdoing. The firm may incur reputational damage within and ire from society at large. If the corporation's actions lead to individual harm, it may incur civil liability to compensate for damages caused. And, of course, much of these possible wrongs fall within the scope of the criminal law, and so the corporation may be subject to criminal punishment, often in the form of large fines. Though these possible responses are many, they are all practices of holding corporations to account for wrongdoing, of holding them responsible.<sup>3</sup>

As in our own case, there are many ways that holding responsible may manifest, and what is appropriate depends on the nature of the wrong committed and the wrongdoer's relationship with the individual(s) wronged. Some instances of holding responsible seem primarily focused on what is owed as a matter of corrective/restorative justice. Victims must be made whole again. But many

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<sup>3</sup> There are many fascinating issues here that have been separately discussed, such as challenges for corporate apologies (Koehn 2013; MacLachlan 2015), the appropriateness of boycotts (*inter alia*, Mills 1996; Hussain 2012; Radzik 2017), and how/why the criminal law is used to hold us responsible (Duff & Green 2011).

ways in which we hold one another responsible aim at moral repair – of demanding that the wrongdoer work to fix a damaged relationship, either with individuals or the public at large (Walker 2006). Indeed, many of our practices involve doing what is necessary to reestablish the standing of the wrongdoer as a member of the moral community, including compelling wrongdoers to reaffirm the dignity of victims. There is a large literature on the justification of punishment—how society can be justified in inflicting harm on wrongdoers. However, I think that the specific aims of punishment are best justified in terms of how they serve this general aim of moral repair.<sup>4</sup>

Under this guise, one of the specific aims of punishment may involve rehabilitating the conduct of the wrongdoer going forward, serving as a kind of moral education (Hampton 1984). Whether in service of this education or as a matter of satisfying what victims need, some expressive or even retributive element may be required as well. Punishment may express something negative about the perpetrator or allow for the acknowledgement that a wrong has occurred (Feinberg 1965). The harm inflicted through punishment may be either to help them understand the nature of the wrong they have committed (and so facilitating their moral education) or else to reassert the dignity of the victim.

Where punishment is justified in terms of that which is needed for moral repair, a pluralistic view is plausible, where the aim of punishment shifts depending on what is most needed. Still, opponents will challenge that none of these aims can be justly met through punishing corporations.

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<sup>4</sup>This is a substantive commitment in think that punishment may not be concerned with relationships and repair. But even abandoning this idea, the same specific aims of punishment are plausible. For instance, punishment may be purely focused on desert – what the wrongdoer deserves for acting badly – suggesting a retributive aim. Alternatively, punishment may focus on maximizing compliance through the threat of penalization, suggesting the aim of deterrence. These conceptions may not permit thinking of the aims of punishment pluralistically as I suggest below, but this will not matter if punishing corporations is shown to satisfy the aim ultimately constitutive of punishment.

Either it is in principle impossible to punish corporations in a way that satisfies these aims, or these aims can only be satisfied through unjustly harming individuals associated with the firm. In particular, focusing on the aims of correcting future behavior or retribution, the concern is that the only way that these aims can be met is by harming stakeholders.<sup>5</sup>

## AGAINST THE CLAIM OF UNJUST STAKEHOLDER PUNISHMENT

It will be said that punishing corporations actively harm innocent parties (or over-penalize the guilty), ultimately harming the company's stakeholders in a number of ways. If the company has to pay a large fine, then this will decrease shareholders' equity. Depending on the penalty, the company might end up being forced to lay off many employees, causing them financial and psychological burdens (Jacobson et. al., 1993; Kuhn, 2002; Pugh et. al., 2003) and even having negative effects on those remaining (Brockner et. al., 1997; Lahner et. al., 2014). The firm may have to close factories critical to local economies. It may have to raise prices for customers.

The stakeholders may be dramatically negatively affected even though they might not have been in any position to know about or stop the corporate wrongdoing. They may have even actively

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<sup>5</sup> It could be similarly argued that punishing corporations cannot satisfy the expressive aim of punishment, perhaps because firms are unable to understand/uptake our expressions, or feel the appropriate attitude (e.g., remorse) in response to these expressions (Sepinwall 2017; Shoemaker 2019). I think this challenge can be met, but it need not be met here, because the expressive aim can arguably be satisfied even if the firm *itself* cannot respond to the expression. It may be satisfied by publicly condemning the corporation's actions, or denouncing these acts (Wringe 2017), or simply reasserting the norms to which we demand adherence (Uhlmann 2016). Vargas (2016) even argues that we hold one another responsible by gossiping with third-parties. These expressions can be justified without a wrongdoer's response.

fought against it. Yet still, it is *they* who must suffer for the corporation's crimes. Worried about these consequences, Hasnas writes, "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" (2017:100).

Velasquez & Rönnegard (2017:133-4) raise the same concern, and Maitland (*op. cit.*) makes this apparent cost very clear by pointing to occasions where it was the shareholders who were made to pay the penalty for the company's criminality (even when its criminality consisted in defrauding shareholders).<sup>6</sup> Throughout these works is the theme of the punishment being passed on to or *actually* paid by stakeholders. Harm befalls these innocent stakeholders, and it is unjustified when it is done as a means of deterring future conduct of the corporation (Hasnas 2012:192). It is a telishment (as coined in Rawls [1955:11]).

The concern of opponents is not just that stakeholders will be harmed as an unfortunate but unavoidable cost of punishing corporations. (This idea is explored in the next section.) Instead, the concern is that these stakeholders are harmed intentionally as a constitutive feature of the punishment, and this is unjust. Stakeholder suffering is a necessary *means of achieving* corporate punishment; the corporation would not be punished without it. So, the wrong done is recognized in light of the well-known doctrine of double effect (McIntyre 2019).

This concern comes across clearly when Hasnas says, "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" (2017:101). And this point is echoed in Velasquez & Rönnegard (2017:133). Even before

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<sup>6</sup> Will we be sympathetic to the plight of shareholders when the wrong is an egregious environmental violation? Some of these intuitions will be helped by distinguishing misdeeds of the corporation itself. We will return to this below.

these authors, though, Albert Alschuler put the point well when he said, “The penalties imposed on innocent shareholders and employees when corporations are convicted are not incidental, collateral, or secondary. They are what the punishment of a collective entity is all about” (2009:1369). In other words, the punishment of corporations is justified as deterrence; and, in order to deter corporations, individuals *must* be punished.

To start towards a response, first note that if this is the right way to conceive of corporate punishment, then it is a surprisingly indirect strategy. As I argue in the next section, punishing a firm does not even guarantee that its stakeholders will be harmed. Even granting stakeholder harm, this is a poor way to generate better corporate outcomes, and for a few reasons.

First, employees might already be acting quite well even as the corporation acts poorly. If employees already meet their obligations, it is unclear how harm should motivate them to act. Now, this may seem unlikely. It is plausible that if the corporation acted wrongly, then of course some individuals in the corporation have acted wrongly as well. But this is precisely something that proponents of CMR do not accept (and so something that cannot be taken for granted). One of the core CMR intuitions is that it is possible for the corporation to act wrongly even if *no* individual acted wrongly.<sup>7</sup> At the very least, it cannot be assumed that corporate wrongdoing is *a matter of* individual wrongdoing. So, threatening individuals to motivate them to avoid wrongdoing will not secure us against corporate wrongdoing, because firms can act wrongly even as individuals do not.

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<sup>7</sup> This is the ‘normative autonomy’ referenced in Copp (2006), or the ‘responsibility deficit’ discussed in List & Pettit (2011). Though, as a proponent of CMR, I may be committed to this possibility, I suspect that in the majority of cases the corporation and various employees are *both* responsible for doing bad things (of different kinds). Whether they both deserve punishment, however, depends upon the possibly exculpatory features of the employee’s situation in particular – whether they were compelled to act wrongly.

Second, even if punishing the firm harms stakeholders who acted badly, those stakeholders are often in a poor position to motivate the firm itself to change anyway. Employees may be powerless to change the corporation's incentives, and it may be those incentives that are ultimately explanatory of the employees' bad conduct. Whether they face the threat of harm may influence their willingness to stay on the job, but most employees are bound to perform their functions at the behest of their managers.<sup>8</sup> That the threat of employee harm is insufficient to motivate corporate change is obvious from the many situations in which employees are already harmed by the corporation, as when they are exploited and/or are put in unhealthy working conditions, and yet the firm faces little internal pressure to change.

Opponents may respond by noting that surely the only way the corporation can change is by changing the behavior of individuals inside it. (They are the ones who *really* run things, after all.) But just because a change in corporate conduct may depend on a change in employee conduct, this is not to say that such a change can always come from a change in employee motivation. As shown above, it is not even clear that a change of *employee* conduct can come from a change in employee motivation.

If corporate punishment is only justified insofar as it promotes better behavior, and harming stakeholders is the only and best way to do this, then punishing firms with an aim to harming stakeholders would be unjust. But in this case, the best defense is a good offense: Firm conduct is

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<sup>8</sup> Similarly, the incentive structure for managers is often beyond their control. There are exceptions, as when managers control the board of directors. But then these managers seem culpable, and the corporation itself does not. Regardless, while managers may have more autonomy, they are less likely harmed as a result of corporate punishment. So, if punishment needs to work by harming employees towards motivating corporate change, this again suggests that punishment would be inefficacious, as those employees likely to be harmed are less likely the ones capable of motivating the change.

directly influenced by focusing on the incentives and motives of the firm itself. Proponents of CMR will maintain that corporations pursue their own ends with their own motives distinct from the motivations of employees. As such, corporations can be motivated to change their conduct in principle without punishing any stakeholders.

Corporate punishment could directly influence change in many ways. The prospect of punishment could change the business case for certain conduct to deter the firm from bad behavior. Corporations can have values, and punishment could play the role of reorienting the firm's values or help the firm attend to how its conduct was in conflict with its values. (For instance, firms may value being law-abiding corporate citizens.) Some even argue that firms can instantiate those reactive attitudes (e.g., guilt, shame, resentment, etc.) that regularly help us to avoid wrongdoing and to learn from punishment (Björnsson & Hess 2017). So, proponents of CMR should say that firms have the resources necessary to be motivated to change on the basis of punishment quite apart from whether or not the stakeholders are harmed. (And below several punishments will be discussed that arguably do not involve stakeholder harm.) Altogether, this undermines the claim that stakeholder harm is unjust when it is caused.

There is a final concern to address. Even if corporations could change in light of punishment, perhaps there is an appropriate retributive aim in punishing corporations that cannot be met without harming stakeholders. The idea is that someone needs to suffer to satisfy this aim, but corporations themselves cannot suffer; corporations cannot be harmed. So, there is either no use

to punishing them or else the only way punishing them can be appropriate is if stakeholders are harmed as a proxy.<sup>9</sup>

One response would be to deny that punishment genuinely requires retribution, and many do deny this. However, I think this is an opportunity to respond a different way, by denying that corporations cannot be harmed. Granted, few proponents of CMR at present accept corporate harm, at least in the sense of feeling pain (e.g., Manning 1984; List & Pettit *op. cit.*).<sup>10</sup> Hess (2013:334) argues that firms cannot be vulnerable for precisely the reason that they cannot feel pain. Again and again, staunch proponents of corporate moral agency insert the caveat that corporations do not really *feel* or *experience* anything, or have a phenomenology like we do. In the literature, only Schwitzgebel (2015) and Silver (2019) are willing to favorably entertain the possibility of corporate phenomenology.

Nevertheless, it is unduly narrow to conceive of harm purely in terms of the feeling of pain.<sup>11</sup> Other prominent and recent accounts of harm are not put in terms of pain, and corporations might count as harmed on them. For example, on the account in Shiffrin (2012), harm is argued to be an imposition on the will, a kind of restriction on autonomy. And Hess (2018a) and others have been willing to accept corporations as autonomous. Similarly, Hanser's (2008, 2019) account frames harm

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<sup>9</sup> This thought comes out explicitly in Hasnas (2017:98), where he ties punishment to the infliction of harm. He notes a page later that "A corporation is not a thing that can experience harm or pain in itself" (99). See also Buell (2020), which argues that corporations can and should be punished, but that the retributive aim cannot be satisfied.

<sup>10</sup> One standout exception to this norm is Thomas (2017), who claims that corporations can be harmed and even *experience* harm (624), though no particular conception of harm is given.

<sup>11</sup> Frustration of one's interests seems more closely tied to harm than pain. We often undergo painful experiences voluntarily in the service of our values (as gym trainers will attest). Punishment may even amount to banning us from these painful experiences.

in terms of undergoing events that cause the loss of basic goods, where he understands those goods in terms of abilities and possessions that make possible pursuing worthwhile activities. As noted, proponents of CMR take corporations to have values and to be capable of using their assets to pursue them, so they will have the means of characterizing corporate harm on this account.

Saying only this much is bound to be unconvincing, especially for opponents to CMR. (If an account of harm leads to the conclusion that firms can be harmed, some will take this as a *reductio* of those accounts.) But the aim here is not to make this case. Rather, the point is just that corporate harm should be more attractive to those in favor of corporate moral responsibility than has been appreciated. If accepting CMR can bring with it a commitment to corporate harm, then proponents will have a way of answering this challenge to the satisfaction of the retributive aim of punishment. Corporate punishment need not aim at stakeholder harm.

## AGAINST THE CLAIM OF UNJUST COLLATERAL DAMAGE

Even if not necessary for successful corporate punishment, there is a worry that a large amount of stakeholder harm is inevitable as a kind of collateral damage of the punishment. That may be bad enough. Any collateral damage is a cost to be weighed against relevant benefits. And it may seem so bad as to clearly overwhelm whatever positive good can be achieved by corporate punishment. Matters may be even worse. Some maintain that collateral damage itself is wrong and cannot be justified (Lefkowitz 2008). If that is right, and if punishing corporations necessarily leads to this collateral damage, then corporate punishment cannot be justified.

To begin answering these concerns, I will show how there are resources for justifying some amount of collateral damage. We may punish firms if we are ready to assume additional duties to

take steps to avoid and mitigate this damage. But the question remains as to whether this is worth it. Are these significant costs to society worth the benefit? Part of answering this is left for the next sections, which concern the benefits of corporate punishment and the costs of failing to punish. In this section, I will put pressure on how to think about these costs of punishment. I do not think they are inevitable or as costly as is often imagined. And where the costs are high, there can be reasons for discounting them. The result will not be that punishment is always justified no matter the ensuing damage, but this creates space for a position that will at times permit corporate punishment, perhaps showing that the presumption should be in favor of punishing. To end the section, however, I will address a lingering challenge regarding shareholders.

### *Justifying Collateral Damage*

Assume that stakeholder are likely to be harmed in all of the familiar ways discussed, and that it is *prima facie* wrong to impose this risk of harm (Oberdiek 2017). There is a duty not to risk harm to stakeholders. Even so, we can still be justified in punishing firms *all things considered*.<sup>12</sup>

Though we may have this obligation, I argue below that there is also an obligation to hold corporations responsible. This leaves us with conflicting obligations, where we must act to satisfy one of them and in despite of the other. So, it may in the end be right to hold corporations responsible despite breaching this duty to avoid imposing the risk of stakeholder harm. If we do

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<sup>12</sup> That we ought not to act in this way is not to say that we *must* not (Vranas 2018). And the circumstances of not complying with this obligation include a competing obligation. Relatedly, Lefkowitz (*op. cit.*:164) himself ends by admitting that there may be times where it is a good thing to engage in acts with collateral damage even when those acts are technically wrong.

this, however, we will have to undertake conduct to facilitate appropriate moral repair for the duty breached. This is in line with how scholars have talked about justifying collateral damage recently.

In a discussion of how to think about justifying military action given the likelihood of collateral damage in the form of innocent casualties, Schwenkenbecker (2014) argues that action can be justified as long as the military acts in accordance with a duty of care. Combatants must take precautions and do what they can to avoid collateral damage, even if we foresee that some collateral damage is likely. Separately, Smart & Majima (2012) argue that engaging in military conduct causing collateral damage generates a further obligation of corrective/restorative justice. We can be justified in acting in ways that lead to collateral damage, but then we assume a responsibility after the fact of acting to fix the damage.

Though this discussion of collateral damage usually occurs in the faraway context of just war theory, my suggestion is that the lessons apply here. We are often justified in holding corporations responsible, but our continued justification depends on our appropriately responding to additional duties we incur by risking collateral damage to stakeholders. We must consider the conditions relevant to that harm and either compensate stakeholders directly when they are harmed or else preemptively work to avoid these conditions.

For example, there is the worry that after a corporate fine, this cost will be passed on to customers. We could respond to this directly by advancing certain consumer protections.<sup>13</sup> However, notice that firms would not be in a position to do this if markets were sufficiently competitive. In competitive markets, prices are determined exogenously, not by the firm. So, if we know that it is

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<sup>13</sup> We could subsidize the purchasing of goods to off-set customer burden. However, this risks making it *even easier* for corporations to off-load fines onto them. So, we may be better-off advocating for structural changes to the market.

more likely that consumers will be harmed after punishing firms in imperfect markets, this could give us a standing obligation to advocate for reform to promote healthy, competitive markets.

(There is another relevant reason for enacting this kind of reform. It will often be said that if firms can pass on their fines to customers, then they are not *really* being punished. Indeed, part of the skepticism about corporate punishment is the thought that there is always some way for them to offload the punishment. This apparent ability would undermine the benefits of corporate punishment discussed below. So, we separately should be motivated to restructure markets to disempower firms from this behavior.<sup>14</sup>)

Much the same can be said for employees. To avoid or mitigate the damages of cut wages or jobs, we can enact legislation to make it easier for employees to transition between jobs or train for new ones, or to secure improved unemployment benefits. We could generally do things to increase competition for labor, make it easier to move between jobs, and make it less painful to be without a job. By doing all of this, we would both minimize the harm that can befall employees and again undercut the corporate ability to off-load punishment.

Regardless of other motivations for pursuing such policies, pursuing them is a necessary condition on our justifiably acting in ways that risk collateral damage to stakeholders. It may be wrong to impose this risk. Nevertheless, and contrary to the worry at the top of the section, we can justifiably punish firms despite this risk if we take seriously these additional obligations.

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<sup>14</sup> The worry may persist that firms must offload their punishment some way (likely onto shareholders). However, this intuition likely stems from the deeper skepticism towards the idea that corporations can genuinely be punished, which is addressed in the next section.

## *Considering the Cost*

That we can *in principle* be justified in holding corporations responsible is not to say that we ever genuinely *are* so justified. Given the apparent conflict of duties (between a duty to hold responsible and a duty to avoid imposing the risk of harms), the question remains as to whether we really should hold firms responsible all things considered. And the presumption might be that we should not, given the magnitude of these inevitable costs. Sure, we could satisfyingly punish firms and try to do something to mitigate the damage, but will we do enough? Is the likely outcome of this punitive exercise better than simply not punishing firms?

In contrast to the prevailing wisdom, I do not think the presumption should be that these costs are not worth bearing. Assume that the costs are as large as is often suggested. Prices will go up; jobs will be lost; the stock price will plummet. These are high costs, but we as a society have been willing to bear much higher costs for the right kinds of benefits.

When firms engage in innovation, it is socially encouraged, though it may ultimately automate away jobs. Or, when firms move factories in search of cheaper labor, we allow this. We console ourselves by reiterating the market benefits, and perhaps by providing resources for the unemployed to mitigate these effects. And the costs of automation and outsourcing are arguably much higher over time than the costs of successfully implementing a regime of appropriate corporate punishment. Perhaps the benefits of holding firms responsible pale in comparison to the benefits of the free market. (Readers can judge for themselves given the discussion of the next few sections.) Still, if the benefits are not insignificant, then the presumption should be that we are generally justified in punishing firms despite these costs.

I doubt, however, that the costs of holding corporations responsible are as significant as is often imagined. These costs are certainly not inevitable. If corporation were merely a plurality of

people, or some complex network of people, then it would be unimaginable that the corporation could be punished without punishing individuals. This is precisely the sort of reductive metaphysical view of the corporation that opponents of CMR are inclined towards (e.g., Velasquez 2003; Hasnas 2010:69). So, it is no surprise for them to be drawn to the view that stakeholder harm is inevitable. But proponents of CMR do not share this view. Instead, they tend to take the corporation to exist either as a distinct object (Phillips 1992) or as a constituted group agent (Hess 2018b), as something that can have distinct features, abilities, and assets. For these authors, punishing corporations will not *ipso facto* harm stakeholders.<sup>15</sup>

It is not hard to recognize this in particular punishments. Certain social and legal sanctions discussed below are not obviously financial, and it is unclear why they would *of course* translate into negative effects for stakeholders. If a firm is punished by being forced to have a member of a regulatory body on its board, why would the firm need to raise prices, cut jobs, or do anything that would negatively affect stakeholders? Yet this may constitute a form of retributive punishment that harms firms insofar as it infringes upon corporate autonomy. Even considering forms of corporate punishment that are financial, as long as the fine is not so large that it puts the firm out of business, it is not clear that it must be borne by this or that stakeholder. Firms have assets that can be used to pay fines,<sup>16</sup> bonds could be issued, or loans can be taken out.

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<sup>15</sup> This issue cannot be adjudicated here, but it bears remembering that the opponents of CMR are arguing that the costs of holding firms responsible is too high even granting that firms genuinely are responsible. My point is that if firms are the kinds of things that can be responsible, then they will not be metaphysically identified with their stakeholders such that punishing firms inevitably punishes those stakeholders.

<sup>16</sup> Perhaps these are really assets of the shareholders, and so that shareholders in particular are immediately and necessarily harmed by fines. I discuss this challenge in the final part of this section.

When stakeholders are negatively affected, it is also not obvious that these effects *must* constitute harms. Price rises, job losses, or share price drops certainly are negative effects that can harm stakeholders, but they may constitute harms less often than we realize. Consider again the case in which a firm responds to a fine by raising prices on its customers. This appears to shift the burden on to customers. But is it really a harm? Suppose that demand for the firm's product is inelastic, and customers tolerate certain price increases. Described so abstractly, it is not clear that customers really are harmed by raising prices. After all, that demand is inelastic reflects a *willingness* to pay more for the good. Customers may lose out on consumer surplus that they otherwise would have reaped, but they are better-off than they otherwise would have been without the transaction. So, they are not harmed on most accounts of harm.<sup>17,18</sup>

Negative effects may certainly follow a corporation's punishment, but more information is needed to be sure that these are genuine harms. Even if they are harms, yet more information is needed to be sure that these harms are relevant to our decision of whether to punish. There are a number of ways that this later harm could fail to be relevant.

Suppose stakeholders *consent* to the risk of harm. If stakeholders themselves consent to or accept the risk, then the consideration of this risk should not count as strongly against holding firms responsible. This appears to be the case when these are harms that follow punishments imposed by

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<sup>17</sup> This kind of story is more plausible for customers than employees. For shareholders, it is again not obvious that share price drops harm them, as I bring out towards the end of this section.

<sup>18</sup> The clear concern is when customers *need* the product (such as a medication), and this explains why demand is inelastic. Then, customers seem wronged by the price hikes, although it is not hard to interpret the case as one in which the firm is *exploiting* the needs of customers. How we understand the wrong done unto customers will then turn on how we understand the wrong of exploitation. For instance, perhaps customers are not technically harmed here, though they are wronged in the sense of being dominated (Vrousalis 2018). This case will be considered more below.

the stakeholders themselves. We often talk in terms of criminal prosecutions, but boycotts, strikes, and the like would constitute punishment by stakeholders.<sup>19,20</sup> The same could even be true of criminal punishment. Prosecutions pursued in good faith by district attorneys in their role as elected representatives are arguably engaged in with the presumptive consent of the governed. So society itself, as a stakeholder of the firm, may indeed count as consenting to the risk of harm it faces after the punishment.<sup>21</sup>

There is yet more to say if the collateral damage still seems either unconsented to or too severe. It may be important to appreciate *why* stakeholders are harmed. The thought has been that any expected harm following corporate punishment should go into our decision of whether to punish.<sup>22</sup> However, it may be relevant whether this harm is a product directly of the punishment or of further corporate wrongdoing.

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<sup>19</sup> However, the punishment inflicted by one group of stakeholders might lead to the unconsented to harm of another, as when a customer boycott harms employees or franchise owners.

<sup>20</sup> Shareholders themselves may be taken to engage in similar behavior by selling their stake in the firm. They will be harmed if selling at a loss, but this too will be self-inflicted. This is a cost that comes from their punishing the firm by severing relations with it. Proof that a drop in share price is no punishment of shareholders is clear from how analysts typically talk about such drops. Rather than referring to them as corporations punishing their shareholders, we typically say that the shareholders are punishing the corporation!

<sup>21</sup> Furthermore, if the professional role of prosecutors is to prosecute crimes—the more egregious, perhaps, the higher priority—then a failure to prosecute corporate crimes would violate their professional obligation. And failing to do so for fear of the harm befalling the community may itself constitute an unacceptable instance of hard paternalism (Dworkin 2020:2.1).

<sup>22</sup> On certain versions of expected act consequentialism, this may be the procedure to use (Sinnott-Armstrong 2019:sec.4).

Many of the cases discussed involve the firm responding to punishment by using market imperfections to offload the cost, possibly exploiting customers and workers.<sup>23</sup> Proponents of CMR will view the corporation as responsible for this decision to exploit stakeholders. Even if the corporation will go bankrupt otherwise, and so it may have some excuse, the firm is still engaging in unnecessary wrongdoing.<sup>24</sup>

The question is: Is it relevant to the decision of whether to punish the firm that it will engage in further wrongdoing if punished? My earlier points stand even if this is not relevant, but I am tempted to say that it is. I do not think that the harm caused by later, freely chosen wrongdoing should count as collateral damage of punishment.<sup>25</sup> Consider: It is no collateral damage of a parking ticket if, after receiving one, I get mad and yell at my children. I am responsible for my own conduct, and so are corporations.

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<sup>23</sup> Not all such conduct should be understood this way. A fine may be so large that a company must shrink the business itself by firing employees or closing factories to survive, and so not be fully offloading the costs. However, when jobs are cut by large firms in particular, it may be fair to assume that this *is* a matter of offloading costs, of using the fine as a pretext for layoffs without garnering outrage. After all, the best way for a firm to overcome the hardship of a fine would be to stay in business where profitable even if additional capital is required, not to shrink the business.

<sup>24</sup> To claim that the firm's choice is compelled is classic bad faith. There will likely be other options including the option of going out of business, an option that could on balance ultimately be better for stakeholders. Even if not, though, the firm cannot understand this choice as compelled. This is in the same sense that you are not compelled to harm someone just to save your own life (though you may be excused for so doing). See Kavka (1983) and Heath (2018) for discussion of the nature and extent of corporate excuses.

<sup>25</sup> However, if we know that this wrongdoing likely follows, and if we have failed to move forward on regulations meant to stifle the ability to exploit stakeholders, then we may count as complicit in the wrongdoing that follows punishment.

One could imagine healthy disagreement on this point,<sup>26</sup> but it can seem almost disrespectful to expect that corporations (or others generally) will act badly just because they are able to. A principle of charity instead suggests punishing firms on the assumption that they will not act badly. This undermines our taking the prospect of particular future stakeholder harms as reasons not to punish. Failure to punish on these grounds would then involve our acting wrongly, a product of being coerced by the threat of corporate retribution.

Before moving on, there is a final point to make on this issue: It is unfair to us as individuals to take the costs of punishing firms to be relevant to our decision of whether to punish. Why should we care so much about these costs in the corporate case, after all, when we fail to garner the same concern for the costs of holding individuals responsible? I do not recall the careful public discussion about whether punishing individuals was unjustified because of the damage it does to their families or communities, nor the presumption that such punishment is unjustified on this basis. So it seems to unfairly prioritize firms and those close to them to concern ourselves with the costs of corporate punishment.

The thought may be that the collateral damages of corporate punishment are simply more significant than the collateral damage done by holding individuals responsible. But tell that to the families of those incarcerated. Holding firms accountable may affect more people, but it is hard to

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<sup>26</sup> At issue is a complicated normative principle regarding the ways in which our judgments and decisions ought to be constrained by our assumptions about the responsive actions of others. There is already a great debate in normative ethics concerning whether our obligations right now depend on how we ourselves will act later (Timmerman & Cohen 2020). (And see Timmerman & Zakhem [2020] for a discussion of this debate's application to business ethics.) Not only would this require a position in this debate, it would need to be determined how it influences the question at issue, which involves the actions of others. That said, I would endorse a principle of action that did not put the effects of possible exploitation at our feet in deciding whether or not to punish.

imagine that it will affect innocent people as severely or personally as when we punish their loved ones.

With that said, within philosophy of law there has been a recent surge of work considering this issue of overcriminalization (following Husak [2008]) and the collateral costs of punishment (Hoskins 2018, 2019; Condry & Mison 2020). And it has even very recently touched on this question of whether the costs borne by innocents may undermine the justification for punishment (Hoskins manuscript). My frustration, however, comes from the fact that the assumption has long been that the costs of punishing individuals are of course worth bearing, while we are instead drawn to care so deeply about the costs of punishing firms.

Perhaps these issues stand or fall together, or perhaps there is yet reason to distinguish them. But as long as the presumption remains that we are justified in punishing individuals, and without being shown a dramatic difference in the cases, it is unfair to individuals not to have the same presumption towards firms. The costs of such punishment may be high, but it wrongs individuals to consider this cost in our decision to punish firms when we will not similarly consider this cost when it comes to punishing you or me.

### *Complications Involving Shareholder Ownership and Responsibility*

One extra challenge to consider involves the claimed special relation between shareholders and the firm. If shareholders are owners of the firm, then they may seem harmed more directly by corporate punishment, and moreover it may seem that they *should* be harmed, because their ownership makes them responsible for corporate wrongdoing. Let's take on these concerns in turn.

The thought is that we directly harm shareholders by taking corporate assets, because shareholders are the *owners* of those assets. Scholars like Friedman (1970) and Jensen & Meckling

(1976) have influentially promoted this position and suggested that it bears on how managers should run firms. But there are alternative models. On Blair & Stout (1999)'s team production model of the firm, for example, the firm is taken to own itself and its own assets. In contrast, Strudler (2017) has recently argued that the assets of the firm are unowned.

This debate typically concerns how managers should use firm assets.<sup>27</sup> As such, little work has been done in thinking about how the question of corporate moral agency intersects with this question of ownership.<sup>28</sup> However, it is not hard to imagine that proponents of CMR will be drawn to the view that shareholders are *not* the owners of the firm or its assets. If so, then there is no special challenge concerning shareholders. They are no more directly harmed by corporate punishment than other stakeholders.

Even if proponents of CMR *are* willing to accept shareholders as owners, shareholders are not inevitably harmed. Key to this is two points. First, a loss of some of what you own may not constitute a harm to you. That someone extremely well-off could lose a small amount of their goods without being genuinely harmed is one of the central intuitions of the harm literature. Second,

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<sup>27</sup> However, von Kriekstein (2020) argues that this question of ownership is a red herring in the debate over shareholder primacy, and I agree with him.

<sup>28</sup> Strudler (*op. cit.*: fn.14) seems skeptical that corporations are moral agents, yet he argues that shareholders do not own the firm or its assets. However, it is his belief that corporations are not rights-bearers that leads him to argue that the firm itself does not own its assets (118-121), and so that the assets are unowned. Since I am sympathetic to the claim that corporations merit certain rights, including property rights, I am inclined to agree with Blair and Stout that the assets are owned by the firm, and moreover that this is normatively significant. Whereas Strudler maintains that it is because the assets are unowned that the managers are justified in using excess corporate wealth for the betterment of society, I think they should be constrained in their deployment of the firm's resources by the values of the firm itself.

shareholders are fairly estranged from the corporate assets they supposedly own, and this suggests that a loss of these assets will not constitute a harm.

Imagine inheriting a house to which you have never been and cannot visit. Now imagine that the house is damaged, though you never learn about it, and it does not in the end change the resale value. How harmed are you by the damage to the house? Even if you learn of the damage, you do not seem harmed. Even if it *does* affect the resale value, it can seem a stretch to say that you are harmed by damage to this house you have merely inherited.

The situation is relevantly similar for shareholders. A mere loss of locked-in assets need not constitute a harm. The balance of so-called ‘shareholder’s equity’ may be money that shareholders would have never seen anyway, or that they might not even care about. Moreover, even if this loss of assets is tied to a lowering of the intrinsic value of the firm, a loss in value is not necessarily followed by a loss in *price*, even if it should be.<sup>29</sup> Stock prices all too often float free of the firm’s intrinsic value.

Of course, shareholders might care a great deal about the firm’s value. They may be firm believers in the mission of the company or its products, genuinely *invested* in its success. So, they really will be harmed by anything that damages it. But this harm is not inevitable across shareholders, and it is not unique to shareholders. Employees and customers could be just as invested in the firm in this sense and harmed by its being punished. In fact, punishing anyone will necessarily harm whoever is emotionally invested in that person. Yet, again, the inevitable emotional harm to the

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<sup>29</sup> The price of shares after issuance is not fully dependent on the corporation’s conduct, as the price is set on the open market. Fines themselves do not lower prices, or even a firm’s being fined. Instead, buyers lower the price with lower bid prices, and sellers lower the price with lower asking prices. Even if the stock price drops and we grant that it is a harm to you for your stock to have a lower value (assuming you do not sell), this could at best be understood as *other shareholders* harming you.

loved ones of individuals does not stop us from criminally punishing individuals. Why should it for corporations?

The foregoing may seem like an odd result. After all, we might have thought that shareholders *do* bear responsibility for corporate wrongdoing (Kolars 2001; Langtry 2002; Sandbu 2012), and so that they *should* be punished.<sup>30</sup> If shareholders own the corporation, then their liability may be vicarious. It is *their* corporation that is culpable. Even if they are not owners, it is still plausible that shareholders bear some kind of responsibility. Shareholders have a collective obligation to elect directors who will institute good practices of corporate governance, ensuring the firm pursues its interests.

It cannot be determined here whether shareholders *in fact* bear responsibility for corporate wrongdoing. Our intuitions about whether shareholders are punished through corporate fines may be tainted by whether we think they should be punished, but this is not the right way to think about punishing shareholders. If we judge that shareholders are responsible for corporate wrongdoing, then we should not simply expect corporate punishment to additionally cover shareholders. We should justify and engineer punishments for shareholders as a separate matter.<sup>31</sup>

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<sup>30</sup> This does not mean that the shareholders may not be victims. Maitland (*op. cit.*) points to cases where shareholders were defrauded. But how to judge these cases depends on how the story is told. If managers can execute the fraud because of inadequate audit mechanisms, then shareholders seem partially responsible (for not electing directors who pushed for sufficient ones). If, instead, adequate control mechanisms were in place, but managers went out of their way to game the mechanisms, then it does seem like the shareholders should not be punished, but neither should the corporation (Walsh & Pyrich 1995).

<sup>31</sup> For example, perhaps shareholder liability should not be limited, but rather proportional, as Sollars (2001) considers. Even our legal justification for criminal punishment may be influenced by answering some of the above questions. If, for instance, shareholders are owners of the firm, then holding them responsible may require appealing to the doctrine of

## THE BENEFITS OF HOLDING CORPORATIONS RESPONSIBLE

If the punishment of corporations does not unjustly harm stakeholders, then we can return to all of the benefits of punishing them. We have already previewed some of these benefits. As proponents of CMR will maintain, if corporations have their own ends, values and incentives; then they have all of the ingredients needed to be successfully deterred from future wrongdoing by punishment. Though Hasnas himself thinks that criminal fines are small relative to civil penalties and so unlikely to do much work in deterring future bad acts, he recognizes that they at least might have this effect, and they could certainly harm the reputation of the corporation (2012:fn.7). And, of course, they could be larger. Proponents of CMR could maintain that firms can be harmed such that it is possible to satisfy whatever retributive aim we have in punishing.

Still, skepticism may remain concerning these apparent benefits. One way to flesh out this skepticism is to suggest that any punishment threatened is ultimately *really* just a fine one way or another, and mere fines do not quite satisfy the aims of punishment. Fines may deter, for instance, but can firms really *learn* from them morally? What if the risk of incurring fines is just something added into the cost-benefit calculation for how to act, rather than encouraging reflection on the wrong done? Moreover, though I have gestured towards how proponents of CMR should think that it is in principle possible for corporations to be harmed, fines themselves may not seem so harmful. (This is especially true when the fine is smaller than the amount the firm benefits from engaging in the bad behavior.) Hasnas presses us towards these concerns when he says,

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*respondeat superior* (which at present is what is often appealed to in order to hold the corporation itself responsible for the conduct of its agents).

...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 their 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. (2017:99)

This is perfectly reasonable from the perspective of someone who does not take corporations to be moral agents with ends of their own. But it is something plausibly rejected from the perspective of someone who does. Proponents of CMR should think that firms can have other, non-financial ends. It could be that fines indirectly impede the firm's ability to see through the ends, or it could be that there are other punishments altogether that impair the firm's autonomy and frustrate its ability to meet these ends. These punishments would harm the corporation, though plausibly in non-financial ways (regardless of whether this punishment can be expressed financially).

Looking beyond fines, it is easier to see a panoply of proposed punishments even just within the criminal law, many of which would constrain reasonable, non-financial corporate ends. Corporations could be barred from certain markets or from selling certain goods, for instance. And this may threaten to stymie a firm's interests in the market. Firm interests could even be waylaid by forcing them to undergo training exercises or compelling them to do community service through CSR campaigns.

Alternatively, firm autonomy can be directly impeded. Punishments can impose greater oversight or government control, as when firms are forced to comply with higher reporting standards or subject to various audits. To constrain autonomy further, firms could be compelled to create directorships for members of oversight bodies or to forfeit total corporate control for a time

to those bodies, forcing them into conservatorships or receiverships.<sup>32</sup> Going even further, forced liquidation might not look like much to us, but it is the ultimate rejection of anything that the corporation was trying to do or be. As a measure of last resort, I see no reason why a proponent of corporate moral agency would not look upon it as a severe form of corporate punishment.

These punishments may be quite serious to the firm, though they do not have obvious financial implications and do not necessarily (or even likely) harm individuals. These punishments constrain the firm, its autonomy in pursuing its goals, and its capacities in just those ways that may constitute harm on the accounts discussed above. Non-financial punishments of individuals certainly can constitute harms for us. Not taking for granted a conception of the firm on which the firm just is a financial instrument, then, the same appears to be true for corporations. Granted, none of these punishments involve a cold, dark cell. But how much closer to the idea of incarceration can be achieved than for a company to be forcefully controlled by the government and barred from any but a select few market activities?

The corporation may be forced to do this or that, but the worry may linger that none of these punishments guarantees repentance, that the firm will *really* see the error of its ways. But this no new challenge. This is the challenge of determining an efficacious punishment generally, and it's just as much a challenge for how we choose to punish individuals.<sup>33</sup> A forced CSR campaign might

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<sup>32</sup> Risser (1989) outlines how corporate punishment could involve forced restructuring, for instance. See Jefferson (2001) for an overview of punishments apart from fines and their advantages/disadvantages. See Sepinwall (2011) for four other criminal punishments that could be used to target corporations.

<sup>33</sup> And why could they not learn from the punishment? Proponents of corporate moral responsibility like Tom Donaldson (1982) take corporations to be sensitive to moral considerations. If they are insensitive and act wrongly, then, why couldn't a punishment be designed to make them more sensitive to their own wrongdoing? Diamantis (2018)

stand the same chance of making a better corporate citizen as community service stands of making me more likely to pick up my trash. In either case, though, it might work, and the world will be a better place regardless.<sup>34</sup>

## THE COST OF FAILING TO HOLD CORPORATIONS RESPONSIBLE

In contrast with the benefits achieved by the many possible corporate punishments, consider the sincere cost of failing to hold corporations responsible. If corporations are genuinely morally responsible for their behavior and capable of committing significant wrongs, then, in failing to hold them adequately responsible, we do a lot worse than merely failing to achieve certain benefits. Instead, we forego something that we badly deserve. It is not simply that corporations do not get their just deserts, or what they have coming to them as some matter of cosmic justice. On the contrary, corporations themselves just as much as the rest of us lose out on something owed to them, something they and we deeply need.

As a final objection, though, it could be suggested that this is all a bit dramatic. Are we really owed something that is insufficiently given unless we punish corporations to the highest degree?

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suggests that our criminal punishment of corporations should be reoriented entirely towards the achievable goal of correcting their moral character.

<sup>34</sup> There is a deeper issue here concerning whether we will be *satisfied* by these punishments. Even if successful at rehabilitating the firm, that corporations are so different may make it such that we cannot *believe* that they have really learned. And our being satisfied is critical to moral repair (repairing a relationship to us). I think that this challenge can be met, but it merits further discussion. See Schormair & Gerlach (2020) for how companies may engage in dialogue with victims of human rights abuses in ways ultimately satisfying to those victims.

Perhaps a less costly approach could be sufficiently satisfying. We would not need to hold corporations criminally responsible if we can find appropriate and less harmful substitutes.<sup>35</sup> And opponents are quick to point to them.

Hasnas (2017:102) goes out of his way to note that we could avoid the wrong of holding corporations criminally responsible by instead holding them responsible socially. We could still morally criticize them and engage in any number of softer practices ranging from complaints in the suggestion box to public demands for apology and calls for boycott.<sup>36</sup> If individuals have been harmed, moreover, we could still appeal to tortious liability, leaving aside the criminal law. Or, even if we were convinced that we *had* to use the criminal law to hold corporations liable, perhaps there are other ways of lessening the damage done. For instance, we could use Deferred Prosecution Agreements, permitting firms to defer prosecutions if they provide sufficient remunerations and assurance of future improvement.

In general, I agree that other punishments should not be overlooked when appropriate. Extralegal means of holding responsible can be extensive and powerful, and there is more work to be done to articulate how to best use these measures. Nevertheless, appealing to anything less than equal treatment under the criminal law is problematic on a number of grounds.

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<sup>35</sup> I leave aside authors with other arguments against corporate criminal liability. Gibson (1995) or Khanna (1996), for instance, suggest that tort law is a more natural fit or more effective for punishing firms.

<sup>36</sup> In his own case, Hasnas may lack the standing to say that criminal punishment is unjust while allowing social sanctions, because social sanctions involve some of the same threats to stakeholders as criminal punishment. A boycott may lead to more money lost than the criminal fine. Hasnas will need to fall back on the idea that what is licensed is merely blaming the corporation or, even weaker, merely acknowledging that it is morally responsible, where this involves no censure whatsoever. This may be what he was suggesting, but it is a frustratingly soft touch for wrongdoing.

For one thing, corporate criminals deserve punishment for their own sake. If corporations are morally responsible agents, then they deserve to be treated the same as the rest of us concerning their liability to punishment. It would be unfair *to them* not to subject to punishment. It robs them the dignity of equal treatment.

Firms also deserve the protection of the law that comes from being secured against the legal wrongs of others. This is threatened if *other* corporations are not held criminally responsible. The law not only forces the firm to behave, but it forces the firm's competitors to behave, and companies may be willing to obey the law as long as it secures compliance from their peers. They may even prefer this system.

Moreover, applying measures apart from findings of direct criminal fault may ultimately be unfair to corporations themselves. A stronger emphasis on vicarious liability, for example, risks over-punishing corporations for the behavior of their agents (Laufer & Strudler 2000:1311). Even the social criticism they garner for bad acts is likely to be disproportionately high if we are barred from criminally prosecuting them. Our relationship with them will likely never be fully repaired, and so we are likely to continue blaming, boycotting, or just thinking ill of corporations long after we would have if they had simply been criminally punished.

For all of the above-mentioned reasons, I think we owe it to firms to subject them to the law. But I will not pretend that my primary concern here is to secure the rights of corporations. I want us to hold corporations responsible because I think *we* deserve it, of course, because it is owed *to us*.<sup>37</sup> It should not be understated just how costly our failure to hold corporations responsible is to us personally and emotionally.

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<sup>37</sup> On at least a natural understanding of the criminal law, this is because corporations have perpetrated public wrongs (Duff 2018), and there is an obligation to redress these wrongs.

Considering the outrage when we perceive fines to be a slap on the wrist (e.g., Beans 2014), or our ire over the notion that some firms are simply too big to fail, our reluctance to sufficiently punish firms is something we already endlessly resent. We are perpetually suspicious that corporations are gaming the system and avoiding the punishment that they deserve. We resent their bad conduct,<sup>38</sup> and we would only resent more strongly the idea that we should *let them* get away with bad conduct because we *can't handle* punishing them. At least, I would.

Imagine realizing that a murderer *could* be criminally punished, but doing so would have adverse effects on the community. Perhaps they threaten to harm other community members if punished, their own friends even. Suppose it is decided that we should be mature about these matters and elect to only hold them civilly liable or else just jeer at them when passing them by. I am not sure how to describe such a situation except to say that it would be abominably morally obnoxious. The individual in question is not a psychopath or someone that cannot appreciate the moral facts. They know exactly how bad they are being, and they also know that we are not going to do anything (criminally) about it. This is exactly the situation of our willingly not punishing corporations, and it is unacceptable.

Failing to hold corporations responsible is clearly a cost insofar as it is acutely emotionally taxing to us to resent them; however, this further amounts to a breach of a duty we have to ourselves. Given the degree of indignity involved in letting corporate wrongdoing slide, so doing constitutes a failure of adequate self-respect. How can we see ourselves as anything but inferior members of society if we allow endless exceptions for corporations that we would never permit for

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<sup>38</sup> See Silver (2005) for discussion of our feelings of resentment and indignation towards firms for certain behavior, and how this can be constitutive of a distinctive kind of corporate moral responsibility.

ourselves?<sup>39</sup> Is it really okay because they are so much more important than we are? No. We have an obligation to ourselves not to think this way. If criminal punishment expresses society's condemnation for bad acts, purposefully not punishing corporations expresses a kind of acquiescence or blind-eyed subservience that is beneath us.

## CONCLUSION

Opponents of corporate moral responsibility have emphasized the darker side of corporate punishment. To punish firms, we unjustly punish stakeholders as a proxy. The cost of the harm to stakeholders is high, and the expected benefits are minimal. We are merely putting financial strain on corporations, and just to satisfy our sense that the scales of justice have been rebalanced. If all of this is right, then even if corporations were responsible agents, we would never be justified in holding firms responsible. This renders the truth or falsity of corporate moral responsibility as a thesis practically irrelevant.

I have argued that this understanding goes wrong at every turn. Punishing corporations need not (and should not) aim at punishing stakeholders. And the injustice of the harm befalling stakeholders can be rectified given a commitment to minimize collateral harm. Meanwhile, a nuanced look at corporate punishment shows that it need not all be construed as financial. There is

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<sup>39</sup> This suggests yet another way of conceiving of an obligation to hold them responsible, this time deriving from what is required for fairness, that corporate agents should be subject to legal sanctions just as we are (Thomas 2018:sec.5). When we commit crimes, where are *our* DPAs? This different in treatment is unjust.

a varied and satisfying path to moral repair. And this is something we all deserve (corporations included).

Taken together, this at least shows that we *can* be justified in holding corporations responsible, which shows that the opponents are wrong: the thesis of corporate moral responsibility is practically relevant in some way. More strongly, I take the foregoing to show that if corporations are morally responsible, then there should be a presumption that we are justified in holding corporations responsible. We are defeasibly justified. This renders corporate moral responsibility not only relevant, but practically significant.

How significant is it? Even if there is a presumption that responsible firms should be punished, I have not claimed that we are *always* justified in punishing. (Opponents are mistaken if we are even *sometimes* justified in punishing.) And I will again admit that there may be some circumstances where the costs to stakeholders is so high that we should not hold the corporation responsible all things considered. Admitting this, however, may leave one feeling a bit unsatisfied. It is nice to know in the abstract that we can be justified in punishing firms, even better with the presumption in favor of punishing. Still, in an actual case where the costs seem quite high and the benefits are hard to assess, we may lose our nerve. What if the presumption is defeated, and we should not punish?

This presents quite a challenge.<sup>40</sup> I have suggested that the decision to punish comes amidst conflicting obligations, but it is controversial how to model reasoning with conflicting obligations (Horty 2003; Nair 2014). I have also spoken in the language of costs and benefits, but there are

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<sup>40</sup> To see why this challenge does not undermine the paper's conclusions, recognize that this applies when considering punishing individuals as well. We are defeasibly justified in punishing individuals, but there are circumstances that justify mercy or leniency or forgiving the unrepentant. Which circumstances? Crafting a response requires engaging in many of the thorny issues discussed below.

many issues with using cost-benefit analyses for moral decisions (Hansson 2007). How do our obligations work as deontic constraints for such an analysis? How are we to think about weighing incommensurate values? What is the right way to model risk aversion? These are deep questions at the center of normative decision theory, many of which are still unresolved. Despite these issues, though, there is reason for optimism.

The presumption alone can embolden prosecutors and the public to pursue punishment. And, as normative decision theory evolves, there will be greater opportunities to leverage this work to determine exactly how/when to punish firms. To end, however, it bears appreciating that even when the costs are so high that we should not punish firms, this is not the end of the story. If we as a society have an obligation to hold the corporation responsible, and we do not, then we will be responsible for a miscarriage of justice.<sup>41</sup>

Consider: If a friend insults you in front of colleagues, moral repair may require demanding an apology. But it may be too awkward and socially costly to demand one right then. In this case, you would be excused for not doing so, but then you must address the matter later. To do less is to inadequately respect yourself. The same is true when thinking about corporate wrongdoing.

If a corporation commits a grave injustice, but we are worried about the genuine costs of punishing them, then the right answer cannot be to simply not punish them. Not only will we be unsatisfied, but we will resent both them and ourselves. We will thus need to do something to adequately repair the corporation's relationship with society. And, in my view, the sooner the better.

## ACKNOWLEDGEMENTS

[omitted for blind review]

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<sup>41</sup> This is a 'justice remainder,' as characterized by Laufer & Hughes (forthcoming).

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