

# Successor Identity

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*The law of successor criminal liability is simple—corporate successors are liable for the crimes of their predecessors. Always. Any corporation that results from any merger, consolidation, spin-off, etc., is on the hook for all the crimes of all the corporations that went into the process. Such a coarse-grained, one-track approach fails to recognize that not all reorganizations are cut from the same cloth. As a result, it skews corporate incentives against reorganizing in more socially beneficial ways. It also risks punishing corporate successors unjustly.*

*This Article offers a more sophisticated approach to successor liability: successors should be liable for the crimes of their predecessors only when they inherit their predecessors' compliance vulnerabilities. In the terms developed by this Article, these successors share a "criminal identity" with their predecessors. Such an approach would incentivize corporations to structure reorganizations in ways that improve compliance and minimize the likelihood of future offenses. At the same time, it would do a better job of ensuring that the criminal law punishes corporate successors only when they deserve it.*

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*“[I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable.”<sup>1</sup>*

## I. Introduction

It is not a good idea to punish one person for another’s crimes. Doing so is fundamentally unjust.<sup>2</sup> It also makes for bad policy—if punishment is going to deter potential criminals, the criminals themselves must suffer the penalty.<sup>3</sup> This bad idea, however, is the settled law where corporate crime is concerned. Successor corporations are on the hook for the crimes of their predecessors, even in circumstances where the two seem like very different corporations. One could imagine some successors wanting to argue, with the corporate equivalent of a straight face, that they are different from their predecessors. The fact that this argument is legally foreclosed to them should seem strange.

Imagine what this would mean for individuals. Courts rarely have to ask whether the defendant before them really is the same person as she was when she committed some crime. The issue arises only in rare cases of dissociative identity disorder<sup>4</sup> or personality-changing brain trauma.<sup>5</sup> Philosophers have had more to say in fanciful thought experiments where people split and fuse with

1. *Korematsu v. United States*, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting).

2. See Anne-Marie Rhodes, *Blood and Behavior*, 36 AM. C. TR. & EST. COUNS. L.J. 143, 155 (2010) (“James Madison wrote that the Corruption of Blood Clause was designed to prevent Congress from [sic] from extending the consequences of guilt beyond the person of its author. Moreover, the corruption of the blood clause, which addresses a substantive right of an individual against the sovereign power, is one of only two such rights directly addressed in the original Constitution. The independent American perspective was clear, an individual is to be judged on his own actions and behavior not those of his ancestors.” (footnote and internal quotation marks omitted)) (quoting Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727, 730 (1992)).

3. See generally Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE. L.J. 1231 (1984) (discussing the limited conditions under which vicarious liability is economically efficient).

4. IAN HACKING, *REWRITING THE SOUL: MULTIPLE PERSONALITY AND THE SCIENCES OF MEMORY* (1995); JENNIFER RADDEN, *DIVIDED MINDS AND SUCCESSIVE SELVES* (1996); Robert Birmingham, *From Odysseus to Capgras: Seven Episodes of Personal Identity in Law*, 49 SYRACUSE L. REV. 99, 117-24 (1998); Stephen Braude, *Multiple Personality and Moral Responsibility*, 3 PHIL., PSYCHIATRY & PSYCHOL. 37 (1996); Kathleen Wilkes, *Multiplicity and Personal Identity*, 32 BRITISH J. PHIL. SCI. 331 (1981).

5. Cf. JOHN M. HARLOW, *RECOVERY FROM THE PASSAGE OF AN IRON BAR THROUGH THE HEAD* 328-47 (1868) (recounting how the personality of Phineas Gage was radically altered following an accident in which an iron rod was driven through his head destroying parts of his brain).

each other.<sup>6</sup> Supposing Dr. Jekyll split into two separate bodies, which body should be punished for the murder of Sir Danvers Carew? Most people would think that is an open question and would want to know which body inherited Mr. Hyde’s psychological traits before answering.<sup>7</sup> Supposing instead that Mr. Hyde then somehow forcibly fused himself with an innocent bystander, most people would ask what remained of Mr. Hyde and what of the bystander before deciding whether and how much to punish the composite. No one thinks it makes sense to punish the individual “successors” as a matter of course—Dr. Jekyll, Mr. Hyde, or the composite—with no further questions asked.

These hypots, while outlandish for real people, are business as usual for corporations. Replace Dr. Jekyll with a parent corporation<sup>8</sup> who has a division with compliance vulnerabilities and a history of past misconduct; the parent may spin off that division into a separate corporation. Or replace Mr. Hyde and the bystander with a criminal corporation that, obscuring its earlier misconduct, merges with a corporation that has a clean record and robust compliance.<sup>9</sup> When

6. Derek Parfit, *Personal Identity*, 80 PHIL. REV. 3, 4-5 (1971) (discussing the disposition of personal identity following a brain transplant or disconnection of brain hemispheres).

7. *Id.* at 11-12 (arguing for a psychological continuity account of personal identity).

8. *See, e.g.*, Kathleen F. Brickey, *Andersen’s Fall from Grace*, 81 WASH. U. L.Q. 917, 929 n.63 (2003) (“At least one account suggests that Andersen tried to persuade the government to approve a restructuring that would allow Andersen to spin off the Houston office as a separate entity, reasoning that the Houston office could then be separately prosecuted without implicating the rest of the firm. The government persisted in its view that the firm as a whole would have to bear responsibility for the shredding, so no agreement to that effect was ever reached. But even if a spinoff of the Houston office had occurred, the restructuring solution would have remained problematic. General principles of entity liability allow the criminal acts and intent of Andersen’s agents to be imputed to the firm. If the Houston office had been restructured as a separate partnership, the crucial time for determining its status as a legal entity would have been the time when the criminal conduct occurred. When Andersen partners and employees shredded the Enron documents, the Houston office had no separate legal identity. Thus, Andersen was the only entity to which its agents’ acts and intent could be imputed.”) (citation omitted); *see also* Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1, 39-40 (1986) (“In anticipation of a potential mass tort, a firm could put the risky product line in a subsidiary corporation so that the limited liability of the subsidiary might shield the parent firm from mass tort liability. Manville, for example, separately incorporated its nonasbestos operations when already facing mass tort claims. The cigarette companies’ strategic reaction to suits by plaintiffs with tobacco-induced disease has already included formation of subsidiaries expressly intended to insulate liability.”) (footnote omitted).

9. *See, e.g.*, *United States v. Wilshire Oil Co.*, 427 F.2d 969, 973 (10th Cir. 1970) (“The brunt of the sufficiency of evidence argument focuses on the propriety of attributing the previously obtained guilty knowledge of a Riffe Division agent, to Wilshire after the merger . . . Wilshire argues that the only knowledge it could have had regarding their participation in the conspiracy was knowledge acquired prior to the merger and they are thereby liable for neither the pre-merger crime nor their post-merger involvement.”); *see also Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime & Drugs of the S. Judiciary Comm.*, 111th Cong. 6 (2010) (statement of Andrew Weissmann, Partner, Jenner & Block LLP) (“Under the current enforcement regime, a company may be held criminally liable under the FCPA not only for its own actions, but for the actions of a company that it acquires or becomes associated with via a merger—even if those acts took place prior to the acquisition or merger and were entirely unknown to the acquiring company. Such a standard of criminal liability is generally antithetical to the goals of the criminal law, including punishing culpable conduct or deterring offending behavior. While a company may mitigate its risk by conducting due diligence prior to an acquisition or merger (or, in certain circumstances, immediately following an acquisition or merger), that does not constitute a legal defense if a matter nevertheless arises that was not detected. Thus, even when an acquiring company has conducted exhaustive due diligence and

the “people” at issue are corporations,<sup>10</sup> what were mere thought experiments become pressing transactional and criminal law policy concerns.

The law of successor liability tells courts when the corporations that emerge from reorganization (the “successors”) should be on the hook for the misdeeds of the corporations that went into the process (the “predecessors”).<sup>11</sup> Doctrinally, the answer is simple: always. A corporation that acquires, merges with, consolidates with, or spins off from a criminal corporation automatically inherits a criminal taint and is liable for punishment.

Though this miasmatic approach would certainly be inappropriate for individuals (we do not punish children for parents’ crimes),<sup>12</sup> perhaps there is more to recommend it in the corporate context. Should criminal liability not stick firmly to corporations and their successors to ensure that corporate crime gets punished?<sup>13</sup> Even if this means that courts will sometimes punish seemingly innocent corporate successors, is this really problematic where such fictional people are concerned?

The current state of successor liability should worry everyone from law and economics scholars to justice theorists. In a world where the annual social costs of white-collar crime often exceed half a trillion dollars<sup>14</sup> and prosecutors regularly resolve corporate investigations for penalties exceeding one hundred million dollars,<sup>15</sup> the stakes of getting corporate liability right are high. By automatically transmitting any criminal liability from predecessors to successors, current doctrine fails to distinguish between ways corporations can reorganize.

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immediately self-reported the suspected violations of the target company, it is still currently legally susceptible to criminal prosecution and severe penalties.”) (footnotes omitted).

10. 1 U.S.C. § 1 (2018) (“[T]he words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”).

11. *Successor Liability*, PRACTICAL LAW GLOSSARY (2017).

12. See also *Wallach v. Van Riswick*, 92 U.S. 202, 208-09 (1875) (holding that forfeiture of property as punishment for a Civil War Confederate’s treason did not extend to the Confederate’s children who retained a future interest in the property).

13. This Article focuses only on the punitive aspects of criminal punishment. Payments that repair harm, such as restitution, are also widely available in criminal law, see, e.g., Mandatory Victims Restitution Act, 18 U.S.C. § 3663A (2018), but require a different approach. Similarly, the Article develops a theory of corporate identity for criminal law only. A different theory of corporate identity will be appropriate in other contexts, such as civil law, where the goals are not the same as in criminal law.

14. See RODNEY HUFF, CHRISTIAN DESILETS & JOHN KANE, THE 2010 NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME 12 (2010), <http://www.fraudaid.com/library/2010-national-public-survey-on-white-collar-crime.pdf> [<https://perma.cc/BDD5-SEEB>].

15. For the last decade or so, prosecutors have resolved (whether by plea or prosecution agreement) an average of ten criminal investigations a year against corporations with penalties exceeding over \$100,000,000. In the last five years, at least one of those each year has been resolved for \$1,000,000,000. These results come from an analysis of data available on Brandon Garrett’s Corporate Prosecution Registry. See Brandon L. Garrett & Jon Ashley, *Corporate Prosecution Registry*, DUKE U. & U. VA. SCH. L., <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html> [<https://perma.cc/BWU7-EZUB>]. When related “civil” penalties are accounted for too, these numbers skyrocket further. See *Risky Business: Top 10 Corporate Crackdowns*, CENSIBLE (July 20, 2017), <https://learn.censible.co/risky-business-top-ten-corporate-crackdowns> [<https://perma.cc/E2Y4-5J3N>].

Reorganizations can differ widely. Corporations know this. It is no secret that they try to use their fluid form and the potentialities of reorganization to manage their liabilities, both criminal and civil.<sup>16</sup> Law influences the choices corporations make during reorganization, and these choices can have important implications for criminal justice policy. One crucial lever of influence is how reorganization impacts corporate criminal liability. That lever is currently stuck in “transmit.”

Some reorganizations are socially preferable, and the law should incentivize them. More specifically, current law fails to recognize that corporate reorganizations are pivotal moments when corporations could be encouraged to make significant improvements to compliance. By ignoring the details of each reorganization, current doctrine also cannot distinguish between cases when punishing successor corporations would advance social goals, and when not. Though corporations may be fictional people, they are composed of largely innocent real people—shareholders, employees, etc.—who bear the burdens of corporate sanctions: “When the corporation catches a cold, someone else sneezes.”<sup>17</sup> The criminal law must balance considerations of social policy and justice where corporations are concerned because punishing them effectively sanctions their constituents.

Puzzlingly, scholars have paid little attention to successor criminal liability. One goal of this Article is to change that, and to start a conversation about how successor liability affects the policy and justice goals of corporate criminal law. It will also offer a proposal for improving current law, a more fine-grained approach to successor liability that better calibrates corporate incentives and responds to considerations of justice. Rather than automatically transmitting liability from predecessors to successors, the proposed replacement asks first whether the successor shares a “criminal identity” with any of its predecessors. Drawing on themes from the science and theory of identity, the Article will define a corporation’s criminal identity to be whatever organizational defect(s) caused or enabled its criminal conduct. Ensuring that courts only punish successors who inherit their predecessors’ criminal identity would be a positive development in light of criminal law’s basic purposes: rehabilitation, deterrence, and retribution. By giving corporations strong incentives to reform themselves during reorganization, the successor identity approach better satisfies criminal law’s project of rehabilitating criminal corporations. Since these reforms raise the chance that any employee misconduct will be uncovered, the proposal stands a better chance of deterring corporate crime at its individual sources. Lastly, only by considering corporate identity can the criminal law ensure that corporate criminals, and not different innocent corporations, receive their just deserts.

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16. See Steven Davidoff Solomon, *In Spinoffs, a Chance to Jettison Liabilities*, N.Y. TIMES (Mar. 12, 2013), <https://dealbook.nytimes.com/2013/03/12/in-spinoffs-a-chance-to-jettison-undesirable-liabilities> [<https://perma.cc/WZY9-4ZYY>].

17. John C. Coffee, “*No Soul to Damn; No Body to Kick*”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 401 (1981).

After some preliminary caveats and stage-setting (Part II), the Article lays out the current law of successor criminal liability (Part III). Courts uncritically imported this doctrine from civil law. While the doctrine may have served admirably in that context, the Article argues that it is poorly adapted to the purposes of corporate criminal law. The law would be better served by tying successor liability to successor identity and by extinguishing criminal liability when reorganization fixes the organizational defects of criminal predecessors (Part IV). Implementing successor identity as a framework for tracing corporate liability through reorganization requires attention to several practicalities and refinements. The Article addresses these (Part V) and concludes by considering the broader implications of identity for corporate criminal law (Part VI).

## II. Preliminaries

Scholarship on corporate criminal law is fraught with conflicting agendas and perspectives that can derail a discussion before it starts. People disagree not only about whether the law should focus on deterring corporate crime or giving corporations their just deserts, but also about whether criminal law has any coherent role to play in regulating corporate affairs at all. A few initial clarifications will frame the project and avoid some possible confusions later on.

### *A. The Purposes of Corporate Criminal Law*

While the law responds to corporate misconduct in many ways, this Article solely concentrates on punitive responses. “Successor liability” refers to overlapping doctrines in both criminal and civil law.<sup>18</sup> These two domains have different purposes,<sup>19</sup> and considerations appropriate to one will not necessarily translate to the other. For example, justice and deterrence are central to criminal law,<sup>20</sup> while civil law tends to focus on matters of social efficiency,<sup>21</sup> like optimal

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18. See CRIMINAL DIV., U.S. DEP’T OF JUSTICE & ENF’T DIV., U.S. SEC. & EXCH. COMM’N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 28 (2012) [hereinafter FCPA RESOURCE GUIDE], <https://www.documentcloud.org/documents/515229-a-resource-guide-to-the-u-s-foreign-corrupt.html> [<http://perma.cc/NZ2E-CYZE>] (“Successor liability applies to all kinds of civil and criminal liabilities.”).

19. See, e.g., Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Law*, 83 GEO. L.J. 2407, 2442, 2444 (1995) (“Notwithstanding [a] modern blurring of civil and criminal law, criminal law retains certain distinguishing features. The most significant is its sanction, from which most of criminal law’s other features flow . . . . [C]riminal law is more appropriate for redressing violations of absolute duties, whereas tort law is better suited for redressing violations of relative duties.”).

20. See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 950, 983 (2003) (explaining that deterrence has been a centerpiece of modern criminal law reform and discussing its relationship to another central concern of criminal law: justice).

21. See, e.g., Michael D. Green, *Negligence = Economic Efficiency: Doubts*, 75 TEX. L. REV. 1605, 1605-06 (1997) (“The Restatement (Second) of Torts . . . provid[es] a risk-benefit test for unreasonable conduct and negligence.”). But see Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 423 (1982) (“[T]he considerations that ground a claim to recompense need not

risk allocation<sup>22</sup> or efficient breach.<sup>23</sup> Admittedly, things are complicated by the fact that the civil/criminal divide is frequently blurred.<sup>24</sup> Some criminal sanctions, like restitution,<sup>25</sup> perform civil-style functions like cost internalization<sup>26</sup> and making victims whole.<sup>27</sup> And some civil remedies, like punitive damages, seem to encroach on criminal law's core concerns.<sup>28</sup> This Article is exclusively about successor *criminal* liability for core *punitive* sanctions, like fines. It does not address civil liability or liability for non-punitive criminal sanctions, like restitution. The considerations that this Article raises in

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coincide with those that ground the obligation to repair.”); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1648 (2009) (“I have outlined a personal sovereignty theory of the foundation of promissory morality and argued that it largely reconciles contract and promise. It explains why contract law’s failure to enforce some promises is consistent with the demands of promissory morality, and why most of the doctrines alleged to diverge from promissory morality in fact correspond to it. . . . [M]any of contract law’s remedial default rules can be understood as enforcing the corresponding remedial moral rights and duties to which breach of promise gives rise.”).

22. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (“[T]he owner’s duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.”).

23. See Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975, 977 (2005).

24. John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193 (1991) (“[T]he dominant development in substantive federal criminal law over the last decade has been the disappearance of any clearly definable line between civil and criminal law.”).

25. 18 U.S.C. § 3663A(a)(1) (2018) (“Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim’s estate.”).

26. PAUL ROSENZWEIG, HERITAGE FOUND., *THE OVER-CRIMINALIZATION OF SOCIAL AND ECONOMIC CONDUCT* (2003), <https://www.heritage.org/crime-and-justice/report/the-over-criminalization-social-and-economic-conduct> [<https://perma.cc/V8TL-5CP6>] (“[Tort law and civil enforcement] systems have been thought, in the past, to suffice in requiring economic actors to internalize the costs of their conduct and avoid imposing those same costs on unwitting external actors. Now, however, the criminal law is being used in an avowedly instrumental capacity.”).

27. Todd R. Clear, Editorial Introduction, *Restorative Justice*, 4 CRIMINOLOGY & PUB. POL’Y. 101, 101 (2005) (“Restorative justice is a new movement contained within an old idea . . . . [It] is a worldwide panoply of new programs, initiatives, and special projects aimed to restore victims by having those who wronged them repair the harm. The swiftness with which restorative justice and related strategies have captured the imagination of justice system reformers is striking . . . . Today, concepts associated with restorative justice principles—community participation, victim-offender interaction, reparative sanctions, and so forth—are a firm part of mainstream justice system priorities.”).

28. Robert H. Maar, *The Punitive Damages Heresy*, 2 SOUTHERN L.Q. 1, 1-2 (1917) (“All that any plaintiff has a right to recover is what is justly due him. He is entitled to be made whole, but to nothing more. The proponents of the exemplary damages theory admit this, but they say, that after the plaintiff has been awarded such damages as compensate him, an additional sum may be awarded against the defendant as punitive damages, to punish him for the wrong he has done, or as exemplary damages, to deter others from the commission of a like wrong. If any damages at all, by way of punishment or example, could be assessed against a defendant, such damages could not belong to a plaintiff who has already been awarded compensation. Things are what they are, not what they may happen to be called: a fine is the sum of money assessed against a defendant for the wrong he has done, and it is none the less a fine because assessed in a civil suit and called ‘punitive damages.’ The proceeds of fines belong to the State, and are wholly under legislative control.”).

favor of limiting successor criminal liability will often not apply where these other sanctions or remedies are concerned.<sup>29</sup>

There is no universal consensus about when it is appropriate to punish corporations. Perspectives vary according to the purposes of corporate criminal law they emphasize. Generally acknowledged purposes include “provid[ing] just punishment, adequate deterrence, and incentives for organizations to maintain internal [compliance and reporting] mechanisms.”<sup>30</sup> Scholars and policy makers often prefer some single purpose over others.<sup>31</sup> Some think just punishment is nonsensical for corporations<sup>32</sup> and evaluate corporate punishment solely in terms of deterrence.<sup>33</sup> Others think justice and retribution need to play a larger, even decisive, role.<sup>34</sup>

This Article will remain neutral on such foundational questions. It will provide separate arguments for each basic purpose of corporate criminal law. The arguments all point to the same conclusion—the current doctrine of successor liability is problematic, and an approach that emphasizes criminal identity would be a significant improvement regardless of which purpose one prefers. The order of the arguments is unimportant, and readers should feel free to skip to those that resonate with their favored perspective.

29. Thanks to Professor Robert Miller for pushing me to finesse this point. As he pointed out to me, for example, I would not want to say that a successor who does not inherit its predecessor’s criminal identity is therefore not identical to its predecessor for contract law purposes. This may seem like saying the successor both is and is not identical to its predecessor. But talking about identity relative to a context—like identity for purposes of criminal law as distinct from identity for purposes of contract law—rather than identity simpliciter should help smooth out this wrinkle.

30. U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENTENCING COMM’N 2016) [hereinafter SENTENCING GUIDELINES]; MODEL PENAL CODE § 1.02(2)(a) (Am. Law Inst. 2017) (referring to all three purposes).

31. Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 11, 11 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (deterrence); Kyron Huigens, *Street Crime, Corporate Crime, and Theories of Punishment: A Response to Brown*, 37 WAKE FOREST L. REV. 1, 5 (2002) (rehabilitation); Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND EMOTIONS 179 (Ferdinand Schoeman ed., 1987) (retribution). For a more pluralistic approach to the purposes of criminal law, see Michael T. Cahill, *Punishment Pluralism*, in RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 25 (Mark D. White ed., 2011).

32. See Kip Schlegel, *Desert, Retribution, and Corporate Criminality*, 5 JUST. Q. 615, 615 (1988) (“To the extent that desert has been considered it generally has been dismissed either as inappropriate or as unfeasible in the context of corporate criminality . . . . First, retributive principles, among which desert is included, are not applicable as justifications for corporate criminal sanctions because concepts such as vengeance and restoring benefits and burdens make little sense in the realm of corporate activity. Second, desert, which focuses on the importance of blame, seems inapplicable to regulatory offenses, which are not considered morally wrong.”) (citations omitted).

33. Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1325 (2001) (“Corporate criminal law . . . operates firmly in a deterrence mode.”).

34. William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1286 (2000) (“We maintain an allegiance to the foundation of the general part of the criminal law, requiring evidence of moral fault in the offending person, whether biological or corporate. By conceiving of the corporation as a moral actor, we challenge the work of those who see the corporate person as ‘soulless,’ and the only or primary objective of the corporate criminal law as deterrence.”).



There is one point of view this Article will not attempt to engage. Some scholars advocate scrapping corporate criminal law entirely,<sup>35</sup> and presumably the law of successor criminal liability along with it. They may be right; perhaps, building from a clean slate, the ideal system of corporate liability would rely exclusively on social, civil, and administrative sanctions.<sup>36</sup> This Article's ambitions are more modest: to improve the law by working, so far as possible, within its present framework. In the current political climate, anything more drastic is probably fanciful anyway—voters want to see corporations held criminally accountable.<sup>37</sup>

### B. *The Identity Principle*

The reason that successor liability has so far escaped the analytic crosshairs of corporate crime scholars may not be very deep; it may just be an accident of language. There are two meanings of “successor corporation.” It can refer to a corporation that emerges from a corporate reorganization.<sup>38</sup> It can also refer to whatever corporation inherits the rights and duties of some earlier corporation.<sup>39</sup> In common legal understanding, these two definitions are merged, so that a successor becomes: “A corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation.”<sup>40</sup> But it is possible to pull the two meanings apart—successors in the first sense need not be successors in the second sense as well. Taking advantage of that space between the meanings would require a change in law and a new concept for transferring liability through reorganization.

To open conceptual space and to distance itself from current doctrines of successor liability, the Article frames its argument in terms of what it calls “successor identity.” This is not just a verbal maneuver. Identity plays a central role throughout criminal law. For individual defendants, identity plays the same

35. See, e.g., Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 319 (1996) (“We argue that there is no need for corporate criminal liability in a legal system with appropriate civil remedies . . .”); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 1330 AM. CRIM. L. REV. 1329, 1329 (2009) (“[Corporate criminal liability] should be explicitly overruled.”).

36. I am skeptical, though. I think corporate criminal law plays an important expressive role that other liability regimes cannot. See Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2063-64 (2016).

37. See Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 612 (2012) (“The public has increasingly registered greater moral outrage in response to corporate governance scandals. Moral outrage, in turn, fuels retributive motivations and therefore supports those institutions best poised to take advantage of such motivations.”).

38. See, e.g., *Centra, Inc. v. Cent. States, Se. & Sw. Area Pension Fund* 578 F.3d 592, 599 (7th Cir. 2009) (“Following such reorganizations, the successor corporation ‘or corporations’ are deemed the ‘original employer’ for purposes of determining withdrawal liability, and withdrawal liability is not incurred until such time (if any) as the successor withdraws from the plan.”).

39. See, e.g., *Emhart Indus. v. Home Ins. Co.*, 515 F. Supp. 2d 228, 233 (D.R.I. 2007) (“[A] successor corporation inherits the rights and benefits of a predecessor corporation’s ‘occurrence’ policies.”).

40. *Successor*, BLACK’S LAW DICTIONARY (10th ed. 2014).

functional role that successorship plays for reorganized corporations; it helps to trace liability for past crimes to present-day people. Courts should punish the individual defendant today only if she shares the identity of the person who committed the crime in the past. This so-called “identity principle” is a basic tenet of criminal justice<sup>41</sup> and due process<sup>42</sup> that usually stands without mention.<sup>43</sup> However, in corporate criminal law, automatic successor liability bypasses the identity principle.

Shifting perspectives to think of corporate liability in terms of identity rather than formal successorship would generate different outcomes—sometimes the identity relation will fail, and successors will not be identical to predecessors. Corporations can, over time, change everything about themselves—who owns them, who manages them, where they are headquartered, what business they do, what they are called, etc. At some point, it becomes implausible to say that a corporation bearing no resemblance to its former self nonetheless has one continuous identity. In those cases, contrary to current doctrine, the identity principle would require absolving successors of their predecessors’ crimes. The identity principle would allow corporate criminal law to make more fine-grained distinctions between different reorganizations; the law today treats all the same.

On the approach this Article develops, everything will turn on whether, for purposes of criminal law, a successor shares a criminal identity with its predecessors. For individual defendants, the analogous question is easy. There are many markers that reliably track individual identity from birth to death, such as DNA, fingerprints, facial structure, and social security numbers. For successor and predecessor corporations, whose composition and structure are much more fluid, the question becomes complex. Nothing about a corporation—its ownership, management, employee base, name, line of business, internal structure, geographic location, etc.—is set in stone.

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41. JOSEPH BUTLER, *Of Personal Identity*, in THE ANALOGY OF RELIGION 439 (3d ed. 1740); JOHN LOCKE, *Of Identity and Diversity*, in AN ESSAY CONCERNING HUMAN UNDERSTANDING 133 (Kenneth P. Winkler ed., Hackett Publ’g 1996) (1689); THOMAS REID, *Essays on the Intellectual Powers of Man: Of Memory*, in ESSAYS ON THE INTELLECTUAL POWERS OF MAN 206 (Ronald E. Beanblossom & Keith Lehrer eds., Hackett Publ’g 2011) (1785); Derek Parfit, *supra* note 6, at 3-5 (1971).

42. U.S. CONST. amend. XIV, § 1; *id.* amend. V.

43. There are some doctrines of criminal law that permit the transfer of liability from one criminal, A, to another, B. *Rosemond v. United States*, 134 S. Ct. 1240, 1246-47 (2014) (discussing aiding and abetting liability); *Pinkerton v. United States*, 328 U.S. 640, 641 (1946) (discussing conspiracy liability). Even though B may not have directly carried out the criminal conduct, these doctrines are premised on the criminal involvement of B in the commission of A’s crimes. *See, e.g., Rosemond*, 134 S. Ct. at 1246-47; *Pinkerton*, 328 U.S. at 644. It would, however, violate the identity principle and Due Process to punish a third person, C, who had no criminal involvement. *See* Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 AM. U. L. REV. 585, 638-39 (2008) (“It is almost certain that the Due Process Clause would forbid sending A to prison for B’s crimes based entirely on the fact that A and B are cousins.”).

The issue of corporate identity is new territory in corporate law and theory.<sup>44</sup> Just as there are different perspectives about the purposes of corporate criminal law, so there will be different perspectives about what counts as a good theory of corporate criminal identity. Most people, at least among legal scholars, think that corporate personhood is just a useful fiction.<sup>45</sup> They should be willing to entertain a broader range of proposals on corporate identity, but these scholars will settle on whichever doctrine best promotes the goals of the fiction. There are some other scholars, usually philosophers of collective responsibility, who think corporations really do have moral personalities, and, presumably, identities.<sup>46</sup> These scholars will want to be persuaded that any proposal about corporate identity truly tracks the continuity of moral personhood from predecessors to successors. Once again, this Article bridges the methodological divide by offering a one-size-fits-all answer. Though the arguments that follow necessarily differ for each perspective, they all support the doctrine of successor identity.<sup>47</sup>

### C. Corporate Reform in Criminal Law

It bears briefly noting that this Article continues previous work about the role criminal law can and should play in reforming corporations. My article, *Clockwork Corporations: A Character Theory of Corporate Punishment*, argued that corporate punishment should involve coercive and invasive reform of convicted corporations, to the exclusion of all other sanctions.<sup>48</sup> Few would disagree that the criminal law should take an interest in reforming criminal dispositions. The unique characteristics of corporate defendants ameliorate the practical (is it possible?)<sup>49</sup> and ethical (does it violate dignity?)<sup>50</sup> concerns some

44. The most relevant prior work I have found on the issue is CAROL ROVANE, *THE BOUNDS OF AGENCY* 136-208 (1998).

45. See, e.g., John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655, 655-73 (1926) (discussing the long tradition of fictitious legal personhood); William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 *EMORY L.J.* 647, 650 (1994) (indicating that the fiction of corporate personhood in criminal law has been uncritically received).

46. See, e.g., Philip Pettit, *Responsibility Incorporated*, 117 *ETHICS* 171, 171 (2007) (asserting that responsibility should be liberally attributed to collective groups in the corporate context).

47. The article develops a theory of corporate identity for criminal law only. A different theory of corporate identity may be appropriate in other contexts, such as civil law, where the goals are not the same as in criminal law.

48. Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 102 *IOWA L. REV.* 507 (2018).

49. See ARISTOTLE, *THE NICOMACHEAN ETHICS* 1114a (David Ross trans., 2009) (“So, too, to the unjust and to the self-indulgent man it was open at the beginning not to become men of this kind . . . but now that they have become so it is not possible for them not to be so.”); Russ Shafer-Landau, *Can Punishment Morally Educate?*, 10 *L. & PHIL.* 189, 200 (1991) (“It remains unlikely that being put behind bars . . . will bring about moral change [in individual criminals].”).

50. See ANTHONY BURGESS, *A CLOCKWORK ORANGE* (1962); Huigens, *supra* note 31, at 18 (“Regardless of how one explains just punishment, it treats the offender with respect because it necessarily supposes that he is a responsible being. The treatment of pathology, in contrast, supposes the patient to be irresponsible and adopts an inherently paternalistic stance toward him.”); Herbert Morris, *A*

scholars have about coercive reform where individual criminal defendants are concerned.<sup>51</sup> This Article builds on the observation that corporations' malleability presents opportunities for fostering reform that the law cannot have with individuals. The theory of successor identity offered below capitalizes on those opportunities.

### III. Shortcomings of Successor Liability

This Part clears the way for a new approach to holding successors liable for predecessor crime. It presents an overview of the current law of successor liability and shows how poorly equipped it is to satisfy the basic purposes of corporate criminal law.

#### A. Existing Successor Liability Doctrine

Few criminal law scholars have had much to say about successor liability. For each type of reorganization, the doctrine says which of the predecessors' criminal liabilities survive. If corporations A and B merge or consolidate to form C, the doctrine says whether C has the liabilities of A or B, neither, or both. If corporation X splits into Y and Z (perhaps by spinning off Z), the doctrine says whether Y or Z inherits the liabilities of X, or whether neither does or both do. Commentators reflecting on the law of successor liability have called it a "doctrinal morass [with a] high degree of uncertainty."<sup>52</sup> But, with some effort, a simple pattern emerges: the criminal liabilities of predecessors survive reorganization, and all successors inherit the criminal taint. In other words, C has the liabilities of both A and B, and Y and Z both have the liabilities of X.<sup>53</sup>

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*Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263, 265 (1981) ("[Morris's theory rejects] any response that sought the good of a wrongdoer in a manner that bypassed the human capacity for reflection, understanding, and revision of attitude that may result from such efforts.").

51. See AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 149 (2015) ("[T]he rights of a corporation cannot be included within the [Constitutional] framework of human dignity. Corporations have no humanity."); DAVID H. GANS & ILYA SHAPIRO, RELIGIOUS LIBERTIES FOR CORPORATIONS?: HOBBY LOBBY, THE AFFORDABLE CARE ACT, AND THE CONSTITUTION 14 (2014) ("[W]hen the Supreme Court has interpreted other fundamental, personal rights of human dignity and conscience, it has consistently held that those protections do not extend to corporations. Thus, while business corporations have a number of rights under the Constitution, there are some—particularly ones that protect human dignity—that they don't possess."); Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM, *supra* note 31, at 87, 105 ("It might be true in the context of individual punishment that, with rehabilitation, 'nothing works.' But we have not yet learned that to be true for corporations.").

52. Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1885 n.15 (1991); see also H. Lowell Brown, *Successor Corporate Criminal Liability: The Emerging Federal Common Law*, 49 ARK. L. REV. 469, 470 (1996) ("[W]hen the predecessor corporation has not been formally charged prior to dissolution, the transmutation of liability to the successor corporation follows a much less established path and becomes a question of whether the criminal liability abated upon dissolution of the predecessor corporation.").

53. The discussion that follows focuses on binding legal authorities, but non-binding authorities also illustrate the point that criminal liability survives reorganization. Commentary to the Sentencing Guidelines tells judges how to determine whether a present-day criminal corporation

Many things can happen during a reorganization. The law is clear that internal changes—such as changes in ownership, turnover in management, or compliance reform—never affect the transmission of criminal liability. The reasons are slightly different for each kind of change. The doctrine of separateness, a cornerstone of corporate law, ensures that corporations have a separate legal personality from their owners.<sup>54</sup> As a result, the identity of a corporation’s owners ordinarily has no bearing on its liability. Similarly, under respondeat superior, liability for criminal conduct attaches to criminal employees and separately to their corporate employers; there are no exceptions in the doctrine for the misconduct of former employees.<sup>55</sup> And the fact that corporate criminal liability persists even after implementing programs of internal compliance is so axiomatic that none have questioned it. The most criminal corporations can hope for by boosting compliance or firing wayward employees is the uncertain exercise of a prosecutor’s favorable charging discretion.<sup>56</sup>

The doctrine of successor criminal liability in merger and spin-off cases is a bit more difficult to tease out, but the final result is the same—criminal liability sticks around and taints all successors. When a reorganization involves the dissolution of a corporate predecessor or the creation of a new composite corporate successor (as in consolidations and mergers), the core doctrines of

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committed other past criminal acts: “in determining the prior [criminal] history of an organization or separately managed line of business, the conduct of the underlying economic entity shall be considered without regard to its legal structure or ownership.” SENTENCING GUIDELINES, *supra* note 30, § 8C2.5 cmt. n.6. Prosecutors have been known to include provisions in deferred prosecution agreements affirming that, “in the event [the corporation] sells, merges, or transfers . . . its business operations . . . it shall include in any contract for sale, merger, or transfer a provision binding the purchaser, or any successor in interest thereto, to the obligations described in this Agreement.” Deferred Prosecution Agreement at 12, United States v. Total, S.A., No. 1:13 CR 239 (E.D. Va. 2013). See also SHERMAN & STERLING, LLP, WHAT YOU DON’T KNOW CAN HURT YOU: SUCCESSOR LIABILITY RESULTING FROM INADEQUATE FCPA DUE DILIGENCE IN M&A TRANSACTIONS (2009), [http://www.shearman.com/~/media/Files/NewsInsights/Publications/2009/03/What-You-Dont-Know-Can-Hurt-You-Successor-Liability-Files/View-Full-Text/FileAttachment/LT030209WhatYouDontKnowCanHurtYouLiabilityInadeq\\_.pdf](http://www.shearman.com/~/media/Files/NewsInsights/Publications/2009/03/What-You-Dont-Know-Can-Hurt-You-Successor-Liability-Files/View-Full-Text/FileAttachment/LT030209WhatYouDontKnowCanHurtYouLiabilityInadeq_.pdf) [<https://perma.cc/LN8Y-5QTK>] (“As a legal matter, when one corporation acquires another, it assumes any existing liabilities of that corporation, including [criminal] liability for unlawful payments, regardless of whether it knows of them.”).

54. See *Burnet v. Clark*, 287 U.S. 410, 415 (1932) (“A corporation and its stockholders are generally to be treated as separate entities”); *Salomon v. A. Salomon & Co.* [1896] UKHL 1, [1897] AC 22; Philip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 287 (1990) (“[T]he corporation is conceptualized as a separate legal right-and-duty-bearing unit.”); 19 C.J.S. *Corporations* § 815 (2017) (“A change in ownership and control of a corporate defendant does not preclude corporate criminal liability for offenses committed prior to that change.”).

55. Hiroko Tabuchi et al., *Six Volkswagen Executives Charged as Company Pleads Guilty in Emissions Case*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/business/volkswagen-diesel-vw-settlement-charges-criminal.html> [<http://perma.cc/C7SX-RQNA>] (explaining that company was prosecuted based on acts of former officers).

56. Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dept. of Justice, to Heads of Dep’t Components and U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) (directing prosecutors to consider “the corporation’s remedial actions, including any efforts . . . to replace responsible management, to discipline or terminate wrongdoers”).

successor liability come into play.<sup>57</sup> Courts must determine whether the liability of the dissolved corporation somehow survives and whether the newly created corporation inherits it. Originally, U.S. courts had adopted a formalistic approach. Criminal liability was tied to the corporate form to which it originally attached. Inspired by an analogy between corporate dissolution and the death of natural people, courts used to hold that dissolution of that corporate form extinguished criminal liability.<sup>58</sup>

Courts and legislatures have since imported very different doctrines of successor liability from civil law<sup>59</sup> into criminal law.<sup>60</sup> Today, dissolution, merger, and consolidation do not eliminate criminal liability.<sup>61</sup> Federal courts have yet to develop a federal common law of successor liability.<sup>62</sup> They turn instead to state law, which they read “liberally to permit criminal prosecutions after the corporation has been dissolved.”<sup>63</sup> This reading accords well with state practice. The Model Business Corporations Act, drafted by the American Bar Association and followed by twenty-four states,<sup>64</sup> recommends that “all debts, obligations and other liabilities of each domestic or foreign corporation or eligible entity that is a party to the merger, other than the survivor, are debts, obligations or liabilities of the survivor.”<sup>65</sup> The Delaware Code’s version of this

57. *Alkanani v. Aegis Def. Servs., L.L.C.*, 976 F. Supp. 2d 1, 11 (D.D.C. 2013) (“[S]uccessor liability presumes that the predecessor entity is absorbed into the success or and ceases to exist as a viable or functional business.”); *ELLEN S. PODGOR ET AL., WHITE COLLAR CRIME 42* (2013) (“Whether via dissolution, bankruptcy, mergers, or sales, the original corporation may no longer be present and it may be necessary to determine whether the criminal matter can proceed.”).

58. *Okla. Nat. Gas Co. v. Oklahoma*, 273 U.S. 257, 259 (1927) (“It is well settled that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution cannot be distinguished from the death of a natural person in its effect.”).

59. H. Lowell Brown, *Successor Corporate Criminal Liability: The Emerging Federal Common Law*, 49 ARK. L. REV. 469, 469-70 (1996) (“In many instances, state laws intended to protect civil creditors and claimants have been borrowed wholesale and engrafted onto the criminal law to form a patchwork that is both perplexing and perilous.”).

60. *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 272 (1959) (“[P]rosecutions abate . . . on the dissolution of a corporate defendant . . . unless the action is saved by statute.”).

61. *United States v. Alamo Bank of Tex.*, 880 F.2d 828, 830 (5th Cir. 1989) (holding that a corporation “cannot escape punishment by merging with [another corporation] and taking [its corporate] persona”).

62. Taylor J. Phillips, *The Federal Common Law of Successor Liability and the Foreign Corrupt Practices Act*, 6 WM. & MARY BUS. L. REV. 89, 130 (2015) (“[N]o federal court has ever analyzed criminal [successor liability].”).

63. *ELLEN POGDOR ET AL., WHITE COLLAR CRIME 43* (2013); *see also Melrose Distillers*, 359 U.S. at 271 (holding that, depending on state law, a corporation that is dissolved can still be subject to criminal liability); *United States v. Arcos Corp.*, 234 F. Supp. 355 (N.D. Ohio 1964) (“A key to finding criminal liability of a dissolved corporation often lies with the existence of a state statute that permits extending the criminal liability beyond the life of the entity. This is because corporations are created and dissolved pursuant to state law and therefore state law may control the legal obligations of the entity.”); Karl A. Groskaufmanis, *Principles of Corporate Criminal Liability*, in 1 BNA/ACCA COMPL. MAN.: PREVENTION OF CORP. LIAB. (BNA) 2:1, 2:19 (1993) (“[C]ourts have displayed considerable dexterity . . . to bless prosecutorial actions against corporate successors.”).

64. Lucian Bebchuk, *The Case for Shareholder Power*, 118 HARV. L. REV. 833, 844 (2014).

65. MODEL BUS. CORP. ACT § 11.07 (Am. Bar Ass’n 2016).

provision provides that in the case of a merger, “all rights of creditors and . . . liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.”<sup>66</sup> As a result, criminal liability survives merger or consolidation and attaches to the resulting corporate successor.<sup>67</sup> So strong is this rule that in some jurisdictions<sup>68</sup> it forms a narrow exception to the long-standing corporate dogma that liabilities do not follow assets in a sale.<sup>69</sup> In these jurisdictions, where a transaction structured as a sale amounts to a de facto merger<sup>70</sup> or a continuation of the prior business,<sup>71</sup> the purchasing corporation inherits the criminal liabilities of the transferring corporation.<sup>72</sup>

With respect to spin-offs, the law of successor liability is a little less clear. For civil liabilities, the spin-off agreement governs whether the parent company, or the spin-off, takes the liabilities, with the presumption being that the liabilities follow the lines of business in which they arose.<sup>73</sup> But it is doubtful that courts would adopt this model directly in the criminal context. Doing so would allow

66. 8 Del. Laws § 259 (2018).

67. *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974) (interpreting New York law as stating that a corporation resulting from a merger is liable for the crimes of its predecessor); *Brown*, *supra* note 52, at 481 (citing many cases).

68. Only a minority of jurisdictions accept the rule. *See, e.g.*, *Farris v. Glen Alden Corp.*, 143 A.2d 25 (Pa. 1958). Very significantly, Delaware courts reject the doctrine, *see Hariton v. Arco Electronics, Inc.*, 182 A.2d 22 (Del. Ch. 1962), *aff'd*, 188 A.2d 123 (Del. 1963), unless a corporation is playing fast and loose with the asset sale statutes. *See Orzeck v. Englehart*, 195 A.2d 375, 378 (Del. 1963).

69. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) (“When no statutory merger or consolidation occurs, but one corporation buys all of the assets of another, the successor will not be saddled with the seller’s liability except under certain conditions.”); Jerry J. Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. REV. 906, 908 (1983) (“In general, corporate law does not impose successor liability in a sale of assets transaction.”).

70. *Arnold Graphics Indus., Inc. v. Independent Agent Ctr., Inc.*, 775 F.2d 38, 42 (2d Cir. 1985) (“A de facto merger occurs where one corporation is absorbed by another, but without compliance with the statutory requirements for a merger”) (emphasis and citation omitted); *Lumbard v. Maglia, Inc.*, 621 F. Supp. 1529, 1535 (S.D.N.Y. 1985) (“For a de facto merger to occur, there must be continuity of the successor and predecessor corporation as evidenced by (1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (4) a continuity of management, personnel, physical location, assets, and general business operation.”). It bears noting that Delaware no longer recognizes the de facto merger doctrine. *Hariton*, 188 A.2d 123 (1963).

71. *Armour-Dial, Inc. v. Alkar Eng’g Corp.*, 469 F. Supp. 1198 (D. Wis. 1979) (“The mere fact that the purchaser continues the operations of the seller does not of itself render the purchaser liable for the obligations of the seller; in order to impose liability on the purchaser, it must be shown that the purchaser represents merely a new hat for the seller.”) (quoting *McKee v. Harris-Seybold Col.*, 264 A.2d 98, 106 (Sup. Ct. N.J. 1970)).

72. *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990).

73. John Heenan, *Graceful Maneuvering: Corporate Avoidance of Liability Through Bankruptcy and Corporate Law*, 65 MONT. L. REV. 99, 115-120 (2004). Phillips, *supra* note 69 (discussing the product line doctrine); Phillip I. Blumberg, *The Continuity of Enterprise Doctrine: Corporate Successorship in United States Law*, 10 FLA. J. INT’L L. 365, 373-75 (1996) (same); *Roe*, *supra* note 8, at 5 (“A firm might reduce the risks associated with a particular product by spinning off to its shareholders the subsidiary that handles the risky product.”).

private fiat to govern the attachment of criminal liability and would open the door to some obvious gamesmanship. As a general rule, even in civil law, the parent must have the agreement of any third party to whom a liability is owed before the parent can assign the liability to the spin-off.<sup>74</sup> In the criminal context, the third party with standing to pursue the liability is the government, and federal prosecutors rarely if ever agree to such assignments of criminal liability.<sup>75</sup> The likely legal result is that the parent and the spin-off remain liable for any crimes committed before the separation. In consequence, prosecutors could opt to go after the parent or the spin-off, or perhaps both. There is some statutory precedent for this result, for example, when it comes to environmental crimes.<sup>76</sup>

### *B. Successor Liability and the Purposes of Criminal Law*

Does the current doctrine of successor liability—that the criminal liability of any predecessor invariably taints all successors<sup>77</sup>—make sense for criminal law?<sup>78</sup> The natural reference points for evaluating the question are the various purposes of corporate criminal law—deterrence, rehabilitation, and retribution. At first glance, there is good reason for skepticism. Because the current law of successor liability always holds successors liable for predecessor crime, it cannot distinguish between reorganizations that promote the interests of criminal justice and those that do not. Detailed arguments from within each perspective on criminal justice confirm this first impression.

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74. STEPHEN M. KOTRAN ET AL., SULLIVAN & CROMWELL LLP, SPIN-OFFS 36 (2010), [https://www.sullcrom.com/siteFiles/Publications/September2010\\_SpinOffs.pdf](https://www.sullcrom.com/siteFiles/Publications/September2010_SpinOffs.pdf) [<https://perma.cc/PAB7-ENSX>].

75. I am aware of no examples.

76. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(e)(1) (“No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section.”).

77. At least one scholar would push back on the narrow issue of whether successor liability applies to successors by way of asset sales in the context of the FCPA. See Taylor J. Phillips, *The Federal Common Law of Successor Liability and the Foreign Corrupt Practices Act*, 6 WM. & MARY BUS. L. REV. 89 (2015). The DOJ historically has disagreed. See FCPA RESOURCE GUIDE, *supra* note 18, at 28. It may be shifting course. Nicholas Bourtin et al., *Deputy Assistant Attorney General Matthew Miner Announces that FCPA Corporate Enforcement Policy Will Apply to Mergers and Acquisitions*, PCCE (July 31, 2018), [https://wp.nyu.edu/compliance\\_enforcement/2018/07/31/deputy-assistant-attorney-general-matthew-miner-announces-that-fcpa-corporate-enforcement-policy-will-apply-to-mergers-and-acquisitions](https://wp.nyu.edu/compliance_enforcement/2018/07/31/deputy-assistant-attorney-general-matthew-miner-announces-that-fcpa-corporate-enforcement-policy-will-apply-to-mergers-and-acquisitions) [<https://perma.cc/R8K8-9PP9>].

78. Professor Miriam Baer has forcefully pressed the point in personal correspondence that this is not quite the right question to ask. Prosecutors stand between doctrine and corporate suspects, and the exercise of prosecutorial discretion affects how doctrine shows itself in practice. She is, of course, right. The better question would ask whether the law of successor liability as-applied makes sense for criminal law. I have previously expressed my skepticism about relying on prosecutors to round out the unappealing edges of our corporate criminal law. See Diamantis, *supra* note 48, at 559-62. Prosecutors often lack the relevant expertise to make good policy for corporate crime and can be distracted by distorting personal incentives. It is my hope that giving them a doctrinal nudge in the right direction would only increase the chance that the system of criminal justice, in the end, promote its own objectives.



The prima facie argument for the deterrent effects of successor liability may seem intuitive enough. By effectively making successor corporations strictly liable for the crimes of predecessors, current law focuses its influence on the incentives corporations have for avoiding crime in the first place. Liability for crime, once it attaches, sticks around until it has been punished or the statute of limitations runs. Current law forecloses any possibility that predecessors could commit crimes and then shed their liability through reorganization. This gives corporations strong incentives to avoid criminal conduct from the beginning, since liability will follow them through any reorganization. Such an approach might seem an effective way to prevent corporate crime, which is what deterrence theorists ultimately want.<sup>79</sup>

However, deterring corporate crime is a more complicated endeavor than the prima facie argument presupposes. Below the surface, corporations are composite actors. Corporate crime is often the product of individual employee misconduct.<sup>80</sup> So deterring corporate crime requires deterring individual employees from committing crime on the corporation's behalf. Employee crime is a byproduct of the fundamental problem of corporate agency costs. Employees "have a natural incentive to advance their personal interests even when those interests conflict with the goal of maximizing firm value."<sup>81</sup> By committing crime, employees can secure private benefits for themselves (in terms of performance bonuses, reputation, promotion, etc.) even if, on balance, the risk of sanction to the corporation outweighs any short-term corporate benefits.<sup>82</sup>

Ordinarily, employee and employer incentives to avoid crime should be aligned since criminal employees should be exposed to criminal penalties for their own misconduct. Many criminal employees, though, are banking on the corporate form to obfuscate their identity and shield them from detection by public authorities.<sup>83</sup> To capture these individuals, authorities need to rely on corporations to investigate and report employee misconduct.<sup>84</sup> While reorganization might otherwise be a prime opportunity for corporations to do

79. See *supra* notes 31-32 and accompanying text.

80. See Benjamin Thompson & Andrew Yong, *Corporate Criminal Liability*, 49 AM. CRIM. L. REV. 489, 491-92 (2012) ("A corporation has no physical existence and can be held vicariously criminally liable for the acts, omissions, or failures of employees acting as agents.").

81. Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 775 (2017).

82. Studies suggest that corporate crime generally decreases overall corporate value. See Cindy R. Alexander & Mark A. Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1 (1999).

83. See Memorandum from Eric Holder, Deputy Attorney Gen., to All Component Heads and U.S. Attorneys, *Bringing Criminal Charges Against Corporations* (June 16, 1999), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> [<https://perma.cc/BSP8-T6YZ>].

84. Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIAMI L. REV. 321, 325 (2012) ("[T]he Organizational Guidelines do not provide firms with sufficient mitigation to ensure that firms face lower expected sanctions if they undertake effective corporate policing when corporate policing substantially increases the probability that the government can detect and sanction the wrong.").

this, as explained in the next paragraphs, the law of successor liability gives corporations strong disincentives to undergo this process. Investigation and self-reporting against the background of both respondeat superior and successor liability is a hazardous prospect for both predecessor and successor corporations.<sup>85</sup> Even if a corporation discovers evidence of misconduct during reorganization, its economically rational course may be to sweep it under the rug rather than report it to authorities.<sup>86</sup>

Deterrence is not the only way to prevent crime. Rehabilitation also has a role to play. Whatever superficial strength successor liability has where deterrence is concerned comes at the expense of encouraging rehabilitation. In a large corporation, it is impossible to keep tabs on what every employee is doing. Some criminal conduct will fly under the radar of even the most robust compliance programs.<sup>87</sup> These undetectable crimes are, by definition, undeterrable. But once a corporation detects misconduct, it has options about how to respond. This is where some attention in criminal law to rehabilitation can do serious work. Encouraging corporations to reform vulnerabilities that allow criminal misconduct requires incentivizing them to detect, investigate, and patch them. Accomplishing this would have strong preventive effects, which is ultimately what rehabilitation theorists of corporate punishment also want.<sup>88</sup>

The current law of successor liability does not provide very strong incentives for self-initiated corporate rehabilitation. Investigating and detecting the criminal misconduct of predecessors is risky under current law because it might draw the attention of authorities.<sup>89</sup> Once criminal liability attaches to a predecessor, it is unshakeable. That leaves corporations with diminished incentive to detect and reform; detection increases the prospect of punishment, and reform does not diminish it.<sup>90</sup> This is true both for predecessor corporations addressing their own misconduct and for successor corporations addressing the misconduct of their predecessors.

This tradeoff between entity-level deterrence and rehabilitation is unavoidable. Providing incentives for corporations to reform after crime occurs necessarily diminishes the incentives they have to avoid crime in the first place.

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85. *Id.* at 324 (“[C]orporate efforts to help the government could hurt the firm by increasing its probability of being held criminally liable.”).

86. Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331, 1361 (2006).

87. Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 644 (1995) (indicating that even through compliance programs, corporations cannot have complete control over their employees).

88. See Mihailis E. Diamantis, *Ditching Deterrence: Preventing Crime by Reforming Corporations Rather Than Fining Them*, N.Y.U. PROGRAM ON COMPLIANCE & ENFORCEMENT (Jan. 3, 2018), [https://wp.nyu.edu/compliance\\_enforcement/2018/01/03/ditching-deterrence-preventing-crime-by-reforming-corporations-rather-than-fining-them](https://wp.nyu.edu/compliance_enforcement/2018/01/03/ditching-deterrence-preventing-crime-by-reforming-corporations-rather-than-fining-them) [perma.cc/72KR-PVYN].

89. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct*, 72 N.Y.U. L. REV. 687, 707 (1997) (indicating that stricter liability for corporations creates perverse effects of less internal policing).

90. *See id.*

Sticking to the *ex ante* deterrent incentives necessarily undercuts the incentive to reform after crime occurs. The ultimate arbiter of when the law has struck the appropriate balance between deterrence and rehabilitation is how well it prevents corporate crime. This is the common currency acknowledged by both perspectives. The arguments in Part IV show that a turn to successor identity would do better because it encourages corporations to reform and does not penalize them if they identify and report criminal employees in the process.

A very different sort of argument is needed to assess whether successor liability satisfies the criminal law's retributive purposes. Retributivists care foremost about giving criminals their just deserts, rather than about preventing crime. Successor liability is well-positioned to make good on the retributivist intuition that crime should be punished.<sup>91</sup> Since the criminal liability of predecessors invariably taints successors, there is no legal bar to punishing successors. Were corporations able to reorganize in ways that would eliminate criminal liability for past misconduct, they likely would, and some crimes would go unpunished.

But retribution does not simply call for punishment to follow crime; it must be punishment *of the person who did it*. This is the identity principle mentioned above. Successor liability allows authorities to punish successors vicariously for predecessor crime, without regard to whether the two share a criminal identity. Every theory of identity allows for the possibility of change, particularly where the sorts of radical transformation that corporate reorganizations involve are at issue.<sup>92</sup> Assuming corporations are the sorts of things that can have persisting and changing identities, this presents a problem for successor liability—it necessarily violates the identity principle and the commitments of retributivism whenever it punishes a successor corporation for the crimes of a predecessor with which it does not share a criminal identity.<sup>93</sup>

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91. IMMANUEL KANT, *METAPHYSICS OF MORALS* § 49 E (Mary Gregor trans., 1991); IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 196 (W. Hastie trans., 1887) (“The undeserved evil which anyone commits on another, is to be regarded as perpetrated on himself.”); see Moore, *supra* note 31, at 179 (“Retributivism is the view that punishment is justified by the moral culpability of those who receive it.”).

92. Cartesian Theory may be a counterexample. According to Cartesians, people are identical to their indestructible and unchangeable souls. Peter G. H. Clarke, *Neuroscience, Quantum Indeterminism and the Cartesian Soul*, 84 *BRAIN & COGNITION* 109, 110 (2014) (discussing that the Cartesian soul holds identity separate from the physical body and brain); David Shoemaker, *Personal Identity and Ethics*, in *STAN. ENCYCLOPEDIA OF PHIL.* (Edward N. Zalta ed., 2016), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=identity-ethics> [<http://perma.cc/2LQL-3RMX>] (“This is nonreductionism, according to which persons exist separately and independently from their brains and bodies, and so their lives are unified from birth to death in virtue of that separately existing entity, what we will call a Cartesian ego (but is most popularly thought of as a soul).”). In any case, importing some similarly strong and unchangeable concept to the corporate context, to treat corporations as though they have something like “souls,” would require very strong motivation.

93. Current law even goes so far as to punish corporations whose identity has been extinguished through dissolution. See, e.g., DEL. CODE ANN. tit. 8, § 278 (2004) (“All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of

To appreciate the weakness of the current law of successor liability, consider the following scenario. Suppose that, unknown to its executives, an employee of a small corporation (S) commits a crime within the scope of her employment. A different, larger corporation (L), also unaware of the crime, sees some business purpose to acquiring S. L has top-shelf compliance programs, which it will apply to all of S's operations. In this case, what could possibly be the purpose behind the law of successor liability which would subject L to the criminal liabilities of S after acquisition? The ideal outcome, it seems, would be for L to acquire and then reform S. After the acquisition, there is nothing for criminal law to do from a rehabilitative perspective. In terms of retribution, it seems unjust to punish L for S's crimes, especially if S hid or was itself unaware of its pre-acquisition misconduct. Successor liability even falls short on deterrence in this example. Punishing L targets the incentives of the wrong entity—L could not have prevented the pre-acquisition misconduct of S.

#### IV. A New Approach: Successor Identity

Corporate criminal liability is a relatively recent innovation. Its major developments, like the introduction of respondeat superior a century ago,<sup>94</sup> involved uncritically importing principles from civil law.<sup>95</sup> Now that experience has made the implications of that move apparent, few bear any principled love for the doctrine.<sup>96</sup> The current law of successor liability will be no different once it receives the attention it deserves. Its underlying logic may be well-suited to the remedial civil-law context where it originated.<sup>97</sup> Given, however, that the

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Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits . . . by or against them.”); *Melrose Distillers, Inc. v. United States*, 359 U.S. 271 (1959).

94. *N.Y. Cen. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 485 (1909) (“[There is] no valid objection in law, and every reason in public policy, why the corporation . . . shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act . . .”).

95. Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 28 (1957) (“The law has developed the concept of corporate criminal liability without rhyme or reason, proceeding by a hit and miss method, unsupported by economic or sociological data.”).

96. See, e.g., Laufer & Strudler, *supra* note 34, at 1298-99 (2000) (“[V]icarious liability is an inferior rule for determining corporate responsibility . . . Prosecutors also have shied away from vicarious liability for the very same reasons expressed by courts and legislatures. In addition to recognizing compliance programs as evidence of due diligence, prosecutorial policies and guidelines increasingly acknowledge an organizational liability that is separate and apart from an imputed liability that accompanies vicarious fault.”); Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation*, 44 AM. CRIM. L. REV. 1343, 1359 (2007) (“A second set of factors that support fault-based criminal liability relate to problematic issues raised by use of the respondeat superior doctrine.”).

97. See Phillips, *supra* note 62, at 129 (“This absence of criminal successor liability analysis comports with an understanding of successor liability as a doctrine that is fundamentally remedial, not punitive.”).

goals of criminal law are different,<sup>98</sup> the prospects for successor liability in that context were dim from the start.

Criminal law has another device for tracing liability from its origin in the past to the present-day person to whom it attaches—identity. Courts could use identity, currently limited to the individual context, as a tool for transferring liability to corporate successors too. Faced with a successor corporation accused of crimes committed by its predecessor, courts would first ask whether the two share a criminal identity. Only if they did would the court then transfer the predecessor’s criminal liability to the successor. Stipulate for now that a criminal corporation’s identity is tied to any organizational features that encouraged, enabled, tolerated, or failed to prevent or detect its criminal conduct.<sup>99</sup> The sections that follow will explain why this makes good policy and conceptual sense as a theory of identity for corporations.<sup>100</sup> First, though, it is necessary to describe *how* criminal identity (with the stipulated definition) can be demonstrated and traced for purposes of transferring liability from predecessors to successors.

#### *A. Organizational Features that Cause Crime*

A turn to criminal identity would mark a significant departure from current law. Recall that, according to current law, the criminal liability of predecessors is virtually inextinguishable. Regardless of what sort of reorganization the predecessor might go through, its successors will all inherit its criminal taint. On the successor identity approach, if the reorganization somehow reforms the predecessor’s criminal identity or otherwise prevents its transfer, the successor corporation will emerge free of criminal liability.

Carrying out this successor identity approach requires an understanding of what sorts of organizational features lead corporations to commit crime. It is these that, if transferred from a criminal predecessor to a successor, would carry with them the predecessor’s liability. Work by business and organizational scholars suggests which organizational features are more likely, and which less, to be responsible for misconduct. They have come to distinguish between

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98. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325 (1991) (discussing the difference between the guilt/innocence focus of criminal law and the rights/responsibilities focus of civil law).

99. Using philosopher’s terminology, these organizational features are the “essential” traits for the criminal corporation’s identity. Aristotle famously distinguished “accidental” from “essential” traits, where only a change to the latter would change the identity of the entity possessing the traits. Gareth B. Matthews, *Aristotelian Essentialism*, 50 PHIL. & PHENOMENOLOGICAL RES. 251, 251-52 (1990) (discussing Aristotelian Essentialism, the idea that some qualities are essential to a thing, while others are only accidental).

100. Courts sometimes use the word “identity” when talking about successor liability. See, e.g., *Wells Fargo & Co. v. United States*, 827 F.3d 1026, 1040 (2016) (“[T]he acquired entity in a merger continues its identity and is an integral part of the successor.”). But they use it in a way that is parasitic on the concepts of successor liability and devoid of independent meaning.

superficial corporate elements, like external branding symbols,<sup>101</sup> and deeper, causally efficacious traits.<sup>102</sup> It is the latter that impact how employees behave and, as a result, whether corporations commit crimes.<sup>103</sup>

One of the initial premises of systems theory is that “[o]rganizations are systems . . . not just aggregations of individuals.”<sup>104</sup> This means that it is often the corporate organization itself, rather than the individuals within it, that is most causally effective. Individuals within a corporation adapt to its procedures, rules, and culture once they join it.<sup>105</sup> As a result, “personnel changes will seldom lead to real changes in the organization’s behavior and work processes.”<sup>106</sup> This is true throughout the corporate hierarchy.<sup>107</sup> Wholesale replacement of large groups of employees may alter causally effective corporate traits, but probably only because the changeover makes changes in other, more important traits possible. As a general rule, though, a predecessor’s criminal identity will not attach to specific individuals,<sup>108</sup> so a change in personnel during reorganization will usually not lead the successor to have a new identity. Conversely, if it is the system rather than particular personnel that matters, continuity in personnel through reorganization need not necessarily entail continuity of criminal identity.

101. See, e.g., Andrea Perez & Ignacio Rodriguez del Bosque, *The Role of CSR in the Corporate Identity of Banking Service Providers*, 108 J. BUS. ETHICS 145 (2012); Claudia Simoes et al., *Managing Corporate Identity: An Internal Perspective*, 33 J. ACAD. MKTG. SCI. 153 (2005); Petra Theunissen, *Co-Creating Corporate Identity Through Dialogue: A Pilot Study*, 40 PUB. REL. REV. 612 (2014).

102. J.M.T. Balmer, *Corporate Identity and the Advent of Corporate Marketing*, 14 J. MKTG. MGMT. 963 (1998); Olivia Kiriakidou & Lynne J. Millward, 5 CORP. COMMS. 49, 50 (2000) (“[C]orporate identity is more than just an organizational symbol or mark of recognition. Rather, corporate identity denotes the characteristic way in which an organization goes about its business . . . .”); Cees B.M. van Reiel & John M.T. Balmer, *Corporate Identity: The Concept, Its Measurement and Management*, 31 EUR. J. MKTG. 340, 341 (1997) (“Increasingly academics acknowledge that a corporate identity refers to an organization’s unique characteristics which are rooted in the behavior of members of the organization” rather than such things as “organizational nomenclature, logos, company housestyle and visual identification.”).

103. John H. Matheson, *Successor Liability*, 96 MINN. L. REV. 371, 381 (2011) (“[C]orporations should not be able to avoid liability by simply changing their form or name.”).

104. J.P. Cornelissen et al., *Social Identity, Organizational Identity and Corporate Identity: Towards an Integrated Understanding of Processes, Patternings and Products*, 18 BRIT. J. MKTG. S1, S8 (2007) (“[C]ollective identities (whether social, organizational or corporate) are . . . associated with behavior that is qualitatively different from that associated with lower-order identities . . . .”); Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468, 479 (1988).

105. JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 427 (1990).

106. Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 64 BUFFALO CRIM. L. REV. 641, 688 (2000).

107. M. David Ermann & Richard J. Lundman, *Corporate and Governmental Deviance: Origins, Patterns, and Reactions*, in CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY 115 (M. David Ermann & Richard J. Lundman eds., 1996).

108. In the rare case where a corporation’s misconduct is ultimately traceable to the influence of a single person, a corporation may effectively shed its criminal identity by firing that person. In such cases, removal from the corporation and prosecution of that individual alone should be sufficient to satisfy the interests of criminal justice.

The same is true of a corporation's shareholders—continuity or change in ownership does not reflect continuity or change in criminal identity. Shareholders do theoretically have the power to affect the internal operation of a corporation and to influence whether a corporation has a criminal essence.<sup>109</sup> But, at least for larger corporations, this power in theory rarely reflects power in fact. Shareholders are a dispersed group with divergent interests, making coordination difficult.<sup>110</sup> Even when coordinated, shareholder power to influence board decisions or composition is limited,<sup>111</sup> their power to influence managers even more so.<sup>112</sup> This is not to deny that shareholders *can* have an effect on corporate behavior, especially large institutional shareholders or shareholders of smaller firms. Even in these cases, though, shareholders are generally not involved in the day-to-day operation of a corporation and can have little connection with the causally effective traits that define a criminal corporation's identity.

If personnel and shareholders are not correlated with criminal identity, what is? There are some compelling hypotheses available. Corporate culture or ethos is one supra-individual feature that has attracted the attention of policymakers<sup>113</sup> and academics in business<sup>114</sup> and law.<sup>115</sup> The idea here draws on the insight that organization-level features influence how individuals within a group perform, including whether they commit crimes.<sup>116</sup> For example, a high-pressure environment oriented toward quotas and production goals with little emphasis on legal or ethical limits can foster malfeasance, even among individuals not

109. Alexander & Cohen, *supra* note 31, at 11, 18 (“Even if owners may have no direct contact with criminal behavior, they have rights to intervene in the internal governance of the corporation in ways that can affect the occurrence of crime.”).

110. Lynn Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1191 (2002) (discussing the “diluted” and decentralized nature of corporate stockownership).

111. *See id.*

112. *See id.*

113. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL 9-28.600 (2018) [hereinafter JUSTICE MANUAL], <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.600> [<https://perma.cc/J7EV-GQTF>] (“A corporation, like a natural person, is expected to learn from its past mistakes. A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs.”).

114. Corneliessen et al., *supra* note 104, at S7 (“Among the most important traits identified by scholars are those relating to strategy, structure, culture and company history.”); *see also* T.C. Melewar & E. Karaosmanoglu, *Seven Dimensions of Corporate Identity: A Categorization from the Practitioner's Perspectives*, 40 EUR. J. MKTG. 846 (2006).

115. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099-1100 (1991); Brent Fisse, *The Attribution of Criminal Liability to Corporations: A Statutory Model*, 13 SYDNEY L. REV. 277 (1991); Ann Foerschler, Comment, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CALIF. L. REV. 1287, 1300-02 (1990); Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 759-60 (1992).

116. *See generally* Martin L. Needleman & Carolyn Needleman, *Organizational Crime: Two Models of Criminogenesis*, 20 SOC. Q. 517 (1979) (introducing and exploring the concept of crime-facilitative corporate systems in which participants are not compelled to perform illegal acts, but rather face extremely tempting structural conditions that encourage or facilitate crime).

otherwise disposed to it.<sup>117</sup> Factors relevant to a corporation's ethos include its hierarchy, goals and policies, treatment of prior offenses, efforts to educate employees on compliance with the law, and compensation scheme.<sup>118</sup> Workplace culture is a huge focus in mergers and acquisitions. Many analysts say that integrating disparate cultures is the number one cause of success or failure when corporations combine.<sup>119</sup>

Another trait that understandably receives a lot of attention is a corporation's compliance program.<sup>120</sup> By definition, compliance programs seek to prevent misconduct within corporations.<sup>121</sup> Compliance programs are related to, but ultimately different from, corporate ethos. They involve formal procedures designed to prevent, detect, and remedy criminal conduct within the corporation. The sorts of techniques currently emphasized in the compliance literature are mostly commonsense: "promulgation of codes of behavior, the institution of training programs, the identification of internal compliance personnel and the creation of procedures and controls to insure company-wide compliance with legal mandates."<sup>122</sup> But they need not stop there. Some scholars, including William Laufer, are calling for a more "progressive," data-driven, and technically sophisticated approach to compliance.<sup>123</sup> We may not know yet exactly what works and what does not;<sup>124</sup> the scientific study of compliance is

117. See, e.g., E. Scott Reckard, *Wells Fargo's Pressure-Cooker Sales Culture Comes at a Cost*, L.A. TIMES (Dec. 21, 2013), <http://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html> [<https://perma.cc/U4N9-8U3D>] (discussing how the high-pressure sales environment of Wells Fargo led to large-scale moral and ethical breaches).

118. Bucy, *supra* note 115, at 1101.

119. See Christa H. S. Bouwman, *The Role of Corporate Culture in Mergers & Acquisitions*, in *MERGERS AND ACQUISITIONS: PRACTICES, PERFORMANCE AND PERSPECTIVES* (Etienne Perrault ed., 2013), [https://mba.americaeconomia.com/sites/mba.americaeconomia.com/files/paper\\_2.pdf](https://mba.americaeconomia.com/sites/mba.americaeconomia.com/files/paper_2.pdf) [<https://perma.cc/AYS8-CL43>]; George Bradt, *The Root Cause Of Every Merger's Success Or Failure: Culture*, FORBES: LEADERSHIP (June 29, 2015, 6:44 AM), <https://www.forbes.com/sites/georgebradt/2015/06/29/the-root-cause-of-every-mergers-success-or-failure-culture/#582b7c92d305> [<https://perma.cc/B62R-A485>]; Dale Stafford & Laura Miles, *Integrating Cultures After a Merger*, BAIN & COMPANY: INSIGHTS (Dec. 11, 2013), <http://www.bain.com/publications/articles/integrating-cultures-after-a-merger.aspx> [<https://perma.cc/G6T5-MUFW>].

120. See Buell, *supra* note 5131, at 93 ("Criminal [deferred prosecution agreements] now routinely require firms to reorganize business operations, adopt compliance measures, submit to enhanced monitoring for legal violations, and create systems to encourage and protect whistle-blowers.").

121. Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 956 (2009) ("'Compliance' is a system of policies and controls that organizations adopt to deter violations of law . . . ."); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1345 (1999) ("An elaborate cottage industry of ethics compliance and preventive law experts lay claim to dramatically reducing the likelihood of criminal liability by maintaining an organizational commitment to ethical standards.").

122. Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 466-67 (2008).

123. William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71 (2017).

124. William S. Laufer & Diana C. Robertson, *Corporate Ethics Initiatives as Social Control*, 16 J. BUS. ETHICS 1029, 1029-30 (1997).



still in its infancy. Still, there is good reason for optimism that with each passing year we will know more about what sorts of compliance programs are effective.

The successor identity approach to transferring liability from predecessors to successors would tie liability to the best present understanding of which organizational features are responsible for corporate misconduct. On this approach, determining which, if any, present-day successor is criminally identical to, and hence liable for the misconduct of, a criminal predecessor is a two-step process. The factfinders must first determine what organizational features—whether a poisonous corporate ethos, a gaping compliance deficiency, or something else entirely—was causally responsible for the predecessor’s misconduct. That is to say, the factfinders must isolate the predecessor’s criminal identity. Second, the factfinders must determine whether a successor emerging from the reorganization inherited those organizational features. If so, whichever successor did would share a criminal identity with the predecessor. If no successor inherited them, then none would be subject to the predecessor’s criminal liabilities.

Suppose, for example, at some point in its past, a bank named Fells Wargo opened a large number of false accounts without customers’ knowledge or permission.<sup>125</sup> After internal reviews at the bank uncovered the practice, executives met to discuss how proactively to address the prospect of criminal fines for bank fraud. The bank took three steps: it sold its wealth management division to an unrelated bank,<sup>126</sup> it rebranded itself as “Fells Wargo Re-Established,”<sup>127</sup> and it forced its CEO to resign.<sup>128</sup>

Does Fells Wargo Re-Established and/or the bank that acquired the wealth-management division share a criminal identity with the pre-reorganization Fells Wargo that committed account fraud? The first step on the successor identity approach is to identify the organizational feature that is causally responsible for the fraud. Suppose that after more investigation, it is revealed that the cause was a high-pressure sales culture that “encouraged” (or rather coerced on pain of being fired) retail employees to open eight accounts for every customer

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125. These facts are loosely based on the Wells Fargo scandal uncovered in 2016. See Jackie Wattles et al., *Wells Fargo’s 17-Month Nightmare*, CNN (Feb. 5, 2018), <https://money.cnn.com/2018/02/05/news/companies/wells-fargo-timeline/index.html> [<https://perma.cc/3N74-FLKG>].

126. While Wells Fargo did not take this step, other banks facing legal trouble have. See, e.g., Michael Wursthorn, *Raymond James to Buy Deutsche Bank’s U.S. Private Client Services Unit*, WALL ST. J. (Dec. 3, 2015), <https://www.wsj.com/articles/raymond-james-to-buy-deutsche-banks-u-s-private-client-services-unit-1449184983> [<https://perma.cc/5NY9-KD4R>].

127. *Wells Fargo Launched ‘Re-Established,’ a New Brand Campaign*, WELLS FARGO (May 7, 2018), <https://newsroom.wf.com/press-release/marketing-and-sponsorships/wells-fargo-launches-re-established-new-brand-campaign> [<https://perma.cc/C7ES-VEYP>].

128. Richard Gonzales, *Wells Fargo CEO John Stumpf Resigns Amid Scandal*, NPR (Oct. 12, 2016), <https://www.npr.org/sections/thetwo-way/2016/10/12/497729371/wells-fargo-ceo-john-stumpf-resigns-amid-scandal> [<https://perma.cc/8A4A-2WGR>].

regardless of need.<sup>129</sup> The second step is to evaluate whether the various steps taken during the reorganization were sufficient to change the high-pressure culture and thereby change Fells Wargo's criminal identity. Rebranding as Fells Wargo Re-Established would have no impact. Such efforts are public relations stunts that may communicate an attempt to break with a nefarious past, but they do not amount to the break itself. Similarly, merely squeezing out the CEO is unlikely to be enough. Tone from the top can be an important influence on corporate culture,<sup>130</sup> but it would be a rare case where replacing a single employee could cause a true cultural shift in a large organization.<sup>131</sup> This still leaves the question of whether the wealth-management division should also take Fells Wargo's criminal identity with it to the acquiring bank. Supposing the criminogenic culture only infected the retail division and not wealth-management, then the identity approach would not hold the latter (or the bank that acquired it) liable for Fells Wargo's criminal conduct. In sum, Fells Wargo Re-Established would share the criminal identity of Fells Wargo and be liable for the fraud. The bank that acquired the wealth management division would not.

The account so far of the successor identity approach is far from complete. Part V has many more details. But there is enough on the table now to show in the next subsections how the successor identity approach would be an improvement over the automaticity of current law. As with the evaluation of successor liability above, the merit of successor identity turns on how it performs in relation to the goals of corporate criminal law—rehabilitation, deterrence, and retribution. On all three, it marks an improvement over the status quo.

### *B. Rehabilitation*

The successor identity approach excels most obviously with criminal law's rehabilitative purpose. According to rehabilitation theorists, criminal law and punishment should be structured to promote the reform of criminals. Under the current law of successor liability, corporations do have some incentive to improve on compliance during reorganization; by doing so, successors lower the likelihood of future misconduct and punishment for that as well. The problem is

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129. Emily Glazer, *How Wells Fargo's High-Pressure Sales Culture Spiraled Out of Control*, WALL ST. J. (Sept. 16, 2016), <https://www.wsj.com/articles/how-wells-fargos-high-pressure-sales-culture-spiraled-out-of-control-1474053044> [perma.cc/8H83-6ULA].

130. See Alexander & Cohen, *supra* note 31, at 33-34 (citing "tone at the top" as a significant variable predicting corporate misconduct).

131. If it did, then firing the CEO could be sufficient in itself to extinguish Fells Wargo's criminal identity. In the actual Wells Fargo case, it would not have been enough. Many actors throughout the corporate hierarchy were responsible for the high-pressure culture; the culture truly was "extensive and pervasive." Joe Nocera, *Wells Fargo Has Shown Us Its Contemptible Values*, BLOOMBERG (May 18, 2018), <https://www.bloomberg.com/view/articles/2018-05-18/wells-fargo-has-shown-its-customers-its-true-values-joe-nocera> [https://perma.cc/FFN7-GJRD]; Ken Sweet, *Wells Fargo Workers: Pressure to Sell Relentless, Pervasive*, PRESS HERALD (Sept. 21, 2016), <https://www.pressherald.com/2016/09/21/wells-fargo-workers-pressure-to-sell-relentless-pervasive> [https://perma.cc/B6PF-KSS3].

that corporations, both predecessors and successors, have strong disincentives to take the first step toward reform—investigating for past misconduct and compliance vulnerabilities. Taking that first step raises the probability of detection by authorities, and, under current law, detection guarantees liability to punishment. Even before enforcement authorities come into the picture, predecessors have an additional incentive under current law to remain ignorant of past misconduct and to hide any misconduct they happen to discover. Were counterparties to the reorganization to find out about the misconduct, they would demand a discount for the liabilities that will come to taint them too.<sup>132</sup> Though the popularity of self-initiated compliance programs<sup>133</sup> may seem to contradict this observation, these tend to be off-the-shelf “paper programs.”<sup>134</sup> They are more effectively designed for ticking off boxes to secure favorable exercises of charging<sup>135</sup> and sentencing discretion<sup>136</sup> than to detect and address misconduct.

An approach that keys successors’ liability to shared criminal identity would enhance corporations’ incentives to detect and remedy organizational vulnerabilities during reorganization. Predecessor corporations who detect their own misconduct could remedy the vulnerability that led to it and, assured that liability for past crimes will not pass on to successors, demand full value from counterparties. Successors would have a double incentive to fix any vulnerabilities they discover during reorganization—to prevent future misconduct and to nullify their liability for the misconduct of their predecessors.

132. See, e.g., Gregg W. Kettles, *Bad Policy: CERCLA’s Amended Liability for New Purchasers*, 21 UCLA J. ENVTL. L. & POL’Y 1, 28-30 (2002) (discussing how successor liability under prior CERCLA provisions acted as a disincentive to successor-buyers and a deterrent to predecessor-sellers because buyers would require steep discounts to step into the shoes of potentially liable predecessors).

133. See generally William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 391 (2018).

134. See David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317, 320-21 (2016) (discussing the amended Organizational Sentencing Guideline’s emphasis on promoting ethical organizational culture as an effort to fight paper programs, programs that exist on paper but are not supported by corporate culture and thus do not influence employee behavior); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 542 (2003) (exploring and theorizing about empirical data that strongly suggests “that internal compliance structures are largely window-dressing mechanisms implemented by corporate management to reduce liability or provide the appearance of legitimacy to corporate stakeholders and the marketplace at large”); Marcia Narine, *Whistleblowers and Rogues: An Urgent Call for an Affirmative Defense to Corporate Criminal Liability*, 62 CATH. U. L. REV. 41, 45 (2012) (noting the irony of the incentives corporations face regarding compliance: “that companies receive the maximum benefit from compliance programs that appear to comply with the Guidelines but that do not actually detect or deter wrongful conduct”); Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in A Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1105-06 (2006) (discussing the Thompson Memo’s focus on having prosecutors explore the strength and seriousness of a corporation’s compliance program to ensure that they are not mere paper programs).

135. See JUSTICE MANUAL, *supra* note 113, §§ 9-28.300, 9-28.800; Hess, *supra* note 134, at 331 (explaining that corporations face dual incentives to adopt compliance programs, either to gain more favorable sentencing or settlement agreements or “to avoid prosecution under the DOJ’s charging policy”).

136. See SENTENCING GUIDELINES, *supra* note 30, §§ 8B2.1, 8C2.5.

By effectively patching these vulnerabilities, successors would, according to the successor identity approach, break with the criminal identity of their predecessors. Such successors would emerge free of their predecessors' criminal liabilities.

### *C. Deterrence*

The successor identity approach may initially seem a step backwards when it comes to deterrence, at least when focusing superficially at the level of the corporate entity. Under the current law, liability for criminal conduct is virtually inextinguishable until satisfied—only long-standing dissolution or the tolling of the statute of limitations will do the trick. Reorganization and improvements to compliance can have no effect. This creates a strong *ex ante* incentive not to commit crime in the first place.

Will corporate entities really be deterred from misconduct if they can commit a crime, reap the benefits, and then insulate themselves from liability by reorganizing and shedding their criminal identity? To the extent this is a concern, it is less a weakness of the successor identity approach than a reflection of the basic tension between criminal law's rehabilitative and deterrent purposes.<sup>137</sup> Fully achieving one can only come at the expense of fully achieving the other; providing incentives to reform necessarily undermines the disincentives to commit crime in the first place.

It is important not to overstate the hit entity-level deterrence would take under successor identity. Successors and predecessors that fail to discover and remedy organizational vulnerabilities would be criminally punished and deterred, just as they are under current law. Furthermore, successors and predecessors that do reform would still face the same non-punitive sanctions—administrative, civil, and restitutionary—that they currently do.<sup>138</sup> These would have the same deterrent effect under the successor liability approach as they do under the law of successor liability.

The true deterrent force of successor identity becomes apparent upon moving past superficial, entity-level considerations to the complex relationship between corporations and their employees. Successor identity could mitigate the agency cost problem whereby employees secure private benefits by committing crime that ultimately harms their corporate employer. Successors who have reformed away the organizational vulnerabilities of their criminal predecessors

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137. PAUL H. ROBINSON ET AL., *CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES* 91-92 (2017).

138. See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1487-88 (1996) ("The discrepancies between enforcement powers in public criminal and public civil cases have greatly diminished since that time, raising the question of why corporate criminal liability is necessary today."); W. Allen Spurgeon & Terrence P. Fagan, *Criminal Liability for Life-Endangering Corporate Conduct*, 72 J. CRIM. L. & CRIMINOLOGY 400, 405, 409 (1981) (noting that Congress has provided criminal, civil, and administrative remedies against harmful corporate conduct in an attempt to enforce social norms upon corporate conduct).

would have less to worry about reporting past employee misconduct to authorities.<sup>139</sup> Since these successors would not share an identity with their criminal predecessors, they would no longer need to fear punishment for what the employees did while on the predecessor's payroll. Even if successors do not self-report individual misconduct to authorities, the successor identity approach raises the expected costs of crime for individual employees. By encouraging predecessor and successor corporations to detect misconduct and reform, the successor identity approach increases the chance that individual misconduct will be detected and sanctioned internally.

To the extent that deterrence theorists ultimately care about preventing corporate crime, however that happens,<sup>140</sup> they have a further reason to embrace successor identity. By encouraging rehabilitation (discussed in the previous Subsection), the successor identity approach would prevent crime by reducing the chance that the successors of criminal predecessors will reoffend.<sup>141</sup> This preventive mechanism is more reliable than the sort of deterrence on which the current law of successor liability relies. Predecessors and successors presently have two options when they discover misconduct. They can invest in reform. This would prevent liability for future misconduct but would increase the chance of having the past misconduct detected and punished. This is the option deterrence theorists hope corporations will take. But predecessors and successors could instead invest in better concealing the past misconduct and similar future misconduct.<sup>142</sup> Which option will be in any corporation's best interest—reform or conceal—will depend on case-specific facts. The successor identity approach would put a strong thumb on the scale in favor of reform. It would do this by making the reform option more appealing. In addition to the benefits it currently brings corporations (less expected liability for future misconduct), reform would also absolve successors of liability for their predecessors' past misconduct.

#### *D. Retribution*

There are two ways to think about what retribution means for corporations, but one argument shows for both how the successor identity approach outperforms successor liability. Retributivists think that punishment should give criminals their just deserts<sup>143</sup> and that the justice deserved is proportional to the

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139. See Arlen, *supra* note 84, at 325.

140. See Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 31-34 (2012) (explaining how deterrence can affect corporate behavior, perhaps in more just ways than in personal criminal law).

141. See RAMSEY CLARK, CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION AND CONTROL 220 (1970) ("Rehabilitation is also the one clear way that criminal justice processes can significantly reduce crime.").

142. See, e.g., Miriam H. Baer, *Too Vast to Succeed*, 114 MICH. L. REV. 1109, 1119 (2016); Sanchirico, *supra* note 86, at 1361.

143. Moore, *supra* note 31.

seriousness of the offense.<sup>144</sup> But retributivists think of just deserts in different ways. According to empirical desert theorists, deciding whether and how much to punish a defendant is a sociological matter.<sup>145</sup> Defendants should be punished when and to the extent that society thinks such punishment is appropriate. For empirical desert theorists, comparing the successor identity approach to successor liability requires assessing people's intuitions about when successors deserve punishment for predecessors' crimes.

Deontological desert is another approach to determining what punishment, if any, criminals deserve.<sup>146</sup> On this sort of theory, the retributive appropriateness of punishment turns on substantive morality—whether the defendant *actually* deserves punishment. Where individuals are concerned, the identity principle demands punishment only of present-day defendants who are identical to the people who committed past crimes. Rightly or wrongly,<sup>147</sup> people generally think there is a fact of the matter about whether the individual in the courtroom is the same person as the one who committed the crime.<sup>148</sup> Any deviation from that fact, e.g., by punishing someone who is not identical to the criminal, works a grave injustice, even if it is supported by strong consequentialist policy. As William Blackstone famously expressed, “It is better that ten guilty persons escape than that one innocent suffer.”<sup>149</sup>

For deontological desert theorists who think that corporations are proper objects of punishment,<sup>150</sup> the identity principle has an important role to play. It requires that successors really share an identity with any predecessors for whose crimes they are punished. Only then would punishing successors for the crimes of predecessors satisfy the demands of justice. To date, no theorists of corporate personhood have had anything to say about how corporate identity persists through time and across reorganizations. In the absence of a ready-developed theory, the safest option for the deontological desert theorist would be to start with common intuitions on the matter.<sup>151</sup> Consulting and systematizing intuitions is a familiar and widely accepted way of inquiring into substantive morality.<sup>152</sup>

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144. ANDREW VON HIRSCH, CENSURE AND SANCTIONS 6-19 (1993).

145. ROBINSON ET AL., *supra* note 137, at 83.

146. *Id.*

147. See Theodore Sider, *Criteria of Personal Identity and the Limits of Conceptual Analysis*, 15 PHIL. PERSP. 189 (2001).

148. Some philosophers think this is an inescapable consequence of our first-personal experience as agents. See Christine M. Korsgaard, *Personal Identity and the Unity of Agency: A Kantian Response to Parfit*, 18 PHIL. & PUB. AFF. 101 (1989).

149. 4 WILLIAM BLACKSTONE, COMMENTARIES \*352 (1769). See also *Genesis* 18:23-32.

150. See, e.g., CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2013).

151. It may strike some readers as odd to talk about retribution where corporations are concerned. But, as I argue elsewhere, there are expressive forms of retributivism that are particularly apt for the corporate context. See Diamantis, *supra* note 36, at 2061-62; see also BILL WRINGE, AN EXPRESSIVE THEORY OF PUNISHMENT (2016).

152. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971).

So, even though they have different starting premises, both deontological and empirical desert theorists will want to build theories of corporate identity that start with common intuition. That is where some cognitive science from the last twenty years can help. Though some scholars think that retributive impulses toward corporations are confused and unsustainable,<sup>153</sup> cognitive scientists now know that they are natural and normal features of our psychology. We have cognitive mechanisms that incline us to think of corporations as though they were moral agents distinct from the people composing them.<sup>154</sup> People do not think of all groups in this way, but they are more likely to do so when the group has a high level of internal cohesion<sup>155</sup>—what cognitive scientists call “entitativity.”<sup>156</sup> Corporations, with their generally hierarchical structure and goal-directed operation, are archetypical entitive groups. As a result, people perceive corporations as being capable of intentional action<sup>157</sup> and as deserving punishment when they act badly.<sup>158</sup>

That line of research only takes the matter so far. Even if people intuitively think corporations should be punished for their bad acts, this still leaves open the question of when a past bad act of a predecessor is an act for which its successor deserves punishment. The answer will depend on when a predecessor’s act also counts as an act of its successor. And this, in turn, will depend on people’s intuitions about how corporate identity persists across time, particularly over the sorts of radical changes that reorganization involves. Cognitive scientists have just started to look into this issue too. Though that data is much more preliminary, the discoveries so far favor the successor identity approach.

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153. See Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1392 (2009) (“[A]ttributing blame to a corporation is no more sensible than attributing blame to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime.”); John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 350 (2003) (“Corporations neither deserve nor attract our sympathy . . . [A]s such they do not deserve sympathy simply because they are not human. For that reason alone, they should not be the subjects of criminal prosecution.”). *But see* Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 832 (1927).

154. See D.T. Campbell, *Common Fate, Similarity, and Other Indices of the Status of Aggregates of Persons as Social Entities*, 3 BEHAV. SCI. 14 (1958).

155. See R.P. Abelson et al., *Perceptions of the Collective Other*, 2 PERSONALITY & SOC. PSYCH. REV. 243 (1998).

156. See Jennifer L. Welbourne, *The Impact of Perceived Entitativity on Inconsistency Resolution for Groups and Individuals*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 481, 481-508 (1999) (discussing entitativity generally and perceptions of collective groups).

157. See N. Dasgupta et al., *Group Entitativity and Group Perception: Associations Between Physical Features and Psychological Judgment*, 77 J. PERSONALITY & SOC. PSYCH. 991 (1999); M. J. O’Laughlin & B.F. Malle, *How People Explain Actions Performed by Groups and Individuals*, 82 J. PERSONALITY & SOC. PSYCHOL. 95 (2010).

158. Anna-Kaisa Newheiser et al., *Why Do We Punish Groups? High Entitativity Promotes Moral Suspicion*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 931 (2012); S. J. Sherman & E. J. Percy, *Psychology of Collective Responsibility: When and Why Collective Entities Are Likely to Be Held Responsible for the Misdeeds of Individual Members*, 19 J.L. & POL’Y 137 (2010).

Scientific work on intuitions about corporate identity builds on previous results in cognitive science about identity more generally.<sup>159</sup> One early discovery was that people distinguish between “accidental” and “essential” traits, where only changes to the latter result in changes in identity.<sup>160</sup> The accidental traits tend to be surface level, while essential traits tend to be deeper and possibly hidden from view.<sup>161</sup> Essential traits also tend to be those that are causally efficacious.<sup>162</sup>

More recent studies have focused on the importance of normative valence (whether a trait is good, bad, or neutral) in determining whether a trait is essential or accidental. Studies about essential traits in individual human beings suggest that normative valence—perceived as being good or bad, rather than neutral—plays an important role.<sup>163</sup> Traits that have a normative valence are more likely to be essential. The newest data suggests that these results hold for corporate people too.<sup>164</sup> For example, if a corporation undergoes a change that causes it to lose its positively valenced traits, then people are likely to judge that it has lost its identity.<sup>165</sup> More importantly for present purposes, “[i]f an entity is explicitly described as having a bad essence, it will be viewed as losing its identity if it improves.”<sup>166</sup>

To test this effect, scientists presented subjects with scenarios about a fictional school in Nazi Germany.<sup>167</sup> The scenarios described the school undergoing various changes and then asked subjects whether the school after the change was the same school, or a different one. Subjects were significantly more likely to say the school lost its identity when it changed a normatively valenced trait, like when it switched from focusing its curriculum on Nazi ideology to traditional academic subjects. Normatively neutral changes, like turnover in administration, did not induce the same effect. Though the studies focused on schools, the authors believe their results should extend to other collectives,<sup>168</sup> presumably including corporations.

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159. Lance Rips et al., *Tracing the Identity of Objects*, 113 PSYCHOL. REV. 1 (2006).

160. Nina Strohminger & Shaun Nichols, *The Essential Moral Self*, 131 COGNITION 159 (2014).

161. S. Blok et al., *Individuals and Their Concepts*, in PROCEEDINGS OF THE TWENTY-THIRD ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY (J.D. Moore & K. Stenning eds., 2005); D. Geoffrey Hall et al., *Preschoolers’ Use of Form Class Cues to Learn Descriptive Proper Names*, 74 CHILD DEV. 1547 (2003).

162. Lance Rips & Susan Hespos, *Divisions of the Physical World: Concepts of Objects and Substances*, 141 PSYCHOL. BULL. 786 (2015).

163. George Newman et al., *Beliefs About the True Self Explain Asymmetries Based on Moral Judgment*, 39 COGNITIVE SCI. 96 (2015); George Newman et al., *Value Judgments and the True Self*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 203 (2014).

164. Julian De Freitas et al., *Normative Judgments and Individual Essence*, 41 COGNITIVE SCI. 382 (2017).

165. *Id.* at 386-88.

166. *Id.* at 393 (emphasis removed).

167. *Id.*

168. *Id.* at 396.



Combining the insights about the importance of causal efficacy and normative valence suggests that the essential trait of a criminal corporation—the trait to which its identity is linked—is whatever trait caused it to commit crime. In the context of a criminal trial, this negatively valenced trait is likely to be the most salient, both because of its strong normative valence and because of its important causal role. If a successor inherits this trait, people should be inclined to judge that it shares an identity with its criminal predecessor, and hence deserves punishment. If, however, in the course of the reorganization, the successor does not inherit the trait (perhaps the trait got reformed or a different successor inherited it), people should be more likely to judge that the successor does not share the predecessor’s identity. In short, ordinary retributive intuitions about the persistence of corporate criminal identity and desert should fit the successor identity approach. According to these intuitions, the current law of successor liability over-punishes corporations because it holds successors liable for predecessors’ crimes even when the two do not share an identity. Since the successor identity approach aligns with folk intuitions, it is well-positioned to fulfill corporate criminal law’s retributive goals (whether deontological or empirical).

Retributivists might still have some concerns. The successor identity approach opens the possibility that a predecessor could commit a crime and then escape punishment using a well-structured reorganization. It may seem in these circumstances that there is some retributive residue that needs addressing. If the criminal essence approach allows cases where a crime will go unpunished, is that not contrary to the retributive spirit?

Maybe. Part of the retributive residue may be addressed by convicting and punishing individuals. Though it is not a focus of this Article, individual punishment for white-collar crime is an important prong of prosecutors’ response. Individual criminals must face justice as well, regardless of whether the corporation of which they are a part has sufficiently changed its identity to avoid its own punishment.<sup>169</sup>

There may still be cases where a predecessor has committed a crime even though no individual within it has.<sup>170</sup> In these cases, should the predecessor subsequently change its identity through reorganization, thereby escaping liability, there would be no suitable object of punishment on the successor identity approach, corporate or individual. A crime would go totally unpunished. This could initially seem like something that would worry retributivists, but the

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169. See generally Memorandum from Sally Quillian Yates, Deputy Attorney Gen., U.S. Dept. of Justice, to all Component Heads and U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download> [<https://perma.cc/RC96-XJA7>].

170. See Julie O’Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schmeyer’s Proposal*, 16 GEO J. LEGAL ETHICS 1 (2002), in JULIE O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME* 176-77 (2016); see also, e.g., *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987) (upholding the conviction of defendant bank despite prior acquittal of all employees involved in the misconduct).

worry would be misplaced. With respect to individual criminals, most everyone, retributivists included, accepts that some crimes must go unpunished, as when the criminal has died.<sup>171</sup> Punishing someone else in the criminal's place would certainly be unjust. But this is exactly what would happen were a successor corporation punished for the crimes of a predecessor with whom it does not share a criminal identity.

The concern over unpunished crimes should be weaker still in the corporate case where the corporate criminal, after reorganization, is no longer around. Those who ultimately bear the brunt of a corporate sanction are the usually innocent corporate stakeholders, like individual shareholders and employees.<sup>172</sup> As such, the prospect of punishing a corporation when not strictly necessarily should be particularly unappealing to retributivists.

Another sort of concern retributivists might have with the successor identity approach is that it may seem unfair vis-à-vis individuals. Retributivists are concerned that the criminal justice system treats similarly situated defendants similarly.<sup>173</sup> Disparities in punishment,<sup>174</sup> enforcement,<sup>175</sup> or standards of liability<sup>176</sup> raise justice concerns, particularly where the disparity seems to be motivated by animus against already disadvantaged groups.<sup>177</sup> The successor identity approach may seem to treat corporate people very differently from natural people—it gives the former the option of escaping liability by reorganizing and reforming.

While the successor identity approach does end up treating corporations differently from natural people, the disparity is not the sort that should worry

171. See *In re Sealed Case*, 124 F.3d 230, 233 (D.C. Cir. 1997), *rev'd sub nom.* Swidler & Berlin v. United States, 524 U.S. 399 (1998) (discussing that lack of criminal liability after death); Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19, 23 (2003) (“Depriving the criminal of [an] ill-gotten advantage is therefore the central focus of punishment. Since that advantage primarily consists of a wrongful exercise of freedom of choice and action, the most appropriate means to restore order is to deprive the criminal of that freedom.”).

172. See Alschuler, *supra* note 153, at 1366-67 (“This punishment is inflicted instead on human beings whose guilt remains unproven. Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too.”).

173. David I. Shapiro, *Sentencing the Reformed Addict: Departure Under the Federal Sentencing Guidelines and the Problem of Drug Rehabilitation*, 91 COLUM. L. REV. 2051, 2069 (1991) (“[T]he dictates of retribution doctrine . . . suggest that similarly situated defendants should receive the same punishment.”) (footnotes omitted).

174. See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1675-1715 (1998) (providing empirical evidence regarding disparities in death sentences based on race).

175. See, e.g., *Drug Sentencing Practices and Issues*, 18 FED. SENT'G REP. 289, 289 (2006) (Statement of Wade Henderson, Executive Director, Leadership Conference on Human Rights, to Inter-American Commission on Human Rights) (noting some serious disparities in our criminal justice system and looking at disparities in enforcement as the cause).

176. See, e.g., Kingsley R. Browne, *Statistical Proof of Discrimination: Beyond “Damned Lies”*, 68 WASH. L. REV. 477, 550 (1993) (“Allowing a finding of liability to be based upon disparities that are statistically significant but not ‘gross’ places undue faith in statistical models and threatens to result in improper findings of liability.”).

177. See generally Baldus et al., *supra* note 174; Browne, *supra* note 176.

retributivists. Unlike the most concerning disparities in criminal justice, it would not be motivated by any sort of animus. Rather, it would be motivated by an acknowledgment of the important differences in the structure of identity for corporations and natural people. Just as fairness demands treating like cases alike, it requires treating different cases differently.<sup>178</sup> While the identity of natural persons is largely grounded in a biological form,<sup>179</sup> corporate identity is more abstract and fluid. With present technology, corporate identity is easier to change than individual identity.<sup>180</sup> Perhaps that will one day change, forcing criminal law to rethink how it punishes present-day people for crimes committed in the distant past. Until then, ignoring this difference between corporations and natural people, as the current law of successor liability does, creates a disparity that truly should concern retributivists—the law sometimes requires courts to punish successor corporations for crimes they did not commit.

Even so, one concern may still loom large for all perspectives on the purpose of corporate criminal law. If reorganization and reform could eliminate criminal liability, would corporations not take advantage of this by committing crime, reaping its benefits, reorganizing and reforming, and then repeating with impunity? This is indeed a worry that the successor identity approach introduces. As discussed below,<sup>181</sup> a modification to the successor identity approach may help address it. For now, it is worth emphasizing that the cause for concern is significantly more limited than it may seem at first. The sort of gamesmanship at issue would be a rare, one-off opportunity. If a successor corporation were truly reformed of the criminal identity of its predecessors, it would not have the predecessors' disposition to misconduct. Lacking that predisposition, the successor would be unlikely to repeat the cycle of misconduct and reform. If whatever trait led the predecessor to try to game the criminal justice system remained, the successor would likely still share its criminal identity and be liable for the original crime. Suppose, for example, that C-suite executives enable such gamesmanship by communicating to middle management that asking for legal forgiveness is preferable to asking for permission where doing so boosts corporate profits. Bona fide reform of the corporation's criminal identity would involve taking whatever measures necessary to halt that message and its uptake. The gamesmanship should cease with the reform of its source.

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178. See, e.g., Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107 (2013) (discussing the treatment of children and adults in the criminal justice system and proposing that children should receive a “youth discount” when considering their culpability and sentencing); Martin Guggenheim, *Graham v. Florida and a Juvenile’s Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 500 (2012) (comparing the historical treatment of children and adults with modern Supreme Court precedent, arguing that the latest cases show that children and adults must be treated differently in the criminal justice system).

179. Michael D. Rivard, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1445 (1992) (“Natural persons are biological beings, which currently includes only humans.”).

180. See also Diamantis, *supra* note 48 (discussing the inflexibility of individual character and the relative changeability of corporate character).

181. See *infra* Part V.C.

## V. Details and Refinements

The successor identity approach would punish successors for predecessor crimes only when the former inherit whatever organizational trait was originally responsible for the crime. It would outperform the current law of successor liability—which invariably holds successors liable for predecessor crimes—by encouraging corporate reform, preventing more corporate crime, and giving results that align better with the interests of justice. So far, successor identity is just a policy framework. Many details remain, some of which are considered below.

*A. Timing the Inquiry*

The successor identity approach would block the transmission of liability from predecessors to successors when the two do not share an identity. It has nothing to say yet about when and who in the criminal justice process should determine whether that condition is satisfied. There are a few options.

One possibility would be to hold off until sentencing. The Organizational Sentencing Guidelines (the “Guidelines”) provide fine reductions for specified conditions,<sup>182</sup> almost removing fines entirely in some circumstances.<sup>183</sup> Provisions relating to successor identity could be added to the mix. Presently the Guidelines call for a reduction if the corporate convict had an effective compliance program at the time the crime was committed.<sup>184</sup> So far, only nine corporations have received effective compliance program credit,<sup>185</sup> which raises the obvious suspicion that the credit is not functioning as intended. One possible problem is that the credit (a three-point reduction to the defendant firm’s culpability score) may not be substantial enough<sup>186</sup> to induce corporations to implement effective compliance programs prospectively.<sup>187</sup> Another possibility is hindsight bias—a sentencing judge must determine whether the corporation had an effective compliance program that nonetheless did not prevent the crime that the corporation committed.<sup>188</sup> The fact that a compliance program failed may bias sentencing judges to think it was ineffective.

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182. See SENTENCING GUIDELINES, *supra* note 30, §§ 8C2.5, 8C2.8.

183. *Id.* § 8C3.3. The smallest minimum fine multiplier is .05. *Id.* § 8C2.6.

184. *Id.* § 8C2.5(f).

185. See *Annual Fiscal Year Sentencing Statistics (Oct. 1-Sept. 30)*, U.S. SENT’G COMM’N: SOURCEBOOK OF FED. SENT’G STAT. tbl.54, <https://www.ussc.gov/research/sourcebook/archive> [http://perma.cc/DQ7F-F3EE] (showing that a total of seven corporations received credit for effective compliance programs between 1996 and 2016); Maurice E. Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 IOWA J. CORP. L. 769, 783-84, n.79 (2014) (reporting an additional two instances of finding effective compliance programs between 1992 and 1996 that are not available on the Sentencing Commission’s website).

186. SENTENCING GUIDELINES, *supra* note 30, § 8C2.5(f).

187. Arlen, *supra* note 84, at 337.

188. See Stucke, *supra* note 185, at 813 (“[H]indsight bias research shows how one is far more likely to condemn unethical behavior when the behavior leads to a bad rather than a good

Were successor identity incorporated as a Guidelines factor, it would take a different approach. Sentencing courts would evaluate the present-day compliance programs of convicted successors, rather than focusing on the pre-violation program of their predecessors. Since the object of assessment would be present programs, hindsight bias should not be an issue. Furthermore, implementing the successor identity approach as a sentencing factor would call for something more substantial than the modest credit of the Guidelines' effective compliance provisions. If the successor defendant does not share the criminal predecessor's identity, the court should impose no fine at all for the predecessor's misconduct. This would be a much more substantial inducement, even though the successor may still have to make non-punitive payments, like restitution.<sup>189</sup>

Despite the appeal of the parallel to effective compliance provisions in the Sentencing Guidelines, waiting until sentencing to assess a successor's identity may not be the most efficient approach. It would force trial courts and successor corporations to go through the expense of adjudication even in cases where they would not be eligible for punishment. At stake are not only the legal expenses, but also the substantial reputational and market disadvantages that corporations suffer from indictment through trial and conviction.<sup>190</sup> If the identity assessment were made at some earlier stage in the criminal justice process, successors who do not share an identity with criminal predecessors could forgo the need for a criminal trial and conviction. They may still be liable for restitution, but only to the extent they have not already paid it voluntarily or through civil or administrative processes.<sup>191</sup> Even probation (another kind of punishment the Guidelines allow)<sup>192</sup> would likely be inappropriate in cases where the successor has no fine to pay<sup>193</sup> and where it does not share its criminal predecessor's organizational defects.<sup>194</sup> A further difficulty of waiting until sentencing is that upon conviction, in many industries, corporations are automatically subject to a series of devastating collateral consequences, like debarment.<sup>195</sup> In light of these

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outcome—even when controlling for the action of the actor being judged.” (internal quotation marks omitted)).

189. SENTENCING GUIDELINES, *supra* note 30, § 8C1.1.

190. See generally Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994).

191. SENTENCING GUIDELINES, *supra* note 30, § 8B1.2 cmt.

192. *Id.* ch. 8, pt. D.

193. See *id.* §§ 8D1.3, 8D1.4.

194. *Id.* § 8D1.4(b)(1).

195. Peter R. Reilly, *Justice Deferred Is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, 2015 B.Y.U. L. REV. 307, 320-22 (2015) (“If a corporation decides to go to trial and loses, it might face debarment or exclusion . . . . For companies that depend heavily on contracts with the federal government, exclusion and debarment can amount to a corporate death penalty.” (internal quotation marks and citations omitted)); Larry Thompson, *The Blameless Corporation*, 46 AM. CRIM. L. REV. 1323, 1325-26 (2009) (“The other dimension of the conundrum of corporate criminal liability, which is the collateral consequences if you are convicted, is enormous . . . . So, it’s not very realistic with respect to thinking about corporate criminal liability of a corporation subjecting itself to a jury trial.”).

collateral effects, the decision about corporate identity should take place at some point earlier than conviction.

These arguments may seem to favor putting the inquiry into the hands of prosecutors at the start of the criminal justice process. Prosecutors already evaluate corporate suspect's compliance shortcomings when deciding whether and how to charge them.<sup>196</sup> From an efficiency perspective, asking prosecutors to evaluate whether successor suspects share a criminal identity with their predecessors would be optimal. If prosecutors determine there is no shared criminal identity, they could decide not to indict the successor, sparing it unnecessary costs (legal and reputational).<sup>197</sup> The trouble with relying on prosecutors is that their charging decisions are entirely discretionary<sup>198</sup> and not subject to any kind of judicial review.<sup>199</sup> This has led to concerns that prosecutors' decisions can be the unprincipled products of private prosecutorial interests and imbalanced bargaining power vis-à-vis corporate suspects.<sup>200</sup>

There may be a way to capture the efficiency benefits of having prosecutors evaluate successor identity without the risks of making that decision unreviewable. Trial courts could be the ultimate arbiters of successor identity. Putting the issue of identity in the courts' hands makes conceptual sense. A successor claiming that it does not share an identity with a criminal predecessor is effectively making an ordinary claim of innocence—claiming that someone else committed the crime. Forcing successors to wait until trial to make this argument would impose potentially unnecessary legal and reputational costs on them. Those could be reduced in some cases where non-identity could provide grounds for a motion to dismiss, perhaps because the prosecution failed to offer any evidence that the successor inherited its predecessor's criminal identity.<sup>201</sup> More commonly, though, successor suspects could advance non-identity

196. JUSTICE MANUAL, *supra* note 113, § 9-28.800.

197. See, e.g., Sharon Oded, *Coughing Up Executives or Rolling the Dice?: Individual Accountability for Corporate Corruption*, 35 YALE L. & POL'Y REV. 49, 59 (2016) ("Apart from saving the tremendous costs of a long-running trial, such as representation and business upheaval, DPAs and NPAs may materially reduce reputation damages."); Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the "Culture of Compliance"*, 2012 WIS. L. REV. 689, 715 (2012) (noting the benefits of entering a DPA in that "the firm largely avoids the stigma and injury to reputation that follows from formal prosecution").

198. See JUSTICE MANUAL, *supra* note 113, § 9-28.100 ("Federal prosecutors must maintain public confidence in the way in which we exercise our charging discretion. This endeavor requires the thoughtful analysis of all facts and circumstances presented in a given case.")

199. See *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 740 (D.C. Cir. 2016) ("By rejecting the DPA based primarily on concerns about the prosecution's charging choices, the district court exceeded its authority under the Speedy Trial Act.")

200. Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 214 (2016) ("D/NPA mandates result from prosecutors' use of informal enforcement to create new legal duties—duties that can be enforced through the imposition of criminal sanctions that otherwise would not be imposed . . . . This use of informal enforcement implicates the rule of law because it enables prosecutors to reach beyond the constraints on the scope of authority that normally bind them, without adequate ex ante or ex post oversight.")

201. FED. R. CRIM. P. 48(b).

arguments to prosecutors pre-indictment. Prosecutors evaluate the merits of a case before making charging decisions.<sup>202</sup> If a successor corporation has a strong claim of innocence premised on non-identity, prosecutors will be less likely to indict.<sup>203</sup> Since the matter may go to trial and be reviewed by a court, successors making identity arguments to prosecutors could expect a more objective assessment than if prosecutors had exclusive authority over the question.

### B. Questions for the Jury

If the successor identity approach were implemented by having courts adjudicate identity, the question would ultimately go to a jury if not resolved by a judge in a motion to dismiss beforehand.<sup>204</sup> Were a successor defendant to raise a claim challenging identity with a criminal predecessor, the jury would have a two-fold task. The first step would be to determine which features of the predecessor corporation were responsible for its criminal conduct, whether by enabling, encouraging, or failing to detect and prevent it. This would be a factually intensive inquiry into the sorts of features that organizational science says can impact employee behavior, things such as corporate ethos and compliance procedures. Most jurors would lack the background expertise needed to evaluate these properly. Effective advocates would likely call on expert witnesses to help frame the inquiry.<sup>205</sup> In this regard, the first step would not differ from others in corporate criminal law where experts in accounting,<sup>206</sup> finance,<sup>207</sup> environmental science,<sup>208</sup> etc., are a necessary aid to the jury.

The second step would be for the jury to determine whether the defendant, a successor corporation, inherited the organizational features identified in the first step. Such features are more likely to follow the lines of business implicated in the defective ethos or compliance.<sup>209</sup> Where the successor resulted from a

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202. JUSTICE MANUAL, *supra* note 113, § 9-28.100 (“In exercising that discretion, prosecutors should consider the . . . statements of principles that summarize the considerations they should weigh and the practices they should follow in discharging their prosecutorial responsibilities. Prosecutors should ensure that the general purposes of the criminal law—appropriate punishment for the defendant, deterrence of further criminal conduct by the defendant, deterrence of criminal conduct by others, protection of the public from dangerous and fraudulent conduct, rehabilitation, and restitution for victims—are adequately met, taking into account the special nature of the corporate ‘person.’”).

203. See generally William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

204. FED. R. CRIM. P. 12(b)(1).

205. See Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1182 (1991) (“We call expert witnesses to testify about matters that are beyond the ordinary understanding of lay people (that is both the major practical justification and a formal legal requirement for expert testimony), and then we ask lay judges and jurors to judge their testimony. This is a very general problem.”).

206. Sofia Adrogue & Alan Ratliff, *Kicking the Tires After Kumho: The Bottom Line on Admitting Financial Expert Testimony*, 37 HOUS. L. REV. 431, 477 (2000).

207. See generally *id.*

208. See generally Kim K. Burke, *The Use of Experts in Environmental Litigation: A Practitioner’s Guide*, 25 N. KY. L. REV. 111 (1997).

209. See, e.g., Perry E. Wallace, Jr., *Liability of Corporations and Corporate Officers, Directors, and Shareholders Under Superfund: Should Corporate and Agency Law Concepts Apply?*, 14

consolidation, merger, or acquisition, the question would be whether the reorganization somehow reformed the organizational vulnerability as it combined lines of business. Perhaps, as a result of the reorganization, the criminal counterparty adopted the better ethos, or was subject to the stricter compliance procedures, of the innocent counterparty.<sup>210</sup> Where the successor defendant resulted from a spin-off, the relevant inquiry would likely be whether the defendant, or some other successor, inherited the line of business in which the criminal conduct occurred.

As with all case-by-case, factually intensive inquiries, there will be some inherent uncertainty about successor identity.<sup>211</sup> Business ethicists, organizational psychologists, big data programmers, and compliance experts are constantly learning more about the sources of corporate crime.<sup>212</sup> As this knowledge filters into the courtroom, it will aid juries in making more accurate determinations of successor identity. Even if this knowledge were already complete, the successor identity approach would lead to less certain results than the very predictable, one-track mechanism of successor liability. But having more discriminating doctrines that are more likely to get the right results always brings increased uncertainty.<sup>213</sup> In this case, the tradeoff is well worth the improvements to rehabilitation, deterrence, and justice of the successor identity approach.

### *C. Degrees of Identity, Degrees of Liability*

As presented so far, the successor identity approach is binary: successors either are or are not identical to their predecessors, and they assume either all or none of their predecessors' criminal liability. Some identity theorists do not think that identity works like this.<sup>214</sup> They think that identity comes in degrees, so that it could make sense to speak of successors that are more identical or less identical to their predecessors. There could be some advantages to such a modification.

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J. CORP. L. 839, 882 (1989) (“The continuity of business operation theory concentrates on the continuation of the line of business and derives much strength from an underlying federal statute that advances broad, remedial objectives in the public interest.”).

210. The Department of Justice has exhibited some interest in implementing such an approach informally. *See, e.g.*, U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, Opinion Procedure Release, No. 08-02 (2008), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0802.pdf> [<https://perma.cc/5U4G-XHUD>].

211. *See, e.g.*, *United States v. Kozminski*, 487 U.S. 931, 951 (1988) (noting “that some degree of uncertainty exists whenever judges and juries are called upon to apply substantive standards,” but noting that judges must be very careful when such standards involve criminal liability and punishment).

212. *See* Laufer, *supra* note 133.

213. *See, e.g.*, Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 384-85 (1985) (discussing the pros and cons of rules and standards generally as well as for legal theories, such as criminal deterrence, specifically).

214. *See* DEREK PARFIT, *REASONS AND PERSONS* 276-77 (1984) (explaining that identity comes in varying degrees).



A related idea sometimes applies in the tort context, where courts must assess product liability and punitive damages against successors. The “degree of identity” test “asks whether enough of the predecessor effectively has been absorbed into the successor so that by punishing the successor, in effect, the predecessor is being punished.”<sup>215</sup> The degree of identity approach recognizes that “[w]hether a successor corporation is the alter ego of its predecessor is a[n] open] question of fact.”<sup>216</sup> Though the test, as developed in tort law, focuses on wrong sources of continuity—continuity in personnel and ownership<sup>217</sup>—it provides some legal precedent for the idea that that successor identity can come in degrees.

The degree of identity test from tort law is, in the end, also binary—if the degree of identity between successor and predecessor is high enough, a court applying the test will treat them as being fully identical. A more interesting approach for present purposes would be to let the result of the test also come in degrees. If successors could be more or less identical to their predecessors, perhaps the criminal liability they inherit could be proportional to their degree of identity. A successor that is largely identical to its predecessor (i.e., one that has taken few effective steps to reform) could inherit all or most of its criminal liabilities; a successor that is largely non-identical (i.e., one that has taken many effective steps to reform) would inherit little or none.

Suppose, for example, that a bank in the process of reorganization discovers it violated the Currency Transaction Reporting Act.<sup>218</sup> It learns that on several occasions, it failed to report currency transactions made by a customer at different bank branches in excess of the statutory trigger.<sup>219</sup> Suppose further that there were three organizational defects that contributed to the violations: an inadequate legal training program for bank tellers, missing systems for sharing information between branches, and compliance personnel with a cavalier attitude toward the risks of money laundering. In the process of reorganization, any or all of these defects may be remedied: by implementing new training protocols,

215. Keith A. Ketterling, *A Proposal for the Proper Use of Punitive Damages Against a Successor*, 11 J. CORP. L. 765, 784 (1986).

216. 1 FLETCHER CYCLOPEDIA CORP. § 48 (2016).

217. See *Alkanani v. Aegis Def. Servs., L.L.C.*, 976 F. Supp. 2d 1, 10 (D.D.C. 2013) (“To determine whether one business is a continuation of a predecessor, the Court should consider whether there was purchasing or selling of assets between the entities and if there is a common identity of officers, directors and stock holders in the selling and purchasing corporations.” (quotation marks and citations omitted)); *Baltimore Luggage Co. v. Holtzman*, 80 Md. App. 282, 297 (1989) (“[Indicia of continuation are] common officers, directors, and stockholders; and only one corporation in existence after the completion of the sale of assets.”) (quoting 15 FLETCHER CYCLOPEDIA CORP. (Cum. Supp. 1988)); *Martin v. Johns-Manville Corp.*, 469 A.2d 655, 657 (Pa. Super. Ct. 1983) (“We believe that when a legal change in corporate identity is not accompanied by major changes in the identity of the predecessor’s shareholders, officers, directors, and management personnel, the imposition of punitive damages against the successor for the reckless conduct of the predecessor may be proper as advancing the goals of punishment and deterrence.”).

218. 31 U.S.C. §§ 5311-5332 (2018).

219. This example is based off *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987).

building new information systems, and replacing the compliance personnel. If all three were fixed, the bank's successors would likely not inherit the criminal identity. However, if fewer than all three changes were accomplished, the successor may share in the criminal identity in proportion to the number of changes made.

Allowing for degrees of successor identity would certainly complicate things and thereby increase uncertainty, but it could have some advantages. One is that it could help the successor identity approach address some of the gamesmanship it could incentivize. As discussed, the successor identity approach could allow for corporations to plan to commit crime, reap its benefits, and then reorganize in ways that eliminate their criminal liability. Introducing degrees of identity may be best applicable for such cases where the successor, while not entirely identical to its predecessor, is not entirely different either. This would mitigate (in proportion to the difference of identity), but not eliminate (in proportion to the overlap in identity), the criminal liability the successor inherits. This would help discourage that sort of manipulation.

Introducing degrees of identity could also help address another potential problem: What happens if authorities discover the criminal conduct of a predecessor while the corporate reorganization and reform are still underway? For example, perhaps the innocent counterparty to a merger is still in the process of subjecting its criminal counterparty to the former's more robust compliance policies. One solution would be to stick with the bare bones successor identity approach described above. If the process is far enough along to reform the organizational vulnerabilities of the criminal predecessor, the successor does not share an identity with it and is not liable for its crimes. However, if authorities interrupt the process before completion, the successor shares an identity with the criminal predecessor and is fully liable for its crimes. This solution risks undermining some of the benefits of the successor liability approach. Recall that the process of reform increases the chance of detection. That being the case, successors may sometimes find reform too risky a prospect.

A different possibility would draw on degrees of identity. Courts would have to consider the stage in the process of reform at which authorities discovered the predecessor's crime. The further along, the lower the degree of identity, and the greater the mitigation of the successor's liability. This would still give predecessors and successors some incentive to get the process of reform started, even if they feared interruption before completion. It would be easy to strengthen this incentive and to encourage successors to speed up the process of reform. Perhaps successors could receive a short window of immunity from indictment post-reorganization. This would give them some time to initiate and follow-through on reform projects without worrying that the process of reform risks drawing the attention of authorities.

## VI. Conclusion: Beyond Successors and Predecessors

Under current corporate criminal law, criminal liability is infectious. Once a corporation commits a crime, any of its successors will be liable for punishment. While this approach may seem to have robust deterrent effects, it ultimately undermines corporate criminal law's deterrent, rehabilitative, and retributive goals. On the approach proposed here, a successor would only be liable for a predecessor's crimes if the two shared a criminal identity, i.e., the organizational trait that was responsible for the predecessor's misconduct. The successor would not be liable, however, if the process of reorganization somehow reformed that trait or transferred it to a different successor.

This new approach would encourage criminal predecessors and their successors to rehabilitate by ridding themselves of organizational vulnerabilities. It would also strengthen the deterrent effect of corporate criminal law. By encouraging reform, it would increase the likelihood that individual employees would face consequences for their misconduct. Finally, because the successor identity approach aligns with folk judgments about corporate identity, it should satisfy retributivists by ensuring successors are only punished for crimes *they* committed.

Though the framing conceit for this Article has been the transfer of criminal liability from predecessors to successors in reorganization, the problems it raises are endemic to corporate criminal law more broadly. Even without reorganizing, corporations can undergo some equally dramatic changes: they can rebrand, change lines of business, gain and lose shareholders, change management, turnover employees, etc. They can also shore up their compliance, improve their ethos, or otherwise reform organizational traits that might dispose them to misconduct. One might ask whether corporate criminal law could be doing more to incentivize corporations to undergo these latter, socially beneficial changes.

The arguments advanced above suggest the answer is “yes.” The incentive structure corporations face when considering whether to investigate and patch vulnerabilities is the same, regardless of whether they are, at the same time, reorganizing. The process of self-investigation and reform increases the likelihood that authorities will catch wind of a violation.<sup>220</sup> Regardless of how the corporation responds, it will be liable as a matter of law for the crimes of its employees.<sup>221</sup> Hoping for a favorable exercise of prosecutorial charging discretion is cool comfort.<sup>222</sup> With the rise of deferred prosecution agreements,

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220. See, e.g., Arlen, *supra* note 84, at 337 (“Given that policing imposes direct costs on the firm, we know that the government cannot induce effective policing unless the firm’s total expected penalties—if it engages in optimal policing—are lower than if it does not. This presents a challenge for corporate liability because policing increases the probability that the firm is sanctioned for any and all crimes that are not deterred.”).

221. Assuming the minimal requirements of respondeat superior are satisfied.

222. See JUSTICE MANUAL, *supra* note 113, § 9-28.1000 cmt. (“In addition to employee discipline, two other factors used in evaluating a corporation’s remedial efforts are restitution and reform

many corporations feel that prosecutorial favor still means a hefty payment, albeit one imposed by a prosecutor rather than a sentencing judge.<sup>223</sup>

Criminal law could encourage corporations to reform themselves by giving them some formal reprieve for doing so. Drawing on the concept of successor identity advanced above, one option would be to recognize a break in corporate criminal identity if a corporation reforms its problematic ethos or compliance vulnerabilities. This would reward corporations who undertake the risk and expense of detecting, investigating, and responding to internal misconduct by eliminating or mitigating their liability for it. The reformed corporate defendant could claim in court that some past version of itself, with which it no longer shares a criminal identity, committed the crimes of which it stands accused. The benefits of adopting such an approach would likely mirror those of moving from successor liability to the successor identity approach.

Even readers who are unpersuaded of the advantages of replacing successor liability with the successor identity approach may see some advantage to reflecting on the malleability of corporate identity. Corporations, in this respect, are fundamentally different individuals. There is no need to restrict the possibilities of corporate criminal law by the limitations of the individual form. Corporate identity is one more perspective from which to appreciate the unique criminal justice challenges and opportunities of the corporate context.

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... [A] corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider as to the appropriate disposition of a case.”)

223. See Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1896, 1903 (2005) (explaining the prevalence of DPAs and NPAs replacing “declination[s] in the corporate context”).