

THE BODY CORPORATE

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I

INTRODUCTION: IT JUST GREW

To break the law, one must have a body capable of acting. Since U.S. law is committed to a centuries-old legal fiction according to which corporations can break the law, it must have some account of the “bodies” through which corporations act. They may not be tangible bodies we can kick—but within the fiction of the law, they must be bodies that are capable of committing crimes, torts, and other violations. An account of this active element would identify which parts of corporations are capable of causing injuries that are legally attributable to them. Despite its obvious significance for the corporate liability inquiry, the body corporate remains largely untheorized.

Failure to attend to the body corporate has led to an odd fact in the modern law of corporate liability: courts use the exact same doctrine for attributing both harmful corporate acts¹ and inculcating corporate thoughts.² For example, when a corporation is accused of bribery, the same legal analysis determines whether it paid an official and whether it did so with a corrupt motive. Earlier in the history of corporate law, jurists were more careful to distinguish the two.³ Yet, this oddity of modern doctrine seems to have escaped notice. With respect to individual defendants, complaining parties must take very different approaches to proving act elements and mental state elements. Acts are the sort of things to which eyewitnesses, documents, and videos can attest directly.⁴ Thoughts are

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1. As used here, “act” refers to what philosophers would call “conduct” or “behavior.” I do not mean “act” to carry any implication of intentionality or responsibility. This is consistent with the legal use of the term. *See, e.g.*, MODEL PENAL CODE § 1.13(2) (AM. L. INST. 2020) (“[A]ct’ or ‘action’ means a bodily movement whether voluntary or involuntary.”). It refers merely to physical movement. The fundamental question of corporate action, then, is whether and when a physical movement (e.g. of an employee) counts as being (also) a physical movement of the corporation. The question of whether the corporation acted intentionally or in a responsibility entailing way can then follow, but it is a separate and additional question.

2. *See* 18B AM. JUR. 2D *Corporations* § 1831 (2015).

3. *See infra* notes 29–32 and accompanying text.

4. White-collar prosecutions generally turn on mens rea because the actus reus elements are usually well-documented. *See* JULIE R. O’SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 34–35 (6th ed. 2016).

hidden, accessible only by inference from circumstantial evidence.⁵ More importantly, acts and thoughts play fundamentally different justice roles. Acts link harms to the people who cause them.⁶ Mental states determine whether a person who caused harm did so culpably.⁷ If someone is injured after tripping over an extension cord, she experiences harm. If the defendant placed the cord there, he caused her harm. But he caused her harm culpably only if he knew (or should have known) that someone might pass by.

This Article is about the active element of the corporate structure—what I here call the “body corporate.” The body corporate is to be contrasted with what I have previously dubbed the corporate mind.⁸ If corporations are to be capable of committing the vast majority of crimes and torts, the law must have some stance on how corporations can satisfy the mental state elements of those violations. Implicit in that stance is a theory of the corporate mind, that is, what it means for a corporation to think or what components of a corporation are capable of thinking on its behalf.

Just as the law needs an account of how corporations think if they are to be held to account for crimes and torts, it also needs an account of how corporations can act. Most crimes and torts require some affirmative act that satisfies an *actus reus* or breaches a duty. Even for inchoate violations, like attempts and conspiracies, the law requires some external, physical manifestation of criminal purpose, for example, words spoken, tools purchased, or maps drawn. So the law must say what it means for a corporation to cause some tangible effect in the world, or it must say which elements of a corporation are capable of causing tangible effects on its behalf. When those whom the law has recognized to be people cause tangible effects, the law generically refers to these effects as acts.⁹ For prototypical legal people—human beings—tangible effects become their acts when, and only when, their bodies cause them. It stands to reason that the law

5. See *United States v. Wells*, 766 F.2d 12, 20 (1st Cir. 1985) (“Being a state of mind, willfulness can rarely be proved by direct evidence. Rather, findings of willfulness usually require that fact finders reasonably draw inferences from the available facts.”); *United States v. Stagman*, 446 F.2d 489, 493 (6th Cir. 1971) (stating that the general rule in criminal cases is that “intent may be inferred from the totality of circumstances surrounding the commission of the prohibited act”).

6. See Mihailis E. Diamantis, *The Law’s Missing Account of Corporate Character*, 17 *GEO. J.L. & PUB. POL’Y* 865, 866–67 (2019) (noting that federal and state laws readily attribute the harmful acts of a corporation’s employees to the corporation itself).

7. Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 *STAN. L. REV.* 681, 689–90 (1983) (discussing how *mens rea* is used to grade the seriousness of criminal conduct).

8. See Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 *NOTRE DAME L. REV.* 2049, 2075–76 (2016) (“Within the fiction of the law, corporations also enter into contracts, buy property, sell goods, and perform all manner of acts implying they have minds.”).

9. The legal sense of “act” is different from the philosophical sense. Philosophers tend to think of acts as being, by definition, intentional. On the law’s understanding, an act may be unintentional, involuntary, and unknowing; in its most basic sense, a legal act is just some physical event caused by some legal person. See, e.g., *MODEL PENAL CODE* § 1.13(2) (AM. L. INST. 2020).

must have some account of what a corporate body is if it is to say which tangible effects qualify as corporate acts.

To the corporate mind, scholars have paid ample attention. They have offered detailed accounts of when injurious corporate acts are culpably taken. William Laufer, for example, would measure corporate culpability by comparing corporate defendants to average corporations acting in similar ways.¹⁰ Pamela Bucy would look to a corporation's ethos for evidence that it intentionally or culpably took some criminal act.¹¹ In earlier work, I proposed a system for inferring culpable corporate mental states directly from corporate acts and the circumstances in which they are taken.¹² Philosophers working on collective responsibility assume corporations can do things and then quickly turn to discussing what makes corporations responsible.¹³ The prior issue of what it means for a corporation to act has been an assumed and largely unanalyzed starting point for us all.¹⁴ Providing an answer requires an account of the body corporate.

Our theories of corporate fault are necessarily incomplete. Corporations can be faulty without being at fault. Incurring a legal or moral debt requires the

10. William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 701 (1994) (“Would an average corporation, of like size, complexity, functionality, and structure, engaging in illegal activity X, given circumstances Y, have the state of mind Z?”). Earlier in the same article, Laufer gets the closest I have seen to a detailed analysis of the body corporate, and it is worth pausing for a moment to show three ways in which the present Article moves beyond Laufer's work. First, he argues for a “constructive” theory of corporate action, which questions whether an “entity-agent relationship [is] strong enough to sustain a finding of authorship? In short, is it reasonable to conclude that the illegal acts of [corporate] officers were the actions of [the corporation]?” *Id.* at 689. His discussion, however, treats “act and intent” as a single unit, and so does not isolate the act element. *See id.* at 684–89. Second, to the extent that Laufer does manage to isolate the body corporate as a distinct object of inquiry, his analysis effectively stops there. He would ask whether, in light of a corporation's various attributes, “it is reasonable to conclude that the agents' acts are the actions of the corporation.” *Id.* at 682. What he means by “reasonable” here is unclear. Later in the paper, he espouses an objective standard of reasonableness which, as applied to the question of corporate acts, would look to whether the acts of similar agents in similar corporations are acts of the corporation. *Id.* at 677. That analysis, however, presumes an antecedent theory of corporate action. Third, Laufer's proposal makes clear that he inherits the assumption (shared by the law and other theorists) that corporations can only act through their agents. *See id.* at 652, 683 n. 140, 727 n. 308. As will become clear in Part IV.B, it is precisely that assumption that I think cannot withstand scrutiny after we successfully isolate the body corporate for analysis.

11. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099 (1991) (“The government can convict a corporation . . . only if it proves that the corporate ethos encouraged agents of the corporation to commit the criminal act.”).

12. *See generally* Diamantis, *supra* note 8 (offering a theory of corporate mens rea motivated by cognitive science).

13. Kendy Hess, *The Free Will of Corporations (and Other Collectives)*, 168 PHIL. STUD. 241, 243 (2014) (“Claims about what corporations ‘believe,’ ‘desire,’ or ‘do’ are thus claims about commitments or actions that exist at the collective, corporate level.”).

14. In writing this paper, I am fulfilling a debt taken out four years ago when I offered a definition of corporate mens rea that relies on an antecedent theory of corporate actus reus. Diamantis, *supra* note 8, at 2053 (“[T]his Article assumes that there is some sensible theory of corporate actus reus—a way of resolving when a corporation has done something and what—nothing will turn on the details of that theory.”).

debtor to have done something. We find this obvious where individuals are concerned. I may hope someone dies or even intend to kill them, that makes me faulty. But I am not at fault for anything; I am liable for no sort of offense, unless and until I take steps to effectuate my hope or intent. Similarly, a corporation can be faulty if, as Bucy would argue, it has a defective corporate ethos, but the corporation cannot be *at fault for* anything unless and until it does something wrong. Defining what it means for a corporation to do something is the primary task of a theory of the body corporate.

This Article's main ambition is modest: it requests recognition of and some reflection on the body corporate.¹⁵ Since the body corporate comprises half of the liability inquiry, attention to it is far overdue. There is no straightforward answer for how best to conceive of the body corporate. Unlike natural bodies, corporate bodies have no perceptible perimeter; their implicit contours are to be found in statutes and cases rather than out in the world.

As I argue below, focusing on the body corporate and the law's role in shaping it may help resolve some longstanding problems in corporate law. Sometimes easy solutions may be hiding in plain sight, if only we have the conceptual tools to perceive them. By failing to distinguish the body corporate from the corporate mind, the law and scholars commenting on it have implicitly assumed the same doctrine must apply to both. This has made it too easy to propose doctrines of corporate liability and too hard to defend them. Raising a new theory of corporate liability needs two arguments to show its appeal: one evaluating its merits as a conception of the body corporate, and one evaluating it as a conception of the corporate mind. Conversely, when it comes time to defend the theory, a counterargument showing the theory has shortcomings as concerns the body corporate need not mean it has the same shortcomings as a theory of the corporate mind, and vice versa.

Historical inertia, rather than policy-driven and empirically-informed analysis, has set the current legal and academic standards, which implicitly limit the body corporate to individual employees. In other words, a corporation can only be legally liable for a harm if the harm is traceable to the conduct of its employees. Yet there are other entities, mechanisms, and systems within corporations that also cause harm for which sound legal policy would hold corporations accountable. By excluding these other sources of harm from the body corporate, the law obfuscates corporations' capacity to cause harm and their responsibility for it. A policy-driven approach to the body corporate would

15. Matthew Caulfield suggested that I frame the discussion in terms of corporate *agency* rather than corporate *bodies*. On the approach he prefers, the question would be: "What things in the world are loci of corporate agency?" Whereas I ask: "What things in the world are part of the body corporate?" To my mind, these are equivalent questions. The advantage of my formulation is that its tongue-in-cheek character (corporations obviously do not *really* have bodies) is universally apparent and emphasizes the need for a policy driven response. While, as I think, corporations also do not *really* have agency either, there is not universal agreement on that point. Some readers, were they pursuing a question on corporate agency, may veer too deeply into misguided metaphysics, a detour from which many have never returned.

eschew the simplistic metaphysics according to which the body corporate can only be identified with individual employees. Were the law to recognize other significant sources of corporate harm as parts of the body corporate, it could hold corporations to account for more of the harms they cause and incentivize them to undertake necessary reform.

This Article begins in Part II by pointing to the likely source of our long-lasting collective neglect of the body corporate. Legal doctrines tell courts how to identify when corporations have engaged in misconduct. “Mis-conduct” is an amalgam of two elements: an act, that is, the conduct; and a mental state, that is, that which renders the conduct amiss. We moderns, commenting on and critiquing the law, have inherited this conflation.

What the law conflates, Part III seeks to distinguish. The act and mental state elements of corporate liability should do different work in corporate law. By failing to separate them, the two-dimensional landscape of corporate liability flattens. To capture the nuance that the liability inquiry should have, the law must isolate the distinct contributions of the body corporate and of the corporate mind. In this Article’s main theoretical contribution, Part III characterizes each in a way that firmly establishes their difference.

Part IV illustrates some of the work the body corporate can do. Few scholars favor the current law of corporate liability, but they criticize it for the wrong reason. Most think the law is too punitive because it holds corporations to account for the misconduct of all employees, even low-level clerks and subversive rogues. Like current law, most commentators tend to conflate the two dimensions of the corporate liability inquiry. If scholars were to distinguish the body corporate from the corporate mind, they would likely no longer default to endorsing a single view for both. Critics are right that current doctrine sweeps too broadly as regards the corporate mind. However, as argued below, the law overlooks potentially important parts of the body corporate, like aggregate employee action and corporate organizational systems. In so doing, it ignores important sources of corporate harm, thereby shortchanging the corporate liability inquiry.

Space constraints do not permit a searching discussion of all types of corporate liability. In what follows, I focus on criminal law.¹⁶ While corporate crimes are far from representative of corporate misconduct generally, the operative doctrines of liability are familiar to the general part of corporate law. Criminal law is a handy test case because of its clearer linguistic distinction between “actus reus” and “mens rea.” While the arguments below will resonate with other types of corporate liability, they may need some adjustment to fit snugly.

16. For a short primer on the current state of corporate criminal law, see generally Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453 (2019).

While civil law scholars have wrangled more openly with what I call the body corporate, they have done so largely within the framework of current doctrine.¹⁷ This Article attempts to go beyond careful parsing of when employees should or should not be included as parts of the body corporate. It takes a more open-ended approach by considering whether other, possibly non-human, aspects of corporations should be included too.

Corporate criminal law is also an appealing place to start because the stakes for getting the right answer are so high. The economic loss attributable to white-collar crime outpaces *all other* crime by twenty-to-one.¹⁸ Most white-collar crime occurs in institutional settings—like corporate workplaces—that provide its necessary preconditions like access to information, markets, and technology.¹⁹ A century ago, the Supreme Court recognized that corporate criminal law is an essential tool for controlling white-collar crime.²⁰ Corporations can (dis)incentivize, (dis)empower, and (dis)allow misconduct.²¹ Failure to calibrate the law’s understanding of the body corporate misaligns corporate incentives to invest in effective compliance.²² This means more victims, more social costs, and less justice. The law can do better.

17. See generally Patrick Hornbeck, *Respondeat Superior Vicarious Liability for Clergy Sexual Abuse: Four Approaches*, 68 BUFFALO L. REV. 975 (2020) (discussing church liability for sexual assault by priests); Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CALIF. L. REV. 671 (2016) (discussing corporate liability for discrimination by algorithms).

18. Compare RODNER HUFF, CHRISTIAN DESILETS & JOHN KANE, THE 2010 NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME 12 (2010), <http://www.fraudaid.com/library/2010-national-public-survey-on-white-collar-crime.pdf> [<https://perma.cc/A22Z-5YG4>] (“[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 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2835847> [<https://perma.cc/B3FD-ZUNE>] (“[M]ore than 23 million criminal offenses were committed in 2007, resulting in approximately \$15 billion in economic losses to the victims.”).

19. Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 501, 510 (2004) (“Many of the [white collar crimes] referred to above are most likely to occur within the context of complex institutions, such as large corporations, partnerships, and government agencies.”).

20. *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494–95 (1909) (“In that class of crimes we see no good reason why corporations may not be held responsible If it were not so, many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.”).

21. See Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1625 (2007) (“Enterprise liability has been the legal system’s chief response to both problems: how firms incentivize their agents ex ante to comply with or violate the law, and how firms impede or assist the state in detecting and sanctioning violations ex post.”).

22. See Mihailis E. Diamantis, *Functional Corporate Knowledge*, 61 WM. & MARY L. REV. 319, 329 (2019) (discussing the concern that the law could over- or under-incentivize corporations to invest in compliance).

II

THE VANISHING BODY CORPORATE

Criminal law's recognition of the body corporate has waxed and waned over the centuries. In the beginning, corporations had no bodies so far as criminal law was concerned.²³ Nor, for that matter, did they have minds. As the Missouri Supreme Court observed in the mid-nineteenth century, "[A] bank is a corporation—it cannot utter words—it has no tongue—no hands to commit an assault and battery with—no mind, heart or soul to be put into motion by malice."²⁴ Indeed, the ultra vires doctrine limited criminal law's ability to see corporations at all.²⁵ Under this doctrine, corporations literally could do and think no wrong because, as a matter of law, they could never do or think anything beyond the scope of their chartered purposes. Early charters limited corporate purposes to narrow public works projects like building railroads or installing waterworks.²⁶ They did not then permit, as modern charters do,²⁷ the open-ended pursuit of any lawful purpose, and they certainly did not anticipate criminal activity. This did not mean there was no white-collar crime. Employees have always misused their positions for personal advantage.²⁸ However, until the turn of the Nineteenth Century, employees did so solely in their individual capacities, not as extensions of their corporate employers.²⁹ Criminal justice and deterrence only applied at the individual level.

As criminal law shed the constraints of the ultra vires doctrine, it began to recognize corporations as capable of acting harmfully, even before it saw them as

23. See also *Bank of Ithaca v. King*, 12 Wend. 390, 390 (N.Y. Sup. Ct. 1834) (“[S]urely [a corporation] has no corporeal body. It has no material existence, it is incapable of performing labor and, therefore, cannot be compelled to perform an impossibility.”).

24. *Childs v. Bank of Mo.*, 17 Mo. 213, 215 (1852).

25. See Albert J. Harno, *Privileges and Powers of a Corporation and the Doctrine of Ultra Vires*, 35 YALE L.J. 13, 23 (1925); *Ultra Vires*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the phrase as “[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or by law”); see generally W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. U. L. REV. 479, 508–10 (2018) (discussing shifting inter-related policies on the ultra vires doctrine in civil and criminal law).

26. See *Constructive Notice of the Charter of a Corporation*, 26 HARV. L. REV. 531, 541 (1913) (“In the early days of corporations when charters were sparingly granted by public act and usually for a quasi-public purpose a charter was properly regarded as a very special privilege.”).

27. DEL. CODE ANN. tit. 8, § 101(b) (2020); Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking A Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 806 (1996) (“By the end of the [Nineteenth] century, states moved away from granting limited corporate charters toward permitting businesses to incorporate freely and to operate for any legal purpose.”).

28. See, e.g., *The Case of the Carrier Who Broke Bulk*, YB 13 Edw. 4, fol. 9, Pasch, pl. 5 (1473) (Eng.), reprinted in 64 Selden Society 30 (1945).

29. Daniel Lipton, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VA. L. REV. 1911, 1926 (2010) (“Under the prevailing common law, corporate criminal acts . . . were considered to be *ultra vires*.”).

thinking wrongly.³⁰ The now-lost distinction between the body corporate and the corporate mind once played an important, if short-lived, role in legal theory. Civil law had long used the doctrine of respondeat superior to define corporations' capacity to act.³¹ That doctrine identified the body corporate with individual employee bodies. Accordingly, a corporation engaged in tortious misconduct alongside any of its employees who did the same within the scope of their employment and with some intent to benefit the corporation.³² When criminal law first recognized the possibility of corporate crime, it initially limited respondeat superior to employee acts. Corporations could only be convicted of strict liability crimes, which have only act elements and no mental state elements.³³ Corporations had the capacity to cause criminal harms through their employees, courts reasoned, but lacked the moral hardware necessary for wrongful thoughts and true culpability.

In 1909, the Supreme Court recognized the shortcomings of limiting corporate enforcement to strict liability crimes. But moving to more general enforcement would necessitate an extended fiction according to which corporations could have minds as well as bodies.³⁴ In *New York Central & Hudson River Railroad Co. v. United States*,³⁵ the Court entertained due process challenges brought by shareholders of a railroad convicted of offering illegal shipping rebates.³⁶ The mental state element of the crime was the doctrinal

30. Historically, this has also been the tradition in civil law countries, which tend to be skeptical of corporations' capacity to have culpable mens rea. See Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 28 (1957) ("Apart from a few temporary and partial exceptions the maxim that *societas delinquere non potest* is still firmly recognized in the civil law."); *id.* at 29 ("[French] courts reason that corporate criminal liability is irreconcilable with the guilt principle, i.e., the doctrine of mens rea, which is the true basis of all criminal law.").

31. JOHN W. SALMOND, *THE LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES* 57–58 (3d ed. 1912); see, e.g., *Phila., Wilmington, and Balt. R.R. Co. v. Quigley*, 62 U.S. 202, 209–10 (1858) ("As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives."). Some trace the doctrine as far back as Roman times. See Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 350 (1891) ("[T]he unlimited liability of an owner for the torts of his slave grew out of what had been merely a privilege of buying him off from a surrender to the vengeance of the offended party, in both the early Roman and the early German law.").

32. *Corporations*, *supra* note 2, § 1841.

33. See, e.g., *Overland Cotton Mill Co. v. People*, 75 P. 924, 926 (Colo. 1904) (holding a corporation liable for "not strictly observing the law, rather than an intentional disregard of its provisions."); see also MODEL PENAL CODE § 2.07(2) (AM. L. INST. 2020) ("When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears.").

34. William Thomas traces corporate criminal liability to an earlier date. William R. Thomas, *Incapacitating Corporate Criminals*, 72 VAND. L. REV. 905, 914–15 (2019); Thomas, *supra* note 25, at 513 & n. 159 (2018) (including sources for the proposition that "the Supreme Court was hardly at the vanguard of innovation; several state supreme courts had already held corporations criminally responsible for general-intent crimes, and courts soon extended these holdings to include specific-intent crimes.").

35. 212 U.S. 481 (1909).

36. *Id.* at 490–92.

sticking point. If the railroad purposely or knowingly offered discounted rates, it would be guilty of a misdemeanor.³⁷ Applying respondeat superior to the mental state elements, as the prosecution asked the Court to do, would breathe intelligence into corporations, attributing to them not only their employees' acts but also their employees' thoughts. It would also entail vicariously transferring fault to corporate employers, in possible violation of due process.

In an opinion based (by the Court's own admission) more on "public policy" than legal analysis, the Court determined that corporations' rise to economic and social prominence necessitated more tools of control.³⁸ Relying on criminal statutes that happened to permit strict liability was no longer enough. To change course, criminal law had to recognize that corporations could harbor mens rea. The Court made it so:

[T]he corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents . . . whose knowledge and purposes may well be attributed to the corporation for which the agents act.³⁹

Today, respondeat superior defines the perimeter of both the body corporate and the corporate mind. But a curious thing has happened since *New York Central*: We have lost sight of the fact that respondeat superior is doing double duty. Courts and scholars, wooed by the tidiness of respondeat superior, now tend to speak of corporate crime but not of separate criminal acts and culpable mental states. The usual modern-day backstop to fumbled doctrine in corporate criminal law is "the good sense of prosecutors,"⁴⁰ but that "good sense" fares no better as regards the body corporate. Since the early days of Eric Holder's 1991 Memo to U.S. Attorneys on Bringing Criminal Charges Against Corporations (Holder Memo),⁴¹ the Department of Justice (DOJ) policy inherited the conceptual coarseness of current doctrine. The Holder Memo states that "a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents."⁴² Vicarious liability for "illegal acts" presumes that actus reus and mens rea travel together.

Losing track of the body corporate and the corporate mind as distinct enforcement concerns can trip up legal analysis and efforts at reform. As one commentator reports, some courts "have asked whether the responsible individual whose conduct provided the basis for imputing liability to the

37. 49 U.S.C. § 14903 (2018).

38. *N.Y. Cent. & Hudson River R.R.*, 212 U.S. at 495.

39. *Id.*

40. *United States v. Dotterweich*, 320 U.S. 277, 285 (1943).

41. Memorandum from Eric Holder, Deputy Attorney Gen., to All Competent Heads and U.S. Att'ys on Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter *The Holder Memo on Prosecuting Corporations*].

42. *Id.*

corporation represented the ‘brains’ of the organization.”⁴³ That sort of inquiry overtly conflates mind and body, as if brain and hand were one and the same. Another commentator writes “that actions of employees can be aggregated and imputed to the corporation as a whole,” but then cites a case that aggregates the act of one employee with the mental state of another.⁴⁴ Many scholars transition seamlessly from discussing corporate crime, to the body corporate, to the corporate mind.⁴⁵

Modern commentators are not to blame. *Respondeat superior*, which sets the terms of most discussions, applies to acts and mental states. So it is natural to lump body and mind together in critical analysis. In the days before *New York Central*, when corporations legally had one but not the other,⁴⁶ the body corporate and the corporate mind were more carefully distinguished. Melding the two seems to have been part of a deliberate intellectual effort. A few years after *New York Central*, Henry W. Edgerton would make the case in the *Yale Law Journal*:

The tradition that the physical movements of a corporation’s representatives may, but their mental states may not, be attributed to it for criminal purposes, seems as inept as it is persistent. There is no occasion for such a distinction between the various parts of the human animal; if what his hands do may properly be attributed to the corporation for which he acts, what his brains do may be attributed to it with equal propriety.⁴⁷

We have lived in Edgerton’s world ever since.

III

RE-MEMBERING THE BODY CORPORATE

Corporate criminal law was conceptually richer before *New York Central* was decided and Edgerton’s paradigm set in. On the standard present-day understanding, *respondeat superior* is a “doctrine [for] holding an employer . . . liable for [its] employee’s . . . wrongful acts.”⁴⁸ But using “wrongful” act as the unit of analysis is too blunt. There are two components to wrongful acts in criminal law: *actus reus* and *mens rea*. Each fulfills a distinct role in sorting the

43. John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 230 n.135 (1991).

44. Stacey Neumann Vu, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459, 471 n.58 (2004).

45. See, e.g., Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 526 (2006) (“Logically, the more tightly the rule is fastened to *institutional blameworthiness*, the more that the practice of entity criminal liability will retain its justification, its bite, and its utility as a means of education A rule deeming virtually all crimes committed by institutional agents in institutional settings to be *institutional crimes* is easy to apply but plainly does not fit with any persuasive account of the relationship between *institutional effects and individual conduct*.”) (emphasis added).

46. See Ervin Hacker, *Penal Ability and Responsibility of the Corporate Bodies*, 14 J. CRIM. L. & CRIMINOLOGY 91, 91–97 (1923) (observing that, as corporate power expanded, legislatures and courts expanded corporate liability beyond the acts of employees by holding corporations to account for both “will and action”).

47. Henry W. Edgerton, *Corporate Criminal Liability*, 36 YALE L.J. 827, 840–41 (1927).

48. *Respondeat Superior*, BLACK’S LAW DICTIONARY (11th ed. 2019).

punishable from the blameless.⁴⁹ In assessing the advisability of current law, we should evaluate respondeat superior twice, once as applied to the body corporate and once as applied to the corporate mind.

To reclaim its lost conceptual nuance, the law must recall its forgotten distinction between the body corporate and the corporate mind. People act with bodies and think with minds. So the range of acts and thoughts that the law recognizes correlates directly to its understanding of bodies and minds. This conceptual truth is even more significant where the “people” at issue are corporations, who can act and think only within the law’s pretense and whose bodies and minds are themselves legal constructs.⁵⁰ While the law should have two separate theories of attribution responsive to the different roles that body and mind play in criminal justice, it has only one: a corporation (body and mind) is its employees (bodies and minds).⁵¹

A. The Corporate Mind

Prying the mind and body apart calls for definitions responsive to the distinct roles that mind and body play in criminal justice. Minds are the seats of mental states, and mental states serve as the measure of culpability for harm caused. A harm in the absence of culpability is usually just that—a mere harm of no legal significance. The addition of mens rea—negligence, recklessness, knowledge, or purpose—changes that fundamentally. The type of attending mental state provides a measure of culpability, with negligence on the low end and purpose on the high.

The general role of minds in criminal law suggests an abstract definition of the corporate mind:

The Corporate Mind (relativized): The aspects, mechanisms, and features of a corporation by reference to which culpable mental states are legally attributable to it.⁵²

Since the definition refers to legally attributable harms, it is relativized to a legal system of concern. By looking to how the law attributes culpable mental states, one can read off its implicit theory of mind. Under current U.S. law, the corporate

49. Both are generally required. *See* *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.”). Most significant corporate crimes have mental state requirements. *See* Mihailis E. Diamantis, *The Extended Corporate Mind: When Corporations Use AI to Break the Law*, 91 N.C. L. REV. 893, 909 (2020).

50. Dictionary Act, 1 U.S.C. § 1 (2018) (defining “person”); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[T]he corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact . . .”).

51. The doctrine is more complex than this introductory statement of it and includes important limitations. I discuss those below. *See* discussion *infra* Part IV.A.

52. Again, the focus here is on *culpable* mental states. Outside of criminal law, such as in the case of agreement to a contract, a broader definition would encompass other mental states (like agreement to a contract).

mind supervenes on the minds of the individual employees, so long as they are working within the scope of their employment and intend to benefit the corporation.⁵³ A deficient theory of the corporate mind will punish corporations even when they are not truly culpable, will overlook corporate culpability when it is present, or will fail to assist the criminal law in carrying out its preventive agenda. The many scholars who, like Laufer and Bucy, propose different measures of corporate culpability offer competing aspirational theories of the corporate mind.⁵⁴ These authors believe respondeat superior is a deficient theory of the corporate mind and seek to replace it.⁵⁵ Since the corporate mind is already the subject of robust discussion, I will not dwell on it further here.⁵⁶

B. The Body Corporate

Bodies fulfill a different role in criminal law. People can ultimately only be criminally culpable for the actions they take.⁵⁷ Mental states, standing alone, have no tangible harmful effects and are not subject to sanction.⁵⁸ Bodies help the criminal law decipher when an act has occurred and whose act it was. Acts are important to the criminal law because they help to pair harms with potential defendants. A harm with no agential source—for example, a building toppled by an earthquake or a hiker gored by a bear—is of no interest to the criminal law. When a branch cracks a person's skull, it makes all the difference in the world whether it fell from a tree or another person swung it. By finding out whose hand was on the branch, the law can trace the harm back to the right defendant.

Characterizing corporate bodies is a very different criminal theory task than characterizing individual bodies. The bodies of natural people precede the law. There is no heavy theoretical lifting for the law to do.⁵⁹ Human beings have an

53. V.S. Khanna, *Is the Notion of Corporate Fault A Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 369–70 (1999) (“[F]ederal courts use respondeat superior to impute *one agent's* acts and mens rea to the corporation.”).

54. See *supra* notes 11–12.

55. *Id.*

56. I dwell on it in considerable detail in Diamantis, *supra* note 8.

57. Of course, people can also be liable for omissions, i.e. failures to act. To be liable for an omission, a defendant must have had the capacity to perform the omitted act. So legal responsibility for omission necessitates a corresponding theory of action. Also, we sometimes speak as though people can be liable for the acts of others, as when a defendant hires a third party to kill his victim. We say the defendant is guilty of murder though he did not pull the trigger, but the source of his liability lies in his own acts—hiring the assassin.

58. Gabriel S. Mendlow, *Why Is It Wrong to Punish Thought?*, 127 YALE L.J. 2342, 2345 (2018) (“It’s a venerable maxim of criminal jurisprudence that the state must never punish people for their mere thoughts.”).

59. There are philosophically interesting questions about human bodies. Is the perimeter of the human body wide enough to include prosthetic parts, or is the body limited to some narrower core? The question, though, is not legally interesting. Suppose the defendant bludgeoned his victim using his prosthetic hand. His guilt is the same regardless of whether the prosthetic hand is part of his body or merely attached to a limb that is part of his body. Where corporate bodies are concerned, every part is artificial. There is no recourse to a naturally occurring and uncontroversial “narrow core.”

intuitive corporeal perimeter, coterminous with their organism. In contrast, the body corporate is a legal construct.⁶⁰ It exists only in the way and to the extent that the law dictates. This makes the effort to define the body corporate both daunting and liberating. The law must conjure an answer because it can look nowhere else. But the law also *gets* to conjure an answer that aligns with sound policy.

We can reverse engineer a given legal system's implicit definition of the body corporate by looking to the role that bodies are supposed to play—pairing harms with defendants. As explained above, the law understands acts of legal people to be effects caused by bodies.⁶¹ There is a three-part relationship between legal people, their bodies, and the legally attributable effects those bodies cause. Where the effects of concern are harms—as is the case in criminal law and tort law—we can triangulate to an implicit theory of the body corporate by seeing how the law pairs harmful effects with legal people, such as:

The Body Corporate (relativized): The aspects, mechanisms, and features of a corporation the harmful effects of which are legally attributable to it.⁶²

Like the definition of the corporate mind from the previous part, this definition keys the body corporate to a prior legal understanding of harm attribution. In a legal system that attributes no harms to corporations—as was the case with U.S. criminal law under the sway of the ultra vires doctrine—there are no bodies corporate. In modern times, respondeat superior largely identifies the body corporate with the bodies of individual employees. Their acts—taken within the scope of their employment and with some intent to benefit the corporation—are corporate acts. The harms their acts cause are legally attributable to their corporate employers.⁶³

The relativized definition of the body corporate is purely descriptive. It only says what a given legal system—at least implicitly—takes the body corporate to be. In order to evaluate whether a legal system characterizes the body corporate too broadly or too narrowly, we need a more idealized aspirational definition keyed to the broader purposes of corporate criminal law. In contrast to the vigorous debate concerning the corporate mind, proposing an idealized definition of the body corporate is relatively untouched theoretical terrain.

60. Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1342 (1974) (“[A]lthough American law has long accepted the independent juridical status of corporations, no one would suggest today that such entities are anything but legal constructs.”).

61. Philosophers of action also recognize the tight conceptual connection between action and causation. I perform the action of making a fist just by causing my hand to close. If, in making a fist, I cause the egg in my hand to crack, then I have also performed the act of cracking the egg.

62. Since the focus of this Article is criminal law, *harmful* effects are the effects that matter. Outside of criminal law, the definition might include beneficial effects too.

63. They are also *employee* harms, i.e. harms attributable to employees in their individual capacities.

In coming to an aspirational definition, it is helpful to return to first principles. Corporate criminal law aims to dole out punishment to those who culpably cause harm and to prevent those harms from recurring. A broad vision of the body corporate would best allow the criminal law to achieve those goals. By expanding the range of harms that count as corporate harms, a broad definition would allow the law to consider more possible points of corporate social control. An overly narrow theory of the body corporate would fail to recognize from the start which harms are properly corporate harms and thereby abort the liability inquiry too early. These considerations motivate the following definition:

The Body Corporate (aspirational): The aspects, mechanisms, and features of a corporation that cause harm.

By adopting a capacious understanding of criminal defendants' capacity to produce harmful effects—and hence a capacious understanding of their bodies—criminal law can maximize its ability to punish harms that deserve punishment and deter harms that can be deterred. The aspirational definition of the body corporate provides a benchmark by which to assess relativized definitions of the body corporate implicit in law.

A few observations about the aspirational definition of the body corporate are in order. Readers may have noticed that the aspirational definition characterizes the body corporate in terms of causation rather than action. This may seem puzzling since I originally introduced the body corporate in terms of corporate acts. The substitution is innocuous. An alternative definition would identify the body corporate with those features, aspects, and mechanisms through which corporations act harmfully. But a harmful act is just one that causes harm. Acting harmfully and causing harm are criminal law equivalents. The advantage of phrasing the aspirational definition in terms of causation rather than action is that the former uses the more familiar concept of corporate causation rather than the more obscure, philosophical notion of collective action.⁶⁴

The aspirational definition is intentionally very broad. Some may worry that it would lead to a dramatic and unjustified expansion of corporate criminal liability. It must be remembered, though, that the body corporate is only one-half of the criminal justice inquiry. Causing harm alone is generally not sufficient for liability. A culpable mental state must accompany the harmful act. The body corporate only helps the law identify when a corporation satisfies the *actus reus*. The impact of the aspirational definition, were it carried into law, would be significantly tempered by the culpability requirement. Even under the

64. Strictly speaking, the definition is circular since I aim to characterize corporate acts in terms of the body corporate and the body corporate in terms of corporate causation, which, as I have said, is tied to corporate action. Breaking that definitional circle will require more detailed work that goes beyond the modest theoretical ambitions of this Article. I have begun to make some steps in that direction. See generally Mihailis E. Diamantis, *Algorithms Acting Badly: A Solution from Corporate Law*, 89 GEO. WASH. L. REV. (forthcoming 2020).

aspirational definition, no corporation would be held to account for any harm to which it did not bear a culpable relation.

The response in the previous paragraph may now raise the opposite worry: Does the aspirational definition go far enough? After all, if the definition seeks to be expansive, it could go further. My proposed definition imposes a causation constraint—only those mechanisms, aspects, or features of corporations that *cause* harm qualify as part of the body corporate. By removing the causation constraint, even more harms could be attributable to corporations.

That more expansive approach would be unappealing for several reasons. First, it would generate a vision of the body corporate as omnipresent. While there may be some capitalists who would find this deific vision of the body corporate comforting, it is deeply counter-intuitive. Second, forcing the liability inquiry to consider a defendant's culpability when causation is absent is wasteful. A defendant who in no way causally contributed to a harm will have had no culpable hand in it and no way of preventing it in the future. Finally, without a causation constraint, the body corporate could no longer help the criminal law pair harms with potential corporate defendants. If one corporation is an omnipresent source of all harm under the operative definition of the body corporate, then all corporations are. This would mean that all harms would become attributable to all corporations. Causation helps narrow the criminal justice inquiry to a set of potential defendants.

The aspirational definition refers vaguely to harms that corporations cause. Clearly not all harms are relevant. Some harms are too minor to concern the criminal law, for example, the aesthetic harm of a poorly designed logo. Others may be outweighed by concurrent social benefits, for example, the harm to a competitor's market share brought about by a superior product. Others still may simply be beyond the legitimate interests of the criminal law, for example, harm to some interest groups from effective corporate speech. Rather than attempt the heroic task of characterizing the harms at issue, the conservative route I prefer is to use "harm" to refer to the sorts of harms with which criminal law currently concerns itself, that is, those harms which, if they are culpably caused, potentially subject a person to criminal sanction. Readers who find the scope of present-day criminal law's concern unappealing should substitute their preferred definition of legally relevant harm.

IV

PUTTING THE BODY CORPORATE TO WORK: RESPONDEAT INFERIOR

This Part showcases some of the work that conceptualizing the body corporate can do. It gives new critical perspectives on issues at the heart of corporate criminal law. By bringing the lens of the body corporate to bear, we can better see overlooked features of what works, what does not, and why.

Respondeat superior is the central doctrine and chief embarrassment of corporate criminal law. No scholar to my knowledge embraces it without

reservation, regardless of whether he or she otherwise supports⁶⁵ or opposes⁶⁶ corporate criminal liability. Roughly speaking, the doctrine states that corporations think what their individual employees think and they do what their individual employees do. It stands as a mockery of every purpose of corporate criminal law: retributive,⁶⁷ deterrent,⁶⁸ and rehabilitative.⁶⁹ It defies common sense, or, at least, what psychologists know about the ordinary understanding of corporate responsibility.⁷⁰ Its implicit metaphysics would puzzle any social ontologist.⁷¹ Its policy implications would make even an economist blush.⁷²

It should come as no surprise that respondeat superior does a poor job. The doctrine was not developed for criminal law. Nor even for corporate law. The doctrine has its origins in Seventeenth Century common law of agency, more than a hundred years before the first true corporation was born. Later pressed with the need for a mechanism to hold corporations liable, Congress and the courts uncritically borrowed the doctrine from agency law to civil corporate law, and then from there to criminal corporate law. They did this despite the fundamentally different goals of the different legal regimes.⁷³

Respondeat superior's critics in criminal law are right to be discontent, but not always for the right reasons. Most commentators say the doctrine is overinclusive.⁷⁴ Surely, the argument goes, it cannot be that *every* employee, at

65. See Laufer, *supra* note 10, at 678.

66. John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1358 ("By creating *respondeat superior* criminal liability, the Court authorized a form of vicarious collective punishment that is inconsistent with the fundamental principles of a liberal society.").

67. See *id.* at 1329 (arguing that "[corporate criminal liability] should be explicitly overruled" because it attributes moral responsibility where there is none).

68. Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 734 (1992) ("This use of enterprise liability cannot be defended on the ground that it promotes optimal deterrence; in fact, enterprise liability appears more likely to shelter individual wrongdoers from liability than to deter them.").

69. See Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 545 (2018) ("[Suppose] a rogue employee commits a crime—which would be attributable to the corporation via respondeat superior—and is immediately fired. The corporation who fires the rogue employee may thereby have eliminated the chance that the criminal conduct could recur. If the corporation is in no need of reform, there is no need for character-directed punishment.").

70. See, e.g., Scott T. Allison & David M. Messick, *The Group Attribution Error*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 563, 564 (1985) (discussing findings of error in "people's tendency to infer the attitudes of an entire social group strictly on the basis of one group member's behavior").

71. See, e.g., Leo Townsend, *Social Ontology: Collective Intentionality and Group Agents*, 1 J. SOC. ONTOLOGY 183, 184 (2015) (reviewing Raimo Tuomela, *SOCIAL ONTOLOGY: COLLECTIVE INTENTIONALITY AND GROUP AGENTS* (2013)) (describing Tuomela's "reticence to count groups as rational agents in the same sense, or to the same degree, as individual humans").

72. See, e.g., Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 565–81, 608–09 (1988) (weighing the efficiencies and inefficiencies of vicarious liability in different factual circumstances).

73. See generally Coffee, *supra* note 43.

74. See *infra* notes 87–95 and accompanying text.

least not the lowliest clerk⁷⁵ nor the rogue defying orders,⁷⁶ is equally identifiable with the corporation as a whole, capable of committing crime on its behalf. However, this familiar criticism, framed in terms of criminal liability, conflates the doctrine's application to the body corporate and to the corporate mind. Distinguishing the two allows for a more nuanced stance. As argued below, however right critics may be about respondeat superior's overbreadth as a doctrine for the corporate mind, it is unequivocally *underinclusive* when it comes to the body corporate.

A. The Standard View: Respondeat Superior is Overbroad

Identifying corporations with their employees for criminal law purposes—as respondeat superior does—may make some initial conceptual sense. The whole point of corporations is that they can do things—install electric grids, purchase properties, manufacture toothpaste, etc. Since corporations cannot act on their own, anything they do, the thought goes, they must do through their employees.⁷⁷

According to the standard critique, however, respondeat superior is too broad. When respondeat superior identifies corporations with their employees, it means *all* employees, from the C-suite down to the most recently hired summer recruit, and regardless of role—executive, managerial, technical, custodial, etc.⁷⁸ Arguably, though, not all employees equally embody their corporate employers. This is why the American Law Institute (ALI) endorses a more restrictive “control group” approach⁷⁹ that only attributes to corporations conduct that involves “high managerial agents.”⁸⁰ The control group approach is supposed to make more sense metaphysically by limiting corporate accountability to “those agents possessing sufficient power and responsibility within the firm that they represent ‘alter egos’ to the corporation.”⁸¹ It is also supposed to make better economic sense. Trying to induce corporations to monitor every employee all of

75. Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 110 (2006) (criticizing jury instructions that allow conviction “regardless of whether the agent in question was a low-level employee or a high-level officer”).

76. 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, 273 (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.”).

77. See The Holder Memo on Prosecuting Corporations, *supra* note 41, at 141.

78. *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962) (“[T]he corporation may be criminally bound by the acts of subordinate, even menial, employees.”).

79. It has also been called the “inner circle test.” 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, 44 (1957).

80. See MODEL PENAL CODE § 2.07(1)(c) (AM. L. INST. 2020) (requiring, as a condition of attribution to a corporation, that “the commission of the offense [be] authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment”).

81. Coffee, *supra* note 43, at 230 n.135.

the time would be a wasteful and futile project.⁸² The control group approach sets a more modest, achievable goal. Though some states have adopted the ALI's approach,⁸³ most jurisdictions, including all federal courts, have stuck with respondeat superior.⁸⁴

Judicial refinement of respondeat during the Twentieth Century has only exacerbated critics' concerns. Courts have weakened the doctrine's scope-of-employment and intent-to-benefit limitations to near inconsequentiality. An employee now works "within the scope of [her] employment" even if she acts against direct orders, violates corporate policy, and subverts compliance efforts.⁸⁵ She "intends to benefit" her corporate employer even if her intent was "befuddled," subsidiary, and in fact harmed the corporation.⁸⁶

In light of such developments, "there is virtually unanimous agreement: corporate criminal liability [under respondeat superior] is extremely broad."⁸⁷ Though there are some notable exceptions,⁸⁸ comments like the following predominate:

- "Respondeat superior is an overbroad doctrine in the criminal context . . ."⁸⁹

82. Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 764 (1992) ("The drafters of the Code appear to have believed that a corporation should not be judged culpable for the mere act of a 'rogue employee,' and attempted to correct the overinclusiveness of the doctrine of respondeat superior by providing a genuine theory of corporate entity culpability.").

83. Kathleen F. Brickley, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 630 (1988) ("[T]wenty-one states . . . have adopted a [control group test] analog.").

84. Even those who have engaged philosophically with the metaphysical status of the corporation have tended to make an uncritical analytical jump from arguments establishing the management layer's culpability to the culpability of entire organizations. See Matthew Caulfield & William S. Laufer, *Corporate Moral Agency at the Convenience of Ethics and Law*, 17 GEO. J.L. & PUB. POL'Y 953, 970–71 (2019) ("Accounts of corporate moral agency often focus on the management of corporations to establish moral agency. It is not clear . . . why these arguments result in identifying the corporation wholly as a moral agent, rather than its management team. Without a more expansive notion of agency, several of the most prominent accounts fail to establish why the entire organization is accountable as a group rather than merely the relevant management layer—Executive Board, middle management, what have you.").

85. See generally *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972) ("[W]e conclude that as a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent.").

86. *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 970 (D.C. Cir. 1998).

87. Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 59 (2007).

88. See, e.g., Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1505 (2007) ("It is also true that liability can be imposed on corporations for the actions of corporate employees, even in the absence of specific proof of corporate fault. This is not unique."); Erin L. Sheley, *Tort Answers to the Problem of Corporate Criminal Mens Rea*, 97 N.C. L. REV. 773, 777 (2019) ("I identify a significant area in which criminal respondeat superior . . . is under inclusive. Specifically, the current requirement that an employee must intend to benefit the corporation has the effect of shielding even reckless or knowing corporate employers from liability in the very worst criminal cases: those of physical and sexual violence by employees committed in connection with their employment.").

89. Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1663 (2007).

- “[Respondeat superior] create[s] an enormous risk of making corporations vulnerable to overinclusive criminal penalties.”⁹⁰
- “In the area of corporate crime, companies . . . have no choice given the overbreadth of the respondeat superior standard of liability.”⁹¹
- “[V]icarious corporate guilt [under respondeat superior] is extraordinarily broad.”⁹²

An overbroad doctrine of corporate liability is bad for criminal justice. It unfairly punishes corporations (and by extension all of their stakeholders).⁹³ It over-deters by incentivizing wasteful levels of compliance.⁹⁴ It distorts the criminal justice process by super-charging prosecutorial power.⁹⁵

B. The Better View: As to The Body Corporate, Too Narrow

Before taking corrective measures to pare back respondeat superior, we should be confident that the doctrine actually is overbroad. Otherwise, we may end up failing to hold corporations accountable when it would suit criminal justice goals to do so.

The standard view on respondeat superior is imprecise. It fails to appreciate that respondeat superior actually encompasses two doctrines—one for the body corporate (identifying corporate acts with employee acts) and one for the corporate mind (identifying corporate thoughts with employee thoughts). To say that respondeat superior is overbroad implies that, both as to body and as to mind, the doctrine includes too much. Two lines of argument would be needed, where only one is offered.

At least as to the body corporate, the standard view is clearly wrong: respondeat superior is too narrow. The aspirational definition of the body corporate offered in the previous Part would include as parts of the body corporate all aspects, features, and mechanisms of corporations that cause harm. That definition certainly encompasses individual employees. Respondeat superior gets that part right. However, by limiting itself to individual employees, the doctrine overlooks other potent sources of corporate harm. In other work, I have argued that corporate algorithms are one significant source of harm that the

90. Stacey Neumann Vu, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459, 466 (2004).

91. Julie Rose O’Sullivan, *The Federal Criminal “Code”: Return of Overfederalization*, 37 HARV. J.L. & PUB. POL’Y 57, 59 n.18 (2014).

92. Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and “Good Corporate Citizenship,”* 76 ST. JOHN’S L. REV. 979, 983–84 (2002).

93. See BARNALI CHOUDHURY & MARTIN PETRIN, CORPORATE DUTIES TO THE PUBLIC 194 (2019) (“Fundamentally, it is impossible to punish a corporation without indirectly affecting its individual stakeholders.”); Jill E. Fisch, *Criminalization of Corporate Law: The Impact on Shareholders and Other Constituents*, 2 J. BUS. TECH. L. 91, 93 (2007).

94. See Diamantis, *supra* note 22, at 324–35 (“[U]nder a broad definition of corporate knowledge, corporations would likely make wasteful investments in excessive compliance.”).

95. O’Sullivan, *supra* note 91, at 62, 67.

law should attribute to corporations.⁹⁶ The following Subpart discusses two more: collective action and corporate systems.

If the law does not hold corporations accountable for these sources of harm, it cannot induce responsible precaution. This is because the sources of harm are attributable to no one if not to a corporation.⁹⁷ Employees cannot be convicted for innocent contributions to collective harms.⁹⁸ Systems are not cognizable criminal defendants. Yet unlike other harms with no identifiable agential source—like damage from an earthquake—harms that flow out of corporations are preventable and provoke the public's retributive ire. Corporate criminal law must be able to tie such harms to corporations if it is to have any chance of punishing corporations' culpable involvement or incentivizing necessary corporate reform.

1. Collective Employee Conduct

Though respondeat superior includes every employee, it treats them as isolated parts of the body corporate. Assuming the scope and intent requirements are satisfied, each time an employee behaves, so does her corporate employer. In group contexts, the activity is often distributed across multiple group members.⁹⁹ Its collective significance can be greater than the contributions of each individual. Groups of employees can engage in harmful conduct without any individual employee doing the same. Conspiracy and complicity can help with cases where there is a coordinating hand or implicit agreement. However, those doctrines have no applicability in common cases where individuals are ignorant of their collective effect.

This is a familiar point to joint action theorists.¹⁰⁰ Some joint actions involve participants each fully performing the action they jointly perform. If two people walk together, they both walk. Other joint actions, however, involve participants

96. See Diamantis, *supra* note 64 (manuscript at 8) (“Corporations develop, run, and maintain the world’s most impactful algorithms. In such cases, I claim that algorithmic action is a species of corporate action Recognizing that corporations act through their algorithms would similarly encourage corporations to exercise responsible control over algorithmic injuries.”).

97. In certain circumstances, the collective action of individual employees may be attributable to corporate officers. See, e.g., *United States v. Dotterweich*, 320 U.S. 277, 278, 281, 285 (1943) (convicting the individual officer but acquitting the corporation); *United States v. Park*, 421 U.S. 658, 660, 676–78 (1975) (holding liable the president of the corporation for violations resulting from food exposed to rodent contamination).

98. The employees in *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987), were all acquitted. The bank was convicted because their innocent acts aggregated to corporate misconduct. See *id.* at 856–59 (“Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation’s knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect . . .”).

99. *Vu*, *supra* note 44, at 471 (“The deeds of any number of employees . . . can collectively embody the actus reus for a single corporate crime.”).

100. See generally MICHAEL E. BRATMAN, *SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER* (2014) (discussing the foundations of sociality).

each making an incomplete contribution. If four people lift a heavy cart, they lift it together; none does it individually. If two people bake a cake, one person cracks the eggs, the other beats them; neither standing alone makes a cake. Such effects can also happen unintentionally, as when we all cause a traffic jam by leaving when the workday ends; none of us intends to cause a traffic jam. Indeed, we probably all prefer for traffic to flow freely. To see the joint action for what it is, one has to aggregate the individual contributions.

A similar sort of problem (and more familiar to corporate lawyers) arises for the corporate mind. For example, knowledge can be distributed across multiple employees, each knowing some relevant facts but none knowing them all. One employee may know that certain transactions must be reported to authorities. Another may know that such a transaction has occurred. And yet, neither may know that a report is owed.¹⁰¹ Under a strict respondeat superior approach to the corporate mind, the corporation also would be ignorant of the required report. This is because respondeat superior only lifts mental states from individual employees for attribution to employers. The doctrine thereby gives corporations a way to immunize themselves from liability for certain crimes. They only have to keep information dispersed and prevent any individual employee from knowing too much. To close this liability loophole, a minority of jurisdictions¹⁰² supplement respondeat superior with a mental state aggregation principle: the collective knowledge doctrine.¹⁰³ In these jurisdictions, corporations know each separate fact known by each employee (what the reporting threshold is and that the threshold has been surpassed) *and know all the facts together* (that a report must be filed).¹⁰⁴

Respondeat superior includes no equivalent aggregation principle for corporate action. This is a product of the fact that respondeat superior, as applied by criminal courts, only attributes employees' misconduct to corporations. If no employee acts wrongfully—perhaps because each only does some small part of a wrongful act—no employee forms part of the criminal law's understanding of the body corporate.¹⁰⁵

101. See, e.g., *Bank of New England*, 821 F.2d at 847–48 (affirming a corporate defendant's convictions for failure to file currency transaction reports according to timing requirements under the Currency Transaction Reporting Act).

102. See Bharara, *supra* note 87, at 64 (“The collective knowledge doctrine has also received significant attention in the literature, much of it negative.”).

103. See *Bank of New England*, 821 F.2d at 856 (discussing the collective knowledge doctrine).

104. Actually, even aggregation is not enough; the court must also allow attribution of logical inferences from the aggregate knowledge. See generally Diamantis, *supra* note 8 (discussing a new approach that would allow factfinders to attribute mental states to corporations as they do to natural people).

105. The leading case on aggregating innocent employee contributions to criminal conduct is *Bank of New England*. That case focused on aggregating employee mental states rather than acts. The act element of the statute at issue was an omission—failing to file a report. Aggregation is a non-issue for omission crimes. *Bank of New England*, 821 F.2d at 847 (“The Act imposes felony liability when a bank willfully fails to file such reports . . .”).

This is counterintuitive and a clear shortfall from the aspirational definition of the body corporate. For natural people, it would be as if the criminal law treated the operation of each body part separately—a hand could close each finger individually, but not make a fist. For corporate people, it leads to similar absurdities. If a single employee performs all the behavior constituting a harmful act, then the corporation, acting through her, did too. However, if different employees each perform discrete parts of the same act causing the same harm, they do not act as parts of the criminal law’s conception of the body corporate.¹⁰⁶ Just as with culpable knowledge in the absence of a knowledge aggregation principle, respondeat superior’s approach to corporate action sets up a liability loophole.

Consider, for example, a case where several agents of a corporation, without any coordination between them, make separate, relatively small payments to a foreign official to secure progress on some business enterprise. While the Foreign Corrupt Practices Act prohibits bribes of foreign officials, it does not apply to “facilitating . . . payment[s],” which are made “to expedite or to secure the performance of a routine governmental action.”¹⁰⁷ While the line between facilitating payments and bribes is notoriously hard to draw,¹⁰⁸ the size of the payment can play an important role.¹⁰⁹ Under the strict terms of respondeat superior, the corporation in the example only ever made innocent facilitating payments—that, after all, is all that each individual employee did. Consider, though, that the payments taken together could have the sort of corrupting influence that anti-bribery laws are supposed to target. The law has a self-inflicted blind spot.

The aspirational definition of the body corporate offers a better approach. It would do for individual employee action what the collective knowledge doctrine does for individual employee knowledge: aggregate and attribute. Employees acting together are no less parts of a corporation than employees acting separately because they can cause harm while acting together just as often as, and even more than, they can while acting individually. By aggregating the facilitation

106. I am assuming there are no further acts manifesting agreement or encouragement between the employees.

107. 15 U.S.C. § 78dd–2(b) (2018).

108. See generally Charles B. Weinograd, *Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception*, 50 VA. J. INT’L L. 509 (2010) (discussing the vague nature of the routine governmental action exception); U.S. DEP’T OF JUSTICE, CRIM. DIV. & U.S. SEC. & EXCH. COMM’N, ENF’T DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 25 (2012) (“Whether a payment falls within the exception is not dependent on the size of the payment, though size can be telling . . .”).

109. Morgan Chu & Daniel Magraw, *The Deductibility of Questionable Foreign Payments*, 87 YALE L.J. 1091, 1119–20 (1978) (“Nondeductible bribes and deductible extortion payments might also be distinguished by their size. The size of Octopus’s \$100,000 payment to the agent suggests that it was not made to obtain a service or result that would ordinarily be forthcoming from the government. By contrast, the size of the \$200 payment to the harbormaster suggests that it was nothing more than a ‘grease payment’ to facilitate that which should ordinarily be forthcoming to the payor.”).

payments in the previous example, the true and potentially corrupt relationship between the corporation and the foreign official may come into focus. The aspirational approach to the body corporate would recognize this by identifying all employees as simultaneous parts of the body corporate. On this account, corporations act through them, doing all they do, regardless of whether the acts are simultaneous or sequential, performed by just one employee or dispersed across many.

2. Corporate Systems

Organizational scientists have long recognized that corporate-level systems can be just as important as employees in shaping what corporations do.¹¹⁰ “Organizations are systems . . . not just aggregations of individuals.”¹¹¹ Corporate ethos or culture has a significant influence on how a corporation impacts the world around it.¹¹² Corporate culture is premised on shared understandings, practices, and histories that bring some features of the environment to social salience.¹¹³ A corporation, for example, may have an ethical culture characterized by a shared practical orientation toward honesty and integrity as overriding concerns. Alternatively, honesty and integrity may recede into the background if personal performance metrics become the salient social currency. Business ethicists and corporate scholars have had an enduring interest in how corporate culture shapes employee behavior and how to change corporate culture to make it a positive influence.¹¹⁴ “Corporate crime can be produced by an organization’s structure, its culture, its unquestioned assumptions, or its very *modus operandi*.”¹¹⁵ Underwriters who use sophisticated analysis to price corporate

110. I have previously argued that such structures and systems may even be what corporations essentially are. *See generally* Mihailis E. Diamantis, *Corporate Essence and Identity in Criminal Law*, 154 J. BUS. ETHICS 955 (2019) (developing a theory of corporate personal identity); Mihailis E. Diamantis, *Successor Identity*, 36 YALE J. ON REG. 1 (2019) (offering an approach to successor liability premised on corporate personal identity).

111. Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468, 479 (1988). *See also* Joey P. Cornelissen, S. Alexander Haslam & John M. T. Balmer, *Social Identity, Organizational 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 behavior that is qualitatively different from that associated with lower-order identities . . .”).

112. *See, e.g.*, FIONA HAINES, CORPORATE REGULATION: BEYOND ‘PUNISH OR PERSUADE’ 25 (1997) (“Organizational culture forms the ‘touchstone’ by which individuals behave and act.”).

113. *See generally* EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1949) (analyzing white collar crime through a detailed investigation of legal violations by various large corporations).

114. *See, e.g.*, Bucy, *supra* note 11, at 1099–101 (discussing how corporate ethos can “encourage” certain kinds of employee behavior); Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3, 30, 64 (2012); Moore, *supra* note 82, at 753 (characterizing corporate character in terms of the “goals, rules, policies, and procedures that are features of the corporation as an entity”); Martin L. Needleman & Carolyn Needleman, *Organizational Crime: Two Models of Criminogenesis*, 20 SOC. Q. 517 (1979).

115. Frank Pearce, *Crime and Capitalist Business Corporations*, in CRIMES OF PRIVILEGE: READINGS IN WHITE-COLLAR CRIME 35, 35–37 (Neal Shover & John Paul Wright eds., 2001).

insurance maintain that corporate “[c]ulture and character . . . are at least as important as and perhaps more important than other, more readily observable” risk factors.¹¹⁶

Corporate policies and procedures also influence the opportunities and incentives employees have to engage in certain forms of behavior. Aggressive quotas and productivity-based compensation metrics can encourage employees—who wish to keep their job and advance in it—to prioritize numbers over more humanistic concerns.¹¹⁷ Organization-level features can also discourage certain forms of behavior, by increasing detection rates and exposing employees who engage in that behavior to penalties.¹¹⁸ Other systems can operate more directly by enabling or disabling certain courses of conduct—an employee who lacks credentials to access customer accounts cannot misuse them.

In earlier work, I referred to such corporate systems as partially constituting a corporation’s “character.”¹¹⁹ I discussed the role that character could play in helping the law to calibrate corporate punishment.¹²⁰ Here the emphasis is different. Corporate systems should be considered part of the body corporate because they shape what corporations do and whether and how corporations cause harm. While respondeat superior focuses exclusively on employee behavior, corporate systems are sometimes the more potent source of corporate misconduct. Employees adapt to corporate procedures, rules, and culture.¹²¹ This means that otherwise upstanding individuals can find themselves and their workplace shaped by defective corporate systems. From this perspective, individuals can become fungible parts of a corrupt body corporate. In such systems, “[p]ersonnel changes will seldom lead to real changes in the organization’s behavior and work processes.”¹²² Corporate systems can take on a life and momentum of their own, shaping all levels of the corporate hierarchy.¹²³

116. Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors’ & Officers’ Liability Insurance Market*, 74 U. CHI. L. REV. 487, 517 (2007).

117. E. Scott Reckard, *Wells Fargo’s Pressure-Cooker Sales Culture Comes at a Cost*, L.A. TIMES (Dec. 21, 2013), <https://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html> [<https://perma.cc/Z9BT-G49P>] (discussing how the high-pressure sales environment of Wells Fargo led to large-scale moral and ethical breaches).

118. Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, in PROSECUTORS IN THE BOARDROOM 11, 18 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

119. See generally Diamantis, *supra* note 8.

120. See generally Diamantis, *supra* note 69.

121. JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 427 (1990) (“[Employees] take on the obligations and expectations, the goals and resources, associated with their positions in the way they put on work clothes for their jobs.”).

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

123. Gilbert Geis, *Corporate and Governmental Deviance: Origins, Patterns, and Reactions*, in CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY 7 (M. David Ermann & Richard J. Lundman eds., 5th ed. 1996).

The systems, rather than the employees who operate within them, are sometimes the root cause of criminal harm.

To some extent, there is overlap between adding corporate systems and adding aggregate employee behavior to the body corporate. Since a significant way in which systems have their effect is by impacting how employees behave, aggregate employee behavior could technically capture this effect. However, a systems-level perspective can sometimes make corporate behavior more perspicuous than trying to aggregate individual contributions. For example, suppose a corporation conceals damaging information from regulators. One could describe what the corporation did as the aggregate effect of individual decisions by hundreds of employees about whether and what information to report up the corporate hierarchy. Alternatively, one could describe it, supposing the facts were supportive, as the effect of a standing internal norm or policy against acknowledging compromising information.

While both employee-level and systems-level accounts show how the corporation caused the harmful effect (concealing information from regulators), distinctly conceptualizing the systems-level account is important for a few reasons. First, it gives enforcement authorities a conceptual lens that may make it easier to apprehend and evaluate what the corporation is doing. Second, the systems-level account can give insight into the depth and significance of the misconduct. Employee behavior that coincidentally amounts in the aggregate to a non-reporting event is very different from behavior that is coordinated by explicit or implicit norms. And third, legitimating the systems-level explanation can help in the courtroom where prosecutors have to explain corporate misconduct in intuitive terms to lay jurors.

There is also some harm attribution that a systems-level account of corporate conduct can accomplish that the aggregate employee behavior account cannot. This is because there are circumstances in which what employees are doing crucially depends on the organizational context in which they are doing it. Suppose, for example, that a mid-level employee is making compensation and promotion decisions for her subordinates. Looking back on the final decisions she made, people who exceeded performance quotas were more likely to receive bonuses and promotions, regardless of how well they fared in compliance audits of their work. Whether awarding the bonuses and promotions constitutes encouragement to shirk compliance standards, to boost productivity, or both, might turn on the policies and procedures that the mid-level manager followed. It makes a big difference whether the corporation's formal compensation metrics explicitly discount audit results, explicitly award points for exceeding quota expectations, or leave decisions entirely to the discretion of mid-level management.

V

CONCLUSION: FLESHING OUT THE BODY CORPORATE

By distinguishing the body corporate from the corporate mind, corporate law could claim for itself some of the nuance available to law as applied to individuals. Presently, corporate law attributes both acts and mental states under a single doctrine. By defining the body corporate, this Article opens the possibility of treating them separately, with different doctrines better tailored to their functional roles in the administration of justice. Regardless of what the best account of the corporate mind is, the law should not rely on an overly narrow conception of the body corporate that is blind to many harms corporations cause. After the full breadth of the harms that corporate bodies cause is on the table, an enlightened understanding of the corporate mind can set to work helping identify which corporations are culpable for the harms they cause.

Even if the aspirational definition of the body corporate—which identifies corporate bodies with all aspects, mechanisms, and features of corporations that cause harm—is correct, it is incomplete. It presumes that we have some way of determining which aspects, mechanisms, and features belong to a corporation and to which corporation they belong. The presentation above implicitly relied on an intuitive sense of how to pair corporations with aspects, mechanisms, and features. In the absence of a worked-out theory or a formal doctrine, the need for that intuitive sensibility means that the definition of the body corporate remains incomplete. When, for example, is a mechanism that causes harm part of a corporation and when is it a part of the regulatory environment of the industry in which it operates? If two corporations share a mechanism—perhaps one corporation leases a warehouse from another—to which does it belong? A general theory of the body corporate would help the law determine which aspects, mechanisms, and features of corporations are associated with which corporate body. That is a task for future work.