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CRIMINAL LAW

THE CORPORATE INSANITY DEFENSE

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Corporate criminal justice rests on the fiction that corporations possess "minds" capable of instantiating culpable mens rea. The retributive and deterrent justifications for punishing criminal corporations are strongest when those minds are well-ordered. In such cases misdeeds are most likely to reflect malice, and sanctions are most likely to have their intended preventive benefits. But what if a corporate defendant's mind is disordered? Organizational psychology and economics have tools to identify normally functioning organizations that are fully accountable for the harms they cause. These disciplines can also diagnose dysfunctional organizations where the threads of accountability may have frayed and where sanctions would not deter. Punishing such corporations undermines the goals of criminal law, leaves victim interests unaddressed, and is unfair to corporate stakeholders.

This Article argues that some corporate criminal defendants should be able to raise the insanity defense. Statutory text makes the insanity defense available to all qualifying defendants. When a corporate criminal defendant's mind is sufficiently disordered, basic criminal law purposes also support the defense. Corporate crime in these cases may trace to dysfunctional systems or subversive third parties rather than to corporate malice. For example, individual corporate employees may thwart well-meaning corporate policies to pursue personal advantage at the expense of the corporation itself. Corporations then may seem more like victims of their own misconduct rather than perpetrators of it.

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Justice and prevention favor treatment of insane corporations rather than punishment. Recognizing the corporate insanity defense would better serve victims' and stakeholders' interests in condemning and preventing corporate misconduct. Treatment would create an opportunity for government experts to reform dysfunctional corporations in a way that predominant modes of corporate punishment cannot. Effective reform takes victims seriously by minimizing the chance that others will be harmed. It also spares corporate stakeholders unnecessary punishment for corporate misconduct that could be sanctioned in more constructive ways.

"[E]liminating the insanity defense would remove . . .
the vitally important distinction between illness and evil."[1]

INTRODUCTION

There is a class of offenders, numbering in the millions,[2] that leading psychologists believe are constitutively psychotic.[3] Their behavior routinely defies common sense and ranges from bizarre to patently self-destructive.[4] Even though this behavior frequently exposes these offenders to crippling criminal liability,[5] not a single one has raised, let alone benefitted from, an insanity plea.[6] By failing to recognize the role that illness can play in bringing about their crimes, the law unjustly punishes defendants who do not deserve it. More importantly, the law undermines victims' interests. By refusing to properly treat these defendants' underlying disorder, the law leaves in place an unpredictable disposition to reoffend that risks creating future victims and diminishes the significance of past victims' suffering.

The "people" who comprise this group of offenders are for-profit corporations. The public's indignation at rampant corporate misconduct is palpable and justified.[7] Pharmaceutical companies poison our citizens,[8] car

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[1] ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 223 (1967).

[2] The U.S. Census Bureau puts the figure at nearly seven million. *2015-2016 SUSB Employment Change Data Tables, U.S. & States, Totals*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/2016/econ/susb/2016-susb-employment.html [https://perma.cc/6YYY-VW6C] (last visited Sept. 3, 2019)

[3] *See infra* Part IV.A.

[4] *Id.*

[5] *See* Peter R. Reilly, *Justice Deferred Is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, 2015 BYU 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.").

[6] At least, I have found no examples.

[7] *See* Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2077–80 (2016) (describing the psychological mechanisms behind blaming corporations).

[8] *See, e.g.*, Press Release, U.S. Dep't of Just., Justice Department Obtains $1.4 Billion from Reckitt Benckiser Group in Largest Recovery in a Case Concerning an Opioid Drug in United States History (July 11, 2019), https://www.justice.gov/opa/pr/justice-department-obtains-14-billion-reckitt-benckiser-group-largest-recovery-case [https://perma.cc/6T7G-C9WX] ("We are confronting the deadliest drug crisis in our nation's history.") (quoting Assistant Attorney General for the Civil Division of the Department of Justice Jody Hunt).

companies blacken our skies,[9] and multinational conglomerates corrupt our democracies.[10] We can only hope that government functionaries feel the same indignation when they respond.[11]

However, we should hesitate before reflexively calling on criminal law to punish every corporate harm. As I argue below, traditional modes of corporate punishment often do little to address victims' needs and nothing to address their deepest concerns.[12] Furthermore, behind any large corporation are thousands or millions of innocent stakeholders—employees, shareholders, creditors, and consumers[13]—whose wellbeing is also on the line.[14] Although justice favors punishing culpable corporations, it also favors sparing these stakeholders the burdens of sanction when neither they nor their corporations are culpable. Criminal liability should not be a one-way ratchet. Some crime should be punished; other crime should be managed. Doctrines

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[9] *See, e.g.*, Press Release, U.S. Dep't of Just., Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests (Jan. 11, 2017), https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six [https://perma.cc/Q5FZ-GSJQ] ("If the software detected that the vehicle was not being tested, it operated in a different mode, in which the vehicle's emissions control systems were reduced substantially, causing the vehicle to emit NOx up to 40 times higher than U.S. standards.").

[10] *See*, *e.g.*, Press Release, U.S. Dep't of Just., Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html [https://perma.cc/GMV5-VYHQ] ("Siemens AG engaged in systematic efforts to falsify its corporate books and records . . . [in order to hide nearly a billion dollars for making] corrupt payments to foreign officials through the payment mechanisms, which included cash desks and slush funds.").

[11] *See generally* William S. Laufer, *Where Is the Moral Indignation Over Corporate Crime?*, *in* REGULATING CORPORATE CRIMINAL LIABILITY 19 (Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann & Joachim Vogel eds., 2014) (arguing that prosecutors should show more genuine indignation at corporate misconduct).

[12] *See infra* Part VI.

[13] Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 825 (2003) ("Stakeholders are people whose financial well-being is tied to the corporation's success, such as employees, suppliers, charities, and communities.").

[14] *See* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1367 (2009) ("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.").

that establish guilt must be tempered by doctrines that excuse and treat the blameless and unblameable.[15]

Some will mistakenly think this Article is an exercise in corporate apology. It is worth pausing now, at the start, to insist adamantly to the contrary. This will be clear by the Article's end, after I have discussed the consequences of a successful corporate insanity plea. The motivating impulse of this Article is to meet the needs of *individuals* affected by corporate crime, both victims and innocent corporate stakeholders. While these interests should be the guiding light of corporate criminal law, that law presently disserves them all. Ordinarily, sensitivity to victim and stakeholder interests might require a zero-sum tradeoff of one against the other.[16] The corporate insanity defense provides a rare opportunity to advance both simultaneously, without requiring any legislative intervention.

Now is a good time to reconsider the scope and demands of the insanity defense. In March 2020, the Supreme Court decided *Kahler v. Kansas* and held that the Constitution[17] does not require states to offer the defense.[18] Kahler is a middle-aged white male. Commentators should pause to considered what implications the arguments in his case might have for defendants who are different from him. For example, some jurisdictions categorically exclude juveniles from raising the insanity defense, despite the fact that mental health is as much a concern among the young as it is among adults.[19] Similarly, *all* jurisdictions tacitly exclude corporations from the insanity defense. These exclusions are likely mistakes. I address the

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[15] HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 414–15 (1979) ("Condemning one who is blameless is universally abhorred as an injustice, and it is astonishing that those who advocate criminal liability regardless of culpability do not perceive this abhorrence as an insurmountable obstacle to the adoption of their program."); Paul H. Robinson, *A System of Excuses: How Criminal Law's Excuse Defenses Do, and Don't, Work Together to Exculpate Blameless (and Only Blameless) Offenders*, 42 TEX. TECH. L. REV. 259, 261 (2009) [hereinafter Robinson, *A System of Excuses*]; Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 229 (1982) ("Excuses do not destroy blame, as do the three groups of defenses previously discussed; rather, they shift if [sic] from the actor to the excusing conditions.") [hereinafter Robinson, *Criminal Law Defenses*].

[16] For example, ordering a corporate criminal to pay restitution or a fine may satisfy victim interests, but at the expense of corporate stakeholders who effectively pay the fine. GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 863 (2d ed. 1961) ("[A] fine imposed on the corporation is in reality aimed against shareholders who are not . . . responsible for the crime, *i.e.*, is aimed at innocent persons.").

[17] U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

[18] 140 S. Ct. 1021, 1027 (2020).

[19] Emily S. Pollock, Note, *Those Crazy Kids: Providing the Insanity Defense in Juvenile Courts*, 85 MINN. L. REV. 2041, 2041 (2001) ("[T]he affirmative insanity defense is, in many jurisdictions, available to people over the age of eighteen but not to juveniles.").

corporate exclusion below and argue that corporations, like individuals, can behave in ways that call reason and accountability into doubt.

The clearest, though by no means only, examples of such behavior involve plainly self-destructive corporate conduct. Often thought to be paragons of rational calculation,[20] corporations sometimes deviate in bizarre ways, far from the path of maximum utility. Consider the textbook classic, *United States v. Sun-Diamond Growers of California*.[21] In the 1990s, prosecutors accused Sun-Diamond of illegally funneling tens of thousands of dollars to a political campaign.[22] Legally speaking, Sun-Diamond committed bribery.[23] Colloquially speaking, it was, in the words of the D.C. Circuit, "befuddled."[24] Sun-Diamond had only the remotest of hypothetical interests in the politician's fortunes. The only sure result was that the payments exposed the corporation to significant legal risks. As the court remarked, Sun-Diamond looked more like a victim of its own misconduct.[25] While bound by current law to uphold the conviction, the court chastised the prosecutor for bringing the case in the first place.[26]

Sun-Diamond represents a broader class of cases where self-undermining corporate behavior conflicts with the rational behavior that responsible action presupposes.[27] In many instances of illegal conduct—

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[20] *See* Harvey M. Silets & Susan W. Brenner, *The Demise of Rehabilitation: Sentencing Reform and the Sanctioning of Organizational Criminality*, 13 AM. J. CRIM. L. 329, 367 (1986) ("The corporation is a rational actor striving to maximize financial gain and minimize financial loss, and so can be manipulated most easily by imposing monetary penalties that affect these acts.") (footnotes omitted).

[21] 138 F.3d 961 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999).

[22] *Id.* at 969–70.

[23] *See id.* at 977 (upholding corporate bribery conviction).

[24] *Id.* at 970.

[25] *Id*.

[26] *Id.* ("Where there is adequate evidence for imputation (as here), the only thing that keeps deceived corporations from being indicted for the acts of their employee-deceivers is not some fixed rule of law or logic but simply the sound exercise of prosecutorial discretion.").

[27] *See* Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 783 (1985) ("Rationality is notoriously hard to define, but a reasonable working definition would include reference to both the sensibleness of the actor's goals and the logic of the means chosen to achieve them . . . . In a rough and ready fashion, we may ask whether, given the social context, any sense can be made of the actor's goals, whether any reasonable person could hold them, whether they are logically or empirically intelligible.").

from insider trading[28] to embezzlement[29]—the criminal corporations are often their own and only victims. Corporations can face criminal charges for exposing their own secrets[30] and stealing from their own coffers.[31]

Such bizarre corporate behavior only starts to make sense once we peel back the fiction that defines corporations as unified legal subjects, and peek inside at the real people, incentives, and systems that comprise them. Realistically speaking, Sun-Diamond did not, in its corporate capacity, bribe an irrelevant politician; an employee funneled Sun-Diamond's money to a personal friend.[32] Corporations do not share their own proprietary information; employees commit insider trading using corporate secrets for personal gain.[33] Corporations do not steal from themselves; employees embezzle corporate funds for personal use.[34]

Nonsensical corporate behavior is an inevitable byproduct of the particular way that the law construes corporate "personhood."[35] The law's simplistic conception of corporate psychology is unmoored from any organizational science or economic sense. According to *respondeat superior*, the centuries-old doctrine most jurisdictions use to hold an employer liable for the actions of its employees,[36] corporations basically do and think whatever their employees do and think.[37] This means that even when

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[28] John P. Anderson, *When Does Corporate Criminal Liability for Insider Trading Make Sense?*, 46 STETSON L. REV. 147, 156 (2016) ("It turns out that in most (though not all) cases where a corporation is subject to criminal liability for the insider trading of its employees, it (or its shareholders) is by theory of law also the principal victim of that same trading.").

[29] *See* City of New York v. Fox, 133 N.E. 434, 435 (1921) ("[T]he warden was just as much responsible for the misappropriation by his appointee as he would have been if he had committed the fault himself.").

[30] *See* JOHN P. ANDERSON, INSIDER TRADING: LAW, ETHICS, AND REFORM 113–14 (2018) ("[In true insider trading cases], shareholders are forced to suffer the crime and the punishment!").

[31] *See, e.g.*, In re Chinacast Educ. Corp. Sec. Litig., 809 F.3d 471, 472–73 (9th Cir. 2015) (attributing to corporation the fraudulent intent of CEO and CFO who embezzled millions of corporate funds).

[32] United States v. Sun-Diamond, 138 F.3d 961, 964 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999).

[33] SEC v. Softpoint, Inc., 958 F. Supp. 846, 863–64 (S.D.N.Y. 1997) (holding that former employee of software company used access to corporate secrets to commit insider trading).

[34] Nat'l Football Scouting Inc. v. Cont'l Assur. Co., 931 F.2d 646, 649–50 (10th Cir. 1991) (reversing summary judgment that had favored a corporation that employed an embezzling employee).

[35] *See infra* Part VI.B.

[36] *See* N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 496 (1909) (recognizing, for the first time, the possibility of corporate criminal liability under federal law for affirmative acts).

[37] *See* 18B AM. JUR. 2D *Corporations* § 1841, Westlaw (database updated May 2019).

employees do or think things that make no sense from the corporate perspective, the law says corporate employers do and think those things as well. It makes no legal difference how hard corporations try to keep their employees on track through corrective policies and compliance procedures.[38]

Ordinarily in criminal law, patently nonsensical behavior strongly suggests that an individual criminal defendant has a condition that mitigates his responsibility.[39] The law recognizes that bringing the full destructive force of criminal sanctions to bear would be inappropriate in these circumstances.[40] A different official response (like mental health treatment) better meets the interests of justice.

I argue below that similar logic applies to some cases of corporate misbehavior. Corporate misconduct often occurs in an evil organization that deserves a harsh criminal justice response. But when corporate misconduct disserves the corporation's own interests, it may instead reflect a broken or exploited organization, rather than an evil one. It is hard to see what retributive or deterrent value there could be to punishment in those cases. If a corporation is broken, it may lack the rational mechanisms needed to weigh the deterrent costs of sanctions. If it is internally exploited, it already has reason enough to prevent further misconduct. Either way, there seems to be no tangible sense in which such corporations display the evil intent that is the lynchpin of retributive justice. Punishing them neither fixes their dysfunction nor sanctions the insiders who exploit them—it only serves to burden innocent corporate stakeholders who may have already suffered because of the underlying misconduct.[41]

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[38] *See* United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1973) ("[Corporate liability for employee misconduct] may attach without proof that the conduct was within the agent's actual authority, and even though it may have been contrary to express instructions."); U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-28.800, https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/X733-HZ7C] ("[T]he existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents.").

[39] Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond* Clark v. Arizona, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1117 (2007) ("Rationality is the [philosophical] touchstone of responsibility, as the structure of criminal law itself indicates.").

[40] Hotema v. United States, 186 U.S. 413, 416 (1902) (approving the following language in a jury instruction: "Where reason ceases to have dominion over the mind proven to be diseased, the person reaches a degree of insanity where criminal responsibility ceases and accountability to the law for the purpose of punishment no longer exists.").

[41] *See* Alschuler, *supra* note 14, at 1367–68 (noting that innocent shareholders, employees, and other stakeholders of a corporation are the ones who primarily suffer the consequences of corporate criminal sanctions).

Although the doctrinal focus of the corporate insanity defense must be on corporate defendants, any broader policy justification must focus on individuals.[42] Individual corporate stakeholders are surely one relevant constituency, but victims should come first. The corporate insanity defense would have no legitimate role in corporate criminal law if it undermined victim interests. These interests include paying restitution, preventing future corporate harms (whether to past or to future victims), and giving victims their day in court to tell their stories and demand recognition. Corporate criminal law must do better for victims. It (sometimes) delivers on restitution, but unequivocally fails with respect to prevention and expressive values.[43]

A corporate insanity defense would both prevent more corporate crime and lead to more trials when corporations do commit crime, all without compromising victim restitution. Introducing the possibility of finding corporate defendants "not guilty only by reason of insanity" would lower the barriers prosecutors face when initiating corporate trials and would thereby provide a surer legal mechanism for recognizing corporate wrongs. The consequences to corporate defendants of such a verdict—which would include intensive compliance reform, the corporate equivalent of mental health treatment—would better prevent offenses from recurring than the penalties criminal corporations currently face.

There are two strategies the law could take to address its failure to provide justice to victims and corporate stakeholders. The first and more familiar approach is to call for radical legal change. Commentators in this camp have suggested rewriting the law's most basic doctrines for understanding corporate conduct, thought, and liability.[44] Many of these dramatic proposals would change things for the better, but they have little realistic prospect of being adopted in the near future. Most would require coordination among legislators, administrators, and judges. In the present

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[42] *See generally* Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95 (2014) (arguing that corporations only have standing to assert certain constitutional rights on behalf of the corporations' individual members). *See also* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1679 (2015) ("If the Court is going to recognize a corporate right, it should be able to identify the specific group of natural persons from whom the corporate right is derived.").

[43] *See* Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 565–68 (2018).

[44] *See, e.g.*, Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099–101 (1991) (proposing corporate ethos, rather than respondeat superior, as a measure of liability).

political climate, even modest cooperation seems too much to hope for.[45] There is a long-lived status quo bias in corporate criminal law. Despite decades of near-universal opposition to current doctrine,[46] the law has seen little reform, and none is predicted.

Here, I adopt a different approach that aims to work within the law as it presently stands, while also pointing out threads that have been overlooked, unappreciated, and underexplored. The single strand I investigate here is the law of excuses[47] and, in particular, the excuse provided to insane defendants.[48] All but five U.S. jurisdictions absolve criminals who suffer from serious mental disease or defect.[49] The prima facie legal case for a corporate insanity defense in these jurisdictions is simple to state. Under federal law, the insanity defense is available to any criminal "defendant,"[50] without regard to corporeal or corporate form. Under state law, the defense is typically available to any "person,"[51] defined to include "any natural person [or] . . . corporation."[52] The deeper legal case draws on corporate psychology, economics, and organizational science to show how corporations can satisfy the legal definition of insanity and how recognizing this would promote fundamental criminal justice policies.

In support of the individual insanity defense, leading commentator Stephen J. Morse observed: "We should not abolish the insanity defense unless we truly believe that every perpetrator of a criminal act deserves to be punished, no matter how [mentally ill]. If we do not believe this . . . then we must retain the defense."[53] As I argue below, the corporate insanity defense satisfies Morse's bar: There are some corporations who do not deserve to be punished because their crimes show they are, organizationally speaking, too

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[45] Charles Gardner Geyh, *Courts, Congress, and the Constitutional Politics of Interbranch Restraint*, 87 GEO. L.J. 243, 246 (1998) (reviewing ROBERT A. KATZMANN, COURTS, CONGRESS, AND THE CONSTITUTIONAL POLITICS OF INTERBRANCH RESTRAINT (1997)) (noting increased interbranch conflicts between judges and legislators in a highly partisan era).

[46] Ved P. Nanda, *Corporate Criminal Liability in the United States: Is A New Approach Warranted?*, 58 AM. J. COMP. L. SUPP. 605 (2010), *reprinted in* CORPORATE LIABILITY: EMERGENCE, CONVERGENCE, AND RISK 63, 85–87 (Mark Pieth & Radha Ivory eds., 2011).

[47] PAUL H. ROBINSON, CATHERINE PALO, AVIK K. GANGULY, MYRON MOSKOVITZ & JANE GRALL, 2 CRIM. L. DEF. *Excuses—generally* § 161, Westlaw (database updated July 2020).

[48] *Id. Insanity* § 173.

[49] Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 85 (2006).

[50] 18 U.S.C. § 17.

[51] MODEL PENAL CODE § 4.01 (AM. L. INST. 2019).

[52] MODEL PENAL CODE § 1.13(8) (AM. L. INST. 2019). State law uses "human being" when it means to refer to members of the species homo sapiens. *See, e.g.*, MODEL PENAL CODE § 210.0(1) (AM. L. INST. 2019).

[53] Morse, *supra* note 27, at 836.

"ill." Skeptical readers' thoughts will naturally jump to extreme cases of seemingly psychopathic corporations escaping conviction for heinous crimes. I will address such cases head-on below.[54] For now, I note that fixating on sensational crimes has corrupted perceptions of the individual insanity defense for decades, and I hope to avoid the same here.[55] Rest assured: psychopathic corporations would not qualify for the defense.

To meet Morse's threshold, I need not wade into the thick of the constitutional debate addressed by the Court in *Kahler*. While I will engage the criminal justice fundamentals on which the case partially turned, I will not suggest that corporations have a constitutional right to raise the insanity defense. Unlike punishing insane individuals,[56] punishing disordered corporations is neither "cruel" (they have no feelings)[57] nor "unusual" (we have done it for more than a century).[58] There is no history or tradition that would justify a fundamental due process right to the corporate insanity defense.[59]

After some preliminary clarifications (Part I), I begin by laying out the history behind the insanity defense and its various present-day formulations (Part II). I describe two corporate disorders that satisfy the legal definitions of insanity (Part III). As I also show, recognizing the corporate insanity defense for corporations with these disorders would advance basic criminal justice goals like retribution and deterrence. I then contextualize these disorders by describing several features of corporations—as conceived by the law, economists, and organizational psychologists—that are common sources of bizarre or destructive behavior (Part IV).

In the second half the Article, I turn to more pragmatic considerations and describe what the defense might look like in practice (Part V). Most importantly, a successful corporate insanity defense comes with strings

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[54] *See infra* Section III.A.

[55] David B. Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528, 531 (1985) ("[I]t is my belief that public disrespect for the defense erupts principally from insanity acquittals in certain species of homicide cases.").

[56] Kahler argued in part that executing the insane violates the Eighth Amendment. *See* Brief for Petitioner at 29, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135); *see also* Stephen M. LeBlanc, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 AM. U. L. REV. 1281, 1283–84 (2007) (arguing that abolishing the insanity defense would violate the Eighth Amendment).

[57] Dynamic Image Techs. v. United States, 221 F.3d 34, 37 n.2 (1st Cir. 2000) ("[C]orporations, unlike natural persons, have no emotions . . . .").

[58] *See, e.g.*, N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494–95 (1909) (upholding criminal conviction of corporation).

[59] Montana v. Egelhoff, 518 U.S. 37, 49 (1996) (noting that state policy violates due process if it conflicts with fundamental rules established in the historical traditions of the country).

attached. Like other insanity acquittees, insane corporations would undergo intensive treatment and rehabilitation, during which various incapacitating protocols would protect the public from reinjury. The Supreme Court has recognized that jurisdictions have wide latitude to shape their insanity doctrines and procedures.[60] Procedural adjustments—like shifting burdens of proof and persuasion—could mitigate potential concerns about abuse and overuse. Though scholars discussing the insanity defense typically focus on defendants, an effective corporate insanity defense could be a major step toward finally making corporate criminal law serve victim interests as well (Part VI). The only remaining question is whether the defense would be appealing enough for corporations to pursue. I conclude that, despite its costs to corporate defendants, the insanity defense offers sufficiently attractive advantages over presently available alternatives (Conclusion).

One more note of context before digging in: I have previously argued in favor of punishing *all* corporations primarily by coercively reforming them.[61] The basic idea is that corporate criminal fines are retributively inappropriate (because they hit innocent shareholders) and ineffective at deterring corporate misconduct (because they do not hit corporate decision makers). Court-ordered reform could do better on both fronts. Here, I offer a separate legal and policy-based argument for forcibly reforming a narrower class of corporate criminals where reform is especially needed—those that are legally insane.

I. SUSPENDING SKEPTICISM (AT LEAST UNTIL PART V)

I expect that many readers will greet the prospect of a corporate insanity defense with some initial skepticism. The argument for it draws on concepts from corporate criminal law, organizational psychology, systems theory, and economics. To clear the path for what follows, I respond here to some preliminary hurdles that might otherwise threaten to derail the conversation before it starts. I aim to persuade readers to suspend their skepticism until I have had a chance to explain in concrete terms what corporate insanity is and to describe the tangible benefits of treating it rather than punishing it.

My thesis—that the criminal law should recognize a corporate insanity defense—must be distinguished from three further theses that I do *not* endorse and that do not follow as a matter of law or logic from what I *do* endorse. First, the corporate insanity defense does not imply that all or even most corporations should escape liability for their crimes. I have argued

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[60] Clark v. Arizona, 548 U.S. 735, 749 (2006).

[61] *See generally* Diamantis, *supra* note 43 (arguing that coercive reform is the only just and effective punishment for corporate criminals).

extensively against this abolitionist position because I believe there are values to punishing corporate misconduct that other systems of corporate liability cannot replicate.[62] Properly understood, the corporate insanity defense would apply only to "disease[d] or defect[ive]" corporations.[63] The conditions that qualify a corporation for the defense must be relatively infrequent, even among corporate criminals. One commentator has quipped that "[i]ncorporation is the law's most successful diminished capacity defense."[64] I hope to prove him right, but not in the way he intended.

Second, this Article's focus on corporate liability does not imply that responsible individuals within corporations should escape prosecution. The public is rightly angered when executives evade accountability for their organization's crimes, seemingly as a matter of course.[65] The reasons this happens are complex,[66] but we must strive to overcome them. Prosecutors can and should investigate charges against both corporations and implicated individual employees for any business crime.[67] Indeed, this is already the Department of Justice's ("DOJ") stated goal.[68] Holding culpable employees accountable is an essential component of any comprehensive strategy for addressing corporate crime.[69]

Lastly, in arguing that the criminal law should excuse some corporate conduct, I do not mean to minimize the significant harms that corporate

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[62] *See, e.g.*, Diamantis, *supra* note 7, at 2058–67.

[63] MODEL PENAL CODE § 4.01 (AM. L. INST., Proposed Official Draft 1962).

[64] MARTIN BLINDER, PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW § 8:1 (5th ed. 2019), Westlaw (database updated Mar. 2019).

[65] *See* Patrick Radden Keefe, *Why Corrupt Bankers Avoid Jail*, NEW YORKER (July 24, 2017), https://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail [https://perma.cc/PZ8M-J6F2].

[66] *See generally* SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE (2016) (discussing factors that lead to leniency in prosecuting corporate crime).

[67] It should be born in mind that sometimes when corporations misbehave there will be no culpable employees. *See* 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, 16 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); *see also* United States v. Bank of New England, 821 F.2d 844, 847–48 (1st Cir. 1987) (convicting corporation despite prior acquittal of all involved employees).

[68] Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Just., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download (requiring line prosecutors to gather all information about culpable individuals before settling charges against corporations) [https://perma.cc/WFA9-28JL].

[69] *See, e.g.*, Mihailis E. Diamantis, *Successor Identity*, 36 YALE J. ON REG. 1, 17–18, 28–29 (2019) ("[D]eterring corporate crime requires deterring individual employees from committing crime on the corporation's behalf.").

crime, excused or not, inflicts on its victims. "Excuse defenses . . . do not turn unacceptable behavior into permissible conduct."[70] To the contrary, as I argue below, the corporate insanity defense is more victim-affirming than current approaches to sanctioning dysfunctional corporate misconduct. I have previously called on lawmakers and scholars to pay more attention to victims when designing corporate enforcement priorities.[71] Federal criminal law and sentencing guidelines rightly give primacy of place to making victims whole.[72] I mean nothing I say here to diminish the law's responsibility for ensuring that corporations compensate their victims, even for misconduct that the criminal law may ultimately excuse. As courts have emphasized, victim restitution serves essentially civil rather than criminal functions.[73] An intricate civil liability regime runs parallel to most of corporate criminal law.[74] There is no general insanity defense to civil liability, nor should there be.[75]

Even with this clarification, three foundational objections to the corporate insanity defense must be set aside as beyond the scope of my argument. In the remainder of this Part, I hope to show that, whatever their philosophical merits, these objections have unacceptable legal, policy, and strategic implications.

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[70] ROBINSON, PALO, GANGULY, MOSKOVITZ & GRALL, *supra* note 47, § 173(a).

[71] Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453, 454 (2019) ("In the absence of a corporate victimology, there is a far greater likelihood that criminal justice priorities, resources, and expenditures will be mismeasured.").

[72] *See, e.g.*, 18 U.S.C. § 3663A (mandating restitution orders in criminal cases); U.S. SENTENCING GUIDELINES MANUAL § 8B1.1(c) (U.S. SENTENCING COMM'N 2018) (requiring courts sentencing corporations to order victim restitution and to prioritize payment of restitution over payment of fines).

[73] *See* United States v. Bach, 172 F.3d 520, 523 (7th Cir. 1999) ("Functionally, the Mandatory Victims Restitution Act is a tort statute . . . .").

[74] *See* Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1327–28 (2001) ("Parallel statutory regimes providing civil and criminal sanctions for essentially the same conduct exist in virtually every area of white-collar wrongdoing, including health care fraud, environmental harms, workplace safety, and securities law.").

[75] *See* William E. Westerbeke, *Survey of Kansas Tort Law: Part II*, 50 U. KAN. L. REV. 225, 225 (2002) (referring to "the unanimous American rule that insanity does not prevent the existence of an intent for purposes of civil liability"); Victoria O'Brien, *Civil Legal Remedies for Crime Victims*, OVC BULL. (Dec. 1993), https://booksite.elsevier.com/9780323287654/content/CH5-OVC_Civil_remedies.pdf [https://perma.cc/TX35-GA2Q].

The first objection rejects any notion that excuses can apply to corporate misconduct.[76] Excuses function by negating moral accountability for harm.[77] If corporations are necessarily morally unaccountable, excuses do not apply.[78] Philosopher Susan Wolf has compared corporations to sociopaths, whom she believes lack moral standing.[79] If corporations are not responsible agents, they can have no responsibility to excuse, whether by the insanity defense or otherwise.

Whether the objection assumes that corporations are not moral agents because they cannot truly act, or because they can act but not responsibly,[80] this is a dangerous path to go down. It threatens to unravel all corporate criminal law. The Supreme Court recognized more than a century ago that the law must hold corporations criminally accountable if it is to have effective tools for controlling corporate harm.[81] Undoing corporate criminal law would leave the public vulnerable to corporate villainy. It would also risk

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[76] *See* Sylvia Rich, *Can Corporations Experience Duress? An Examination of Emotion-Based Excuses and Group Agents*, 13 CRIM. L. & PHIL. 149, 149–50 (2019) ("It seems unlikely that a corporate entity could benefit from such human-specific defenses as insanity or lack of capacity."). Interestingly, Rich argues that corporations could benefit from a duress defense. *Id.* at 150.

[77] Robinson, *Criminal Law Defenses*, *supra* note 15, at 221 ("Excuses admit that the deed may be wrong, but excuse the actor because conditions suggest that the actor is not responsible for his deed.").

[78] *See* C.M.V. Clarkson, *Kicking Corporate Bodies and Damning Their Souls*, 59 MOD. L. REV. 557, 566 (1996) ("Culpability can only be attributed to moral agents and many commentators have argued that companies, for these purposes, cannot be culpability-bearing agents in their own right.").

[79] Susan Wolf, *The Legal and Moral Responsibility of Organizations*, *in* CRIMINAL JUSTICE: NOMOS XXVII, 267, 278–81 (J. Roland Pennock & John W. Chapman eds., 1985); *see also* Amy J. Sepinwall, *Blame, Emotions, and the Corporation*, *in* THE MORAL RESPONSIBILITY OF FIRMS 143, 144–63 (Eric W. Orts & N. Craig Smith eds., 2017) (arguing since corporations do not have emotions, they cannot be morally responsible).

[80] *See* 41 AM. JUR. PROOF OF FACTS 2D 615 *Insanity Defense* § 14, Westlaw (database updated Sept. 2020) ("Automatism is a defense closely related to unconsciousness. A person in a state of automatism, while capable of action, is not conscious of what he is doing. Such a person may perform complex actions without intent, exercise of will, or knowledge of the act. Automatistic behavior is frequently followed by a partial or complete inability to recall the actions performed while unconscious."); Michael S. Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563, 1572–73 (1980) (arguing that an unconscious person cannot be responsible for his acts); People v. Ray, 533 P.2d 1017, 1020 (Cal. 1975) (noting that involuntary unconsciousness is a full defense to criminal charges).

[81] N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 495 (1909) ("We see no valid objection in law, and every reason in public policy, why the corporation [should be held criminally accountable] . . . ."); *see generally* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006) (arguing that the criminal law has uniquely powerful deterrent effects for corporations).

undermining the broader legitimacy and efficacy of criminal law.[82] The concept of corporate responsibility is an ingrained and intuitive fixture of our social lives.[83] Perceptions of corporate agency and responsibility are hardwired into our cognitive architecture.[84] If the criminal law refuses to hold corporations accountable, it risks undermining its perceived moral authority. In any case, given the broad public support for punishing corporations, abolishing corporate criminal law is a political nonstarter.[85]

A second objection to the corporate insanity defense says that corporations cannot be insane because they do not have minds.[86] This objection has even further-reaching abolitionist implications than the first. A foundational premise of corporate law is the fiction that corporations have mental states.[87] While "the corporate personality is a [legal] fiction, [it is] a fiction intended to be acted upon as though it were a fact."[88] Regardless of whether corporations really have minds, there are compelling reasons for the pretense.[89] Without that fiction, corporations could not take the many legal actions that make them so useful, like entering into contracts, buying property, selling goods, etc. It is hornbook law that without a "meeting of the minds" there can be no contract.[90] Furthermore, abandoning the fiction that

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[82] PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 176–88 (2013) ("[T]he criminal law's moral credibility is essential to effective crime control . . . .").

[83] Joshua Knobe & Jesse Prinz, *Intuitions About Consciousness: Experimental Studies*, 7 PHENOMENOLOGY & COGNITIVE SCI. 67, 71–72 (2008); Matthew J. O'Laughlin & Bertram F. Malle, *How People Explain Actions Performed by Groups and Individuals*, 82 J. PERSONALITY & SOC. PSYCH. 33, 33 (2002).

[84] Diamantis, *supra* note 7, at 2077–80; Steven J. Sherman & Elise J. Percy, *The 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, 150 (2010); Amy L. Johnson & Sarah Queller, *The Mental Representations of High and Low Entitativity Groups*, 21 SOC. COGNITION 101, 112 (2003) (providing evidence of a basic shift in cognition toward groups with high versus low entitativity).

[85] *See* Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 612 (2012) (arguing that the public demands corporate criminal liability). *But see* John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1329 (2009) (arguing against corporate criminal liability).

[86] *See* John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 350 (2004).

[87] *See generally* Diamantis, *supra* note 7 (discussing criminal law's commitment to corporate mental states).

[88] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[89] *See generally* CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011) (arguing that corporations are agents). *But see generally* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY (Guenther Roth & Claus Wittich eds., 1978) (arguing that corporations are not agents).

[90] Insurance Company v. Young's Administrator, 90 U.S. 85, 107 (1874).

corporations have minds would effectively immunize corporations from most significant forms of liability.[91] The vast majority of crimes require both a criminal act and a criminal mental state.[92] No mind, no mens rea, no crime.

Finally, I set aside (at least until Part V) a third class of objections because of their close kinship to a destructive and mistaken mythology that opponents of the insanity defense have recited for decades.[93] Unsubstantiated criticisms of the insanity defense include that it allows criminals to "beat the wrap,"[94] involves arbitrary line-drawing,[95] is too vague,[96] is too widely used,[97] releases dangerous criminals back into the public,[98] and is a "rich

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[91] *See* Mihailis E. Diamantis, *The Extended Corporate Mind: When Corporations Use AI to Break the Law*, 98 N.C. L. REV. 893, 899 (2020) (discussing the implications of not having a doctrine for attributing mental states to corporations when they act through algorithmic rather than employees).

[92] United States v. Apfelbaum, 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable mens rea and a criminal actus reus are generally required for an offense to occur.").

[93] *See* Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 604 (1989) ("I begin the process of unpacking the myths by focusing on a series of meta-myths that have developed around the empirical myths: myths animated by an omnipresent fear of feigning, by a community sense that mental illness is somehow different from other illnesses, by a public need for mentally disabled criminal defendants to conform to certain typical external manifestations of 'craziness,' and by a persistent belief that it is simply improper to exculpate most criminal defendants because of their mental illness.").

[94] Linda C. Fentiman, *"Guilty But Mentally Ill": The Real Verdict Is Guilty*, 26 B.C. L. REV. 601, 601–02 (1985) ("Although the insanity defense is invoked in far less than one percent of all felony cases, and is successful in only a fraction of the cases in which it is invoked, the view is widely held that the insanity defense is used to 'coddle' criminals and to permit guilty and violent individuals to escape the criminal sanction.").

[95] Parsons v. State, 2 So. 854, 864–65 (Ala. 1887) ("It is no satisfactory objection to say that the rule above announced by us is of difficult application. The rule in *McNaghten's Case* is equally obnoxious to a like criticism. The difficulty does not lie in the rule, but is inherent in the subject of insanity itself.") (citation omitted).

[96] 1 NAT'L COMM. ON REFORM OF FED. CRIM. LAWS, WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 249 (1970) (noting the key terms in the various insanity tests are so vague that they "invite semantic jousting, metaphysical speculation, intuitive moral judgments in the guise of factual determinations").

[97] William S. Laufer, *The Jurisprudence of the Insanity Defense*, 16 J. LEGAL MED. 453, 454 (1995) (reviewing MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE (1994)) ("Myth 1[:] The insanity defense is overused.").

[98] Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 972–75 (1987) ("One of the most palpable bases for public distrust of the insanity defense is the widespread fear that defendants found NGRI are quickly released from mental hospitals to commit new crimes against society.").

man's" defense.[99] I assume, along with most criminal law professors, that the insanity defense for individuals is desirable and that we should dismiss these myths.[100]

For individual defendants, the data belie the naysayers' story. Defendants rarely feign mental illness.[101] Indeed, defendants are more likely to feign sanity than insanity.[102] The insanity defense is pled in only 0.9% of cases and is successful in only 0.2%.[103] Criminal defendants whom courts find to be insane are rarely set free. In the vast majority of cases, they face commitment to a mental institution,[104] often for longer than the prison sentence they would have faced upon conviction.[105] Lastly, the rich are no more likely to benefit from the defense than the poor.[106]

These data are, of course, all about individuals asserting the insanity defense. There is no such data about corporations. In its absence, we should resist unfounded speculation. Allowing this sort of criticism to creep in too

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[99] Morse, *supra* note 27, at 798–99 ("It is also often claimed that insanity is a rich person's defense—the Hinckley verdict is a particularly popular example—but this claim proves too much. Wealthier defendants can almost always retain the best attorneys and experts in all types of cases, both civil and criminal."); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 7.1(d) (3d ed. 2019), Westlaw (database updated Oct. 2019) ("Insanity is in practice only a 'rich man's defense' in that only the wealthy can afford the array of experts needed to mount a convincing defense—experts who are in short supply and whose time would be better spent in treatment of those who have been committed or imprisoned.").

[100] *See* Brief of Amicus Curiae 290 Criminal Law and Mental Health Professors in Support of Petitioner's Request for Reversal and Remand at 3, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135) (arguing that abolishing insanity defense is unconstitutional). *But see* Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1243–46 (2000) (arguing for abolition).

[101] Robert M. Wettstein & Edward P. Mulvey, *Disposition of Insanity Acquittees in Illinois*, 16 BULL. AM. ACAD. PSYCHIATRY L. 11, 15 (1988) (reporting very low rates of malingering about insanity).

[102] *See* Dorothy Otnow Lewis, Jonathan H. Pincus, Marilyn Feldman, Lori Jackson & Barbara Bard, *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 841 (1986).

[103] HENRY J. STEADMAN, MARGARET A. MCGREEVY, JOSEPH P. MORRISSEY, LISA A. CALLAHAN, PAMELA CLARK ROBBINS & CARMEN CIRINCIONE, BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 28 (1993); *see* Morse, *supra* note 27, at 797 ("Few defendants 'beat the rap' with the insanity defense. There are little hard data for this claim, but it is best estimated that the insanity defense is raised in fewer than two percent of federal and state trials and is rarely successful.").

[104] LAFAVE, *supra* note 99, § 8.4.

[105] Mac McClelland, *When 'Not Guilty' Is a Life Sentence*, N.Y. TIMES MAG. (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html [https://perma.cc/L7CM-L6L4] ("[Insanity acquittees] often lost their freedom for twice as long as those actually convicted of the same offense.").

[106] *See* Michael R. Hawkins & Richard A. Pasewark, *Characteristics of Persons Utilizing the Insanity Plea*, 53 PSYCH. REP. 191, 194 (1983).

early could have unwelcome implications for the insanity defense more broadly. Selective news reporting largely informs the public's skeptical perceptions of the insanity defense[107] and is "fueled by the supposed invisibility of mental illness."[108] We should resist fanning the flames.

II. MEASURING MADNESS

The criminal law presumes that we are all sane and responsible for our actions.[109] It is on that basis that we can be punished when we commit crimes. The insanity defense, though, is criminal law's acknowledgement that this presumption can be overcome. Mental impairment may cause moral impairment, and moral impairment may make punishment inappropriate.[110] The defense is "the law's conscientious efforts to place in a separate category people who cannot justly be held 'responsible' for their acts."[111]

Public opinion has contributed more to the history of the insanity defense than has the reasoned march of scientific progress.[112] Though contemporary Americans tend to be highly skeptical of the defense,[113] it has long been a fixture of criminal law. There is some debate about the defense's true origins.[114] Most scholars trace it to ancient Greek, Roman, or Hebrew

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[107] *See* NAT'L MENTAL HEALTH ASS'N, MYTHS AND REALITIES: A REPORT OF THE NATIONAL COMMISSION OF THE INSANITY DEFENSE 5 (1983).

[108] Perlin, *supra* note 93, at 721.

[109] Clark v. Arizona, 548 U.S. 735, 766 (2006) ("The presumption of sanity is equally universal . . . being (at least) a presumption that a defendant has the capacity to form the *mens rea* necessary for a verdict of guilt and the consequent criminal responsibility."); Slobogin, *supra* note 100, at 1202 ("Accepting blameworthiness as the touchstone of the criminal law means that individual culpability must be assessed. That is where the kind of inquiry the insanity defense mandates comes into play. It is meant to help us decide who among those who commit criminal acts deserve to be the subject of criminal punishment.").

[110] LAFAVE, *supra* note 99, § 7.1(d) ("[W]e would rebel at the notion of labeling as criminal those who are generally conceded not to be blameworthy.").

[111] United States v. Freeman, 357 F.2d 606, 615 (2d Cir. 1966).

[112] Loren H. Roth, *Preserve but Limit the Insanity Defense*, 58 PSYCHIATRIC Q. 91, 91 (1986–87) ("The evolution of the insanity defense over the centuries cannot be viewed as a march of scientific progress, but instead as a barometer of public and jurisprudential thinking about justice.").

[113] PSYCHOLOGICAL AND SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS § 3:3, Westlaw (database updated May 2020) ("Despite society's tacit acceptance of insanity as a disease in the medical realm of diagnosis and treatment, society has not been predisposed to extend the illness model to the legal forum."); Mickenberg, *supra* note 98, at 965 ("Virtually every relevant survey reveals a deep-seated public antipathy to the NGRI verdict.").

[114] *See* Debra Wood, *Ancient Origins – or Otherwise – of the Insanity Defense*, 16 PSYCHIATRY, PSYCH. & L. S145, S150–51 (2009) (arguing, contrary to common scholarly assertion, that ancient Greek law had no insanity defense).

law.[115] From there, the insanity defense found its way to medieval British law,[116] where it was a well-established part of the common law by the end of the Middle Ages.[117]

Although the central insight of the insanity defense has always been that mental impairment can negate moral responsibility, the doctrinal test for mental impairment has changed over time. Early English legal commentators noted the defense's existence, but there are few direct textual records of the legal standards courts used.[118] One of the first—the "wild beast" test—comes from the early 18th century.[119] Edward Arnold was charged with the attempted murder of Lord Thomas Onslow in 1724.[120] Arnold had shot Onslow in front of two witnesses.[121] There were several signs that things were not quite right with Arnold: he would hoot like an owl, put hot coals in his father's food, and complain that Lord Onslow was living inside his belly.[122] The judge instructed the jury that "a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment."[123] Though the jury convicted Arnold and the judge sentenced him to death, Lord Onslow interceded so that the punishment was reduced to life imprisonment.[124]

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[115] RUDOLPH JOSEPH GERBER, THE INSANITY DEFENSE 8 (1984); ARISTOTLE, NICOMACHEAN ETHICS 33 (W. D. Ross trans., Batoche Books 1999) ("Since virtue is concerned with passions and actions, and on voluntary passions and actions praise and blame are bestowed, on those that are involuntary pardon, and sometimes also pity, to distinguish the voluntary and the involuntary is presumably necessary for those who are studying the nature of virtue, and useful also for legislators with a view to the assigning both of honours and of punishments.").

[116] Slobogin, *supra* note 100, at 1208 ("Although we have virtually no direct evidence about the facts of individual cases in medieval and renaissance times, commentators of the period consistently spoke of a requirement that the defendant lack understanding of good and evil or be devoid of all reason, and often equated the insane with animals or infants.").

[117] Sheila Hafter Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 562 (1972).

[118] *See* Homer D. Crotty, *The History of Insanity as a Defense to Crime in English Criminal Law*, 12 CAL. L. REV. 105, 107–14 (1923–24).

[119] *See generally* Anthony M. Platt, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 ISSUES IN CRIMINOLOGY 1 (1965) (describing the historical origins of the wild beast test).

[120] R v. Arnold, 16 How. St. Tr. 695, 695 (Eng. 1724).

[121] *Id.* at 699–700.

[122] *Id.* at 733–34, 725–26, 731–32.

[123] *Id.* at 765.

[124] *Id.* at 765–66.

The modern doctrinal history of the insanity defense began more than a century later, in 1843, with *M'Naghten*.[125] M'Naghten shot and killed the Prime Minister's secretary, mistaking him for the Prime Minister.[126] In his defense, M'Naghten explained that the Prime Minister had been orchestrating a vast political conspiracy to kill him.[127] Mental health experts testified that M'Naghten suffered from paranoid delusions.[128] The judge accordingly instructed the jury on the insanity defense, setting forth what is, to this day, the best known insanity standard: any defendant who, at the time of his crime, was "labouring under such a defect of reason, from disease of mind as not to know the nature and quality of the act he was doing: or if he did 'know' it, that he did not know he was doing what was wrong," is legally insane.[129] The jury found M'Naghten "not guilty, by reason of insanity."[130] He lived out his days between the "criminal lunatic department" at Bedlam Hospital and the Broadmoor Asylum.[131]

Though tests measuring insanity by the defendant's inability to distinguish "right and wrong" existed since the early 1800s,[132] the "M'Naghten test" quickly became the standard throughout England.[133] Soon after, it migrated to the United States. By the middle of the 19th century, U.S. federal courts and many state courts had adopted the M'Naghten test.[134] Before long, many became most.[135]

The insanity defense's history did not stabilize with the M'Naghten test. Following a slew of scholarly challenges to the test during the 1950s, the

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[125] DANIEL W. SHUMAN, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE § 12:2 (3d ed. 2018).

[126] M'Naghten's Case, 8 Eng. Rep. 718, 719 (1843).

[127] RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN 1 (1981).

[128] M'Naghten's Case, 8 Eng. Rep. at 719.

[129] *Id.* at 722.

[130] MORAN, *supra* note 127, at 19.

[131] *Id.* at 23–24.

[132] Slobogin, *supra* note 100, at 1209 ("Beginning no later than the early 1800s, courts in both England and America increasingly referred to insanity as an inability to distinguish 'right and wrong.' This language conld [sic] be construed to mean that a person who intentionally harmed another and was generally aware of the concept of crime might still be acquitted if, because of mental disorder, he . . . delusionally perceived facts that amounted to a justification.").

[133] *See* MORAN, *supra* note 127, at 2.

[134] PSYCHOLOGICAL AND SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS, *supra* note 113, § 3:7.

[135] *See* Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CAL. L. REV. 1227, 1257 (1966).

release of the American Law Institute's ("ALI") own test in 1962,[136] and the passage of the federal Insanity Defense Reform Act in 1984,[137] the picture in the United States is much more complicated today. States have substantial leeway to shape their own tests, giving rise to a patchwork of different approaches.[138] While five states—Alaska,[139] Idaho,[140] Kansas,[141] Montana,[142] and Utah[143]—have abolished the defense, the remaining jurisdictions allow some combination of so-called "cognitive" and "volitional" tests.[144]

Volitional tests are premised on the assumption that a defendant must have control of his actions to be responsible for them. Control serves as a constraint on liability throughout the criminal law. For example, criminal liability generally requires that a person acted voluntarily.[145] The duress excuse similarly recognizes that certain circumstances—e.g., coercion by another's use of unlawful force[146]—can impair control and render a person blameless.[147] Volitional insanity tests provide an excuse when a mental

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[136] MODEL PENAL CODE § 4.01 (AM. L. INST. Proposed Official Draft 1962).

[137] 18 U.S.C. § 17(a).

[138] Clark v. Arizona, 548 U.S. 735, 742 (2006) (rejecting challenge to Arizona's particular formulation of the insanity defense).

[139] ALASKA STAT. § 12.47.010 (Westlaw through 2020 Sec. Reg. Sess.).

[140] IDAHO CODE ANN. § 18-207 (Westlaw through 2020 Sec. Reg. & First Extra. Sess.).

[141] KAN. STAT. ANN. § 22-3219 (Westlaw through 2020 Reg. & Special Sess.).

[142] MONT. CODE ANN. § 46-14-102 (Westlaw through 2019 Sess.).

[143] UTAH CODE ANN. § 76-2-305 (Westlaw through 2020 Fifth Special Sess.).

[144] The Supreme Court distinguishes four types of test for the insanity defense: cognitive, moral, volitional, and product-of-mental-illness. Clark v. Arizona, 548 U.S. 735, 749 (2006) ("The main variants are the cognitive incapacity, the moral incapacity, the volitional incapacity, and the product-of-mental-illness tests."). To streamline the argument, I focus the most common cognitive and volitional tests. Commentators often collapse the cognitive and moral tests, *see, e.g.*, *id.* at 737, 753 ("[C]ognitive incapacity is itself enough to demonstrate moral incapacity . . . . Cognitive incapacity, in other words, is a sufficient condition for establishing a defense of insanity, albeit not a necessary one."), and only New Hampshire uses the product-of-mental-illness test. *Id.* at 751.

[145] MODEL PENAL CODE § 2.01(1) (AM. L. INST. 2019) ("A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.").

[146] MODEL PENAL CODE § 2.09(1) (AM. L. INST. 2019) ("It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of . . . unlawful force against his person . . . that a person of reasonable firmness in his situation would have been unable to resist.").

[147] ROBINSON, PALO, GANGULY, MOSKOVITZ & GRALL, *supra* note 47, § 173(e)(1) ("These claims of impairment of control are not unique to the insanity defense. The duress defense recognizes that even normal persons, those who suffer no mental illness, may blamelessly fail to resist coercive forces compelling their criminal conduct.").

disease or defect sufficiently impairs a defendant's control over a criminal act.

Since the M'Naghten test was so influential and lacked a volitional component, volitional tests for insanity were rare[148] until relatively recently.[149] By the mid-20th century, most U.S. jurisdictions had adopted some form of a volitional test.[150] The most common formulation applied if a defendant experienced an "irresistible impulse" to engage in the underlying criminal conduct.[151] Commentators criticized the starkly binary nature of that formulation of the test, which presumes that an impulse is either resistible or not.[152] Accordingly, during the 1960s and '70s, many states turned to the ALI's more nuanced version,[153] according to which a defendant is legally insane if he "lack[ed] substantial capacity . . . to conform his conduct to the requirements of the law."[154] By the early 1980s, every federal court to have considered the issue had also adopted a volitional test.[155]

The volitional test's dominance was short-lived. In 1982, John Hinkley attempted to assassinate President Ronald Reagan.[156] During his federal criminal trial, he raised the volitional prong of the insanity defense. He argued that his obsession with actress Jodi Foster deprived him of control over his actions.[157] After Foster ignored his many letters, he felt compelled to assassinate the President to grab her attention and win her esteem.[158] The jury bought it.[159] His acquittal provoked national outrage and prompted

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[148] *See* Edwin R. Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956, 961–65 (1952) ("After *M'Naghten*, English trial judges in charging juries generally employed the test of 'knowledge of right and wrong' and, when the question arose, declared that irresistible impulse was not a defense."). They did exist in Britain and the United States, though they were more rarely invoked. *See* Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 11–18 (1988) (discussing limited use of the volitional test for insanity in early 20th century American and U.K. courts).

[149] Some historians question whether the *M'Naghten* court actually intended to abolish the volitional test. Crotty, *supra* note 118, at 118.

[150] *E.g.*, Commonwealth v. Rogers, 7 Met. 500, 502 (Mass. 1844).

[151] *See, e.g.*, Smith v. United States, 36 F.2d 548, 549 (D.C. Cir. 1929).

[152] *See, e.g.*, Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 196 (1983).

[153] SHUMAN, *supra* note 125, § 12:2.

[154] MODEL PENAL CODE § 4.01(1) (AM. L. INST. 2019).

[155] English, *supra* note 148, at 45.

[156] United States v. Hinckley, 200 F. Supp. 3d 1, 3 (D.D.C. 2016).

[157] *See* PETER W. LOW, JOHN CALVIN JEFFRIES, JR. & RICHARD J. BONNIE, THE TRIAL OF JOHN W. HINCKLEY, JR.: A CASE STUDY IN THE INSANITY DEFENSE 22–27 (1986).

[158] *Hinckley*, 200 F. Supp. 3d at 3.

[159] Valerie P. Hans & Dan Slater, *John Hinckley, Jr. and the Insanity Defense: The Public's Verdict*, 47 PUB. OPINION Q. 202, 202 (1983).

reflection.[160] During the ensuing backlash against the volitional test, all but eighteen states and the District of Columbia abrogated it.[161]

Critics of the volitional test worry that it is so imprecise that it is virtually meaningless. All people feel urges, and all people have choices.[162] So, why should we excuse some people's urges? As the American Psychiatric Association put it: "The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk."[163] Many think psychology has little to add to this commonsense refrain: "There is no scientific measure of the strength of urges."[164] However, some psychologists today are more optimistic that recent advances in neuroscience and clinical research can help.[165] Although these developments may not yet offer a numerical measure of control, they at least show that the capacity for control is no more difficult to assess than the cognitive capacities that other formulations of the insanity defense reference.[166]

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[160] Shannon v. United States, 512 U.S. 573, 577 (1994) ("The acquittal of John Hinckley on all charges stemming from his attempt on President Reagan's life, coupled with the ensuing public focus on the insanity defense, prompted Congress to undertake a comprehensive overhaul of the insanity defense as it operated in the federal courts. The result of this effort was the IDRA."); Jay M. Zitter, Annotation, *Construction and Application of 18 U.S.C.A. 17, Providing For Insanity Defense in Federal Criminal Prosecutions*, 118 A.L.R. FED. 265 (1994) ("As one of the responses to public pressure surrounding the use of the insanity defense in the prosecution of John Hinckley for the attempted assassination of President Reagan, Congress enacted the Insanity Defense Reform Act of 1984."); STEPHEN E. ARTHUR & ROBERT S. HUNTER, 1 FEDERAL TRIAL HANDBOOK: CRIMINAL § 12:18 (4th ed. 2018), Westlaw (database updated Dec. 2020) ("The [Insanity Defense Reform Act] thus eliminated the volitional prong of the defense; prior to the act, a defendant could assert a valid defense if he were unable to appreciate the nature of his act *or* unable to conform his conduct to the requirements of law.").

[161] Redding, *supra* note 49, at 85.

[162] Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1592, 1599–1602 (1994).

[163] S. REP. NO. 98-225, at 228 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3410.

[164] Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 584 (1978); *see also* S. REP. NO. 98-225 at 227 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3408–09 (quoting Professor Richard Bonnie) ("There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment.").

[165] Redding, *supra* note 49, at 90.

[166] *Id.* at 104–05 ("[T]he availability of control tests should not turn on how satisfactorily we can measure control . . . . In practice, however, determining whether a defendant's delusions or hallucinations were directly responsible for the criminal conduct, and whether they distorted the defendant's perceptions of legal or moral wrongfulness to the degree that he or she should not be held criminally responsible, also poses significant line-drawing problems.").

After discarding the volitional test, most states and the federal system only have a cognitive test for insanity.[167] Cognitive tests roughly say that a defendant may be excused if he was unable to understand his conduct in some important respect.[168] "To qualify as a blameworthy moral agent," the thought behind cognitive tests goes, "[an] individual must have the capacity to make moral judgments about what to do and how to be."[169] The best-known formulation of the cognitive test is the M'Naghten standard quoted above, and many states still subscribe to it today.[170] Federal law is similar and applies if a defendant is "unable to appreciate the nature and quality or the wrongfulness of his acts."[171] However, like the irresistible impulse test for control, M'Naghten's requirement that a defendant lack all knowledge about the nature and quality of his actions is binary. "The M'Naghten rules fruitlessly attempt to relieve from punishment only those mentally diseased persons who have no cognitive capacity . . . . This formula does not comport with modern medical knowledge that an individual is a mentally complex being with varying degrees of awareness."[172] Accordingly, the ALI's test avoids the all-or-nothing language of M'Naghten and replaces it with a less stringent standard referring to "substantial capacity":[173] "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lack[ed] substantial capacity . . . to appreciate the criminality his conduct."[174] Roughly half the states use the ALI's version.[175]

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[167] *Id.* at 85. It should be noted that some commentators believe that the cognitive test implicitly includes the volitional test as well. *See* PSYCHOLOGICAL AND SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS, *supra* note 113, § 3.9 ("The Committee that created the test and prepared the accompanying commentary believed that the cognitive aspect of the test in essence encompassed the volitional aspect.").

[168] Clark v. Arizona, 548 U.S. 735, 747 (2006).

[169] Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1518 (1992) (emphasis omitted).

[170] *See* Michael Louis Corrado, *Responsibility and Control*, 34 HOFSTRA L. REV. 59, 61–62 (2005).

[171] 18 U.S.C. § 17(a).

[172] Wade v. United States, 426 F.2d 64, 66 (9th Cir. 1970).

[173] United States v. Brawner, 471 F.2d 969, 973 (D.C. Cir. 1972).

[174] MODEL PENAL CODE § 4.01(1) (AM. L. INST. 2019).

[175] Michelle Migdal Gee, Annotation, *Modern Status of Test of Criminal Responsibility—State Cases*, 9 A.L.R.4th 526 § 2[a] (1981) ("The ALI [cognitive] test, either in its proposed official form or with some omissions, substitutions, or other variations, has now been adopted by over half of the jurisdictions in the United States.") (internal cross-references omitted). The following states have adopted the ALI cognitive test without revisions: Alabama, Alaska, Connecticut, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, New York, North Dakota, Oregon, Rhode Island, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. *Id.* § 5.

The cognitive test's critics point out that there are mental illnesses that leave a person cognitively intact but nonetheless deprive him of responsibility.[176] For example, "[a] person who knew what he was doing was wrong, but who felt 'compelled' to commit the criminal act—say, a person suffering from kleptomania or manic-depressive psychosis—would be criminally punished [under a cognitive standard]."[177] The significant advantage of cognitive tests is supposed to be that, unlike volitional tests, they are more amenable to psychiatric analysis.[178] It is unclear, though, whether this is true.[179] Regardless, it is also far from obvious that introducing more psychiatric analysis into the courtroom is a good thing, since it may distract from what the insanity defense is really about. "[T]he insanity defense's biggest problem is that it has been 'over-sciences.' In the end . . . legal insanity is a legal and moral policy judgment, not a particular empirical fact."[180]

Moral considerations have dominated the history of justification and critique of the insanity defense in both its formulations.[181] "[M]inimal rationality (a cognitive capacity) and minimal self-control or lack of compulsion (a volitional capacity) are the essential preconditions for responsibility."[182] The moral case shows how both tests for insanity promote

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[176] Parsons v. State, 2 So. 854, 857 (Ala. 1887) ("[A]s it was soon discovered that insanity often existed without delusions, as well as delusions without insanity, this view was also abandoned.").

[177] Slobogin, *supra* note 100, 1210–12; *see also* United States v. Emery, 682 F.2d 493, 497–99 (5th Cir. 1982); Smith v. United States, 36 F.2d 548, 549 (D.C. Cir. 1929) ("It will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong.").

[178] Jonathan B. Sallet, *After* Hinckley*: The Insanity Defense Reexamined*, 94 YALE L.J. 1545, 1555 (1985) (reviewing LINCOLN CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR. (1984)) ("By eliminating the 'volitional' element of the defense and placing new evidentiary restrictions on psychiatric testimony, Congress indicated a desire to recognize the limits of psychiatric expertise.").

[179] *See* Julie E. Grachek, Note, *The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System*, 81 IND. L.J. 1479, 1493 (2006) ("Therefore, exclusive use of cognitive ability to determine insanity may also disregard the existence of free will because cognitive tests do not recognize the role of the unconscious mind."); Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1410–13 (1986) (providing psychiatrists' testimony in various cases highlighting the significant volitional component, in relation to the cognitive component, of a defendant's condition).

[180] Morse & Hoffman, *supra* note 39, at 1119.

[181] *See generally* Arenella, *supra* note 169 (discussing the moral basis of the insanity defense). *See also* Bonnie, *supra* note 152, at 196.

[182] Morse, *supra* note 27, at 782.

criminal law's retributive goal, i.e., to give criminals what they deserve.[183] A person who is not responsible for a crime deserves no punishment for it.[184]

The full modern case for the insanity defense rests on showing how it also promotes the other three major justifications for criminal punishment: deterrence, rehabilitation, and incapacitation.[185] I address each in turn. Deterrence is effectively an economic theory of criminal law.[186] It views both would-be and actual criminals as rational actors who try to maximize benefits and minimize costs.[187] On this theory, the goal of criminal law is to prevent crime by increasing the expected costs of criminal mischief.[188] Criminal law does this by imposing punishment when crime is discovered.[189] The law hopes both to deter the criminal himself from reoffending (specific deterrence) and to deter other would-be criminals (general deterrence) by displaying the legal consequences of misconduct.[190]

The logic of deterrence seems to require punishment for all criminals; however, this is not necessarily the case for volitionally- or cognitively-impaired offenders.[191] As to general deterrence, most would-be criminals are unlikely to identify with insane offenders.[192] If people do not see themselves as potentially standing in a defendant's shoes, facing the same punishment, they will draw no implications for their own conduct. As to specific

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[183] *See* IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 138 (John Ladd trans., 1999).

[184] Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER AND EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179 (Ferdinand Schoeman ed., 1987) ("*Retributivism* is the view that punishment is justified by the moral culpability of those who receive it.").

[185] Ewing v. California, 538 U.S. 11, 25 (2003).

[186] *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (offering an economic account of criminal deterrence).

[187] *See* Alexander & Cohen, *supra* note 67, at 14 (describing "the lens of an economic model in which corporate crime is the outcome of decisions of utility-maximizing individuals who have the ability to incur criminal liability on behalf of the corporation").

[188] *Id.* at 11 ("The *threat of sanction* is central to the deterrence of corporate crime . . . .").

[189] *Id.* at 14–15 ("Within this rational-choice 'deterrence' framework, individuals weigh the costs and benefits of crime-related activity against the expected sanction to maximize their private utility under the constraints of the organization in which they find themselves.").

[190] *Deterrence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[191] 41 AM. JUR. PROOF OF FACTS 2D 615, *supra* note 80, § 1 ("A person who suffers from a mental disorder is deprived of this capacity; he is neither culpable nor capable of being deterred and is therefore not subjected to the same penalties as are others who are sane.").

[192] LAFAVE, *supra* note 99, § 7.1(c)(4); LeBlanc, *supra* note 56, at 1318 ("Deterrence is effective only if people view the lessons of the offender as applicable to them, which is likely if they can identify with the offender and the circumstances of the offense. A sane person is unlikely to identify with an insane offender or the offending situation, and thus is not susceptible to the deterrent effect of punishing the insane.").

deterrence, "[t]hose who are substantially unable to restrain their conduct are, by definition, undeterrable."[193] Criminals must have some control over their conduct if the sort of cost–benefit calculus at the heart of deterrence theory is to have any effect. They must also be able to understand which courses of conduct will trigger criminal sanction. Insane defendants who fail the cognitive test lack that capacity, and they will not acquire it through punishment.[194]

Rehabilitation and incapacitation also favor excusing the criminally insane. Prisons are poorly suited for people with mental illness. Since they typically lack adequate mental health facilities, prisons are incapable of treating or rehabilitating insane inmates.[195] Nor does locking up mentally ill criminals incapacitate them from harming others. It just relocates their destructive behavior from the general public to the prison population, where criminal activity resumes.[196] Inexpert treatment at prison facilities often works against any rehabilitative ambitions by exacerbating mental illness.[197] The better approach, so far as rehabilitation and incapacitation are concerned, is to keep mentally ill criminals out of prison and keep them in mental health facilities, which are best equipped to treat and (as necessary) restrain them.[198]

To summarize, there are two general legal tests for insanity. Volitional tests require that the defendant lacked the (substantial) capacity to control his behavior. Cognitive tests require that the defendant lacked the (substantial) capacity to appreciate the wrongfulness of his conduct. Although there are jurisdictional variations in the phrasing of the tests, nothing below will turn on precise wording. The criminal justice case for either test turns on its ability to distinguish sane criminals—whose punishment promotes retribution,

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[193] United States v. Freeman, 357 F.2d 606, 615 (2d Cir. 1966).

[194] *See* LeBlanc, *supra* note 56, at 1318 ("It is the same mental disease that causes an insane offender's criminal conduct, which also makes that offender incapable of understanding or learning from the punishment of others.").

[195] *See Freeman*, 357 F.2d at 615 ("What rehabilitative function is served when one who is mentally incompetent and found guilty is ordered to serve a sentence in prison? Is not any curative or restorative function better achieved in such a case in an institution designed and equipped to treat just such individuals?").

[196] W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 937 (2019) ("[I]mprisonment protects the broader population from future wrongdoing by ostensibly dangerous persons. This protection, however, does not extend to the prison population—prisoners are of course still able to commit crimes while in prison.").

[197] *See, e.g.*, Grant T. Harris, Tracey A. Skilling & Marnie E. Rice, *The Construct of Psychopathy*, 28 CRIME & JUST. 197, 235 (2001) ("[T]reatments that benefit other offenders actually harm psychopaths . . . .").

[198] LeBlanc, *supra* note 56, at 1321 ("A better approach for protecting society is to provide an affirmative insanity defense, thereby assuring that insane individuals acquitted of crimes will be committed to psychiatric institutions until their dangerous propensities subside.").

deterrence, rehabilitation, and incapacitation—from insane criminals—whose punishment does not further those ends.

To justify extending the insanity defense to corporations with "volitional" or "cognitive" deficits, I ultimately need to argue that punishing such corporations conflicts with the four basic purposes of criminal law. First, though, I must show that corporations *can* satisfy the volitional and cognitive tests for insanity. That will require some background from corporate law, psychology, organizational science, and economics on the sorts of pathologies that can affect corporations. I turn to that background next.

III. LEGALLY INSANE CORPORATIONS

If, as the law presupposes, corporations have minds, can those minds be disordered in ways that meet the insanity defense's requirements? State and federal law codify the insanity defense, so presumably statutory text and purpose should dictate the answer. Nothing in the statutory language excludes corporate defendants. The law opens the defense to any "person"[199] or "defendant,"[200] terms that include corporations.

The muddier issue is whether corporations can ever satisfy the elements of the defense. "Insanity" is a legal term. If the law defined "insanity" in terms of organic brain abnormalities, corporations would be disqualified automatically. As explained in the previous Part, the law takes a different approach, characterizing insanity as a defect that sufficiently inhibits volition or cognition. While corporations may not initially seem to have volition or cognition any more than they have organic brains, those concepts have a specific understanding within the context of the insanity defense. On that understanding, there are organizational features that are intuitively compelling corporate equivalents of volition and cognition. There are organizational defects that can inhibit them. These include rogue employees who commit isolated, self-serving crimes (discussed in Part III.A) and corporate cultures so defective that they distorts employees' capacity to reason ethically (discussed in Part III.B). As argued below, corporations with these conditions would satisfy the statutory requirements under volitional and cognitive tests, respectively. Recognizing a defense for them would advance the basic goals of criminal justice.

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[199] MODEL PENAL CODE § 4.01 (AM. L. INST. 2019).

[200] 18 U.S.C. § 17(a).

A. SATISFYING THE VOLITIONAL TEST

It may at first sound like a conceptual mistake to suggest that corporations can satisfy the volitional test for insanity. Corporations are not true moral agents, even if they are people within the fiction of the law.[201] They do not have free will.[202] So how could corporations suffer a defect of will?

These intuitions are powerful but misleading. The volitional test is not about will, free or otherwise.[203] Rather, it is about the important role of *control* as a precondition of criminal liability—a defendant who cannot control his actions is beyond blame.[204] However odd it may be to speak of corporate will, corporate control is much more natural. Indeed, corporate control over employee action goes to the very heart of the agency principles that motivate *respondeat superior* liability.[205] The corporation—by virtue of

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[201] This claim is common sense but deeply controversial. *Compare* Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 207 (1979) ("I hope to provide the foundation of a theory that allows treatment of corporations as members of the moral community, of equal standing with the traditionally acknowledged residents: biological human beings . . . ."), *with* Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982) ("Since it is a legal fiction, a corporation is incapable of having social or moral obligations . . . ."). If I am wrong and corporations truly are moral agents, my argument that they should be able to benefit from the insanity defense only becomes easier.

[202] Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 473 (2005) ("A free will test is particularly useless, and particularly ridiculous, when the free will in question is that of an entity such as a corporation."); Edwin M. Borchard, *Governmental Responsibility in Tort, VI*, 36 YALE L.J. 1, 7 (1926) ("[I]t is astonishing for how many centuries the theory of fault resting on an alleged free will served to relieve corporations, public and private, of responsibility in tort.").

[203] This is despite some theorists' claims to the contrary. *See, e.g.*, LeBlanc, *supra* note 56, at 1316 ("The criminally insane offender is characterized by a complete absence of free will over his actions.").

[204] *See, e.g.*, Clark v. Arizona, 548 U.S. 735, 749 (2006) ("The volitional incapacity or irresistible-impulse test . . . asks whether a person was so lacking in volition due to a mental defect or illness that he could not have controlled his actions."); United States v. Lyons, 739 F.2d 994, 1000 (5th Cir. 1984) (Rubin, J., dissenting) ("When a defendant is properly acquitted by reason of insanity under the control test, the guilty does not go free . . . . [For] those few unfortunate persons so afflicted by mental disease that they knew what the law forbade but couldn't control their actions sufficiently to avoid violating it[,] [t]he nature of their illness makes punishment useless . . . .").

[205] *See* RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (AM. L. INST. 1958) ("The assumption of control is a usual basis for imposing tort liability when the thing controlled causes harm.").

its theoretical control over employee conduct—is held vicariously liable for conduct taken within the scope of employment.[206]

The volitional test defines the relevant notion of control in terms of "capacities" (which corporations have) rather than "wills" (which corporations lack).[207] Any defendant that "lacks substantial capacity . . . to conform [its] conduct to the requirements of [the] law" is legally insane.[208] Since, according to *respondeat superior*, corporate conduct is just employee conduct, any corporation that lacks the substantial capacity to get its employees to obey the law should qualify. The question of whether corporations can ever satisfy the volitional test becomes: Can it ever be that a corporation lacked the substantial capacity to control an employee who commits the crime on the job?

Having now translated the volitional test to the corporate context, it is much easier to see how a corporation might satisfy it. Suppose, for example, that a corporation has in place a stellar compliance program that trains employees about the law's requirements and monitors their adherence to legal and ethical norms. Suppose further that the program significantly exceeds industry standards and has all the features that any informed prosecutor would think to recommend. The DOJ's "Principles of Federal Prosecution of Business Organizations" offer some insight into what some of those features would be: "comprehensiveness," "disciplinary action [against past violators]," "revisions to [the] corporate compliance program," "promptness of any disclosure of wrongdoing to the government," "internal audit functions," and "information and reporting system[s]."[209] This hypothetical corporation has all of those features.

Now suppose that one of the compliant corporation's employees subverts its robust compliance program and commits a crime. The

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[206] Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1645 (1990); *see also* Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 868–69 n.23 (2003) ("There is also an emerging notion that artificial persons, like natural persons, must control themselves in a manner that comports with civilized society and the behavioral rules by which it is governed.").

[207] I set aside the older "irresistible impulse" formulation of the volitional test because it is not clear that corporations have impulses in any interesting sense. Under *respondeat superior*, corporate impulses are the impulses of its employees. A corporation with an employee who, because of an irresistible impulse, commits a crime might derivatively claim the same insanity defense that would protect the employee.

[208] MODEL PENAL CODE § 4.01(1) (AM. L. INST. 2019).

[209] Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't. of Just., Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memo].

compliance literature refers to such employees as "rogues."[210] As even the DOJ recognizes, every corporation faces a risk of rogue employees: "[N]o compliance program can ever prevent all criminal activity by a corporation's employees."[211] Corporations cannot monitor their employees perfectly,[212] so there is always a chance that some misconduct will go undetected, especially by motivated rogues.[213] This is the economic reality of agency costs—the inevitable divergence of employee and corporate interests (discussed in Part IV.B.1). Agency costs can be mitigated by efforts to align incentives, to monitor more heavily, or to sanction employee misconduct, but they can never be eliminated.[214]

One company that serves as a real-world example of this dilemma is Siemens AG.[215] After an extensive international investigation into alleged foreign bribery,[216] Siemens pled guilty in 2008 to one of the largest-ever public corruption scandals.[217] As part of its plea agreement, Siemens agreed

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[210] George R. Skupski, *The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability*, 62 CASE W. RES. L. REV. 263, 277 (2011) ("[R]espondeat-superior-based liability likely creates contrary control incentives due to its creation of constructive strict liability. This effect is best exemplified in cases where a rogue agent acts contrary to corporate policies and well-intentioned efforts to control the subordinate's conduct.").

[211] Thompson Memo, *supra* note 209, at 9; *see also* Hasnas, *supra* note 85, at 1343–44 ("But all managers know that no matter how good their organization's internal controls may be, they cannot ensure that no rogue employee will intentionally violate the law . . . .").

[212] *See* Henry L. Tosi, Luis R. Gomez-Mejia & Debra L. Moody, *The Separation of Ownership and Control: Increasing the Responsiveness of Boards of Directors to Shareholders' Interests?*, 4 U. FLA. J.L. & PUB. POL'Y 39, 46 (1991) ("[E]ven if the principle [sic] is willing to incur agency costs of monitoring, it may still be difficult to effectively control agents."); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 780–81 (1972); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309 n.10 (1976).

[213] *See* Irwin Schwartz, *Toward Improving the Law and Policy of Corporate Criminal Liability and Sanctions*, 51 AM. CRIM. L. REV. 99, 112 (2014) ("No organization—private or government—can prevent all misconduct by all employees, all of the time.").

[214] *See infra* notes 392–99 and accompanying text.

[215] SIEMENS, https://new.siemens.com/global/en.html [https://perma.cc/A2EE-S7BY] (last visitedFeb. 15, 2021).

[216] *See* Information, United States v. Siemens S.A. (Argentina), No. 1:08-cr-367-RJL (D.D.C. Dec. 12, 2008), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/02/12-12-08siemensargen-info.pdf [https://perma.cc/NM3U-ZQE6].

[217] Department's Sentencing Memorandum at 1, United States v. Siemens Aktiengesellschaft, No. 1:08-cr-00367-RJL (D.D.C. Dec. 12, 2008), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/02/12-12-08siemensvenez-sent.pdf [hereinafter Siemens Sentencing Memo].] [https://perma.cc/QG4T-XZYL]. Brandon Garrett

to work closely with government monitors to implement new and dramatically expanded compliance protocols.[218] Siemens became a governmental partner and catalyst for change by requiring all of its business partners to have similar anti-corruption standards.[219] The efforts were a great success. After its reforms, Siemens was hailed by the DOJ as having "set a high standard for multi-national companies to follow."[220] Despite Siemens' 600-person compliance department, industry leading Anti-Corruption Toolkit, and additional compliance controls in high-risk jurisdictions, reports of rogue activity soon resurfaced.[221] In its 2013 SEC filings, Siemens reported internal and public investigations into public corruption connected to its activities in Kuwait, the Caribbean, Central Asia, Turkey, Iraq, Brazil, Argentina, Greece, Switzerland, Austria, Venezuela, South Africa, Thailand, and Bangladesh.[222]

As a matter of black-letter law, compliance programs presently have no impact on a corporation's criminal liability. The DOJ's official position is that "[a] corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability."[223] Federal courts have reinforced this stance: "[A] compliance program, however extensive, does not immunize the corporation from liability when its employees . . . fail to comply with the law."[224] Thus, despite world-class compliance investments, Siemens remains chargeable for bribery by a rogue employee wherever and whenever it occurs.

A corporation plagued by a rogue employee despite having a robust compliance program "lack[s] [the] substantial capacity to . . . conform [its] conduct to the requirements of [the] law."[225] For individuals, efforts to conform to the law take the form of psychological resolve. A person who,

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offers an effective treatment of the Siemens case throughout his book *Too Big to Jail*. *See generally* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014) (discussing Siemens extensively).

[218] Siemens Sentencing Memo, *supra* note 217, at 11.

[219] *Id.* at 22–24.

[220] *Id.* at 24.

[221] Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 614–15 (2012).

[222] Siemens Aktiengesellschaft Form 20-F Annual Report at 40–42 (Nov. 27, 2013), https://www.siemens.com/investor/pool/en/investor_relations/financial_publications/sec_filings/2013/20_f.pdf [https://perma.cc/W2ZN-2KV7].

[223] Thompson Memo, *supra* note 209, at 9.

[224] United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989); *see also* United States v. Ionia Mgmt., 555 F.3d 303, 310 (2d Cir. 2009) ("[W]e refuse to adopt the suggestion that the prosecution, in order to establish vicarious liability, should have to prove as a separate element in its case-in-chief that the corporation lacked effective policies and procedures to deter and detect criminal actions by its employees.").

[225] MODEL PENAL CODE § 4.01(1) (AM. L. INST. 2019).

despite evincing substantial resolve not to take others' property, ends up stealing something, could suffer from kleptomania and be a candidate for an insanity defense to theft.[226] Corporations show equivalent effort by implementing well-meaning compliance programs designed to prevent employee misconduct.[227] Greater expense and more extensive protocols correlate to increased corporate effort.[228]

When rogue employees subvert extensive compliance efforts, their employers lack the substantial capacity to control them. Though, in hindsight, it may appear that some additional compliance protocol could have prevented the misconduct,[229] that fact shows only that the corporation had *some* capacity for control, not that it had *substantial* capacity. The presence of a robust compliance program is important. A corporation with a limited program would have a difficult time proving that it lacked the substantial capacity to control a rogue because it did not expend much effort.[230]

Not only does our hypothetical corporation satisfy the language of the volitional test for insanity, giving it a defense for rogue conduct also promotes criminal law's fundamental goals. It is "inherently inequitable"[231] as a retributive matter to sanction a corporation—and by extension all its stakeholders—when it acts "with the best of motives, with the best of efforts,

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[226] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 461 (5th ed. 2013) (noting that kleptomaniacs suffer from "problems in both emotional and behavioral regulation").

[227] Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1160 (1983) ("[O]rganizational offenders cannot exert self-control merely by individual self-denial. Self-denial on these offenders' parts must be embodied in corporate policy and backed by appropriate disciplinary measures and organizational procedures.").

[228] Mihailis Diamantis, *Functional Corporate Knowledge*, 61 WM. & MARY L. REV. 319, 374–75 (2019) (defining corporate effort).

[229] *See* Urska Velikonja, *Leverage, Sanctions, and Deterrence of Accounting Fraud*, 44 U.C. DAVIS L. REV. 1281, 1316 (2011) ("[T]he fact that fraud occurred will be used as evidence that internal compliance failed and that the failure was avoidable.").

[230] *See* Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 J. CORP. L. 731, 763–64 (1996) (discussing how to weigh the sufficiency of a compliance program by balancing policies that encourage misconduct against good faith efforts to prevent misconduct).

[231] Pitt & Groskaufmanis, *supra* note 206, at 1653 ("For the government to recommend—or require—compliance programs and then dismiss them as irrelevant has an inherently inequitable ring."); *see also* Lucian E. Dervan, *Re-Evaluating Corporate Criminal Liability: The DOJ's Internal Moral Culpability Standard for Corporate Criminal Liability*, 41 STETSON L. REV. 7, 17–18 (2011) (noting that in such cases, corporations lack the "moral culpability element").

and with the utmost in 'due diligence'"[232] Cognitive scientists know that people ordinarily think about corporate blameworthiness in the same way they think about human blameworthiness.[233] When individuals take extensive precautions and nonetheless find themselves on the wrong side of the law, we generally recognize their blamelessness.[234] Similarly, corporations that do the same are not "worthy of criminal sanction."[235]

Criminal law also has no deterrent interest in punishing such corporations. As former Deputy Attorney General Larry D. Thompson has remarked, "[I]f you really want to have a deterrence of corporate criminal liability, the best weapon against corporate misconduct is establishing an effective compliance program."[236] The sort of corporation presently under consideration already has an effective compliance program. So, the criminal law already deters the corporation as much as it could hope. Punishing such corporations risks undermining deterrence by discouraging corporations from undergoing the expense of implementing robust compliance in the first place.[237] For the same reason, the criminal law has no interest in

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[232] Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1537 (2007).

[233] *See* Bertram F. Malle, *The Social and Moral Cognition of Group Agents*, 19 J.L. & POL'Y 95, 132 (2010) ("[G]roup agents can be blamed through the operation of the same cognitive apparatus through which individuals are blamed.").

[234] *See* ROBINSON, PALO, GANGULY, MOSKOVITZ & GRALL, *supra* note 47, § 61 ("[R]ecklessness is generally accepted as the norm for minimum culpability, and reliance upon negligence to establish liability is viewed as appropriate only in the exceptional case."); Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 THEORETICAL INQ. L. 283, 286–88 (2002) ("[T]he primary fault underlying a negligence [tort] claim is the actor's failure to take a reasonable precaution against the risk of harm."); Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1078 (1997) ("refer[ring] throughout to 'negligence' as a minimally acceptable form of fault").

[235] Cheryl L. Evans, *The Case for More Rational Corporate Criminal Liability: Where Do We Go from Here?*, 41 STETSON L. REV. 21, 28 (2011) (emphasis omitted); *see* 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, 689 (1995) (arguing that a corporation with robust compliance "lack[s] the culpable mental state necessary to hold it responsible for a criminal action"); H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279, 327–28 (1995) (arguing that corporations with robust compliance programs lack "organizational culpability").

[236] Thompson, *supra* note 5, at 1327.

[237] *See* Pitt & Groskaufmanis, *supra* note 206, at 1653 ("On a cost/benefit basis, the present state of the law does not provide the same incentive [to implement compliance]."). *But see* Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 110–11 (2007) ("[I]nstitution of a compliance program defense risks creating a system of under-deterrence.").

rehabilitating or incapacitating corporations that already have effective compliance programs.

Several scholars have proposed a defense for corporate criminals—the due diligence defense—that would often overlap with the insanity defense proposed here.[238] The due diligence defense would allow a corporation's "compliance program [to] operate as a defense against corporate criminal liability."[239] Where a corporate criminal defendant could show that it had an otherwise effective compliance program, the due diligence defense would allow it to avoid conviction. The Model Penal Code includes a limited version of this defense.[240]

The volitional prong of the corporate insanity defense overlaps with, but is ultimately more nuanced than, the due diligence defense. Every corporation that would benefit from the due diligence defense would likely also qualify for the insanity defense. The reverse is not true. A robust compliance program targeted at preventing the sort of crime with which the corporate defendant is charged is not an absolute requirement of the insanity defense. Of course, having such a compliance program significantly strengthens the corporation's case that it lacked the substantial capacity to control its rogue employee. It is to be expected that most corporations that successfully mount an insanity defense would have effective compliance programs in place. But the corporate insanity defense could also be available in two circumstances to corporate defendants that lack a compliance program. The first circumstance is where no reasonable program would have prevented the misconduct anyway. For example, a technologically-sophisticated and motivated rogue may purposely compromise his employers' automated compliance protocols to effectuate his crime. The second is where the sort of misconduct, while perhaps preventable with the right program, was not foreseeable. For example, a compliance program might address all manner of misconduct pertinent to ordinary business operations, but a rogue employee may divert business resources to pursue unrelated misconduct that his employer could neither reasonably predict nor reasonably prevent. The due diligence defense would not kick in for either of

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238 *See, e.g.*, Koehler, *supra* note 221, at 611; Podgor, *supra* note232, at 1538; Steven M. Kowal, *Vicarious Corporate Liability: Judges Should Credit Diligent Compliance When Evaluating Criminal Intent*, 24 WASH. LEGAL FOUND. 1, 4 (2009) ("Companies should not be held criminally responsible for conduct that their best compliance efforts were unable to prevent."); Walsh & Pyrich, *supra* note 235, at 676.

239 Pitt & Groskaufmanis, *supra* note 206, at 1652.

240 MODEL PENAL CODE § 2.07(5) (AM. L. INST. 2019) ("[I]t shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.").

these cases.[241] The insanity defense provides room for corporations in these two circumstances to argue that they nonetheless lacked the substantial capacity to control their employees. It thereby puts the criminal law in a better position to refrain from asking corporations to do that which is not reasonably possible.

The insanity defense has one other crucial advantage over the due diligence defense: it requires no new law in jurisdictions that endorse the volitional test for insanity. If, as argued here, corporations can satisfy the test, judges could implement the corporate insanity defense without waiting for legislative action. This is not so with the due diligence defense. Scholars have touted the due diligence defense for more than forty years.[242] To this day, "[i]n the American legal system, a due diligence defense is not common for legal bodies."[243] Quicker progress could be made with the corporate insanity defense.

B. SATISFYING THE COGNITIVE TEST

Can a corporation "lack[] substantial capacity . . . to appreciate the criminality of [its] conduct?"[244] After translating the cognitive test to the corporate context, it becomes easier to see how this capacity could be compromised in a corporation. An individual who satisfies the cognitive test for insanity may "understand the physical nature and consequences of his act, but not its legal or moral character."[245] According to *respondeat superior*, corporations only understand or appreciate things when their employees do. This means that a corporation whose employees fail to appreciate the criminality of their collective conduct may be a candidate for an insanity defense under the cognitive test.

Organizational scientists have long recognized that "[o]rganisations are systems . . . not just aggregations of individuals."[246] For example, corporate

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[241] Walsh & Pyrich, *supra* note 235, at 685–86 (describing the elements of a due diligence defense).

[242] *See Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1229, 1256 (1979).

[243] Eli Lederman, *Corporate Criminal Liability: The Second Generation*, 46 STETSON L. REV. 71, 73 (2016).

[244] MODEL PENAL CODE § 4.01(1) (AM. L. INST. 2019).

[245] ROBINSON, PALO, GANGULY, MOSKOVITZ & GRALL, *supra* note 47, § 173; *see also* State v. Singleton, 48 A.3d 285, 295 (N.J. 2012) (distinguishing the capacity to understand an act from the capacity to understand its moral character).

[246] Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468, 479 (1988); Joep P. Cornelissen, S. Alexander Haslam & John M. T. Balmer, *Social Identity, Organizational*

culture is a feature of the organization itself.[247] Though it is not a feature of the individuals who compose the organization, it is a critical factor that influences how employees behave and think.[248] Corporate culture relates to shared understandings, practices, and histories that bring some features of the environment to social salience.[249] Factors that influence a corporation's culture include its hierarchy, goals and policies, treatment of prior offenses, efforts to educate employees on compliance with the law, and compensation scheme.[250] Individual employees adapt to corporate culture,[251] which in turn can influence whether they engage in criminal conduct.[252] 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 otherwise disposed to misbehave.[253]

Defective corporate culture can have a normalizing effect on individual misconduct.[254] Morally extraordinary behavior can come to seem commonplace, ordinary, and banal.[255] People look to the behavior of those around them for cues about what behavior is acceptable and what behavior is

Identity and Corporate Identity: Towards an Integrated Understanding of Processes, Patternings and Products, 18 BRIT. J. MGMT. S1, S8 (2007) ("[C]ollective identities (whether social, organizational or corporate) are . . . associated with behaviour that is qualitatively different from that associated with lower-order identities . . . .").

[247] Bucy, *supra* note 44, at 1099–1101.

[248] FIONA HAINES, CORPORATE REGULATION: BEYOND 'PUNISH OR PERSUADE' 25 (Keith Hawkins ed., 1997) ("[O]rganizational culture forms the 'touchstone' by which individuals behave and act.").

[249] *See* EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 257–69 (1949).

[250] Bucy, *supra* note 44, at 1101.

[251] JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 427 (1990).

[252] *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).

[253] *See, e.g.*, E. Scott Reckard, *Wells Fargo's Pressure-Cooker Sales Culture Comes at a Cost*, L.A. TIMES (Dec. 21, 2013, 12:00 PM), http://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html (discussing how the high-pressure sales environment of Wells Fargo led to large-scale moral and ethical breaches); *see also* Mihailis E. Diamantis, *The Law's Missing Account of Corporate Character*, 17 GEO. J.L. & PUB. POL'Y 865, 873–74 (2019) (discussing the effect corporate level systems can have on individual employee behavior).

[254] Christina Parajon Skinner, *Misconduct Risk*, 84 FORDHAM L. REV. 1559, 1584 (2016).

[255] Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 997 (2005).

not.[256] Once microcultural and situational conditions push employee behavior in an unethical direction, the effects can snowball.[257] Employees in such environments may find their moral senses dulled. This can impair their capacity to appreciate the potential criminality of the conduct of those around them, conduct in which they themselves also engage. "[R]egular people . . . succumb to the pressure of situational coercion[,] . . . people who had no prior intention to do anything wrong."[258]

For example, in 2016, news broke that Wells Fargo had, for several years, opened a large number of false accounts without customers' knowledge or permission.[259] This violated the Consumer Finance Protection Act of 2010.[260] Internal investigations revealed the problem's source: a high-pressure sales culture that encouraged retail employees to open eight accounts for every customer regardless of need.[261] By some reports, "[t]he fraud seems to have stemmed from CEO John Stumpf's mantra to employees: 'eight is great.'"[262] But the motto long preceded Stumpf.

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[256] *See* Floyd H. Allport, *Methods in the Study of Collective Action Phenomena*, 15 J. SOC. PSYCHOL. 165, 179 (1942) ("[T]he behavior of an individual in a collectivity must be understood through seeing what other individuals in the collectivity are doing."); Brian T. Gregory, Stanley G. Harris, Achilles A. Armenakis & Christopher L. Shook, *Organizational Culture and Effectiveness: A Study of Values, Attitudes, and Organizational Outcomes*, 62 J. BUS. RES. 673, 675 (2009) ("Individuals use the organization's culture to create behavioral expectancies and then use these behavioral expectancies to decide the type of behavior that is appropriate for a particular situation.") (citation omitted).

[257] *See* Francesca Flood, *Social Psychology of Organizations*, *in* GLOBAL ENCYCLOPEDIA OF PUBLIC ADMINISTRATION, PUBLIC POLICY, AND GOVERNANCE 5699, 5702 (Ali Farazmand ed., 2018) ("*Social contagion theory* suggests that behaviors can spread like a contagious virus affecting worth [sic] ethic, manners, approachability, and a host of other organizational behaviors.") (citation omitted); Dan Currell, *Finding and Fixing Corporate Misconduct*, RISK MGMT. (Apr. 1, 2010), http://www.rmmagazine.com/2010/04/01/finding-and-fixing-corporate-misconduct/ [https://perma.cc/9Y3D-L5SJ].

[258] Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law*, 124 YALE L.J. 1628, 1648 (2015).

[259] *See* Jackie Wattles, Ben Geier & Matt Egan, *Wells Fargo's 17-Month Nightmare*, CNN (Feb. 5, 2018, 7:28 AM), https://money.cnn.com/2018/02/05/news/companies/wells-fargo-timeline/index.html [https://perma.cc/3N74-FLKG].

[260] Consent Order, *In re Wells Fargo Bank*, 2016-CFPB-0015 (Sept. 8, 2016), https://files.consumerfinance.gov/f/documents/092016_cfpb_WFBconsentorder.pdf [https://perma.cc/9FLT-559X].

[261] Emily Glazer, *How Wells Fargo's High-Pressure Sales Culture Spiraled Out of Control*, WALL ST. J. (Sept. 16, 2016, 4:10 PM), https://www.wsj.com/articles/how-wells-fargos-high-pressure-sales-culture-spiraled-out-of-control-1474053044 [https://perma.cc/5MKH-5PYK].

[262] *The Wells Fargo Fake Account Scandal: A Timeline*, FORBES, https://www.forbes.com/pictures/fkmm45eegei/eight-is-great/#7fb88f9d3d6b [https://perma.cc/YHK9-8GSW].

Northwest Corporation, a bank that merged with Wells Fargo in 1998,[263] originated the "Going for Gr-Eight" theme.[264] According to one former Northwest executive, "It was a religion. It very much was the culture."[265]

The high-pressure quota culture perpetuated itself after the merger: "The better [employees] did at sales, the more they advanced, so it got spread across the company. An entire generation of managers thrived in the culture, got rewarded for it, and [came to] positions of power."[266] Individual bankers who perceived the ethical problems with this "gaming" (manipulating sales for compensation) would quit (or be fired for underperformance), and the beat would go on.[267] The practice became fully normalized: "[N]obody seemed to care."[268]

The toxic culture at Wells Fargo was bigger than any individual employee. It was systemic. Indeed, it may even have been bigger than Wells Fargo itself. Commenting when the scandal broke, Hillary Clinton saw it as a symptom of the broader "'culture of misconduct and recklessness' in the banking system."[269] It is not hard to understand how ordinary, well-intentioned Wells Fargo recruits could eventually lose their way.[270]

Corporate culture can compromise a corporation's capacity to appreciate the criminality of its conduct without necessitating that its employees are also legally insane. Recall that legal insanity must arise from a disease or defect. While a toxic corporate culture impacts how both employees and corporations distinguish right from wrong, it is only a defect of the corporation. Culture is a social phenomenon beyond the control of any

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[263] Timothy L. O'Brien, *Wells Fargo and Norwest Plan Merger*, N.Y. TIMES (June 9, 1998), https://www.nytimes.com/1998/06/09/business/wells-fargo-and-norwest-plan-merger.html [https://perma.cc/PSH3-UZM8].

[264] Bethany McLean, *How Wells Fargo's Cutthroat Culture Allegedly Drove Bankers to Fraud*, VANITY FAIR (May 31, 2017), https://www.vanityfair.com/news/2017/05/wells-fargo-corporate-culture-fraud [https://perma.cc/E2GN-ZZF2].

[265] *Id*.

[266] *Id*.

[267] *Id.*

[268] *Id*.

[269] Reuters, *Hillary Says John Stumpf Owes All of Wells Fargo's Customers a 'Clear Explanation'*, FORTUNE (Sept. 20, 2016, 12:15 AM), https://fortune.com/2016/09/20/wells-fargo-scandal-hillary-clinton/ [https://perma.cc/NM6P-SYYE].

[270] *See* Pascal-Emmanuel Gobry, *The Real Reason Wells Fargo Employees Resorted to Fraud*, WEEK (Oct. 3, 2016), https://theweek.com/articles/652186/real-reason-wells-fargo-employees-resorted-fraud [https://perma.cc/542B-7N5Y]; *see also* Ken Sweet, *Wells Fargo Workers: Pressure To Sell Relentless, Pervasive*, PRESS HERALD (Sept. 22, 2016), https://www.pressherald.com/2016/09/21/wells-fargo-workers-pressure-to-sell-relentless-pervasive [https://perma.cc/W8VV-ZWK9].

single individual.[271] People exist within culture, and their susceptibility to its effects is a normal adaptive mechanism of human psychology.[272] While we may commiserate with Wells Fargo's employees for other reasons (perhaps they were coerced to do wrong), they were not insane.

The cognitive test's biggest challenge is not whether corporations can satisfy it, but whether it makes sense to excuse corporations that do. Wells Fargo is not sympathetic. As I have argued elsewhere, corporations with toxic internal cultures often seem like they are paradigmatic examples of evil deserving the harshest responses.[273] Overcoming our strong punitive instincts is a broader challenge that the cognitive test for insanity must meet. Even for individuals, the line between the inability to appreciate moral wrong and actually being morally wrong—between insanity and evil—can seem too fine. One skeptical judge opined: "[T]hat which is sometimes called 'moral,' or 'emotional insanity,' savors too much of a seared conscience, or atrocious wickedness, to be entertained as a legal defense."[274]

The criminal justice case for permitting a cognitive test for corporate insanity does not turn on fairness considerations toward the corporate defendant because it cannot. As I argue extensively below,[275] applying the cognitive test may sometimes be fairest *to victims*. The full argument draws on what the corporate insanity defense would look like in practice—how corporations assert it and what happens if they are successful—which I lay out in Part V. For now, I can only note the conclusion: allowing the cognitive test for corporate insanity could secure more trials of corporate wrongdoing

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[271] *See* Robert E. Wood, Victoria Roberts & Jennifer Whelan, *Organizational Psychology*, *in* IAAP HANDBOOK OF APPLIED PSYCHOLOGY 233, 251 (Paul R. Martin, Fanny M. Cheung, Michael C. Knowles, Michael Kyrios, Lyn Littlefield, J. Bruce Overmier & José M. Prieto eds., 1st ed. 2011). ("Organizational culture is a complex and multi-level concept . . . . [It is] [t]he shared understandings, expectations, and interpretations includ[ing] values and assumptions of members, norms that invoke sanctions when broken by members, standards of behavior that members are expected to display, and goals that members pursue while at work.") (citation omitted).

[272] *See* John Tooby & Leda Cosmides, *Evolutionary Psychology and the Generation of Culture, Part I: Theoretical Considerations*, 10 ETHOLOGY & SOCIOBIOLOGY 29, 46 (1989) ("The richest source of information about local adaptation is the behavior of other members of one's social group. Learning mechanisms have evolved allowing humans to make use of this valuable source of information, creating the social and cross-generational interactions anthropologists lump together as 'culture.' Although these numerous mechanisms are responsible for the existence of culture, virtually every other psychological mechanism also participates in shaping the particular features of local culture . . . as well.").

[273] Diamantis, *supra* note 43, at 565–68.

[274] Boswell v. State, 63 Ala. 307, 321 (1879).

[275] *See infra* Part VI.A.2.

and better protect future potential victims by ensuring meaningful corporate reform.

One might worry that the cognitive test for corporate insanity would open the path for corporate gamesmanship. For example, some corporations might purposely induce cultural defects to immunize themselves from liability. This worry is not unique to the corporate context. A similar concern arises for individuals, who could also purposely induce cognitive defects (say, by taking intoxicants) before committing crime. With respect to individuals, the law has solved this problem by disqualifying voluntarily-induced insanity.[276] The same rule would apply to corporations: no corporation that purposely instigates its own cognitive failings by consciously promoting a criminogenic culture would qualify for the insanity defense. Other scholars have pointed to the important difference between "accidental" or "planned" corporate dysfunction for purposes of assessing corporate culpability.[277] A corporation whose managers purposely craft a criminogenic corporate culture to free its employees from law-abiding psychological inhibitions would have no defense. Only corporations whose cognitive deficiencies arose organically, as it were, without a directing hand, could benefit from an insanity defense.

Even with purposely-induced defects excluded, another concern is whether too many corporations would qualify for the defense. This concern will be especially salient to people who are skeptical of corporations' willingness and ability to encourage ethical behavior from their employees. There is good cause for skepticism. As argued in the next Part, destructive and bizarre behavior is essentially unavoidable for organizations like corporations. Corporate law is a significant source of the problem because of the way it understands what counts as a legitimate corporate purpose and who is authorized to pursue that purpose on behalf of the corporation. Fortunately, as the next Part also discusses, there are several limitations internal to the corporate insanity defense that constrain its application. The best way to address significant swaths of corporate misconduct likely lies outside of the criminal justice system, in corporate law and mental health treatment for employees.

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[276] Phillip E. Hassman, Annotation, *Effect of Voluntary Drug Intoxication Upon Criminal Responsibility*, 73 A.L.R. 3d. 98 § 2[a] (1976).

[277] *See* Bucy, *supra* note 44, at 1136–37; *see also* Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210, 245 (1997) (proposing a lower standard of corporate criminal knowledge "[w]hen a corporation deliberately structures itself" to impede the flow of information).

IV. THE ECONOMICS AND PSYCHOLOGY OF CORPORATE PATHOLOGY

This Article is far from the first to view corporations through an interpretive lens according to which they are intelligent organisms. For the better part of a century, economists have used biological and psychological models to diagnose corporations as healthy or pathological. The best-known expositor of such theories, Edith Penrose, turned to biology in an effort to abstract away from "human motives" and understand firm success and failure.[278] She saw firm growth as "a *process* of development, akin to natural biological processes in which an interacting series of internal changes leads to increases in size accompanied by changes in the characteristics of the growing object."[279] Economist Kevin Boulding advanced two competing biological models of firm health as a kind of equilibrium: the "life cycle" theory, which sees firms as ecosystems,[280] and the "homeostasis theory," which sees firms as organisms.[281] Armen Alchain's viability analysis sees firms as products of evolution and natural selection; health is market survivability.[282]

Critics point out that pure biological models of firms fail to appreciate that firms do not behave like animals, "unconscious . . . [and] without much deliberation."[283] Rather, corporations have the capacity to respond to their environment in rational ways. This means that any complete model of the firm must account for its motivating psychology.[284]

Economists and psychologists have obliged. More than two decades ago, the American Psychological Association recognized industrial-organizational psychology as one of seventeen specialties in professional psychology.[285] Among other topics, organizational psychologists study how group behavior arises from organizational culture and individual

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[278] Edith Tilton Penrose, *Biological Analogies in the Theory of the Firm*, 42 AM. ECON. REV. 804, 811–12 (1952).

[279] EDITH PENROSE, THE THEORY OF THE GROWTH OF THE FIRM 1 (3d ed. 1995).

[280] KENNETH E. BOULDING, A RECONSTRUCTION OF ECONOMICS 5–9, 26–27 (1950).

[281] *Id*. at 26–27.

[282] Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 213 (1950).

[283] Penrose, *supra* note 278, at 814.

[284] PENROSE, *supra* note 279, at 2 ("[H]uman motivation and conscious human decision have no place in the process of [biological] growth . . . the growth of a firm is connected with attempts of a particular group of human beings to do something . . . .").

[285] *Recognized Specialties and Proficiencies in Professional Psychology*, AM. PSYCHOL. ASS'N, https://www.apa.org/ed/graduate/specialize/recognized [https://perma.cc/G76F-XJH7] (last visited Dec. 30, 2020).

interactions.[286] Economists have also provided numerous psychologizing models of collective rationality and irrationality.[287]

Psychology and economics can be tools for understanding healthy corporate function and diagnosing corporate deviance. Though the law explicitly subscribes to the fiction that corporations have minds, psychologists and economists do not usually claim that corporations actually have subjective points of view or human-like psychology.[288] The psychologizing perspective that psychologists and economists offer is an aid to fleshing out what the law's fictional stance entails. By modeling businesses as collectives possessing mental attributes, psychology and economics can help identify when and why corporations behave in ways they should not.

What the models suggest is dispiriting. The law seems to predispose corporations to behave in pathological ways. This Part considers two salient examples: psychopathy and self-destructive behavior. Both can have criminogenic effects. If the corporate insanity defense applied to these prevalent corporate conditions, it would pose a serious threat to corporate criminal law and the interests it protects. As discussed, though, the prevalence of these conditions disqualifies them. The insanity defense only applies to "diseases" or "defects," terms that demand a certain level of abnormality. If the law is to address these underlying sources of corporate misbehavior, it must look outside of the criminal justice system.

A. CORPORATE PSYCHOPATHY

During the 1980s, Ford Motor Company performed a simple economic calculation that tipped the scale in favor of killing many customers.[289] The company knew that minor traffic accidents could cause its new Pinto model's fuel tank to leak and explode.[290] Of forty rear-impact tests that Ford

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[286] *See* Wood, Roberts & Whelan, *supra* note 271, at 233–34.

[287] *See infra* notes 382–389 and accompanying text.

[288] *See generally* William W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471 (1989) (discussing managerialist and contractual conceptions of the firm). *See also* Keith A. Lavine & Elna S. Moore, *Corporate Consciousness: Defining the Paradigm*, 10 J. BUS. & PSYCH. 401, 402 (1996) ("[C]orporate consciousness . . . is not so much metaphysical as it is cognitive.").

[289] Estimates range from 27 to 180 deaths. *See* Ben Wojdyla, *The Top Automotive Engineering Failures: The Ford Pinto Fuel Tanks*, POPULAR MECHANICS (May 20, 2011), https://www.popularmechanics.com/cars/a6700/top-automotive-engineering-failures-ford-pinto-fuel-tanks/ [https://perma.cc/T65T-E2VP].

[290] Mark Dowie, *Pinto Madness*, MOTHER JONES (Sept. 1977), https://www.motherjones.com/politics/1977/09/pinto-madness/ [https://perma.cc/PS7Y-ARVQ] (noting that "Ford

conducted, every one occurring at more than twenty-five miles per hour resulted in a "ruptured fuel tank."[291] Internal memoranda showed that an inexpensive safety device (a $1 plastic "baffle") would have prevented the lethal gas leaks.[292] But economic forecasts uncovered an even cheaper approach: paying civil damages for wrongful deaths.[293] Ford assigned a dollar value for each human life: $200,000 (in 1970s dollars).[294] Between 27 and 180 people (estimates vary) burned to death in Pintos.[295]

During the late 2000s, the Peanut Corporation of America ("PCA") killed nine people[296] and sickened many hundreds more, most of them children.[297] PCA knew this would happen.[298] Its peanut butter was tainted with salmonella, a potentially life-threatening intestinal infection.[299] "Most people . . . [get] salmonella by eating foods . . . contaminated by feces," often because farmers hydrate their fields with dirty water.[300] The contamination was no surprise to anyone who had seen PCA's facility. Federal investigators discovered roaches, mold, and a leaking roof.[301] PCA itself detected salmonella at least twelve times during the months leading up to the outbreak and did nothing.[302] Publicly announcing the contamination

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knows the Pinto is a firetrap . . . ." and that the bumpers were designed to resist impacts of only five miles per hour).

[291] *Id*.

[292] *Id*.

[293] *Id*.

[294] *Id*.; Matthew T. Lee & M. David Ermann, *Pinto "Madness" as a Flawed Landmark Narrative: An Organizational and Network Analysis*, 46 SOC. PROBS. 30, 30 (1999).

[295] Wojdyla, *supra* note 289.

[296] Julia Belluz, *A CEO Just Got 28 Years in Prison After 9 People Died from his Salmonella-Tainted Peanuts*, VOX (Sept. 22, 2015, 1:10 PM), https://www.vox.com/2015/9/22/9372519/parnell-sentencing [https://perma.cc/VJ86-BNLK].

[297] *Salmonella: Typhimurium Infections Linked to Peanut Butter*, CTR. DISEASE CONTROL & PREVENTION (May 11, 2009), https://www.cdc.gov/salmonella/2009/peanut-butter-2008-2009.html [https://perma.cc/68RP-HPBF].

[298] Jessica Smagacz, *Criminal Charges Brought Against Peanut Corporation of America*, ATLANTA INJURY L. NEWS (Feb. 2, 2009), https://atlanta.legalexaminer.com/health/toxic-substances/criminal-charges-brought-against-peanut-corporation-of-america/ [https://perma.cc/P8GB-YX9N].

[299] *Salmonella*: *Questions & Answers*, CTR. DISEASE CONTROL & PREVENTION, https://www.cdc.gov/salmonella/general/index.html [https://perma.cc/2TCY-HZVW] (last visited Oct. 17, 2020).

[300] *See Salmonella Infection*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/salmonella/symptoms-causes/syc-20355329 [https://perma.cc/A352-JTT6] (last visited Dec. 30, 2020).

[301] Associated Press, *FDA Finds Multiple Problems at Peanut Plant*, NBC NEWS (Jan. 28, 2009, 5:36 PM), http://www.nbcnews.com/id/28897859/ns/health-food_safety/t/fda-finds-multiple-problems-peanut-plant/ [https://perma.cc/RG22-TT87].

[302] *Id*.

would have damaged PCA's reputation and would have required a costly product recall. Cleaning the production lines would have brought its own costs and delays. Instead, PCA continued business as usual, sending its peanut butter to customers while falsely assuring them that the shipments were safe.[303] According to the U.S. Attorney prosecuting the case, the explanation was simple: "corporate greed."[304]

Ford's and PCA's behavior, devoid of concern for the suffering of others, bears more than a passing resemblance to psychopathic behavior.[305] Organizational psychologists have used personality disorder diagnostic criteria in systems analysis for years.[306] Dr. Robert Hare's Psychopathy Checklist–Revised ("PCL-R") is the gold standard for diagnosing psychopathy.[307] PCL-R consists of eighteen traits and behaviors including: pathological lying, shallow affect, criminal versatility, lack of empathy, and irresponsibility.[308] The fourth and fifth editions of the Diagnostic and

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[303] Sabrina Tavernise, *Charges Filed in Peanut Salmonella Case*, N.Y. TIMES (Feb. 21, 2013), https://www.nytimes.com/2013/02/22/business/us-charges-former-owner-and-employees-in-peanut-salmonella-case.html [https://perma.cc/8VAM-9NCH] ("On several occasions, the indictment contended, employees stated that shipments were safe, when in fact they were contaminated or had not been tested at all.").

[304] Press Release, U.S. Dep't of Just., Former Officials and Broker of Peanut Corporation of America Indicted Related to Salmonella-Tainted Peanut Products (Feb. 21, 2013), https://www.justice.gov/opa/pr/former-officials-and-broker-peanut-corporation-america-indicted-related-salmonella-tainted [https://perma.cc/4AD4-43YX].

[305] *See generally* JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER (2004) (discussing psychopathic attributes of corporations).

[306] *See generally* Alan Goldman, *Personality Disorders in Leaders: Implications of the DSM IV-TR in Assessing Dysfunctional Organizations*, 21 J. MANAGERIAL PSYCH. 392 (2006) (discussing toxic leaders and dysfunctional organizations, referencing the psychological diagnostic criteria).

[307] *See* Delroy L. Paulhus & Kevin M. Williams, *The Dark Triad of Personality: Narcissism, Machiavellianism, and Psychopathy*, 36 J. RES. PERSONALITY 556, 557 (2002); Robert D. Hare, *Psychopaths and Their Nature: Implications for the Mental Health and Criminal Justice Systems*, *in* PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR 188, 192–93 (Theodore Millon, Erik Simonsen, Morten Birket-Smith & Roger D. Davis eds., 1998); Robert D. Hare & Craig S. Neumann, *Psychopathy: Assessment and Forensic Implications*, 54 CAN. J. PSYCHIATRY 791, 795–96 (2009); *see also* Charles Fishette, Note, *Psychopathy and Responsibility*, 90 VA. L. REV. 1423, 1429 (2004) ("There is currently a very reliable tool for identifying the presence of psychopathic personality—the Hare Psychopathy Checklist."); *see generally* ROBERT D. HARE, THE HARE PCL-R: TECHNICAL MANUAL (2d ed. 2003).

[308] *See* Hare & Neumann, *supra* note 307, at 792 ("On the interpersonal level, people with psychopathy are grandiose, deceptive, dominant, superficial, and manipulative. Affectively, they are shallow, unable to form strong emotional bonds with others, and lack empathy, guilt, or remorse . . . . [They exhibit] irresponsible and impulsive behavior, and a tendency to ignore or violate social conventions and mores."); *see also* Jennifer L. Skeem, Devon L. L. Polaschek,

Statistical Manual of Mental Disorders ("DSM") provide diagnostic criteria that largely overlap with Dr. Hare's.[309] Although there are no accepted clinical criteria for diagnosing organizations with psychopathy,[310] Dr. Hare believes that psychopathy is a helpful lens through which one can understand corporate misconduct and the psychological mechanisms that lead to it.[311]

1. The Law's Role in Fostering Corporate Psychopathy

In a sense, Ford and PCA were behaving as corporations should. Indeed, some commentators emphasize just how typical Ford's actions were.[312] According to corporate law's doctrine of shareholder primacy, corporations are supposed to maximize shareholder wealth without regard to humanistic considerations.[313] Human lives have no intrinsic value in this calculus; they are the equivalent of some number of plastic baffles. Although corporations

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Christopher J. Patrick & Scott O. Lilienfeld, *Psychopathic Personality: Bridging the Gap Between Scientific Evidence and Public Policy*, 12 PSYCHOL. SCI. PUB. INT. 95, 99–103 (2011) (providing history leading to Hare's criteria).

309 Hare & Neumann, *supra* note 307, at 795–96.

310 Dale Hartley, *Are Corporations Inherently Psychopathic?*, PSYCHOL. TODAY (May 23, 2016), https://www.psychologytoday.com/us/blog/machiavellians-gulling-the-rubes/201605/are-corporations-inherently-psychopathic [https://perma.cc/PT6P-E2E9] ("The fact is, no clinical criteria and no test of psychopathy have been developed or tested for use in diagnosing corporate behavior. Criteria and tests have only been validated for use on individuals . . . .").

311 *See* THE CORPORATION (Big Picture Media Corp. 2003); PAUL BABIAK & ROBERT D. HARE, SNAKES IN SUITS: WHEN PSYCHOPATHS GO TO WORK 95 (2007) ("To refer to *the* corporation as psychopathic because of the behaviors of a carefully selected group of companies is like using the traits and behaviors of the most serious high-risk criminals to conclude that *the* criminal (that is, every criminal) is a psychopath. If [common diagnostic criteria] *were* to be applied to a random set of corporations, some might qualify for a diagnosis of psychopathy, but most would not.").

312 *See* Lee & Ermann, *supra* note 294, at 32 ("Ford's actions were typical . . . .").

313 Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1921 (1996) ("The efficiency goal of maximizing the company's value to investors . . . [is] the principal function of corporate law."). Shareholder primacy is the law in Delaware, *see, e.g.*, eBay Domestic Holdings v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("I cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders."), which has more registered corporations than any other state, *see* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1061 (2000) ("More large publicly-traded corporations are incorporated in Delaware than in any other state."); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 490 (1987) ("[M]ore corporations are chartered in Delaware than in any other state."). While many states have stakeholder statutes that permit directors to consider interests of stakeholders other than shareholders, their practical impact is questionable. *See* Hale, *supra* note 13, at 827 ("[S]takeholder statutes alone cannot cultivate the regular and earnest stakeholder consideration . . . .").

must always obey the law,[314] reducing all other decisions to matters of profit can blur legal and moral lines.

Coincidentally, the doctrine of shareholder primacy traces its legal roots to another case involving Ford from sixty years before the first Pinto rolled off the assembly line.[315] During the early 20th century, Ford accumulated significant capital surpluses that it wanted to use for philanthropic purposes: to employ more people and lower the cost of its cars even further.[316] Henry Ford, the company's president and majority stockholder, described the objective: "My ambition . . . is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back into the business."[317] But putting profits back into the business meant they were not paid as dividends to shareholders expecting a cut. This, the Michigan Supreme Court told the company, it could not do: "A business corporation is organized and carried on primarily for the profit of the stockholders . . . . [I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others."[318] It may be little surprise, then, that Ford Motor Company would put profit over all else decades later.

The shareholder primacy principle is not the only source of corporate psychopathy. Since corporate law attributes the actions and thoughts of employees to their corporate employers, it stands to reason that a corporation with psychopathic employees will itself exhibit psychopathic behavior. As it turns out, there are a lot of psychopathic employees, particularly in management positions. One percent of the general population are psychopaths,[319] which equates to roughly 3.3 million people in the United

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[314] *See* DEL. CODE ANN. tit. 8, § 101 (Westlaw through ch. 281 of the 150th Gen. Assembly (2019–2020)) ("A corporation may be incorporated or organized under this chapter to conduct or promote any *lawful* business or purposes . . . .") (emphasis added).

[315] Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

[316] This, at least, was the official story in court and the one on which the judge premised his opinion. In reality, Ford was likely trying to prevent two of its substantial investors, the Dodge brothers, from receiving a handsome dividend and starting their own car company. *See* M. Todd Henderson, *Everything Old is New Again: Lessons from* Dodge v. Ford Motor Company 16–18 (John M. Olin Program L. & Econ. Working Paper No. 373, 2007).

[317] *Dodge*, 170 N.W. at 671.

[318] *Id.* at 684.

[319] *See* Clive R. Boddy, *The Corporate Psychopaths Theory of the Global Financial Crisis*, 102 J. BUS. ETHICS 255, 256 (2011) ("Psychopaths are the 1% of people who have no conscience or empathy and who do not care for anyone other than themselves.").

States.[320] The incidence of psychopathy among corporate managers is *ten-fold* higher.[321] Psychologists and business scholars who study the phenomenon call these managers "corporate psychopaths"[322] (which they distinguish from managers who merely foster generalized workplace toxicity).[323] Corporate psychopaths have been on psychologists' radars for decades.[324] According to one prominent theory, corporate psychopaths are so prevalent because they exhibit external characteristics like "polish, charm, and cool decisiveness" that lead "organizations . . . [to] single[] [them] out for rapid promotion."[325]

Corporate psychopaths foster systemically destructive corporate behavior. Top management is one of the primary factors that determines whether corporations promote lawful or unlawful behavior.[326] The presence of "[c]orporate [p]sychopath[s] correlate[s] significantly and negatively with the construct of [corporate social responsibility]."[327] This means that corporations with psychopathic managers are less likely to engage in responsible business practices and philanthropic projects. Employees at organizations led by corporate psychopaths feel underappreciated and are less likely to agree that their employers operate in ways that are socially desirable, environmentally friendly, or beneficial to local communities.[328]

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[320] *See U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ [https://perma.cc/M8D5-SMZ2] (last visited Oct. 6, 2020).

[321] *Catalyst: Corporate Psychopaths* (ABC television broadcast May 5, 2005), https://www.abc.net.au/catalyst/corporate-psychopaths/11008598 [https://perma.cc/XR6A-Z22W]; Jack McCullough, *The Psychopathic CEO*, FORBES (Dec. 9, 2019, 6:00 AM), https://www.forbes.com/sites/jackmccullough/2019/12/09/the-psychopathic-ceo/#15e4bc59791e [https://perma.cc/T34K-B96A] ("[T]he extent of the presence of psychopaths in corporate America with most other estimates landing between 8% and 12%.").

[322] Boddy, *supra* note 319, at 256 ("Some psychopaths are violent and end up in jail, others forge careers in corporations. The latter group who forge successful corporate careers is called Corporate Psychopaths.").

[323] *See* Goldman, *supra* note 306, at 393.

[324] *See generally* MICHAEL MACCOBY, THE PRODUCTIVE NARCISSIST: THE PROMISE AND PERIL OF VISIONARY LEADERSHIP (2003) (discussing prevalence of one important psychopathic trait—narcissism—among corporate elites); BABIAK & HARE, *supra* note 310 (charting the history of the rise of corporate psychopaths).

[325] Boddy, *supra* note 319, at 257; *see also* Alasdair Marshall, Denise Baden & Marco Guidi, *Can an Ethical Revival of Prudence Within Prudential Regulation Tackle Corporate Psychopathy?*, 117 J. BUS. ETHICS 559, 562 (2013) (discussing Pareto's classical elite theory).

[326] Bucy, *supra* note 44, at 1126 (providing overview of executive interviews about environmental factors leading to white-collar crimes).

[327] Clive R. Boddy, Richard K. Ladyshewsky & Peter Galvin, *The Influence of Corporate Psychopaths on Corporate Social Responsibility and Organizational Commitment to Employees*, 97 J. BUS. ETHICS 1, 8 (2010).

[328] *Id.* at 11–12.

Perhaps more surprisingly, studies show that corporate psychopaths are bad for business.[329] "[U]ndiagnosed or misdiagnosed pathologies in our leaders are a precursor to ever escalating organizational dysfunction,"[330] which "adversely affect[s] productivity and ha[s] a negative impact on . . . organizational effectiveness."[331] Some business scholars argue that the negative effects of corporate psychopathy can reach beyond individual firms to undermine entire industries (such as finance).[332]

2. Corporate Psychopathy Not Eligible for the Defense

It would be a significant strike against the corporate insanity defense if it seriously weakened the tools criminal law has to hold psychopathic corporations like Ford or PCA accountable.[333] That result would seem unavoidable if, as some scholars argue, psychopaths qualify for the insanity defense. For a variety of reasons, though, psychopathic corporations would be ineligible.

Advocates for extending the insanity defense to individual psychopaths ground their arguments in science. Though psychopaths do not suffer from delusions[334] and often appear rational,[335] psychologists now know that psychopaths' lack of emotional affect limits their normal reasoning.[336] Psychopaths often make inconsistent statements and engage in contradictory thinking because their words are not "fused with the affective meaning" that

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[329] Boddy, *supra* note 319, at 255 ("[T]he study of dark, dysfunctional, or bad leadership has emerged as a theme in management research.").

[330] Goldman, *supra* note 306, at 410.

[331] Boddy, *supra* note 319, at 256; *see also* Clive Boddy, *Corporate Psychopaths and Productivity*, MGMT. SERVS. 26, 26 (2010).

[332] *See* Boddy, *supra* note 319, at 255 (arguing that corporate psychopaths are responsible for the 2008 financial crisis).

[333] *See supra* Section III.A.

[334] Fishette, *supra* note 307, at 1424 ("Because their actions appear 'rational,' in the sense that they are aware of what they are doing and harbor no illusions about the nature or consequences of their conduct, such psychopaths are generally held to be criminally responsible for their actions.").

[335] Scott A. Bonn, *The Differences Between Psychopaths and Sociopaths*, PSYCH. TODAY (Jan. 9, 2018), https://www.psychologytoday.com/us/blog/wicked-deeds/201801/the-differences-between-psychopaths-and-sociopaths [https://perma.cc/8E2N-XHCA] (describing psychopaths as more "cool, calm, and meticulous").

[336] Laura Reider, Comment, *Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories*, 46 UCLA L. REV. 289, 293 (1998) ("Proponents of treating psychopaths as moral agents, however, fail to recognize that cognition alone does not fully constitute practical deliberation or rationality. Although some of these theorists acknowledge a richer conception of rationality than pure instrumental reasoning, including a limited role for emotions, they stop short of including all of the relevant capacities.").

helps shape proper use.[337] Psychopaths' rational deficiencies extend beyond mere word use. Studies show that psychopaths are "not capable of rational choice . . . [because] the emotional and biological cues that normally guide individuals in the decision-making process are absent."[338] Psychopaths are particularly handicapped in ethical reasoning,[339] which requires an emotional capacity to respond to moral[340] or social stimuli[341] that psychopaths lack. Consequently, some scholars argue, psychopaths cannot be morally responsible for their criminal behavior.[342]

The argument for extending the insanity defense to psychopaths, whatever its merits, has yet to persuade lawmakers.[343] The drafters of the Model Penal Code purposely excluded psychopathy from their definition of insanity[344] by making the defense unavailable for "an[y] abnormality manifested only by repeated criminal or otherwise antisocial conduct."[345] Some psychologists agree with this approach because they think psychopathy

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[337] Fishette, *supra* note 307, at 1432–33 ("This difference may be explained by the fact that, for normal people, words are fused with affective meaning. Research confirms the fact that psychopaths seem to lack the connotative and emotional knowledge that goes along with our normal use of words. . . . It may well be that this disordered and contradictory thinking is the result of their emotional poverty.").

[338] Reider, *supra* note 336, at 331.

[339] Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 393 (1998) ("[Psychopaths are] irrational concerning moral conduct.").

[340] Adina Roskies, *Are Ethical Judgments Intrinsically Motivational? Lessons from "Acquired Sociopathy"*, 16 PHIL. PSYCH. 51, 55–58 (2003).

[341] ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN xii (2005) (ebook) ("[T]he absence of emotion and feeling is no less damaging, no less capable of compromising the rationality that makes us distinctively human and allows us to decide in consonance with a sense of . . . social convention.").

[342] Anthony Duff, *Psychopathy and Moral Understanding*, 14 AM. PHIL. Q. 189, 190–92 (1977); *see also* Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 701 (1988) ("Desert is based on the principle that a specific blameworthy act can be imputed to the person . . . who is in court if, but only if, he had the capacity and fair opportunity to function in a uniquely human way, *i.e.*, freely to choose whether to violate the moral/legal norms of society.").

[343] *See* ROBERT D. HARE, WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US 4–5 (1993); Natalie Jacewicz, *Does a Psychopath Who Kills Get To Use the Insanity Defense?*, NPR (Aug. 3, 2016, 11:58 AM), https://www.npr.org/sections/health-shots/2016/08/03/486669552/does-a-psychopath-who-kills-get-to-use-the-insanity-defense [https://perma.cc/48EV-7TNN] ("Oklahoma is not the first to carve those with antisocial personality disorder, also sometimes called psychopaths or sociopaths, out of the legal protections of insanity.").

[344] MODEL PENAL CODE § 4.01 cmt. 160 (AM. L. INST. Tentative Draft No. 4, 1955) ("[T]he diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality.") (citation omitted).

[345] MODEL PENAL CODE § 4.01(2) (AM. L. INST. 2019).

is "distinct from a psychosis that undermines . . . [the relevant] capacity to act rationally."[346] Perhaps equally salient for lawmakers is the pragmatic concern that "[i]f antisocial behavior were to constitute insanity, a substantial proportion of serious criminals would be able to assert . . . [the insanity] defense."[347] As the Supreme Court of California put it, "such an expansive role for the insanity defense would work more harm than good."[348]

Above and beyond the psychological and pragmatic reasons against allowing individual psychopaths to raise the insanity defense, there are decisive legal reasons to exclude psychopathic corporations. Most for-profit corporations purposely orient themselves toward profit. This seeming tautology has important implications. As discussed above, the profit motive seems to be one significant explanation for psychopathic corporate behavior. However, mental diseases and defects that result from voluntary choices—like taking intoxicants—usually do not qualify for the insanity defense.[349] "To hold otherwise would allow . . . [a person] to steel his nerves, blanket his conscience, and fortify his resolve . . . in preparation for a criminal enterprise."[350] Analogously, corporations that organize themselves to prioritize profit over humanistic considerations should not be shielded when they succeed. The DSM takes a related position in defining psychopathy, which "must be distinguished from criminal behavior undertaken for gain that is not accompanied by . . . [other psychopathic] personality features . . . ."[351]

Furthermore, if the profit motive is a significant contributor to corporate psychopathy, then all or most for-profit corporations will exhibit it. The insanity defense is only supposed to apply to relative rare diseases or defects

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[346] FINBARR MCAULEY, INSANITY, PSYCHIATRY AND CRIMINAL RESPONSIBILITY 32–33 (1993); *see also* Clarkson, *supra* note 78, at 566–67 ("[M]oral responsibility need not necessarily involve 'emotional capacity to be moved by moral concerns.' This would surely involve our holding the cold and callous person who is unmoved by any moral concerns and simply operates for personal profit or gain to lack moral responsibility . . . . They certainly do not lack responsibility to the degree necessary for a finding of lack of responsibility (ie [sic] insanity).").

[347] 41 AM. JUR. PROOF OF FACTS 2D. 615, *supra* note 80, § 7.

[348] People v. Fields, 673 P.2d 680, 708 (Cal. 1983).

[349] Hassman, *supra* note 276, § 2[a] ; Morse, *supra* note 27, at 787–88 ("In other words, the actor should not be excused if the irrationality or compulsion was the result of the person's rational, voluntary act. If the irrationality is produced by the voluntary and knowing ingestion of a hallucinogen, for example, the actor is entirely responsible for the subsequent irrationality and will therefore not be excused.").

[350] State v. Bower, 440 P.2d 167, 175 (Wash. 1968).

[351] AM. PSYCHIATRIC ASS'N, *supra* note 226, at 663.

that represent deviations from the norm.[352] Near-universal traits—like corporate profiteering—cannot suffice.[353]

Even though corporate psychopaths would not qualify for the corporate insanity defense, we may still wonder whether criminally punishing them is the best response. To be sure, psychopathic traits in criminal defendants seem to amplify our punitive impulses, even in white collar cases.[354] Yet, for individual psychopathic criminals, the data show that punishment and prison are ineffective criminal justice tools: they bring little deterrence or rehabilitation.[355] The same is true of psychopathic corporate criminals. Some scholars believe that the corporate form's economics effectively guarantees that corporations will always put shareholders and profits first.[356] So, corporate psychopathy may be hardwired, leaving criminal law no way to

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[352] Morse, *supra* note 164, at 531–32 ("The special treatment authorized by mental health laws is usually based on the premises that the mentally disordered person is abnormal."); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 344 (1996) (emphasizing "the doctrinal requirement that the defendant's incapacity stem from a mental disease"); Sallet, *supra* note 178, at 1545 ("[A] contested insanity defense almost invariably requires that a lay jury decide the degree to which a defendant is mentally ill, and not merely whether a defendant is mentally ill.").

[353] *See* Natalie Abrams, *Definition of Mental Illness and the Insanity Defense*, 7 J. PSYCHIATRY & L. 441, 448 (1979) ("[Deciding] what the criteria are or should be in distinguishing behavior which is so-called not normal from that which is normal . . . [] is basically the question of the identification of mental illness. "); ROBINSON, PALO, GANGULY, MOSKOVITZ & GRALL, *supra* note 47, § 173(b)(1) ("[C]ommunity recognition of the severity of the abnormality is essential if those who engage in prohibited conduct are to be excused without endangering the effectiveness of the general prohibition against that conduct."); *see also* Slobogin, *supra* note 100, at 1222 ("Current insanity tests are overbroad because, if taken literally, they move too far toward the deterministic *reductio ad absurdum* that no one is responsible.").

[354] Jennifer Cox, John F. Edens, Allison Rulseh & John W. Clark, *Juror Perceptions of the Interpersonal-Affective Traits of Psychopathy Predict Sentence Severity in a White-Collar Criminal Case*, 22 PSYCH. CRIME & L. 721, 733 (2016) ("Linear regression analyses suggest participant perceptions of defendant psychopathic traits significantly predicted sentencing recommendations, with participants who perceived the defendant as more psychopathic recommending longer prison terms.").

[355] Harris, Skilling & Rice, *supra* note 197, at 233 ("Psychopaths derive little benefit from programs aimed at the development of empathy, conscience, or interpersonal skills. There is evidence that such programs actually increase the risk of recidivism among psychopaths."); Hare & Neumann, *supra* note 307, at 798 ("[Psychopaths] appear to derive little benefit from prison treatment programs that are emotion-based, involve talk therapy, are psychodynamic or insight-oriented, or are aimed at the development of empathy, conscience, and interpersonal skills.").

[356] *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 468 (2001) ("And as the goal of shareholder primacy becomes second nature even to politicians, convergence in most aspects of the law and practice of corporate governance is sure to follow.").

unwire it. Furthermore, some sociologists believe that psychopathic individuals will always find their way into senior corporate management. According to classical elite theory, human social structures guarantee that cunning and manipulative people will prosper in upper echelons.[357]

Though we should still punish criminal corporations, we should set aside any illusions that the criminal law can improve corporations with psychopathic tendencies. Criminal law can at least give us is the catharsis of striking back and provide us with the sense of justice done.[358]

If we hope for change, we may need to reach outside of criminal law to mental health systems and corporate law. Since corporate psychopathy seems to be a systemic problem, it demands a systemic solution. More social attention to individual mental health problems among corporate managers would benefit the entire corporate hierarchy, including the managers themselves. Successful people are not immune to mental illness. The popular belief that white-collar crimes "are almost always . . . well-motivated and performed with an uncommonly clear head" is almost certainly wrong.[359] The high incidence of personality disorder among upper corporate ranks belies perceptions that corporate managers are "largely 'reasonable' men and women" who need mental health treatment least.[360] While white-collar offenders may have "relatively easy access to psychiatric treatment,"[361] personality disorders can hide themselves from the people who suffer from them, making self-initiated treatment less likely.[362] We must continue to

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[357] *See generally* VILFREDO PARETO, THE RISE AND FALL OF ELITES: AN APPLICATION OF THEORETICAL SOCIOLOGY (8th prtg. 2009) (introducing foundational views of classical elite theory).

[358] *See generally* Christina Mulligan, *Revenge Against Robots*, S.C. L. REV. 579 (2018) (arguing for the cathartic value of punishing robots).

[359] BLINDER, *supra* note 64, § 8.1 .

[360] *Id.*

[361] *Id.*

[362] Arthur Freeman & Ray W. Christner, *Personality Disorders*, *in* ENCYCLOPEDIA OF COGNITIVE BEHAVIOR THERAPY 280, 280 (Arthur Freeman, Stephanie H. Felgoise, Arthur M. Nezu, Christine M. Nezu & Mark A. Reinecke eds., 2005).

> Patients with personality disorders usually do not present for treatment to address underlying personality problems; rather, they desire relief of symptomatic complaints including depression [or] anxiety . . . . The typical pattern for patients with personality disorders is that they generally see the problems they encounter or experience as outside of them and independent of their behavior. Pressure from significant others in their lives or from the judicial system is often the enforcing agent to these patients seeking or pursuing therapy. They often hold little insight about how they became the way they are, how they contribute to their life problems, or how to change their actions, what they experience, and how they think.

Id. at 280.

criticize "dark leader attributes—lack of empathy, ruthless preoccupation with self-promotion, treacherous disloyalty to persons, groups and collective beliefs"[363]—but we should not stop at criticism. Recognizing that these attributes can be symptomatic of underlying psychological distress could be a step in the right direction.

We should also resist the supposed legal and economic necessity of shareholder primacy in corporate law. Scholars have long proposed extending the law's conception of corporate purpose to include more stakeholders.[364] Corporations less fixated on profit and more attentive to social, labor, and environmental concerns would likely behave like the better-rounded citizens we want them to be.[365] There is cause for optimism on this front. The Corporate Business Roundtable, whose members include Jeff Bezos, Tim Cook,[366] and many other CEOs from major U.S. corporations,[367] recently voted to redefine corporate purpose as promoting "an economy that serves all Americans."[368] Although it is unclear what tangible effect this nonbinding vote will have,[369] signatories have personally committed to valuing customer, employer, supplier, and community interests alongside shareholder value.[370]

B. CORPORATE IRRATIONALITY AND IDENTITY DISORDERS

The previous Section showed that the law's understanding of corporate purpose pressures corporations to act like psychopaths. Even though psychopathic action ignores common-sense humanistic concerns, it is often hyper-rational from a practical perspective. This Section shows how the

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[363] Alasdair Marshall, Denise Baden & Marco Guidi, *Can an Ethical Revival of Prudence Within Prudential Regulation Tackle Corporate Psychopathy?*, 117 J. BUS. ETHICS 559, 562 (2013).

[364] *See generally* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (offering an alternative account of corporate purpose).

[365] Diamantis, *supra* note 253, at 888–91.

[366] *Members*, BUS. ROUNDTABLE, https://www.businessroundtable.org/about-us/members [https://perma.cc/RBQ6-Q2HV] (last visited Oct. 6, 2020).

[367] *About Us*, BUS. ROUNDTABLE, https://www.businessroundtable.org/about-us [https://perma.cc/JZW2-5CBE] (last visited Oct. 6, 2020).

[368] *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE [https://perma.cc/YZ53-N6EZ] (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

[369] *See* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 123 (1999) (discussing failed previous attempt to encourage stakeholder corporate governance).

[370] *Business Roundtable Redefines the Purpose of a Corporation*, *supra* note 368.

law's doctrines for understanding corporate behavior can destine corporations to behave in ways that lack even the pretense of rationality.

1. The Law's Role in Fostering Corporate Irrationality

A simple noncorporate example will illustrate the basic problem. Suppose you are sitting alone on a park bench. An apartment window across the street slides open and catches your attention. The weather is crisp outside, but the air is fresh and invigorating. "Maybe the apartment was getting stuffy," you think to yourself. A couple minutes later, you see the window slide closed. "Perhaps the air was a little too chill for whoever lives inside?" But no, some minutes later, the window opens again. Soon after, it closes. And then opens. And then closes. And opens. And so forth. After a half hour of this, you decide whoever lives there must be rather eccentric, and walk away not wanting to risk eye contact.

While it may have been impossible to see from your vantage point, there is a simple explanation for the behavior you observed at the window. No "eccentric" lives in the apartment. If you looked through the window, you would learn that a couple, Jack and Jane Sprat, live there. They have opposite tastes in temperature. Jack prefers it cooler. Jane likes it warmer. He was opening the window; she was closing it. Though Jack and Jane were, as individuals, acting rationally in light of their preferences, "the couple," as a unit, was behaving bizarrely. It makes no sense for anyone to repeatedly open and close a window. To diagnose and fix the problem, you would have to look through the window to see the individuals, their preferences, and the systems that connect (or divide) them. In healthy relationships, couples have interpersonal tools for solving such simple problems: a conversation, a compromise, and a half-open window.

The law of corporate liability looks at the corporate window but not through it. Corporations are legal constructs, "existing only in contemplation of law."[371] The law gets to define what corporations are and what counts as corporate behavior.[372] Federal law's approach, and the approach adopted by most states,[373] is set out in the doctrine of *respondeat superior*: "[A] corporation acts through its employees."[374] All employee acts are simultaneously corporate acts so long as the employees take them "within the

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[371] Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819).

[372] *See* Diamantis, *supra* note 253, at 877 (discussing the need for corporate law "to distinguish between actions that proceed from [a corporation] and events that happen to [it]").

[373] Ellen S. Podgor, *Corporate Criminal Liability*, 41 STETSON L. REV. 1, 2 (2011) ("The federal system and most states use respondeat superior theories for finding a corporation liable.").

[374] Cedric Kushner Promotions Ltd. v. King, 533 U.S. 158, 166 (2001).

scope of [their] employment [and] with the intent to benefit the corporation."[375]

Though the scope and intent requirements may seem like they could do significant work sifting true corporate acts from private employee acts, courts have weakened both limitations to near inconsequentiality. *Respondeat superior* applies even when an employee acts contrary to her employer's orders[376] and with an intent to benefit her employer in only a subsidiary,[377] hypothetical,[378] or ineffective[379] way.

> [T]he employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the *alter ego*, while acting within the scope of his duties, be negligent—in disobedience, it may be, of the employer's positive and specific command—the employer is answerable for the consequences.[380]

Courts have rebuffed nearly every request to peer through the corporate window to look at individual employees, systems, and incentives before deciding whether to hold corporations liable for employee misconduct. Corporate behavior *just is* employee behavior—all of it.[381]

Economists and psychologists who study groups know that rational action from individuals can lead to patently irrational group behavior. Collective action problems like the tragedy of the commons are one familiar example.[382] Individuals using a common resource (e.g., a pasture) may each make rational self-interested decisions about how to use the resource (e.g., each puts more of his own sheep in the pasture) but thereby soon "brings ruin to all" (e.g., the pasture becomes overgrazed and unusable).[383] The rational course for the group would have been to use the resource sustainably.

Kenneth Arrow's impossibility theorem is another example of individual rationality leading to group irrationality.[384] Arrow proved that

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375 *Developments in the Law*, *supra* note 242, at 1247; RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment.").

376 United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972).

377 United States v. Automated Med. Lab'ys., 770 F.2d 399, 407 (4th Cir. 1985).

378 *See* United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 970 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999).

379 Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945).

380 New York Cent. R.R. v. White, 243 U.S. 188, 198 (1917).

381 So long as the employee is actually on the job. Corporations generally are not liable for criminal acts employees commit in their private lives.

382 *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (discussing the tragedy of the commons).

383 *Id*. at 1244.

384 Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328, 330 (1950).

collectives that use voting to aggregate individual preferences (say, by majority vote) will end up setting bizarre courses of action,[385] even if everyone's individual preferences are sensible.[386] For example, suppose there are three possible projects (A, B, and C) that the group could pursue and each individual votes on which project to pursue before the other projects. Even if everyone votes rationally in accordance with their preference about project order, the results may dictate that B should start before A, C should start before B, and (impossibly) A should start before C.[387]

The tragedy of the commons and the impossibility theorem are not difficult to explain. They are also relatively easy to mitigate once understood. Privatizing communal property helps each person internalize the full costs of its use.[388] Different voting procedures can reduce the chance of reaching paradoxical results.[389] To appreciate the source of the problem and the solutions available, one must take advantage of two perspectives, simultaneously seeing the collective and the individuals composing it—the forest and the trees.

Better internal corporate procedures cannot fix all the self-undermining irrationality that corporate law currently attributes to corporations. According to *respondeat superior*, each and every corporate employee simultaneously instantiates the entirety of their employer's capacity to act. Arrow's collectives at least have mechanisms for aggregating individual preferences into unified group preferences. Corporate law, however, refuses to aggregate individual employee behavior into unified corporate behavior. From the law's perspective, a corporation always takes every action that any of its employees takes. This makes for a very strange picture of the sort of "people" corporations are. If two employees argue, the corporation adopts both sides of the argument. If two employees fight, the corporation at once throws and receives all the punches.

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[385] *Id.* at 343 ("[T]he doctrine of voters' sovereignty is incompatible with that of collective rationality.").

[386] *Id.* at 334 ("[I]t will be assumed that individuals are rational . . . .").

[387] *Id.* at 329.

[388] Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967) ("A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities.").

[389] DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 441–76 (1992); Nathan Collins, *Arrow's Theorem Proves No Voting System Is Perfect*, TECH, (Feb. 28, 2003), http://tech.mit.edu/V123/N8/8voting.8n.html [https://perma.cc/49JN-DABT] ("The practical question for policy makers and voters is which system manages to run in to its problems least often.").

Of more practical concern, where different employees have inconsistent understandings of corporate objectives or have conflicting individual goals, *respondeat superior* says the corporation simultaneously pursues them all. For example, one employee in a hiring department might make hiring decisions on purely objective criteria, another might give undue preference to men, a third might give undue preference to women, and a fourth might be running compliance to make sure all hiring practices are legal. According to the way the law defines corporate behavior, this corporation, at one and the same time, hires in a nondiscriminatory way, engages in gender discrimination (both in favor of and against women), and tries to prevent discrimination.

According to *respondeat superior*, corporations literally have multiple identities and act on them all. In any natural person, such patterns of behavior could be symptomatic of a disruptive psychological condition called "dissociative identity disorder" ("DID," formerly "multiple personality disorder"). "[DID] is a rare condition in which two or more distinct identities, or personality states, are present in—and alternately take control of—an individual."[390] The DSM-V diagnostic criteria for DID include "discontinuity in . . . sense of agency, accompanied by related alterations in . . . behavior . . . " that "impair[] social, occupational, or other important areas of functioning . . . ."[391] While DID may be rare among natural people, *respondeat superior* effectively prescribes it for all corporate people.

Even focusing on single personalities, the law necessitates that corporations will behave in irrational and self-destructive ways. The source of the problem is an unavoidable feature of any agent–principal relationship: agency costs.[392] Employees have a "natural incentive to advance their personal interests even when those interests conflict with the goal of maximizing firm value."[393] Since employers can never perfectly monitor their employees, employees can act opportunistically at their employers'

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[390] *Dissociative Identity Disorder*, PSYCH. TODAY (Feb. 22, 2019), https://www.psychologytoday.com/us/conditions/dissociative-identity-disorder-multiple-personality-disorder [https://perma.cc/FBZ4-BVWU].

[391] AM. PSYCHIATRIC ASS'N, *supra* note 226, at 292.

[392] Park McGinty, *The Twilight of Fiduciary Duties: On the Need for Shareholder Self-Help in an Age of Formalistic Proceduralism*, 46 EMORY L.J. 163, 188 (1997) ("[C]orporate law's most important and difficult challenge is to reduce agency cost. . . . The inevitable conflict between the rational economic interests of the agent and those of the principal produces an unavoidable loss of wealth, as compared to an unrealistic realm in which agents actually ignored their own interests.").

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

expense.[394] This opportunism may manifest itself in relatively mundane ways, like shirking on the job or using the office printer to make garage-sale signs. It can also show itself in criminal conduct that is far from mundane, like boosting sales numbers through fraudulent bookkeeping or trimming costs by dumping pollutants illegally. Such activities secure private benefits for the employees who carry them out (e.g., performance bonuses, bolstered reputation, promotion, etc.), often with little real risk of getting caught. The corporate form can obfuscate employees' identity and shield them from detection.[395]

Since *respondeat superior* ignores these agency costs, it forces the law to see corporations as behaving in irrational and self-destructive ways. The consequences for corporations can be devastating. For one thing, the expected costs of employee crime to the corporation usually outweighs any benefit the corporation may incidentally derive. Studies show that corporate crime generally decreases overall corporate value.[396] And decades of experience show that corporations are much easier targets for prosecution than employees.[397] Sometimes corporations do not even have to wait for a criminal charge to experience the costs of employee crime. As in *Sun Diamond* (discussed in the Introduction), the corporation itself may be the victim. Employees can enrich themselves by illegally filching corporate money or making illicit use of corporate information. Since the crimes of corporate agents (i.e., employees) are the crimes of the corporate principal

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394 *See* Jensen & Meckling, *supra* note 212, at 327–28.

395 *See* Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Just., 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/7GUW-V43K].

396 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, 22 (1999).

397 James B. Stewart, *In Corporate Crimes, Individual Accountability Is Elusive*, N.Y. TIMES (Feb. 19, 2015), https://www.nytimes.com/2015/02/20/business/in-corporate-crimes-individual-accountability-is-elusive.html [https://perma.cc/5SLP-2F5K] ("Professor [Brandon L.] Garrett analyzed 303 nonprosecution and deferred prosecution agreements with corporations from 2001 to 2014 in which companies avoided guilty pleas by paying fines and agreeing to other measures . . . . [and] found that individuals were charged in only 34 percent of the cases." After Professor Garrett asked prosecutors why this is the case, he reported that "[s]ome say they don't have the resources. It's one thing to settle with a big company and another thing to do serious investigations of dozens of people. Others say these aren't really intentional crimes, or it's difficult to establish intent in individual cases. Others just repeat the party line, which is, 'We target individuals whenever we have the evidence.' All of those are probably true to some extent.").

(i.e., the employer),[398] the law sees corporations as committing crimes that, contrary to all reason, only hurt themselves.[399]

2. Mere Corporate Identity Disorders Not Eligible

Mere corporate irrationality of the sort just described, even when analogizable to real psychological conditions like dissociative identity disorder, would not qualify for the insanity defense. This may sound surprising, given that courts often recognize that people who suffer from DID can be candidates for the insanity defense.[400]

Where multiple personalities are concerned, an interesting question arises as to which personality is tried. Assume, for example, that an accused has a dual personality. His usual personality is conforming and conventional. During a dissociative episode, the accused switches to his alter personality and commits a murder. At the time of trial, the accused is in his conventional personality. Is it fair to try the conventional personality? Is it even constitutional?[401] If a defendant suffering from DID engaged in criminal conduct during a dissociative episode, the conventional personality necessarily lacked control over the crime.[402] This would seem to be a straightforward argument for the insanity defense under the volitional test.

There are two reasons why the corporate insanity defense would not extend to corporate identity disorders. Though DID only affects 1.5% of the

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[398] *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.").

[399] Economists have shown that, as a general rule, corporate crime has a negative long-term effect on firm value. *See* Alexander & Cohen, *supra* note 67, at 22.

[400] State v. Lockhart, 542 S.E.2d 443, 446 (W. Va. 2000) ("[E]xpert testimony regarding Dissociative Identity Disorder *may* be admissible in connection with a defendant's assertion of an insanity defense."); United States v. Denny-Shaffer, 2 F.3d 999, 1013–14 (10th Cir. 1993); Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCH. PUB. POL'Y & L. 534, 596–97 (1995) ("[D]issociative identity disorder . . . in appropriate cases ha[s] been accepted as [a] predicate[] for an insanity defense."). *But see* State v. Greene, 984 P.2d 1024, 1032 (Wash. 1999) ("[I]t was not possible to reliably connect the symptoms of DID to the sanity or mental capacity of the defendant."). Indeed, fifty-five percent of criminal defendants with DID enter an insanity plea. *See* Sabra M. Owens, *Criminal Responsibility and Multiple Personality Defendants*, 21 MENTAL & PHYSICAL DISABILITY L. REP. 133, 140–43 (1997).

[401] 41 AM. JUR. PROOF OF FACTS 2D 615, *supra* note 80, § 14.

[402] *Denny-Shaffer*, 2 F.3d at 1014 ("We are convinced that the trial court's interpretation of [the insanity defense statute and its application to a person suffering from multiple personality disorder] is unreasonable in restricting the focus of the court and jury narrowly to the alter or alters cognizant of the offense, and ignoring proof that the dominant or host personality was not aware of the wrongful conduct.").

general population,[403] among corporations it is a near universal phenomenon. Recall, these disorders for corporations arise because *respondeat superior* treats corporations as though they act through all of their employees all of the time. If two employees pursue conflicting conceptions of the corporate good, the corporation simultaneously pursues them both. As a consequence, most corporations necessarily have multiple personalities that are acting on their behalf. The insanity defense, however, can only apply to relatively rare conditions.

Additionally, the law has developed a way to use prosecutorial discretion as a solution to corporate identity problems in criminal law.[404] When it comes time to charge a corporation, prosecutors can identify one employee to stand in for the entire corporation.[405] Prosecutors then show that that employee, while acting on behalf of the corporation, committed a crime. As the courtroom narrative unfolds, the corporation effectively comes to have just a single personality linking its past misconduct and its present defense.

Allowing prosecutors to pick an employee to represent the entire corporation has controversial criminal justice implications. It is not clear that every employee is an equally plausible stand-in for the entire corporation. Although many find it intuitive that upper-level management are good proxies for corporations, those intuitions become strained as prosecutors move down the corporate hierarchy.[406] Singling out just one representative of the corporation also sidelines what other corporate employees were doing at the time of the crime. That may be relevant if, for example, they were

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[403] AM. PSYCHIATRIC ASS'N, *supra* note 226, at 294.

[404] *See* U.S. DEP'T OF JUST., JUSTICE MANUAL §§ 9-28.210 (2018), 9-28.1300 (2015), 9-28.1400 (2020), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/4VRW-VLN4]; Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Just., Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf ("In making a decision to charge a corporation, the prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law.") [https://perma.cc/W7TF-ESDQ].

[405] *See, e.g.*, United States v. Sun-Diamond Growers of Cal., 138 F.3d 961 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999) (upholding conviction of corporation for bribes paid by single employee).

[406] *See* 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, 40–41 (1957) ("[High managerial agents] are the *mens*, the mind or brain, of the corporation."); *see also* MODEL PENAL CODE § 2.07 explanatory note (AM. L. INST. 2019).

engaged in efforts to prevent the sort of misconduct at issue.[407] One might have thought that the concerted action of many employees would be more reflective of the corporation than the deviant action of just one. But the prosecutor need not consider this.[408] Whatever the criminal justice implications of letting prosecutors pick a corporate personality for trial, that approach at least fixes the conceptual challenges posed by corporate DID—the corporate identity at the time of the trial becomes the same as its identity at the time of commission.

V. THE DEFENSE IN PRACTICE

Just as the test for the insanity defense varies by jurisdiction,[409] so does its procedure. Long-settled Supreme Court precedent protects states' decisions about how to implement the defense.[410] It is a doctrine that has "historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States."[411]

Procedure determines not just how the defense operates in practice, but what its criminal justice significance is. Shifting burdens of production and proof shape who can assert the defense and how likely they are to succeed. Any evaluation of the insanity defense would be incomplete without considering the procedural consequences of successfully asserting it. In contrast to most criminal law defenses, the insanity defense ordinarily does not entail releasing acquittees to the general population. Routine release would undermine many of the goals of the insanity defense, like protecting

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[407] Bharara, *supra* note 237, at 65 ("[A] multinational corporation may theoretically be indicted, convicted, and perhaps put out of business based on the alleged criminal activity of a single, low-level, rogue employee who was acting without the knowledge of any executive or director, in violation of well-publicized procedures, practices, and instructions of the company.").

[408] *See* United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972) (upholding conviction of corporation for crime of single employee who acted against corporate policies).

[409] Clark v. Arizona, 548 U.S. 735, 737 (2006) ("[T]he insanity rule . . . is substantially open to state choice.").

[410] *See generally* Nobles v. Georgia, 168 U.S. 398 (1897) (holding that the procedure by which insanity is assessed is a matter of state legislation); Solesbee v. Balkcom, 339 U.S. 9 (1950) (upholding Georgia's recognition of its governor's competency to assess insanity); Caritativo v. California, 357 U.S. 549 (1958) (upholding California procedure which denies prisoners any right to initiate their own insanity determination).

[411] Powell v. Texas, 392 U.S. 514, 536 (1968).

the public and the defendant from his condition. Most insanity acquittees should be, and are, diverted to mental health facilities for a period of time.[412]

This Part focuses on significant procedural decision points for implementing the corporate insanity defense. Advocates of the individual insanity defense often argue that modifying procedure can disarm critics' concerns.[413] For corporate defendants too, sensible procedure can go a long way toward addressing potential worries. Procedure can, as necessary, ratchet down the defense's availability and ratchet up its consequences.

An added nuance could be layered over the procedural recommendations that follow. The discussion assumes that each jurisdiction would apply its own, uniform procedure for all corporate defendants claiming the insanity defense. Other models are available. The American Bar Association, for example, recommends a two-tiered approach to the insanity defense: one tier for defendants acquitted of violent felonies and another for all other acquittees.[414] Federal law also partially uses a two-tiered system.[415] Some scholars propose a third tier specifically for homicide cases.[416] In that third tier, the insanity defense could be prohibited or limited in various ways.[417] Something similar may be appropriate for corporate defendants—limiting the availability of the defense or amplifying the consequences of asserting it for certain categories of corporate crime, e.g., those that cause physical injury or significant market harms. Current corporate sentencing law already singles out such crimes for distinctive treatment.[418] Corporations that

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412 LAFAVE, *supra* note 99, § 7.1.

413 R. Michael Shoptaw, *M'Naghten is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84 MISS. L.J. 1101, 1130–32 (2015); Morse, *supra* note 27, at 779 ("I believe that the insanity defense ought to be retained because it is basically just, and that sensible and fair reforms can remedy most of the problems associated with it.").

414 CRIM. JUST. STANDARDS ON MENTAL HEALTH 7–7.2, 7.74 (AM. BAR ASS'N 2016), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental _health_standards_2016.authcheckdam.pdf [https://perma.cc/4ARG-VE49].

415 18 U.S.C. § 4243(d) ("[A] person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect. With respect to any other offense, the person has the burden of such proof by a preponderance of the evidence.").

416 Wexler, *supra* note 55, at 555–57.

417 *Id.* at 550.

418 U.S. SENTENCING GUIDELINES MANUAL § 8C4.2 (U.S. SENTENCING COMM'N 2018) ("If the offense resulted in death or bodily injury, or involved a foreseeable risk of death or bodily injury, an upward departure may be warranted."); *id.* § 8C4.5 ("If the offense presented a risk to the integrity or continued existence of a market, an upward departure may be warranted.").

conceal crime after it has occurred could also face more stringent standards and consequences, perhaps even disqualification from the insanity defense.[419]

A. TREATMENT AFTER ACQUITTAL

One obvious worry is that the insanity defense would let corporations off the hook, freeing them to injure new victims with impunity and emboldening future corporate criminals. That result would be a disqualifying strike against the defense. However, the worry turns on a mistake about how the insanity defense works. "An acquittal by reason of insanity is rarely a ticket to freedom."[420] For some scholars, this feature of the insanity defense warrants its abolition.[421] As to the corporate insanity defense, mandatory evaluation and treatment of acquittees is a critical safeguard.

Applying the insanity defense puts the criminal justice system in an awkward position. By acquitting the defendant, the court necessarily finds that he is not criminally or morally responsible for his misconduct. Yet the court must also find that the defendant had a disorder that led to criminal behavior. Releasing him could expose the public to a known source of criminal harm and leave the acquittee without needed treatment.

The law adopts a sensible solution: committing the acquittee to a mental health facility for a period of time. "Like defense of self, the defense of insanity, if successfully pleaded, results in 'acquittal.' But unlike the acquittal of self-defense which means liberty, the acquittal of the insanity defense means deprivation of liberty for an indefinite term in a 'mental institution.'"[422] Often, defendants who successfully raise the insanity defense spend more time under treatment, segregated from the general

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[419] ROBINSON, PALO, GANGULY, MOSKOVITZ & GRALL, *supra* note 47, § 173(i) ("Concealing one's identity, fleeing a crime scene, hiding evidence, resisting arrest, and showing awareness of consequences, can be reasonably interpreted to indicate knowledge of a moral wrong, with regard to a mental-illness defense.").

[420] *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605, 605 (1981); *see also* AM. BAR ASS'N, THE MENTALLY DISABLED AND THE LAW 404 (Samuel J. Brakel & Ronald S. Rock eds., rev. ed. 1971); Henry Weihofen, *Institutional Treatment of Persons Acquitted by Reason of Insanity*, 38 TEX. L. REV. 849, 849 (1960) ("A person acquitted of crime by reason of insanity is of course not usually allowed simply to walk out of the courthouse, a free man. In most states,' statutes provide that on such an acquittal, the judge may (in some states must) order commitment.").

[421] Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 864 (1963) ("Rather, its real function is to authorize the state to hold those who must be found not to possess the guilty mind *mens rea*, even though the criminal law demands that no person be held criminally responsible if doubt is cast on any material element of the offense charged." (internal citations and quotation marks omitted)).

[422] *Id*. at 858.

public, than they would have spent in prison if convicted.[423] As one Supreme Court Justice has summarized the law, "[i]f a defendant establishes an insanity defense, he is not criminally liable, though the government may confine him civilly for as long as he continues to pose a danger to himself or to others by reason of his mental illness."[424]

Treatment for corporations necessarily looks different than it does for individuals, but it is nothing new. Organizational scientists and economists have identified many potential causes of corporate insanity.[425] As above, I continue to focus on the role of defective corporate culture and agency costs. There are well-established strategies for addressing both. "Tone at the top" seems to be one of the most crucial influence on corporate culture.[426] Upper management sets the example and shapes the norms by which the rest of the corporation operates.[427] It stands to reason that replacing managers whose personalities and management style foster a criminogenic workplace environment can help. That is why hiring new management is one of the first responses many corporations take when they discover prevalent internal misconduct.[428] However, sometimes internal dynamics can prevent a

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[423] Eric Silver, *Punishment or Treatment?: Comparing the Lengths of Confinement of Successful and Unsuccessful Insanity Defendants*, 19 L. & HUM. BEHAV. 375, 383–84 (1995). While some jurisdictions time limit special commitment by the length of the sentence the acquitted would have served if convicted, *see, e.g.*, CRIM. JUST. STANDARDS ON MENTAL HEALTH 7-7.7 (AM. BAR. ASS'N 2016); TEX. CODE 46C.269(a) (Westlaw through 2019 Reg. Sess.), many important jurisdictions do not, *see, e.g.*, 18 U.S.C. § 4243(f).

[424] Delling v. Idaho, 568 U.S. 1038, 1038 (2012) (Breyer, J., dissenting from denial of certiorari).

[425] I discuss them in much more detail in earlier work. *See* Diamantis, *supra* note 43, at 539–44.

[426] *See* Alexander & Cohen, *supra* note 67, at 33–34.

[427] MARSHALL B. CLINARD, CORPORATE ETHICS AND CRIME: THE ROLE OF MIDDLE MANAGEMENT 54 (1983) (finding that more than fifty percent of Fortune 500 middle management identify top management behavior as the most significant factor affecting culture of ethical behavior in their corporation).

[428] *See* Celia Moore, David M. Mayer, Flora F. T. Chiang, Craig Crossley, Matthew J. Karlesky & Thomas A. Birtch, *Leaders Matter Morally: The Role of Ethical Leadership in Shaping Employee Moral Cognition and Misconduct*, 104 J. APPLIED PSYCHOL. 123, 141 (2019) ("One of the most common responses to the discovery of corporate misconduct is to replace the CEO . . . .") (citing Marne L. Arthaud-Day, S. Trevis Certo, Catherine M. Dalton & Dan R. Dalton, *A Changing of the Guard: Executive and Director Turnover Following Corporate Financial Restatements*, 49 ACAD. MGMT. J. 1119 (2006)); Heather R. Huhman, *Leaders Everywhere Are Being Fired for Ethical Misconduct. Here's How to Make Sure You're Not One of Them.*, INC. (Jan. 24, 2018), https://www.inc.com/heather-r-huhman/leaders-everywhere-are-being-fired-for-ethical-misconduct-heres-how-to-make-sure-youre-not-one-of-them.html [https://perma.cc/U5X2-JNTS] ("[B]etween 2012 and 2016, there was a 36 percent increase in the number of forced CEO turnovers due to ethical lapses.").

corporation from replacing management—the managers who need replacing may be entrenched or may themselves be responsible for making personnel decisions.[429] In such cases, compulsion by an external hand may be necessary for meaningful change.

Implementing better compliance programs can be an effective course of treatment for mitigating destructive agency costs. By definition, compliance programs seek to prevent misconduct.[430] They involve "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."[431] Compliance programs can keep employees in check with operating procedures designed to prevent, detect, and sanction criminal conduct.[432] Once misconduct occurs, an effective compliance program updates itself to reduce the chance of it happening again.[433] As big data, automation, and artificial intelligence come to play a larger role in compliance science, many agency costs will become easier and cheaper to mitigate.[434]

But see Anup Agrawal, Jeffrey F. Jaffe & Jonathan M. Karpoff, *Management Turnover and Governance Changes Following the Revelation of Fraud*, 42 J. L. ECON. 309, 339 (1999) ("In univariate comparisons, there is some evidence that firms committing fraud have higher managerial and inside director turnover. But in multivariate tests that control for other firm attributes, the relations between turnover and fraud are either negative or statistically insignificant.").

[429] *See* Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 385 (2017) ("[Compliance reform] mandates should be imposed only if the prosecutor has evidence to conclude that the inadequate policing was due to substantial policing agency costs and that, absent intervention, such agency costs will result in inadequate policing in the future.").

[430] *See* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C.L. REV. 949, 958 (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.").

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

[432] Mihailis E. Diamantis, *The Body Corporate*, 83 L. & CONTEMP. PROBS. 133, 155–57 (2021).

[433] U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-28.600, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.600 ("A corporation, like a natural person, is expected to learn from its mistakes."); *id.* § 9-28.800 ("Does the corporation's compliance program work? In answering these questions, the prosecutor should consider . . . revisions to corporate compliance programs in light of lessons learned.").

[434] *See* William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71, 89–90 (2017).

If corporate insanity can be treated along the lines just described, the law must say who is to administer the treatment. Judges already occasionally mandate some kinds of corporate treatment after conviction.[435] The Sentencing Guidelines give judges broad discretion to design terms of probation that can include implementing new compliance programs and replacing personnel.[436] Prosecutors also frequently do something similar before, and in lieu of, trial. Many DOJ investigations into corporate misconduct end with deferred or nonprosecution agreements ("DPA" and "NPA"), which avert trial in exchange for the corporations' agreements to pay fines and improve compliance.[437]

Unfortunately, neither judges nor prosecutors are well-suited to the task of treating defective corporations. Both lack the necessary expertise.[438] Compliance, corporate governance, and management are sophisticated sciences.[439] They are not a part of the training regimen for judges and prosecutors. Federal prosecutors are perhaps the biggest offenders, both in terms of the significance of the cases they try to resolve through pretrial diversion and the hubris they display.[440] Of prosecutorial compliance efforts, the Government Accountability Office tells us that the "DOJ cannot evaluate

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[435] *See, e.g.*, United States v. Atlantic Richfield Co., 465 F.2d 58, 59–61 (7th Cir. 1972) (imposing probation on corporate convict and requiring compliance reform); *see also* Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1, 12–26 (1988) (discussing the emergence of corporate probation in federal law).

[436] *See* U.S. SENTENCING GUIDELINES MANUAL § 8D1.4 (U.S. SENTENCING COMM'N 2018).

[437] *See* Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 67, 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.").

[438] *See* Baer, *supra* note 430, at 953 ("Despite the fact that the DOJ has intoned an interest in generating a more ethical 'corporate culture,' its prosecutors have little expertise in bringing about this development . . . ."); Diamantis, *supra* note 43, at 563–65.

[439] *See generally* Shann Turnbull, *The Science of Corporate Governance*, 10 CORP. GOVERNANCE 261 (2002) (discussing technologically sophisticated analysis of some approaches to corporate governance). Many graduate schools offer advanced degrees in fields such as corporate compliance and management. *Launching a Career in Compliance Consulting: 3 Frequently Asked Questions*, ROBERT HALF (June 10, 2015, 6:00 PM) https://www.roberthalf.com/blog/job-market/launching-a-career-in-compliance-consulting-3-frequently-asked-questions [https://perma.cc/CA7X-PTYK]; *MBA Programs and Specialties*, U.S. NEWS, https://www.usnews.com/best-graduate-schools/top-business-schools [https://perma.cc/DC59-3TQL] (last visited Dec. 26, 2020).

[440] I have previously argued that judges are institutionally better situated to make decisions about compliance reforms for corporate criminals. *See* Diamantis, *supra* note 43, at 559–62.

and demonstrate the extent to which DPAs and NPAs . . . contribute to the department's efforts to combat corporate crime because it has no measures to assess their effectiveness."[441]

The thought of turning treatment decisions over to judges or prosecutors would strike us as absurd where individual mental health is concerned. It is no less absurd here. As for individuals, corporate insanity acquittees should receive expert treatment. There is no shortage of experts, including state of the art compliance consulting firms.[442] Private, for-profit services to treat corporate criminals may raise concerns about objectivity. Many states have government-run facilities for housing and treating criminally insane individuals.[443] One commentator has suggested that states should go further and create mental-health sentencing boards to "determine both the appropriate sentencing scheme and treatment of each offender that is found [not guilty by reason of insanity], as well as monitor the offender's treatment."[444] Both government-run treatment options and expert sentencing boards would be suitable for implementing the corporate insanity defense. These would necessarily entail expenses for an already resource-stretched criminal justice system. Though individual insanity acquittees at state

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[441] U.S. GOV'T ACCOUNTABILITY OFF., GAO 10-110, DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 20–24 (2009), http://www.gao.gov/new.items/d10110.pdf [https://perma.cc/CP8F-J496].

[442] Such consulting firms include: ACCENTURE, https://www.accenture.com/us-en/services/business-process-services/compliance-as-a-service [https://perma.cc/U5LR-MLQ2] (last visited Oct. 18, 2020); DELOITTE, https://www2.deloitte.com/us/en.html [https://perma.cc/ZP34-MC7P] (last visited Oct. 18, 2020); DUFF & PHELPS, https://www.duffandphelps.com/services/compliance-and-regulatory-consulting [https://perma.cc/7JFX-4L7L] (last visited Oct. 18, 2020); FTI CONSULTING, https://www.fticonsulting.com/industries/public-sector/government-contracts/compliance-and-regulatory-solutions (last visited Oct. 18, 2020); POLARIS GROUP, https://www.polaris-group.com/services_compliance1.asp?page=compliance1 [https://perma.cc/Q5QZ-D3VK] (last visited Oct. 18, 2020); SPARK COMPLIANCE CONSULTING, http://www.sparkcompliance.com/ [https://perma.cc/NAE2-T5AD] (last visited Oct. 18, 2020).

[443] *See* AMANDA WIK, VERA HOLLEN & WILLIAM H. FISHER, NAT'L ASS'N OF STATE MENTAL HEALTH PROGRAM DIRS., FORENSIC PATIENTS IN STATE PSYCHIATRIC HOSPITALS: 1999-2016 103 (2017), https://www.nasmhpd.org/sites/default/files/TACPaper.10.Forensic-Patients-in-State-Hospitals_508C_v2.pdf (providing data regarding census of "not guilty by reason of insanity" patients per state) [https://perma.cc/E2CZ-2YMC]; *New York State Office of Mental Health Division of Forensic Services*, N.Y. STATE OFFICE OF MENTAL HEALTH, https://www.omh.ny.gov/omhweb/forensic/bfs.htm; *Oregon State Hospital*, OR. HEALTH AUTH., https://www.oregon.gov/oha/OSH/Pages/index.aspx [https://perma.cc/BX88-3ZFA].

[444] Julie E. Grachek, Comment, *The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System*, 81 IND. L.J. 1479, 1497 (2006).

hospitals sometimes receive free treatment,[445] the present trend in corporate criminal justice is to have corporations foot the bill for their own compliance reforms.[446]

Just as the law needs a different sort of expert to treat corporations, it needs a different method for delivering treatment. For individuals, the process is relatively straightforward. The state commits individuals to mental health facilities, which serve a double purpose: They isolate potentially dangerous acquittees from the general public and also provide a forum where doctors can directly deliver treatment. The State cannot commit corporations to a place of treatment. They have no bodies to lock away.[447] Even if it were possible, segregating corporations from the public—their customers, investors, creditors, etc.—would inevitably kill them, a self-defeating result from a treatment perspective.[448]

There are methods short of confinement to incapacitate criminal corporations in ways that protect the public and make treatment possible. They vary in the extent of the limitations they impose. On the more permissive end, I have extensively discussed one approach which prosecutors and judges currently use in their efforts to rehabilitate: hiring corporate monitors who are experts in corporate reform.[449] A monitor would oversee internal compliance improvements while allowing the corporation to continue operating as a business. The powers granted to corporate monitors

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[445] C.T. Drechsler, Annotation, *Constitutionality of Statute Imposing Liability upon Estate or Relatives of Insane Person for His Support in Asylum*, 20 A.L.R. 3d 363 § 2 (1968) ("It is generally settled that the care and custody of insane . . . persons is vested in the state; the state, under the traditional doctrine of parens patriae, controls, treats, and maintains the insane, both for their protection and the protection of others . . . . [However,] [i]n a number of jurisdictions, statutes have been enacted making the property of a[n] [inmate], or his relatives, liable for the inmate's maintenance and support while confined in a state asylum.").

[446] U.S. SENTENCING GUIDELINES MANUAL § 8D1.4(b)(5) (U.S. SENTENCING COMM'N 2018) ("Compensation to and costs of any experts engaged by the court shall be paid by the organization.").

[447] *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981); JEREMY BENTHAM, PANOPTICON VERSUS NEW SOUTH WALES; OR THE PANOPTICON PENITENTIARY SYSTEM, AND THE PENAL COLONIZATION SYSTEM, COMPARED 27 (1812) (describing incapacitation as a "body operating upon a body").

[448] *See* Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 277–79 (2008); Thomas, *supra* note 196, at 955 ("To reiterate, de jure suspension means de facto death. No business can wait around for five years without operating; employees will leave and third parties and customers will take their business elsewhere.").

[449] *See generally* Mihailis E. Diamantis, *Monitorships: An Academic Perspective*, *in* GLOBAL INVESTIGATIONS REVIEW: THE GUIDE TO MONITORSHIPS (Anthony S. Barkow, Neil M. Barofsky & Thomas J. Perrelli eds., 2019) (discussing the use of monitors to reform corporate criminals).

can be tailored to specific cases but typically include at least access to necessary information, the authority to design compliance protocols, and the means to ensure their implementation.[450]

An intermediate to incapacitating corporations is also available: suspending their privilege to conduct certain forms of business.[451] Many industries require special licenses (e.g., to provide accounting services for publicly traded companies)[452] or authorization (e.g., to file for Medicare reimbursements).[453] Reinstatement of such licenses and authorizations could be conditioned on successful treatment. Where public protection and treatment demand a more intrusive approach, one scholar describes a system of "robust receivership, or even temporary nationalization" that might be up to the task.[454]

B. THE ROLE OF THE JURY

The previous Section's emphasis on the importance of expertise for treating insane corporations may prompt concern about the role of jurors. When a defendant raises the insanity defense, it is the jury that decides whether it applies.[455] Yet lay jurors typically lack the background in organizational science needed to evaluate a corporate defendant's internal culture or compliance systems.[456]

This sort of concern does not arise only for corporate defendants. Lay jurors are just as inexpert about the medical sciences as they are about organizational science. Of course, jurors are more familiar with applying the psychological concepts of insanity to individuals than they are to corporations. This casual use, though, makes things worse. Familiarity may lend a sense of confidence, but it does not entail understanding. Often, jurors

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[450] *See* Veronica Root, *Modern-Day Monitorships*, 33 YALE J. REG. 109, 127–30 (2016); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1724 (2007).

[451] *See* GARRETT, *supra* note 217, at 67–68 (detailing KPMG's 2005 DPA and how the DOJ chose to take no action regarding KPMG's auditing privileges, though the government could have suspended or debarred the firm).

[452] *E.g.*, 15 U.S.C. 7212(a) (accounting license to service publicly traded companies); 15 U.S.C. § 78 (broker-dealer license to trade stock of publicly owned companies).

[453] *E.g.*, 42 C.F.R. § 424.510 (authorized Medicare provider).

[454] Thomas, *supra* note 196, at 955.

[455] Dixon v. United States, 548 U.S. 1, 11 (2006) ("'[T]he fact of sanity, *as any other essential fact in the case*, must be established to the satisfaction of the jury beyond a reasonable doubt.'") (quoting Davis v. United States, 165 U.S. 373, 378 (1897)).

[456] *See* Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 L. & CONTEMP. PROBS. 177, 182–90 (1989).

attempting to apply medical concepts look for an "insane defendant [who] resembles a crazy caricature" disconnected from actual medical categories.[457]

Some scholars argue for a more scientific approach to the insanity defense.[458] If "the legal insanity defense [were] rooted in medicine," jurors would be less inclined to rely on background intuitions about what insanity is and looks like.[459] In the corporate context, where the stakes for the public are higher and the number of stakeholders affected by the disposition at trial is greater, the argument for injecting more science into the process could be even stronger. Regardless of whether scholars make any progress on this front for individual defendants, courts could adopt a different process for corporations. One way to do this could be to modify the rules of evidence concerning expert testimony. Currently, expert insanity witnesses testifying in federal court cannot opine on the ultimate issue of whether the defendant was actually insane.[460] Removing this restriction in corporate cases would give experts more influence in the courtroom.

There are a number of reasons that it is probably preferable to preserve a strong role for lay juries in applying the corporate insanity defense. Although insanity might be a scientific concept outside of the law, within the courtroom it is ultimately a moral concept. "Courts have traditionally stressed the distinction between mental disease as a 'legal' concept and mental disease as a 'medical' concept."[461] Some courts are quite blunt on the matter: "[L]egal insanity has a different meaning and a different purpose than the concept of medical insanity."[462] The American Medical Association agrees:

> A defense premised on psychiatric models represents a singularly unsatisfactory, and inherently contradictory approach to the issue of accountability . . . . The essential goal of an exculpatory test for insanity is to identify the point at which a defendant's mental condition has become so impaired that society may confidently conclude that he has lost his free will . . . . [F]ree will is an article of faith, rather than a concept that can be

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457 Laufer, *supra* note 97, at 454.

458 *See* Reider, *supra* note 336, at 291 ("[O]ur current tests for insanity would benefit from an exploration of the scientific world.").

459 Beatrice R. Maidman, Note, *The Legal Insanity Defense: Transforming the Legal Theory into a Medical Standard*, 96 B.U. L. REV. 1831, 1834 (2016).

460 FED. R. EVID. 704(b).

461 Kahan & Nussbaum, *supra* note 352, at 344.

462 State v. Crenshaw, 659 P.2d 488, 491 (Wash. 1983); *see also* State v. Singleton, 48 A.3d 285, 294 (N.J. 2012) ("The insanity defense exists in criminal law not to identify the mentally ill, but rather to determine who among the mentally ill should be held criminally responsible for their conduct.").

> explained in medical terms . . . . Accordingly, since models of mental illness are indeterminant in this respect, they can provide no reliable measure of responsibility.[463]

The decision for the jury to make is not whether the defendant has a mental illness (scientific concept), but whether the mental illness he has negates responsibility (moral concept). The latter is precisely the sort of judgment that lay juries are competent to make.[464]

The fundamentally moral nature of the insanity defense does not mean that experts have no role to play. Expert testimony gives the jury insight into the psychological facts needed to make a decision. "Ideally, psychiatrists—much like experts in other fields—should provide grist for the legal mill, should furnish the raw data upon which the legal judgment is based. It is the psychiatrist who informs as to the mental state of the accused—his characteristics, his potentialities, his capabilities."[465]

Especially in the corporate context, compliance and organizational expert witnesses would aid the jury in evaluating a defendant's responsibility, but they probably should not testify to the ultimate issue of insanity. By limiting psychiatric expert testimony, Congress sought "to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact."[466] The legislation was backed by the American Psychiatric Association.[467]

The concern about experts capturing insanity determinations is even more pressing in the corporate context. Less familiar with how large organizations operate, jurors may relinquish control to expert opinion rather

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[463] Board of Trustees, *Insanity Defense in Criminal Trials and Limitations of Psychiatric Testimony*, 251 JAMA 2967, 2978 (1984); *see also* SHUMAN, *supra* note 125, § 12:3 ("The role played by psychiatric and psychological testimony in the insanity defense is further complicated by many conceptual differences between law and the behavioral sciences of psychiatry and psychology. The criminal law rests on the assumption that free will exists and that it is therefore generally legally and morally appropriate to punish violations of the criminal laws. Psychiatry and psychology focus on various biochemical, genetic, organic, behavioral, and psychological explanations for behavior.") (citation omitted).

[464] United States v. Freeman, 357 F.2d 606, 620 (2d Cir. 1966) ("[I]t is society as a whole, represented by judge or jury, which decides whether a man . . . should or should not be held accountable for his acts.")

[465] *Id.* at 619–20.

[466] S. REP. No. 98-225, at 230 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3412.

[467] Insanity Defense Work Group, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 686 (1983). *But see* Anne Lawson Braswell, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620, 631, 635 (1987) (disagreeing with FRE 704(b) because "juries may reject any expert's opinion" and the rule "deprive[s] jurors of information necessary to make that testimony helpful").

than relying on their personal moral perspective.[468] Expert information about a corporate defendant's organizational "disease or defect and [a] descri[ption of] the characteristics and effects of the disease or defect" would aid jurors.[469] Where large dollar values are at stake (as is often the case with corporate trials), deference to compliance experts (some of whom will be highly compensated and motivated defense witnesses) on ultimate issues should give us pause.

For readers concerned about potential overuse of the corporate insanity defense, there is additional appeal to leaving ultimate control with juries. Successful assertion of the insanity defense is rare among individual criminal defendants.[470] Available evidence comparing jury sympathy toward similarly-situated corporate and individual defendants consistently reveals bias against the former.[471] Keeping the defense firmly in the hands of juries could be an effective means of ensuring that the standards for asserting the corporate insanity defense remain high.

C. EVIDENTIARY STANDARDS

Evidentiary standards govern access to the insanity defense and how the defense operates. Proof is needed at three separate stages: trial, when the jury decides whether to grant or deny the defense; post-trial, when the judge decides whether to commit the acquittee to a treatment facility; and release, when some official determines whether and under what terms the acquittee may leave the treatment facility. Jurisdictions vary widely in the standards and burdens they apply at each of these stages. Regardless of how jurisdictions approach evidence for individual insanity claimants, they may prefer a different, perhaps more demanding, arrangement for corporate claimants. This Section proposes some best practices.

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[468] Clark v. Arizona, 548 U.S. 735, 740 (2006) ("[T]here is the potential of mental-disease evidence to mislead jurors (when they are the factfinders) through the power of this kind of evidence to suggest that a defendant suffering from a recognized mental disease lacks cognitive, moral, volitional, or other capacity, when that may not be a sound conclusion at all."). *But see* Kahan & Nussbaum, *supra* note 352, at 346 ("Even when the law insists that they express themselves in mechanistic terms, decisionmakers are likely to think and judge in evaluative ones.").

[469] ARTHUR & HUNTER, *supra* note 160, § 12:18; United States v. Freeman, 804 F.2d 1574, 1576 (11th Cir. 1986); *see also* Morse, *supra* note 27, at 823 ("Experts should be limited to offering both full, rich, clinical descriptions of thoughts, feelings, and actions and relevant data based on sound scientific studies.").

[470] PSYCHOLOGY AND SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS, *supra* note 113, § 3:11 ("Since the *Hinckley* case and the subsequent narrowing of the insanity defense, few serious crimes result in a verdict of not guilty by reason of insanity.").

[471] *See* Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 L. & SOC. REV. 121, 133–34 (1996).

1. At Trial

The default presumption at trial is that the defendant was sane at the time of the alleged crime.[472] The initial burden of production is always on the defendant to rebut that presumption.[473] "The burden that must be carried by a defendant who raises the insanity issue . . . defines the strength of the sanity presumption."[474]

Beyond uniformly placing the initial burden of production on the defendant, states vary widely in their evidentiary standards for (dis)proving insanity at trial.[475] Some states are very permissive. In Massachusetts, for example, once a defendant provides any credible evidence of insanity, the prosecution must prove beyond a reasonable doubt that the defendant was sane at the time of the crime.[476] At the other end of the spectrum, states may even (though none do today) reverse the burden and require the defendant to prove his insanity beyond a reasonable doubt.[477] Federal law and most states opt for a middle ground. They treat the insanity defense like any other affirmative defense, which the defendant must prove by a preponderance of the evidence or clear and convincing evidence.[478]

By setting the burden too high, jurisdictions risk convicting defendants who are not criminally responsible. By setting it too low, they risk letting those who are criminally responsible go free. As a general rule, the American public seems more concerned with the latter.[479] In light of the general suspicion with which lay people regard corporations, the concern would

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[472] W.E. Shipley, Annotation, *Presumption of Continuing Insanity as Applied to Accused in Criminal Case*, 27 A.L.R.2d 121 § 11 (1953) ("The state, in a criminal prosecution, normally has the benefit of a presumption that all persons are sane and criminally responsible, so that, in most jurisdictions, the accused who contends that he is or was insane has the burden of proving his mental incompetence, or at least of introducing evidence to meet the presumption of sanity.").

[473] ROBINSON, PALO, GANGULY, MOSKOVITZ & GRALL, *supra* note 47, § 173(a).

[474] Clark v. Arizona, 548 U.S. 735, 769 (2006).

[475] *See* Leland v. Oregon, 343 U.S. 790, 798 (1952).

[476] Commonwealth v. Kostka, 350 N.E.2d 444, 451 (Mass. 1976).

[477] In 1952, Oregon was the only state to require this. *Leland*, 343 U.S. at 798. Oregon has since changed its approach. *See* OR. REV. STAT. ANN. § 136.410 (West, Westlaw through 2020 Reg. Sess. of the 80th Legis. Assemb.).

[478] PSYCHOLOGY AND SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS, *supra* note 113, § 3:15; *see Clark*, 548 U.S. at 769.

[479] James W. Ellis, *The Consequences of the Insanity Defense: Proposals To Reform Post-Acquittal Commitment Laws*, 35 CATH. U. L. REV. 961, 963 (1986) ("[T]he popular dissatisfaction with other issues, such as allocation of the burden of proof on the insanity issue and the insanity standard, is fueled ultimately by concern over the possibility that too many defendants are 'getting off,' which to many in the general public means 'going free.'") (citation omitted).

likely be amplified for corporate defendants. The profit motive, both for corporate defendants and their highly compensated experts, could bias juries against the defense in ways not usually applicable for individual defendants. An additional worry is that skepticism about corporations improperly benefiting from the insanity defense could bleed into greater skepticism toward individual insanity.

These considerations favor a stronger burden for corporate criminal defendants. For good reason, no state presently requires defendants to prove insanity beyond a reasonable doubt; doing so would effectively foreclose the defense. A demanding intermediary standard like clear and convincing evidence seems the best affirmative burden of proof for corporate defendants.

2. Post-Trial Commitment

If a defendant successfully claims insanity, the court must then determine what to do with him: release him or commit him to an institution for treatment and evaluation. The stakes at this stage are palpable. The defendant has successfully proven that he suffered from a mental disease or defect that led him to commit a criminal act. If he is still insane, releasing him could endanger the public and forfeit an opportunity to provide the defendant with needed treatment. The risks are even greater for corporate criminals. Because of corporations' often far-reaching social and economic standing, the public is more vulnerable to corporate misconduct than individual misconduct. The law can mitigate these risks by tailoring the procedure courts use when deciding whether and how to commit corporate acquittees.

Jurisdictions have different standards for committing insanity acquittees. Earlier in the defense's history, commitment to a mental health institution was automatic.[480] As Blackstone noted: "It was the doctrine of our ancient law that persons deprived of their reason might be confined till they recovered their senses, without waiting for the forms of a commission or other special authority from the crown . . . ."[481] Today, some states still use automatic commitment for a period to allow the court to determine whether longer commitment is appropriate.[482] Federal law is illustrative: "[A] person . . . found not guilty only by reason of insanity . . . shall be committed

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[480] Barbara A. Weiner, *Not Guilty by Reason of Insanity: A Sane Approach*, 56 CHI.-KENT L. REV. 1057, 1064–66 (1980).

[481] J.W. EHRLICH, EHRLICH'S BLACKSTONE 745 (1959).

[482] *See, e.g.*, WIS. STAT. ANN. § 971.17(1)(b) (West, Westlaw through 2019 Act 186) ("["When a defendant is found not guilty by reason of mental disease or mental defect of a felony . . . the court shall commit the person to the department of health services for a specified period . . . .").

to a suitable facility . . . ."[483] Within forty days, the court must then conduct a follow-up hearing.[484] Some state jurisdictions require a showing of continuing danger prior to any commitment.[485] Whether for temporary or longer-term commitment, the inquiry is typically into whether the acquittee poses a "substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect."[486]

Jurisdictions differ as to the standard of proof they require for committing insanity acquittees. Some use the same higher standard generally used for civil commitment (clear and convincing evidence),[487] others merely require a preponderance of the evidence.[488] Under federal law, the standard varies depending on the seriousness of the underlying crime.[489] Jurisdictions also differ as to who bears the proof (be it the defendant or the state).[490]

The rationale behind automatically committing successful insanity claimants or for using lower thresholds of proof for commitment is straightforward. "The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness."[491] This has been the American Psychiatric Association's position regarding defendants acquitted by reason of insanity.[492] Moved by

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[483] 18 U.S.C. § 4243(a).

[484] 18 U.S.C. § 4243(c).

[485] ROBINSON, PALO, GANGULY, MOSKOVITZ & GRALL, *supra* note 47, § 173(g) n.91; CRIMINAL JUSTICE STANDARDS ON MENTAL HEALTH § 7–7.4(b) (AM. BAR ASS'N 2016).

[486] 18 U.S.C. § 4243(d).

[487] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 46C.253(a) (West, Westlaw through 2019 Reg. Sess. of 86th Legis.) ("The hearing on disposition shall be conducted in the same manner as a hearing on an application for involuntary commitment under Subtitle C or D, Title 7, Health and Safety Code . . . ."); WIS. STAT. ANN. § 971.17(3)(a) (requiring clear and convincing evidence).

[488] *See, e.g.*, ARK. CODE ANN. § 5–2–314(e)(2) (West, Westlaw through 2020 First Extraordinary Sess. of the 92nd Ark. Gen. Assemb.) (requiring preponderance of the evidence).

[489] 18 U.S.C. § 4243(d).

[490] *Compare e.g.*, Milam v. State, 341 S.E.2d 216, 218 (Ga. 1986) (defendant), *with* People v. Murphy, 331 N.W.2d 152, 157 (Mich. 1982) (state).

[491] Jones v. United States, 463 U.S. 354, 364 (1983) (footnote omitted); *see also* Alter v. Morris, 536 P.2d 630, 633 (Wash. 1975) ("[P]ast conduct is heavily indicative of the likelihood that a person will commit similar acts which will again endanger others.").

[492] Insanity Defense Work Group, *supra* note 467, at 686 ("Their future dangerousness need not be inferred; it may be assumed, at least for a reasonable period of time."). *But see* Ellis, *supra* note 479, at 986 ("[T]he APA's statement that future dangerousness can be 'assumed' is thus unsupported, and indeed is contradicted by the existing studies. It simply is not true that all (or even most) acquittees will engage in dangerous conduct in the future."); Morse, *supra* note 27, at 834 ("As I have shown, however, this presumption [of continuing

this common-sense supposition, "[c]ourts have justified lower standards of proof for commitment of insanity acquittees as an outgrowth of the normal purpose of civil commitment: protecting the community from the dangerously insane."[493] Some courts show little concern with making mistakes, i.e., committing someone who is, in fact, not insane, because, in their view, such a person should not have benefited from the insanity defense in the first place.[494] Committing such acquittees, the thinking goes, deprives them of no liberty which they were otherwise due. Compulsory or presumptive commitment also raises the stakes of a successful insanity defense, thereby discouraging false pleas.[495]

Ultimately, the decision about where to set the evidentiary standard for commitment should turn on weighing the relative costs of false positives (improperly committing an acquittee) and false negatives (improperly releasing an acquittee). For individuals, this is a fraught balance to strike. False negatives risk unnecessary danger to the public (and possibly to the acquittee himself). False positives risk committing an acquittee who actually is not a danger to himself or to others. This could happen, for example, if the defendant was only temporarily insane at the time of the crime but is no longer insane at the time of acquittal.[496] As such, false positives infringe on

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insanity and dangerousness] is not justified. At most, the state should be entitled to brief custody after an insanity acquittal during which the acquittee can be evaluated for a commitment hearing to assess present disorder and consequent dangerousness."); Bernard L. Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 447–48 (1974).

493 *Commitment Following an Insanity Acquittal*, *supra* note 420, at 606–07 (footnotes omitted).

494 Warren v. Harvey, 632 F.2d 925, 931 (2d Cir. 1980) ("While the acquittee therefore may be deprived erroneously of his liberty in the *commitment* process, the liberty he loses is likely to be liberty which society mistakenly had permitted him to retain in the *criminal* process.") (emphasis added).

495 Lynch v. Overholser, 369 U.S. 705, 715 (1962) ("[] Congress might have considered it appropriate to provide compulsory commitment for those who successfully invoke an insanity defense in order to discourage false pleas of insanity.").

496 41 AM. JUR. PROOF OF FACTS 2D 615, *supra* note 80, § 10 ("Temporary insanity may constitute a sufficient defense to a criminal charge. Thus, if a defendant was insane at the time of a particular offense, he may be found not guilty by reason of insanity regardless of whether the period of insanity lasted several months or several hours.") (footnote omitted); *see also* People v. Kelly, 516 P.2d 875, 883 (Cal. 1973) (en banc); *Commitment Following an Insanity Acquittal*, *supra* note 420, at 620 (identifying "several possible groups of insanity acquittees who are neither criminally responsible for the act with which they were charged, nor insane and dangerous enough to be criminally committed"); In re Franklin, 496 P.2d 465, 472 (Cal. 1972) (en banc).

individuals' weighty due process interests against unjustified infringement of their liberty.[497]

Like people, corporations can experience temporary insanity. For example, a corporation with an otherwise stellar compliance program may have committed a crime through a subversive rogue employee and promptly fired him. In such a case, the corporation might qualify as legally insane under the volitional test even though, after firing the rogue, it no longer has a volitional deficit.[498] A treatment regimen could accomplish nothing since, by hypothesis, the corporation already has effective compliance in place.

Despite the possibility of temporary corporate insanity, false positives regarding commitment carry greater risks and false negatives less weighty infringements. As mentioned, the public is much more vulnerable to corporate crime than to individual crime.[499] Releasing a dangerous corporate acquittee with no constraints or oversights can endanger many more people than a typical dangerous individual. In contrast, corporations do not have the same liberty interests at stake with false positives. As discussed above, corporations cannot be physically incapacitated. Corporations that are being treated will generally continue to operate; their employees will still show up to work, their creditors will still receive payments, and their customers will still receive goods and services. During that time, however, a planned program of compliance reform would be in progress.

The cost-benefit ledger for corporate acquittees favors automatic commitment. With respect to individuals, most jurisdictions require some showing that the insanity which afflicted the defendant at the time of the crime is continuing or permanent.[500] That showing should not be required for corporate acquittees. This effectively sets up an unrebuttable presumption, at least until commitment, that corporate acquittees continue to

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[497] Addington v. Texas, 441 U.S. 418, 428–29 (1979).

[498] Temporary corporate insanity is less likely for corporations that qualify under the cognitive test. The sorts of mechanisms, e.g., corporate culture, that underlie cognitive deficits in corporations are generally more durable.

[499] The FBI estimates that the economic costs of white-collar crime are *twenty times* the economic costs of all other crime combined. *Compare* RODNEY HUFF, CHRISTIAN DESILETS & JOHN KANE, THE 2010 NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME 21 (2010) ("[The] approximate the annual cost of white collar crime [is] between $300 and $660 billion."), *with* Kathryn E. McCollister, Michael T. French & Hai Fang, *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation*, 108 DRUG & ALCOHOL DEPENDENCE 98, 98–99 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2835847/ [https://perma.cc/4H2A-DQZ2] ("[M]ore than 23 million criminal offenses were committed in 2007, resulting in approximately $15 billion in economic losses to the victims . . . .").

[500] Shipley, *supra* note 472, § 2 ("[I]t appears to be well established in most jurisdictions that in order to give rise to such a presumption the evidence must disclose prior insanity which was permanent or continuing in nature.") (footnote omitted).

be insane and to pose a public danger. The drafters of the federal insanity defense took this stance toward individuals: "[I]nsanity, once established, should be presumed to continue and the accused should automatically be confined for treatment until it can be shown that he has recovered."[501] The Supreme Court has held that such a presumption does not violate due process: "When a person . . . is found not guilty by reason of insanity . . . [it may be] properly inferred that at the time of the verdict the defendant [i]s still mentally ill and dangerous and hence c[an] be committed."[502] Regardless of the merits of this federal position toward individual acquittees, it should be universally adopted for corporate acquittees. Given the significant risks of failing to reform a dangerous corporation, any corporate criminal defendant that benefits from the insanity defense should be presumed insane and then required to submit to a searching expert evaluation of continuing dangerousness.

3. Release

Once an insanity acquittee has been committed for treatment, there must be a process to determine when he has completed his treatment and should be released. The standards and process for release determine how long an acquittee remains in state custody. They also determine what safety threshold an acquittee's condition must reach before releasing him to the public.

As the Supreme Court has held, an "acquittee may be held as long as he is both mentally ill and dangerous, but no longer."[503] Individual jurisdictions have wide latitude to determine the timing of review, who has the power to initiate review, the precise standard applicable, and who has the burden of proving it.[504] The defendant or an official in the mental institution to which the defendant is committed typically initiates the release process.[505] In most

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[501] S. REP. NO. 84-1170, at 13 (1955).

[502] Foucha v. Louisiana, 504 U.S. 71, 76 (1992); *see* Jones v. United States, 463 U.S. 354, 366 (1983) ("We therefore conclude that a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society."). *But see* Robert C. Hunt & E. David Wiley, *Operation Baxstrom After One Year*, 124 AM. J. PSYCH. 974, 978 (1968) (finding that insanity acquittees are not significantly more dangerous); Henry J. Steadman, *Follow-Up on Baxstrom Patients Returned to Hospitals for the Criminally Insane*, 130 AM. J. PSYCH. 317, 317 (1973) (discussing the very small percentage of people who return to hospitals for the criminally insane).

[503] *Foucha*, 504 U.S. at 77.

[504] *See* Gretchen E. Rowan, Foucha v. Louisiana*: Confinement Based on Dangerousness Alone*, 37 ST. LOUIS U. L.J. 731, 736–743, 737 n.47 (1993).

[505] WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 322 (1972).

jurisdictions, the defendant bears the burden of persuasion to show it is no longer necessary to confine him.[506] Jurisdictions use different standards of proof, from a preponderance of the evidence to beyond a reasonable doubt.[507]

A range of more restrictive or lenient procedures are available. Federal law illustrates an intermediate approach. An acquittee's mental health director initiates release by certifying that the acquittee has recovered from his disease and no longer poses a substantial risk to person or property.[508] Release becomes official if a court subsequently agrees with the certification under a clear and convincing standard.[509] Texas has a more acquittee-friendly process. That state mandates annual court review.[510] Commitment continues only if a physician demonstrates by clear and convincing evidence that continued commitment is "appropriate."[511] Arizona has gone in the opposite direction, placing the burden of proof on the acquittee and charging a psychiatric security review board with making release decisions.[512]

Once again, applying demanding but not prohibitively high standards and burdens to corporate acquittees would be preferable. As to the length of treatment, the law estimates that one to five years are needed to rehabilitate corporations with defective compliance programs. Sentencing courts ordering compliance-oriented probation are capped at a term of five years.[513] The pretrial diversion agreements that prosecutors design to improve compliance programs in corporations suspected of misconduct also typically range from one to five years.[514] Probation and pretrial diversion agreements build in some flexibility by extending the termination date if the corporation fails to cooperate.[515]

Unlike probation or pretrial diversion, fixed terms of treatment would likely be a mistake where the corporate insanity defense is concerned. The law should strive to avoid any impression that it accords corporations

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506 *Id.* at 324–25.

507 *Id.*

508 18 U.S.C. § 4243(f).

509 *Id.*

510 TEX. CODE CRIM. PROC. ANN. art. 46C.261(a) (West, Westlaw through 2019 Reg. Sess. of the 86th Leg.).

511 *Id.* (h).

512 ARIZ. REV. STAT. § 13-3994(C), (D), (F) (West, Westlaw through Second Reg. Sess. of the 54th Leg.).

513 U.S. SENTENCING GUIDELINES MANUAL § 8D1.2 (U.S. SENTENCING COMM'N 2018).

514 Khanna & Dickinson, *supra* note 450, at 1723.

515 *See id.*; U.S. SENTENCING GUIDELINES MANUAL § 8F1.1 (U.S. SENTENCING COMM'N 2018) ("Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.").

preferential treatment. As for individuals, the term should be tied to treatment success.[516] The length of time needed for treatment is difficult to predict in advance.[517] The goal, after all, is to protect the public and rehabilitate the corporation, not to impose punitive or lenient conditions.

Decisions about release should apply demanding standards and involve multiple parties. Once again, it would be appropriate to place the burden of production on the corporation to show that it no longer presents a danger to person or property. The burden of persuasion should strike a balance between the need to protect the public and the need to preserve the corporation as a going concern. A clear-and-convincing-evidence standard rather than a beyond-a-reasonable-doubt or a preponderance-of-the-evidence standard would be appropriate.

As to the identity of those with the power to initiate review and decide on release, federal law for individuals provides a good model. The expert designated to oversee and implement the corporation's rehabilitation could initiate the process by certifying that the corporation now has an effective compliance program in place targeted to the violation of which it was acquitted. A judge should then make the release determination. This will provide some check on the possibility of industry capture, a concern that has arisen in the pretrial diversion context. In all cases, release should be conditional on appropriate terms,[518] such as the corporation maintaining its compliance program and submitting to future compliance audits.[519] Treatment should resume if the corporation violates one of the conditions.[520]

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[516] Morse, *supra* note 27, at 827 ("A fixed hospital term, tied to the length of the prison sentence allowed for the crime charged, is also improper for the same reason: hospital commitment should be related to continuing disorder, not to irrelevant punishment concerns. In large measure the terms of sentences are defined by the punishment the offender deserves.").

[517] Jones v. United States, 463 U.S. 354, 368 (1983) ("[I]t is impossible to predict how long it will take for any given individual to recover—or indeed whether he ever will recover . . . .").

[518] Weihofen, *supra* note 420, at 867 ("Just as it is recognized today that parole should be the normal method of release from prison, so conditional release under supervision should become the normal method of release for this group of criminal insane.").

[519] 18 U.S.C. § 4243(f)(2) ("[Where appropriate, a court may] (A) order that [an insanity acquittee] be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him . . . and (B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.").

[520] *Id.* § 4243(g) (stating that if an acquittee violated a condition of release, "[he] may be arrested" and the court will determine, following a hearing, whether "[he] should be remanded to a suitable facility").

VI. VINDICATING VICTIMS

The corporate insanity defense—and the rehabilitative treatment it portends for corporate acquittees—is the best way to vindicate the interests of victims injured by insane corporations. There are three primary types of interests victims have in the criminal process: justice, expressive, and preventive. To see how the corporate insanity defense vindicates these interests, one must set aside many assumptions drawn from the general part of criminal law because corporate criminal law works very different.

A. JUSTICE INTERESTS

Generally, in criminal law, victims' justice interests include being made whole and seeing the defendant suffer.[521] The emphasis in corporate criminal law is exclusively on the former. Corporations do not suffer.[522] The best the law can do is to show it is being tough on crime and the defendant. As explained above, the insanity defense does not conflict with that interest. A successful insanity defense is the law's way of recognizing that a defendant is not fully responsible for his actions. If a defendant is not fully responsible, the justice interest in seeing him suffer is correspondingly weaker. In any case, insanity acquittees often face just as harsh—or even harsher—treatment than they would have if the defense had not been available. This fact would be no different for corporate acquittees.

As to victims' financial interests, it bears repeating that corporate acquittees should, and would, still be obliged to make their victims whole. A successful insanity defense does not mean there has been no injury. Often, victims or regulators will be able to bring a civil suit for damages.[523] Insanity is no defense outside criminal law.[524] Examples abound of private parties successfully suing insane defendants,[525] sometimes even after the defendant

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[521] Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. REV. 157, 159 (1996).

[522] Diamantis, *supra* note 253, at 879; Dynamic Image Techs. v. United States, 221 F.3d 34, 37 n.2 (1st Cir. 2000) ("[C]orporations, unlike natural persons, have no emotions . . . .").

[523] Delahanty v. Hinckley, 799 F.Supp. 184, 186 (D.D.C. 1992) ("[Though not criminally liable,] [an] insane person is liable for compensatory damages for his torts where express malice or evil intent is not a necessary element of the tort.") (citation omitted).

[524] *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 130 (2d ed. 2020); RESTATEMENT (THIRD) OF TORTS § 11 (AM. L. INST. 2010); RESTATEMENT (SECOND) OF TORTS § 283B (AM. L. INST. 1965). *But see* Breunig v. Am. Family Ins., 173 N.W.2d 619, 627 (Wis. 1970) (upholding defense to civil suit for sudden onset of insanity).

[525] *See, e.g.*, McIntyre v. Sholty, 13 N.E. 239, 240 (Ill. 1887) (shooting; "It is well settled that, though a lunatic is not punishable criminally, he is liable in a civil action for any tort he may commit."); Jewell v. Colby, 24 A. 902, 902 (N.H. 1890) ("On the facts stated in the case,

mounted a successful insanity defense in a criminal trial for the same underlying misconduct.[526] Connecticut, the lone jurisdiction with some contrary authority (at least, the only one I could find),[527] has since changed its approach.[528]

Criminal courts faced with an insane corporate defendant might be able to speed victim recovery using the Mandatory Victim Restitution Act ("MVRA"). The Act makes restitution for the full amount of victim losses mandatory in certain instances, notwithstanding any other provision of federal law, and even where the defendant cannot pay.[529] Since criminal punishment is prohibited for insanity acquittees, the applicability of the MVRA turns on whether restitution counts as punishment. Some states, in applying their own version of the MVRA, have found that restitution is punitive.[530] Federal circuits seem to be of the opposite view.[531] The Supreme Court has given mixed signals.[532] Other scholars and I have argued that restitution is not punitive since its purpose is to make victims whole rather

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evidence of the defendant's insanity is not admissible to defeat the right to recover . . . ."); Bollinger v. Rader, 69 S.E. 497, 497 (N.C. 1910) (killing); Seals v. Snow, 254 P. 348, 349 (Kan. 1927) (killing); Ross v. York, 233 S.W.2d 347, 349 (Tex. Civ. App. 1950) (shooting); Shapiro v. Tchernowitz, 155 N.Y.S.2d 1011, 1011 (N.Y. Sup. Ct. 1956) (wrongful death); Bolen v. Howard, 452 S.W.2d 401, 403 (Ky. 1970) (shooting).

[526] *See, e.g.*, Parke v. Dennard, 118 So. 396, 399 (Ala. 1928); Aetna Cas. & Sur. Co. v. Porter, 181 F. Supp. 81, 88 (D.D.C. 1960); Vosnos v. Perry, 357 N.E.2d 614, 616 (Ill. App. Ct. 1976); Polmatier v. Russ, 537 A.2d 468, 472–73 (Conn. 1988).

[527] Fitzgerald v. Lawhorn, 294 A.2d 338 (Conn. 1972).

[528] *Polmatier*, 537 A.2d at 468.

[529] 18 U.S.C. §§ 3663A(a)(1), 3664(f)(1)(A).

[530] *See, e.g.*, State v. Garnett, 916 A.2d 393, 396–98 (Md. Ct. Spec. App. 2007); State v. Thomas, 69 P.3d 814, 814–15 (Or. Ct. App. 2003) (per curiam).

[531] *See, e.g.*, United States v. Grimes, 173 F.3d 634, 639 (7th Cir. 1999) (observing that "the [statute's] intended beneficiaries are the victims, not the victimizers" and that "[t]he criminal has no rights under the quoted provision"); Fern L. Kletter, Annotation, *Mandatory Victims Restitution Act – Constitutional Issues*, 20 A.L.R. Fed. 2d 239, §§ 8, 10, 11, 19, 20, 21, 22, 23, 26, 27, 28 (2007) (noting Sixth and Eighth Amendments inapplicable to restitution).

[532] *Compare* Pasquantino v. United States, 544 U.S. 349, 365 (2005) (holding that the purpose of restitution is to "mete out appropriate criminal punishment"), *with* Hughey v. United States, 495 U.S. 411, 416 (1990) (holding that the purpose of restitution is to "compensate victims"); *see also* Dolan v. United States, 560 U.S. 605, 612–13 (2010) ("[The MVRA] seeks . . . primarily to ensure that victims of a crime receive full restitution . . . and only secondarily to help the defendant."); Cortney E. Lollar, *What is Criminal Restitution?*, 100 IOWA L. REV. 93, 98 (2014) ("[W]hen restitution is imposed as a part of sentencing in a criminal case, the restitution is punishment.").

than to inconvenience the defendant.[533] Corporate acquittees should be required to pay victim restitution, regardless of the stance jurisdictions take toward individual acquittees.

B. EXPRESSIVE INTERESTS

Victims' expressive interests in criminal law include having an opportunity to tell their story at trial[534] and having public condemnation of the wrong that was done to them.[535] The impact the insanity defense has on those interests depends on the baseline for comparison. For individual criminal defendants, the baseline is an alternative where, at the end of trial, insane defendants are convicted rather than acquitted. Since the trial still occurs and victims still have the opportunity to serve as witnesses, the effect of the insanity defense on their interest in telling their story is a wash. Since insane individual defendants are not convicted, victims' interest in the public condemnation is arguably diminished by the defense.

The comparative baseline for corporate offenders is very different. Corporate prosecutions and convictions are rare events.[536] Investigations into the most significant corporate wrongdoing, affecting the greatest number of victims, routinely ends in pretrial diversion.[537] These deals, cut by prosecutors and corporate suspects in secret negotiations, avoid corporate trial and conviction in exchange for concessions by the corporation (usually in the form of fines and compliance reform).[538] The corporate parties agree to a statement of facts, but typically will not admit guilt.[539] Everything is "off the books" since courts have no oversight and the facts are never entered into

[533] *See* Diamantis, *supra* note 43, at 534–35; Randy E. Barnett, *Restitution: A New Paradigm for Criminal Justice*, 87 ETHICS 279, 300 (1977) (arguing that restitution should be purely compensatory in nature and therefore should be imposed according to the nature and consequences of the crime, even on criminal defendants who are not criminally responsible by reason of insanity).

[534] *See The Trauma of Victimization*, NAT'L CTR. FOR VICTIMS OF CRIME, https://members.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/trauma-of-victimization [https://perma.cc/U8LJ-K8DB] (last visited Oct. 17, 2020).

[535] David Alm, *Crime Victims and the Right to Punishment*, 13 CRIM. L. & PHIL. 63, 69 (2019).

[536] Diamantis & Laufer, *supra* note 71, at 454.

[537] GARRETT, *supra* note 217, at 162.

[538] Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 159–60 (2008).

[539] Buell, *supra* note 437, at 89 ("Notice that there is nothing traditionally criminal in this arrangement—no guilty plea or jury verdict, no sentencing, no punishment other than a fine.").

the public record.[540] Many feel that these agreements let corporations off too leniently and procure very little by way of actual change or sanction.[541] Prosecutorial oversight and follow-through on the terms of the agreements are also often lacking.[542] Judges who attempt to exercise any real oversight find their hands tied by the separation of powers concerns—pretrial diversion agreements are the exclusive prerogative of the executive.[543]

The corporate insanity defense holds out the prospect of having more criminal trials of corporations that would presently receive pretrial diversion agreements. One major barrier to trying corporations is that, in many sectors,[544] convicted corporations lose essential business privileges, like environmental permits,[545] the authority to audit publicly traded companies,[546] or the right to submit receipts to Medicare and Medicaid.[547] These collateral consequences are life-ending.[548] DOJ guidelines instruct prosecutors to bear these collateral consequences in mind when deciding whether to charge corporations.[549] The usual result is pretrial diversion. The corporate insanity defense alters the calculus by sometimes giving prosecutors a means of bringing corporations to trial while avoiding conviction and its collateral effects.

More corporate criminal trials would mean satisfying more of victims' expressive interests, even for trials that end with a successful insanity defense. Typically, a defendant raises the insanity defense only after the facts pertaining to guilt are clear.[550] "A plea of not guilty by reason of

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[540] United States v. Fokker Servs. B.V., 818 F.3d 733, 736–38 (D.C. Cir. 2016); Lisa Kern Griffin, *Inside-Out Enforcement*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 67, at 110 ("DPAs are less visible than adjudication, which detracts from both the coherence of the government's enforcement strategy and the accountability of prosecutors.").

[541] GARRETT, *supra* note 217, at 63 ("Corporations plead guilty, and a plea agreement can include similar terms . . . . A deferred prosecution or non-prosecution agreement is even more lenient, though, because it . . . avoids both an indictment and a criminal conviction.").

[542] *Id.* at 75 ("These data suggest that prosecutors are not taking structural reform seriously.").

[543] *Fokker*, 818 F.3d at 736–38.

[544] Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reform*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 67, at 65.

[545] 42 U.S.C. § 7606(a) (Clean Air Act); 33 U.S.C. § 1368(a) (Clean Water Act).

[546] 15 U.S.C. § 77t(b); 17 C.F.R. § 201.102(e)(2).

[547] 48 C.F.R. § 9.406-2(a).

[548] Rachel Barkow, *The Prosecutor as Regulatory Agency*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 67, at 179.

[549] Thompson Memo, *supra* note 209, at 3.

[550] 41 AM. JUR. PROOF OF FACTS 2D 615, *supra* note 80, § 19 ("When a defendant seeks to raise the defense of insanity, the court must decide whether there should be a unitary trial, in

insanity . . . does not implicate guilt or innocence but, instead, determines whether the accused shall be punished for the guilt which has already been established."[551] During the guilt phase of a corporate trial, victims will have an opportunity to tell their narratives and memorialize their experiences of corporate wrongdoing in an official, public setting.

Resolving corporate wrongdoing with an insanity defense can also satisfy victims' expressive interests in public condemnation better than pretrial diversion. Pretrial diversion cuts any note of condemnation out of the process. The resolution is contractual rather than criminal. When corporations raise a successful insanity defense at trial, the verdict is one of acquittal, but acquittal with expressive bite. An acquittal by reason of insanity is importantly different from a finding of innocence or an acquittal premised on other defenses. Jurisdictions vary in exactly how they phrase the verdict. Federal law is representative: "[T]he court shall find the defendant—(1) guilty; (2) not guilty; or (3) not guilty only by reason of insanity."[552] The latter option recognizes that victims were wronged even as it ultimately precludes criminal punishment of the defendant. Many states have gone a step further, allowing verdicts of "guilty but insane."[553] As one commentator remarked, this effectively "mean[s] 'guilty,'" even if it is not formally a conviction.[554]

C. PREVENTIVE INTERESTS

Victims have a deep interest in preventing criminal wrongdoing from recurring. The interest extends to their own future integrity and also to other possible future victims. By doing what it can to prevent criminals from

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which evidence as to both guilt and insanity are presented during the same trial, or a bifurcated trial. In a bifurcated trial, the first phase focuses exclusively on whether the defendant committed the charged crime. The second phase focuses solely on the question of insanity. The second stage is not reached unless and until the prosecution proves in the first phase beyond a reasonable doubt that the defendant committed a criminal act . . . . Bifurcation is often preferred on the basis that a unitary trial is fraught with confusion.").

[551] People v. Blakely, 178 Cal. Rptr. 3d 876, 878 (2014) (internal quotation marks and emphasis omitted).

[552] 18 U.S.C. § 4242(b). Federal law thirty-five years ago was different. Shannon v. United States, 512 U.S. 573, 575 (1994) ("Prior to the enactment of the Insanity Defense Reform Act of 1984 . . . [d]efendants who mounted a successful insanity defense—that is, those who raised a reasonable doubt as to their sanity at the time of the offense—were simply found 'not guilty.'").

[553] Diane Courselle, Mark Watt & Donna Sheen, *Suspects, Defendants, and Offenders with Mental Retardation in Wyoming*, 1 WYO. L. REV. 1, 54–55 n.268 (2001).

[554] Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 13 n.68 (2003).

recidivating, the law shows victims that it takes the harm done to them seriously.

The preventive aspects of the insanity defense are often overlooked in defendant-focused discussions. By removing a dangerously insane acquittee from the general population, the law protects his victims, past and future, from injury. Yet it is not enough simply to remove the acquittee; it is important that the insanity defense ordinarily operates to place the acquittee in a treatment facility. Simply imprisoning the acquittee would only relocate the risks he poses from the general population to the prison population.[555] Prisons are ill-equipped to handle insane inmates or to prevent their harmful interactions with prison officials and other inmates.[556] Treatment facilities serve two preventive purposes. First, because of their expertise relative to prisons, they are better suited to address the risks that acquittees pose during confinement. Second, because most of those who commit crimes will eventually be released, treatment reduces the risks that acquittees pose after confinement. Returning a dangerously insane person back to public life would expose his past and future victims to significant risk. While prison life often exacerbates mental health issues,[557] insanity acquittees who are released after hospitalization have lower rearrest rates than "sane" defendants convicted of committing the same crimes.[558]

Similar reasoning would apply to criminal corporations acquitted under the insanity defense. I have argued extensively elsewhere that the only way to effectively prevent corporate criminal recidivism is through forcible rehabilitation.[559] The arguments apply with even greater force to corporations whose dysfunction justifies their use of the insanity defense. In brief, the two approaches the law currently uses—threatening corporate fines

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[555] JACK P. GIBBS, CRIME, PUNISHMENT AND DETERRENCE 58 (1975).

[556] *See generally* HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS (2003), https://www.hrw.org/reports/2003/usa1003/usa1003.pdf (describing the prison environment—being intended for punishment—as conflicting with insane inmates' mental health needs).

[557] *See, e.g.*, *id.* at 94–105, 153–54 (noting examples of inmates' worsening mental health due to understaffing, lack of timely resources, and inadequate monitoring and citing prison segregation as a key reason for inmates' deteriorating mental condition).

[558] Weihofen, *supra* note 420, at 868–69 ("Meaningful statistics are difficult to obtain, but such as exist indicate that persons acquitted of crime by reason of insanity and subsequently discharged from the hospital as recovered are not more likely to commit further crimes than are persons with similar prior criminal records who have never been in a mental hospital . . . . If anything, the rate of subsequent arrest among ex-mental patients with a record of criminal arrest prior to hospitalization seems to be lower than rearrest rates in persons with similar records who had not been in a mental hospital.").

[559] *See generally* Diamantis, *supra* note 43 (arguing that fining corporations does not promote reform or deterrence).

and prosecutor-led reform—do not work. Empirical studies demonstrate that increasing corporate fines does not increase corporate deterrence.[560] The basic economic reason is simple: agency costs.[561] A corporate fine, paid by the corporation, does not directly impact the incentives of the individuals within a corporation who are in a position to commit or avoid crime.[562] Prosecution-led reform through pretrial diversion fails in part because of what some scholars call the "compliance game": The DOJ seems more interested in scoring political points and clearing cases than ensuring meaningful solutions to corporate crime.[563] Even well-intentioned prosecutors lack the expertise and institutional competence to design, implement, or oversee effective corporate reform.[564] Where a corporate criminal exhibits the sort of dysfunction that could justify an insanity defense, corporate fines and prosecutors are particularly inept. The selfsame dysfunction can hinder the rational cost-benefit mechanisms by which fines have their intended preventive effects. Such corporations are also in even greater need of the expert guidance that prosecutors cannot provide.

Effective prevention would require court oversight and injecting more expertise into the process. The corporate insanity defense promises both. Court oversight could be a solution to the compliance game by bringing some objectivity to the resolution of corporate cases.[565] As discussed above, the corporate insanity defense lowers some of the barriers prosecutors face in taking criminal corporations to trial. Trials bring courts onto the scene, and court involvement would continue post-acquittal through supervision of reform. Since the treatment would be designed, overseen, and implemented

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[560] *See e.g.*, Alexander & Cohen, *supra* note 67, at 24 ("There is little evidence that increasing the magnitude of monetary sanctions has a deterrent effect."); GARRETT, *supra* note 217, at 165–68 (noting that corporations who have already paid millions of dollars in DPAs or NPAs recidivate nonetheless).

[561] Alexander & Cohen, *supra* note 67, at 2.

[562] Diamantis, *supra* note 253, at 880; Peter J. Henning, *Should the Perception of Corporate Punishment Matter?*, 19 J.L. & POL'Y 83, 87–88 (2010) (referring to fines, in the context of their limited deterrence, as "meaningless retribution"); *see also* S.E.C. v. Bank of America Corp., 653 F.Supp.2d 507, 512 (S.D.N.Y. 2009) ("[T]he fine is imposed, not on the individuals putatively responsible, but on the shareholders, it is worse than pointless: it further victimizes the victims.").

[563] Laufer, *supra* note 434, at 79–80; *see also* Reilly, *supra* note 5, at 344–46 ("The question is do we really want our federal prosecutors to focus on reforming corporate culture rather than on indicting, prosecuting, and punishing?").

[564] Arlen, *supra* note 544, at 66–68.

[565] Mihailis E. Diamantis, *Looking Glass: A Reply to Caulfield and Laufer*, 103 IOWA L. REV. ONLINE 147, 152 (2019) ("A scrutinizing judicial eye and strengthened judicial hand would certainly do something to temper the brashness of the compliance game.").

by compliance experts, it would be better suited to securing the crime-free future that victims deserve.

CONCLUSION: WILL CORPORATIONS GO FOR IT?

All serious corporate crime provokes our instinctive ire. As in the general part of criminal law, enlightened policy does not always favor submitting to the lure of instinct. When a defendant lacks sufficient self-control or the capacity to distinguish right from wrong, all of the basic goals of criminal justice call for an alternative to punishment. Sanction cannot deliver desert where none is called for. The threat of sanction cannot deter where control and cognition are compromised. This is just as true of volitionally- and cognitively impaired corporate defendants as it is of individual defendants. The insanity defense offers a needed alternative.

Fairness to defendants is the primary motivation for the insanity defense in the individual context; in the corporate context, it is respect for victims. Corporations who successfully raise the insanity defense would immediately be neutralized as public threats through necessary constraints on their business conduct. While those constraints are in place, corporate acquittees would face an intensive treatment program, designed and implemented by government experts. The constraints would only be released once the experts certify, and a court determines, that the corporation no longer poses a danger. Victims can rest assured that they and others will not face injury again. At the same time, other innocent corporate stakeholders benefit as the corporations on whom their livelihood rests would remain ongoing concerns.

While an initial concern about the corporate insanity defense could be that it would prove too much of a boon for corporations, the opposite concern now arises: Will corporations find the defense attractive enough raise it? The benefits of the defense only materialize if corporations can see an overall advantage in it. If acquitted, corporations can avoid the reputational costs of conviction, but being declared "criminally insane" would hardly make for an easy public relations challenge. As one managerial psychologist wrote: "Viewed from the necessarily pragmatic viewpoint of the practicing consultant and corporate client, are there many CEOs out there who want to be told that 'I diagnosed your organization and I am sorry to inform you that the entire system suffers from narcissistic personality disorder or borderline personality disorder?'"[566] Adding insult to injury, executives and managers seem to be particularly averse to the sort of oversight and rehabilitative corporate treatment that the insanity defense would necessarily entail.

[566] Goldman, *supra* note 306, at 407.

Compulsory reform can be expensive, and it infringes the autonomy interests that managers' guard so closely.[567]

Despite these costs, there are three compelling advantages that the insanity defense offers corporations. First, as compared to conviction, acquittal under the insanity defense would avoid the fatal collateral consequences that can follow a guilty verdict. Many convicted corporations automatically face various restrictions—like debarment or loss of license—that effectively terminate their ability to ply their trade.[568] Any resolution that avoids that result should be preferable from the corporation's perspective.

Second, there is reason for corporations to prefer reform following an insanity defense over reform pursuant to a pretrial diversion agreement. If acquitted at trial under the insanity defense, corporations could avoid paying the criminal fines that are a near ubiquitous feature of pretrial diversion agreements.[569] Additionally, corporations may see some benefit to having courts involved in their rehabilitation. Pretrial diversion agreements commonly reserve to the DOJ exclusive and total discretion to determine whether the corporation has complied.[570] This despotic dynamic raises obvious concerns for corporations.[571] Judicial oversight following a successful insanity plea should result in a more objective and balanced process.

The third and final appeal of the corporate insanity defense for corporations is that, if all goes as it should, corporate acquittees emerge with an expert certification and court validation that they are now reliable business partners, service providers, employers, and community members. In short,

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[567] William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PENN. J. BUS. L. 392, 392 (2018); *see* Fisse, *supra* note 227, at 1155 ("A recent discussion of the potential use of probation as a sanction against corporations pointed out that probationary orders requiring corporations to rectify defective standard operating procedures or to make other structural changes within the organization may have a significant deterrent as well as rehabilitative effect because such intervention detracts from managerial autonomy.") (footnote omitted).

[568] Baer, *supra* note 430, at 956 ("Although corporate entities are technically criminally liable for nearly all of their employees' misconduct, the government has learned not to formally prosecute these entities due to the steep collateral consequences of indictment.").

[569] *See* Khanna & Dickinson, *supra* note 450, at 1723–24.

[570] Julie R. O'Sullivan, *How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29, 61–62 (2014); Andrew Chinsky, Essay, *Modern Approaches to Financial Crime: Judge Rakoff, The Financial Crisis, DPAs, and Too Big to Prosecute*, 8 HARV. L. & POL'Y REV. 12, 28 (2014).

[571] Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1437 (2007) (discussing "[t]he abusive tendencies of [the DPA and NPA] bargaining imbalance").

they reenter public life with a credible claim to having become good corporate citizens. This credential should significantly mitigate the reputational effects of a criminal trial. A corporation that has successfully undergone treatment for the root cause of its criminal behavior is a corporation that is unlikely to reoffend. That is a result that everyone involved in the criminal justice process—the corporate defendant, its victims, the judge, the prosecutor, and the public—can applaud.