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A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity

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A PRAGMATIC CRITIQUE OF CORPORATE CRIMINAL THEORY: LESSONS FROM THE EXTREMITY

*James G. Stewart**

Corporate criminal liability is a controversial beast. To a large extent, the controversies surround three core questions: first, whether there is a basic conceptual justification for using a system of criminal justice constructed for individuals against inanimate entities like corporations; second, what value corporate criminal liability could have given co-existent possibilities of civil redress against them; and third, whether corporate criminal liability has any added value over and above individual criminal responsibility of corporate officers. This article uses examples from the frontiers of international criminal justice to criticize all sides of these debates. In particular, I highlight the shortcomings of corporate criminal theory to date by examining the latent possibility of prosecuting corporate actors for the pillage of natural resources and for complicity through the supply of weapons. Throughout, the article draws on principles derived from philosophical and legal pragmatism to reveal a set of recurring analytical flaws in this literature. These include: a tendency to presuppose a perfect single jurisdiction that overlooks globalization, the blind projection of local theories of corporate criminal responsibility onto global corporate practices; and a perspective that sometimes seems insensitive to the plight of the many who have fallen victim to corporate crime in the developing world. To begin anew, we need to embrace a pragmatic theory of corporate criminal liability that is forced upon us in a world as complex, unequal, and dysfunctional as that we presently inhabit.

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“When the formalist dream of finding invariant meanings underwritten by God or the structure of rationality is exploded, what remains is not dust and ashes but the solidity and plasticity of the world human beings continually make and remake.”

Stanley Fish¹

I. INTRODUCTION

The history of corporate criminal liability is pragmatic. In the United States, the seminal decision authorizing the curious practice of holding corporations criminally responsible explicitly reasoned that disallowing the practice “would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.”² Corporate criminal liability was, in effect, a practical necessity given the absence of other viable forms of redress. The rapid uptake of corporate criminal liability in Europe several decades later was inspired by similar thinking. In calling European nations to embrace corporate criminal responsibility despite the anthropomorphism inherent in treating inanimate entities as having mental states, the Council of Europe argued that individual criminal liability of corporate officers left an unacceptable regulatory gap, which corporate criminal responsibility could fill.³ In both

¹ Stanley Fish, *Truth and Toilets: Pragmatism and the Practices of Life*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 418, 419 (Morris Dickstein ed., 1998).

² *New York Central R. Co. v. United States*, 212 U.S. 481, 496 (1909). See also Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASHINGTON UNIVERSITY LAW QUARTERLY 393, 421–422 (1982). (concluding that within Anglo-American systems, “recognition of corporate criminal accountability constituted a more effective response to problems created by corporate business activities than did existing private remedies.”).

³ In 1988, the Council of Europe recommended that European states rapidly overcome their earlier misgivings with corporate criminal liability, on the bases of “the increasing number of criminal offences committed in the exercise of the activities of enterprises which cause considerable damage to both individuals and the community” and “the difficulty, rooted in the legal traditions of many European states, of rendering enterprises which are corporate bodies criminally liable.” See, Council of Europe, Recommendation no. R (88) 18 of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their

instances, the justifications for the concept were, first and foremost, highly pragmatic.

By no small coincidence, these events took place (in the United States at least) at almost precisely the same time as the advent of philosophical pragmatism. In 1907, only two years prior to the US Supreme Court's landmark decision approving corporate criminal liability, William James published his celebrated philosophical text, *Pragmatism*.⁴ James was a gentleman. While he accepted credit for the label, he magnanimously conceded that the underlying theory originated with his friend Charles Peirce.⁵ The great philosopher John Dewey continued the burgeoning pragmatic philosophical tradition,⁶ before it fell into a long period of stasis, only to be resurrected by Richard Rorty some thirty years later.⁷ While there is much variation within the school these philosophers initiated, they shared a distaste for what they describe as "philosophical escapism." For the philosophical pragmatists, the rest of philosophy had become overly abstract, self-referential, and practically disengaged.

In the past decades, scholars have incorporated aspects of this philosophical tradition into legal theory, claiming to have developed a middle way between legal formalism and realism. A number of distinguished legal theorists have adopted some variant of legal pragmatism as a methodology,⁸ but none more prominent than Richard Posner.⁹ Initially an academic pioneer of law and economics then an appellate judge in the United States, Posner's work on pragmatism sought to censure the tendency, in his view rife within the legal academy, to offer theories that amounted to little more than "highfalutin rhetoric of absolutes."¹⁰ Instead of engaging with these absolute theories, Posner maintained that his iteration of legal pragmatism was normatively preferable. For Posner, his approach entailed "a disposition to base action

Activities (adopted by the Committee of Ministers on 20 October 1988 at the 420th meeting of the Ministers' Deputies).

⁴ WILLIAM JAMES, *PRAGMATISM* (1995).

⁵ Charles S. Peirce, *How to Make Our Ideas Clear*, 12 *POPULAR SCIENCE MONTHLY* 286 (1878); Charles S. Peirce, *The Fixation of Belief*, 12 *POPULAR SCIENCE* 1 (1877).

⁶ See, in particular, JOHN DEWEY, *EXPERIENCE AND NATURE* (2008).

⁷ RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1981); For a beautiful discussion about the relationship between pragmatic philosophy and law, see Richard Rorty, *Pragmatism and Law: A Response to David Luban*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE*, *supra* note 1 at 304.

⁸ See in particular, JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2003).

⁹ Posner's most prominent text on pragmatism is RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2005).

¹⁰ POSNER, *supra* note 9, at 12.

on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans.”¹¹

Strangely, though, legal pragmatism has not been harnessed to criticize corporate criminal theory, despite this concept’s unquestionable origins in highly pragmatic thinking and its remarkable coincidence with the rise of philosophical pragmatism. However, only legal pragmatism can offer anything approaching an adequate account of corporate criminal liability in its full complexity, which must account for the following variables: the application of corporate criminal liability to crimes that vary from tax evasion to genocide; corporate actors as diverse as gigantic multinationals enterprises whose revenues exceed those of most states and closely held family businesses; corporations operating uniquely within the borders of a single state and those engaged in transactions across the four corners of an increasingly globalized planet; and companies that are incorporated for profit as compared with others that pursue charity. What theory can account for the innumerable contingencies corporate criminal theory must navigate in these circumstances, other than a pragmatic theory that resists absolute claims?

Two examples from the frontiers of international criminal justice substantiate this point. The first involves corporate responsibility for the war crime of pillage, for illegally exploiting natural resources from modern conflict zones. Modern national courts not only enjoy jurisdiction over corporations who perpetrate this war crime,¹² they can draw on a rich body of precedent to articulate the parameters of the offense as applied to corporations.¹³ For instance, at the end of the Second World War, a range of corporate officers from German businesses were prosecuted for pillaging natural resources like coal, iron and oil,¹⁴ all of which were exploited to fuel the Nazi apparatus. But since then, legally comparable commercial practices have led to little real accountability, despite the fact that illegal exploitation of natural resources from conflict zones has substituted for superpower sponsorship as a predominant means of

¹¹ *Id.* at 3.

¹² For an overview of the law likely to govern corporate responsibility for pillaging natural resources from conflict zones, including the bases upon which many national courts can prosecute corporations for international crimes like pillage, see JAMES G. STEWART, *CORPORATE WAR CRIMES: PROSECUTING PILLAGE OF NATURAL RESOURCES* (2010).

¹³ *Id.*

¹⁴ *Id.* Walther Funk has convicted of pillage achieved through his role in the management of a commercial enterprise named the Continental Oil Company, which exploited crude oil throughout occupied Europe; Paul Pleiger, the manager of a company known by the acronym BHO, guilty of pillaging coal from mines located in Poland; convicting businessman Hermann Roechling for pillage after he seized and exploited steel plants at Moselle and Meurthe-et-Moselle that yielded 9 million tons of liquid steel per annum.

conflict financing since the end of the Cold War.¹⁵ Coupling corporate criminal liability, the war crime of pillage and the jurisdiction of domestic courts over these crimes offers a new means of ending this impunity, which is very much in keeping with the pragmatic origins of corporate criminal liability as a concept.

The second illustration looks to the arms industry. Advocates suggest that over 2,000 civilians die each week from weapons-related injuries, many at the hands of notoriously brutal regimes that acquired this weaponry from corporations.¹⁶ I argue that under certain circumstances, corporations that manufacturer, sell and distribute weaponry become complicit in the international crimes their commerce enables.¹⁷ To draw again on illustrations from practice, corporate officers were prosecuted for selling the chemicals used to asphyxiate civilians at Auschwitz after WWII,¹⁸ and modern courts have also begun to prosecute individual arms vendors for complicity in international crimes for knowingly transferring weapons to recipients who use them to perpetrate atrocities.¹⁹ While these precedents are presently focused on corporate officers as individuals, a turn to corporations is imminent. In good pragmatic tradition, this shift is likely to appeal given the paucity of other viable avenues for redress.

What then are the key tenets of legal pragmatism, and how do these examples from the forefront of international criminal justice help

¹⁵ PHILIPPE LE BILLON, *WARS OF PLUNDER: CONFLICTS, PROFITS AND THE POLITICS OF RESOURCES* (2012); *NATURAL RESOURCES AND VIOLENT CONFLICT: OPTIONS AND ACTIONS*, (Ian Bannon & Paul Collier eds., 2003); MICHAEL KLARE, *RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT* (2002).

¹⁶ ANDREW FEINSTEIN, *THE SHADOW WORLD: INSIDE THE GLOBAL ARMS TRADE* (2011); LORA LUMPE, *RUNNING GUNS: THE GLOBAL BLACK MARKET IN SMALL ARMS* (2000); RACHEL STOHL & SUZETTE GRILLOT, *THE INTERNATIONAL ARMS TRADE* (2009).

¹⁷ I concede that this point is not beyond dispute as a matter of criminal theory. See R A Duff, "Can I Help You?" *Accessorial Liability and the Intention to Assist*, 10 *LEGAL STUDIES* 165 (1990) (arguing that using complicity in the ordinary course of business is structurally akin to omission liability since it requires the businessperson to break with their usual course of conduct). For different views that use arms vendors as examples of accessorial liability, see John Gardner, *Complicity and Causality*, 1 *CRIM. LAW AND PHILOS.* 127 (2007); CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* (2000).

¹⁸ Trial of Bruno Tesch and Two Others (The Zyklon B Case), British Military Court, Hamburg, 1 *Law Report of Trials of War Criminals*, 93 (March 8, 1946).

¹⁹ Prosecutor v. Van Anraat, Netherlands, LJN: BA6734, Gerechtshof 's-Gravenhage , 2200050906-2, (May 9, 2007) (charging Frans Van Anraat with complicity in genocide and war crimes for selling chemical weapons to Saddam Hussein, that were ultimately used to gas civilians); Prosecutor v. Kouwenhoven, Netherlands, LJN: AY5160, Rechtbank 's-Gravenhage , 09/750001-05 (July 28, 2006) (charging Guus Kouwenhoven with complicity in international crimes perpetrated by Charles Taylor's regime in Liberia).

demonstrate its necessity in corporate criminal theory? To begin, note that there is little agreement among self-styled pragmatists about the content of their method, which requires that I pick and choose certain themes to inform this critique.²⁰ In so doing, I neither concur with the controversial conclusions some pragmatists reach,²¹ nor defend pragmatism against its many detractors.²² Instead, I use five central themes distilled from philosophical and legal pragmatism in order to highlight significant structural flaws in thinking about corporate crime. In many respects, examples from international criminal justice suit these purposes ideally; their extreme nature allows us to test the integrity of categorical models from the periphery rather than the core, and the highly transnational character of the underlying transactions upsets the state-centric thinking that animates many existing accounts of corporate criminal liability. Let me proceed, then, to introduce the five pragmatic themes.

First, pragmatism rejects abstract theories that are absolute in formulation. In its philosophical guise, this arises from an anti-foundationalist view of epistemology, which denies that there are fundamental and indubitable truths. As John Dewey explains, when a theory is “[n]ot tested by being employed to see what it leads to in ordinary experience and what new meanings it contributes, this subject-matter becomes arbitrary, aloof—what is called ‘abstract’ when that word is used in a bad sense to designate something which exclusively occupies a realm of its own without contact with the things of ordinary experience.”²³ Once incorporated into legal theory, this idea clashes with formalism—the notion that abstract concepts rationally applied mechanically produce specific answers in concrete cases.²⁴ By contrast, pragmatists distrust “pretensions of totalizing Big Think theories to

²⁰ To some extent, many scholars consider that legal pragmatism can stand apart from its predecessor philosophical pragmatism, but I choose to draw from both traditions. Thomas C. Grey, *Freestanding Legal Pragmatism*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE*, *supra* note 1, at 254.

²¹ I am opposed, for instance, to Posner’s reasoning about the role of pragmatism in the war on terror. See POSNER, *supra* note 9.

²² RONALD DWORKIN, *LAW’S EMPIRE* 150–153 (1986); BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* 26–57 (1999); David Luban, *What’s Pragmatic about Legal Pragmatism?*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE*, *supra* note 1.

²³ DEWEY, *supra* note 6, at 6.

²⁴ BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* 35 (1999) (discussing formalism within the context of pragmatism more broadly).

capture all that is important in law.”²⁵ And yet, as we will soon see, existing theories of corporate criminal liability are almost invariably couched in absolutist terms, in ways pragmatism is so keen to expose as either fallacious or meaningless.

Second, pragmatism evaluates the merit of a theory in purely instrumental terms. In the earliest stages of this critical philosophy, William James famously announced that pragmatism “has no particular results. It has no dogmas, and no doctrines save its method.”²⁶ The quintessence of the method he imagined was to dispassionately ascertain whether a given theory was “good for anything.”²⁷ To return to Dewey, the acid test of any philosophical concept is: “[d]oes it end in conclusions which, when they are referred back to ordinary life-experiences and their predicaments, render them more significant, more luminous to us, and make our dealings with them more fruitful.”²⁸ Alas, I fear that the answer to this question for much of current corporate criminal theory is no, and that cases at the brink of international criminal justice help expose this reality most clearly.

Third, pragmatists undertake their assessment of theories with great sensitivity to context. In keeping with the understanding that truth is dynamic, not eternal, many pragmatists look to realities within particular historical and cultural contexts to gauge the merit of conceptual models.²⁹ In the legal realm, Thomas Grey eloquently argues that “[p]ragmatists remind lawyers that their activities are complex and multifarious, and unlikely to be completely accounted for by any single theory, however compelling its application in any particular context.”³⁰ Despite this warning, much of the literature offering theoretical accounts of corporate criminal liability is universal in conception but informed by only a single context. Corporate responsibility for tax fraud in Delaware need not hold to the same conceptual principles as corporate war crimes in Iraq, the Congo or East Timor, but theorists often gloss over these nuances, offering accounts that presume one-size-fits-all.

²⁵ David Luban, *What's Pragmatic about Legal Pragmatism?*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE*, *supra* note 1, at 275.

²⁶ JAMES, *supra* note 4, at 47.

²⁷ Grey, *supra* note 20, at 265. (Pragmatists ask, in assessing theories, what good they are for anything”).

²⁸ DEWEY, *supra* note 6, at 9–10.

²⁹ POSNER, *supra* note 9, at 52. (“pragmatists justify their recommendations contextually. They see the quest for livable ethical principles as arising from concrete practices and predicaments, situated in particular historical and cultural contexts.”)

³⁰ Grey, *supra* note 20, at 266.

Beneath this commitment to assessing theories in context lies an associated concern about perspective. Because truth is contingent rather than universal, the perspective of those offering theoretical explanations colors the validity of their conceptual models. In addressing this point, Martha Minow and Elizabeth Spelman emphasize “how apparently neutral and universal rules in effect burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual, adult men for whom those rules were actually written.”³¹ Even if some of these biases are less obvious in the context of corporate criminal theory, many commentators do assume a *single perfect jurisdiction*, which plays down widespread corporate crimes in the Global South, and in the case of international crimes in particular, their terrible continuity with colonialism and slavery. Asking how to best achieve justice for corporate crimes in these contexts inserts a new perspective that immediately disrupts the discourse.

Fourth, and relatedly, pragmatists are weary of universalizing local experience. In a world where truth is malleable and dynamic, conceptual principles that are valid within one community are not immediately transposable across all manifestations of the phenomena. As Dewey puts it, we should resist the temptation to “transform purely immediate qualities of local things into generic relationships.”³² This proposition perhaps warrants no real emphasis in an age that has finally begun to embrace legal pluralism, and yet in some instances, corporate criminal theory still contravenes this principle by adopting a parochial understanding of the concept even though others exist elsewhere and by overlooking that many corporations are operating in contexts that are not local, i.e., in countries foreign to theorists. At points, this tendency in corporate criminal theory is so pronounced that it risks substantiating Richard Posner’s concern that “[o]ur minds race ahead of themselves... inclining us to universalize our local, limited insights.”³³

Fifth, pragmatism is committed to experimentation. As a philosophical principle, pragmatism “is eclectic, a thing of compromises, that seeks a *modus vivendi* above all things.”³⁴ This implies a desire for rigorous conceptual explanations, but ones that are consistent with practice rather than pure abstractions in the sense pejorative to pragmatists. So, contrary to Posner’s appreciation of the concept, pragmatism does not eschew moral theorizing or its relevance to law; it recommends instead that each

³¹ Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1601 (1989).

³² DEWEY, *supra* note 6, at 128–129.

³³ POSNER, *supra* note 9, at 5.

³⁴ JAMES, *supra* note 4, at 25.

and every conceptual ideal is tested in the laboratory of real-world experience.³⁵ On a superficial level, all of our attempts to regulate the might of corporate power follow this model, from the advent of corporate criminal liability to the Alien Tort Claims Act and beyond. The challenge is for theoretical understandings to catch up with these ongoing acts of experimentation, which will soon move into a new international phase. In a world as complex and dysfunctional as that we inhabit, experimentation like this is a necessity.

Finally, let me qualify the foregoing and situate these principles within criticisms of pragmatism. On the one hand, I remain agnostic about pragmatism as an interpretative technique, and I certainly see enormous value in an ongoing engagement between philosophy and law. I am also almost entirely on board with Henry Smith's thoughtful argument that "[l]egal pragmatism is best understood as a kind of exhortation about theorizing; its function is not to say things that lawyers and judges do not know, but rather to remind lawyers and judges of what they already believe but often fail to practice."³⁶ While most of the key tenets of pragmatism are just basic measures of any defensible theory, there is still something unique to the pragmatic method in an area such as corporate criminal theory, where the contingencies are immense and cannot be known ahead of time. In essence, at least here, pragmatism has unique value. Thus, we should embrace a pragmatic theory of corporate criminal liability that circumstance forces upon us.

My argument elaborating on these views proceeds in three phases. Having set out basic themes of legal pragmatism that I use as benchmarks throughout the remainder of this article, Part II addresses both sides of the arguments for and against corporate criminal liability as a concept. Those who argue that we need corporate criminal liability may be correct as a generic policy, but their arguments cannot be universalized for every iteration of corporate offending. Likewise, attempts to account for the guilt of corporations in retributive terms are, sometimes by their own admission, contingent in ways that often pass unnoticed. Part III then employs the same methodology to criticize debates about the relative merit of corporate criminal liability as compared with corporate civil liability. Here, we witness violations of all principles pragmatists revere: local experience universalized without regard to context, perspective or heterogeneity in the real world. Part IV continues the pragmatic critique by highlighting how many of the arguments for corporate criminal liability over and above individual liability of corporate officers do not

³⁵ Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 708 (2003).

³⁶ Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 411 (1990).

automatically apply to international crimes. I conclude by arguing that in order to make sense of all this, we require a entirely new pragmatic model that grapples with the many hidden variables, appreciates the vast array of applicable laws as best possible, and develops conceptual priorities that operate on a provisional not fixed basis.

II. JUSTIFICATIONS OF CORPORATE CRIMINAL LIABILITY

Corporate criminal liability is a controversial creature. To essentialize the competing arguments, the debate is between those who argue we need corporate criminal liability and others who complain that it jeopardizes the criminal law's exclusively individualistic focus, thereby endangering the discipline and society. Indeed, when puzzling over the curious practice of blaming inanimate entities, many doubt "the justice and wisdom of imposing a stigma of moral blame in the absence of blameworthiness in the actor."³⁷ In this section, I criticize both sides of this debate, arguing that much of this discourse has fallen into the unconvincing habit of over-generalization, in ways that contravene almost all of the tenets pragmatists hold dear. Once we correct for these structural flaws, as the advent of corporate responsibility for international crimes will demand, we begin to observe the highly contingent character of arguments for and against corporate criminal liability. This, in turn, should lead inexorably to the triumph of a pragmatic, not absolute, explanation of the concept.

A. *The Occasionally Overstated Need for Corporate Criminal Liability*

If one were to reduce consequentialist accounts of corporate criminal liability to a slogan, it might be this: one legal fiction deserves another. The decision to grant corporations personhood was the original conceptual evil, so having endorsed this initial untruth, we should at least follow the fiction through to its logical conclusion. Otherwise, if we tolerate the half measure, corporations are assigned all the normal human propensity for causing harm, but no possibility of being called to account before one of society's strongest means of expressing moral condemnation. Put differently, to entertain the magical thinking that corporations are people to the tremendous benefit of these entities, then to slam the door on arguments that they should be held responsible like

³⁷Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 UNIVERSITY OF CHICAGO LAW REVIEW 422, 422 (1963).

people seems badly lop-sided. In the name of consistency, we need corporate criminal liability to balance the conceptual scales; we need a second lie to counterbalance the first.

But on closer inspection, the idea of pursuing the fallacy to its logical ends invites dangerous floodgates arguments in two directions. In the first, does this commitment mean that we could also have a corporation as President of the United States? In the second, would the theory of moral agency this would entail also mean that states, rebel groups, international organizations and the Holy See could be held criminally responsible? If not, why? Without clear philosophical parameters preventing this multi-directional slippage, the argument for complete embrace of corporate personality seems too absolute, in ways pragmatists rightly reject. Legislatures and courts do not adopt corporate criminal liability because of its philosophical coherence within the surrounding legal system, they do so out of a very pragmatic concern that there is no other meaningful option.

It is not difficult to sympathize with the anxiety that feeds this posture—evidence of corporate power makes for staggering reading. Of the 100 largest economies in the world, 51 are corporations,³⁸ and the revenues of just General Motors and Ford “exceed the combined GDP for all of sub-Saharan Africa.”³⁹ To draw on one sector that is especially relevant to our present inquiry, the top 100 companies involved in the production and marketing of arms and ammunition reportedly posted a 60% increase in profit between the years 2000 and 2004 alone. And yet already, the intuition that corporate might necessitates corporate criminal liability reveals an argument whose boundaries are ill-defined and a one-size-fits-all approach that need not coincide with every instance of corporate criminality. True, many international crimes are occasioned by the actions of these leviathans, but some are also carried out by their miniscule siblings.

The extractive industry, for instance, habitually relies on much smaller risk-embracing “juniors” to operate in conflict zones in order to acquire cheaper access to precious metals such as coltan, cassiterite, gold and wolframite. These “juniors” tend to be closely held companies, some of which are just shells specifically created for single high-risk commercial speculation carried out by individual businesspeople. In certain circumstances, there is evidence to suggest that some of these companies have been instrumental in determining the course of major international armed conflicts, installing new governments by signing lucrative extractive contracts with rebel groups *en pleine guerre*. And yet,

³⁸SARAH ANDERSON, TOP 200: THE RISE OF CORPORATE GLOBAL POWER 1 (2008).

³⁹JOSHUA KARLINER, THE CORPORATE PLANET 5 (1997).

if any of these companies are ever criminally prosecuted, the size and strength of multinational corporations globally will provide no justification for the practice.

Perhaps deterrence is the better rationale? Indeed, many argue that corporations may be more rational than individuals, thus allowing the criminal law to better stymie future offending. As Brent Fisse has cogently argued, the reality with criminal law in its individualistic orientation is that society expresses condemnation in a way that ostracizes the people who perpetrate crimes, exacerbating rather than correcting the social deviance that led to the offending.⁴⁰ By contrast, “corporations are more likely to react positively to criminal stigma by attempting to repair their images and regain public confidence.”⁴¹ Despite the inherent difficulty of measuring deterrence, there is stimulating literature that suggests corporations may be more deterrable than individuals in certain circumstances.⁴² If this is true, corporate criminal liability offers very new opportunities for deterring crime,⁴³ which tends to remain underappreciated in the literature on deterrence of atrocity, which is almost exclusively oriented towards individuals alone.

Let me expand. To date, much of the literature on deterrence of atrocity has focused uniquely on the social foment necessary to generate mass violence, pointing out that any rational incentive generated by criminal law is unlikely to restrain the fierce passion required to perpetrate offences of this barbarity, particularly when the probability of prosecution is so low.⁴⁴ And yet, this assumes that only individuals are guilty of international crimes. On the contrary, corporations pursuing profit rather

⁴⁰ Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 SOUTHERN CALIFORNIA LAW REVIEW 1141, 1164 (1983).

⁴¹ *Id.* at 1153–1154. In the same vein, Walsh & Pyrich note that corporate criminal convictions can strongly impact consumer purchasing decisions, and that criminal conviction may have other effects such as barring a corporation from certain kinds of business activity. Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS LAW REVIEW 605, 635 (1995).

⁴² SALLY S. SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL 36 (2002).

⁴³ In fairness, not everyone shares this view. For example, though Eli Lederman is open to considering “self-identity” models of corporate criminal liability, he views individual liability as a more compelling and efficient deterrent. Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFFALO CRIMINAL LAW REVIEW 641, 702 (2000).

⁴⁴ Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 7, 10 (2001); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT’L L.J. 473, 474 (1999); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*, 84 WASH. U. L. REV. 777, 832 (2006).

than inter-ethnic rivalries also satisfy the formal elements of international crimes. And importantly, the corporations that sustain bloodshed are more exposed to foreign law enforcement, more prone to rational deliberation through their commitment to profit-maximization, and likely to perceive conviction for a war crime as nothing short of a commercial catastrophe. Thus, there is reason for some jubilation at this promising new stratagem for inhibiting mass violence, even if it remains latent at present.

To placate the pragmatists, though, we should still qualify our enthusiasm. For one reason, some companies are very much part and parcel of a genocidal apparatus, undermining the arguments that corporations are more prone to general or specific deterrence than those who fiercely swing the machetes. During WWII, the Nazi regime created all range of companies to implement their terrifying expansionist agenda,⁴⁵ but a more modern example better illustrates the point. During the Rwandan genocide, calls to butchery were constantly issued and coordinated by the infamous Radio Télévision Libre des Mille Collines (RTLM).⁴⁶ These acts constitute corporate crime *par excellence*, even if they were never tried as such. Only here, the corporate officers were every bit as “impassioned” as those who obediently responded to their instigations. Consequently, deterrence may well be illusory here, for reasons many excellent scholars of international criminal justice point out.⁴⁷ The overarching point, which coincides perfectly with core concepts in pragmatism, is that reality is far more complex than any one absolute conceptual model can explain.

Enter law and economics, where the habit of over-generalizing plays out in different garb. While corporate criminal responsibility has inspired excellent scholarship in law and economics, much of it fails adequately to tailor pure theory to the realities of globalized markets. As Jennifer Arlen explains, the tendency among commentators is to “present the classic economic analysis of corporate liability for crime, focusing on optimal individual and corporate liability in a ‘perfect world’⁴⁸ But what of the

⁴⁵ See, for instance, the discussion of the Continental Oil Company, a company aptly dubbed “ROGES”, and Mining and Steel Works East Inc. (BHO) in STEWART, *supra* note 12 paras. 41, 42 and 105; For a more complete history, see J. A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094 (2009).

⁴⁶ The employees of the company were tried and convicted for instigating and inciting genocide. See Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgment; Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Judgment.

⁴⁷ See *supra* note 22.

⁴⁸ Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW, 144-203 (Alon Harel and Keith Hylton, eds., 2012).

deeply flawed one we populate? Jennifer Arlen's work is very good at offering altered iterations based on real-world contingencies, but this approach must be extended still further, such that a pragmatic attitude becomes the norm rather than the exception. If we view the problem of corporate offending as a global phenomenon and purge ourselves of our understandable proclivity to view law through a very "local" lens, leading economic theory suddenly fails to explain many iterations of the subject in its extremity.

Take the gravity of international crimes like genocide, crimes against humanity, and war crimes. If the utility of criminal law is at least partially dependent upon the social meaning of a crime's stigma,⁴⁹ it stands to reason that the utility of corporate criminal responsibility is not constant across different crimes. The extreme character of international offenses is helpful in exposing the point: corporations will probably react differently to being convicted of a war crime than an everyday domestic offense. In fact, popular associations with international crimes might be so intense that companies are over-deterred from operating in volatile political climates, creating a counterproductive economic trap for nation-states struggling to avoid or emerge from episodes of mass violence. And yet, these intricacies do not feature in the justifications for corporate criminal liability on offer within law and economics,⁵⁰ which sometimes seem to assume transactions within a single pristine legal system. By definition, corporate crimes in war zones fall outside this model.

Maybe stigmatizing companies is the better rationale for corporate criminal liability? The argument goes that "[t]he stigma and sanctions of the criminal law promise greater deterrence from corporate misconduct and more opportunities for asset recovery, compensation, and mandatory corporate reform."⁵¹ In addition, many also speak to the role of criminal justice in propagating moral values within a post-modern world that has seen the decline of alternative moral systems.⁵² To bring things back to international criminal justice, prosecuting corporations involved in the

⁴⁹ For an excellent articulation of this point, including in the context of corporate criminal liability, see Dan M Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998).

⁵⁰ In fairness, Jennifer Arlen's work does helpfully distinguish between the implications of fraud convictions, as compared with environmental harm. My thesis is merely that these types of distinction should feature more centrally in corporate theory, since corporate liability for international crimes will exponentially magnified the discrepancy. Arlen, *supra* note 48 at 9.

⁵¹ CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK 9, 4–5 (Mark Pieth & Radha Ivory eds., 2011).

⁵² See, e.g., Cristina de Maglie, *Societas Delinquere Potest? The Italian Solution*, in CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK 9, *supra* note 51, at 255–270, 268–269.

sale of weapons or the pillage of natural resources from war zones can transmit values across a global market in a singly unique manner. Given the ubiquity of these corporate crimes and the market's spectacular success in insulating itself from the sharp end of all other forms of accountability, might corporate convictions for international crimes not harness stigma to good effect?

Sometimes, however, corporate criminal liability may be too blunt an instrument. An alternative strategy geared towards acculturation rather than stigmatization may prove more successful in changing endemic commercial practices, depending on the prevailing circumstances. In the sister field of international human rights, Ryan Goodman and Derek Jinks have pointed to the potential superiority of strategies that employ acculturation to promote compliance, beyond those that are coercive or persuasive in character.⁵³ So, if acculturation is likely to be more effective as a tool for restraining corporate excess in any given situation, sharper punishments could actually run counter to the expressive purpose many view as a key justification for corporate criminal liability.⁵⁴ We should, therefore, recoil from the proposition that corporate criminal liability is *always* preferable or even useful as a communicative device, in favour of a theory that responds to realities on the ground in a more dynamic fashion. That theory is pragmatic.

B. *The Contingencies of Corporate Desert*

In the preceding section, we considered a small set of consequentialist arguments for corporate criminal liability. The classic response is simple—they leave out *guilt*. In his famous reconciliation of the general theoretical purpose of criminal law as a system as a whole and the principles to be employed in attributing blame in concrete cases, HLA Hart pointed out that even if your rationale for punishment within a criminal system generally is deterrence, it is clearly morally vulgar to punish family members of those who carried out criminal offenses, even if doing so has massive deterrent effects.⁵⁵ By analogy, the use of criminal law as mechanism of regulatory control over corporations in the sale of weapons to warring African countries, say, is only defensible if the corporation is first culpable of some established crime. And here, many

⁵³ Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) See in particular, the table at page 699 summarizing these arguments in the context of implementation.

⁵⁴ *Id.* at 687–699.

⁵⁵ *Id.* at 5-6.

argue, corporate criminal liability fails to comply with first principles of criminal responsibility.

Consider some of the effects of shoehorning corporations into a criminal structure built for individuals: a corporation has no mind and therefore cannot experience guilt; it has no body so cannot therefore act in a sense that is not entirely derivative; punishing it would violate the fundamental principle that punishment must be imposed only on the actual offender; and the usual penalties envisaged within the criminal law are frustrated where the nature of the convicted party precludes incarceration.⁵⁶ For many commentators, forcing a square peg into a round hole like this is not only unfair to the corporation called to answer within a criminal trial, it does violence to the discipline that is obliged to accommodate the poor fit. If we are interested to construct a coherent, holistic account of criminal justice, instead of treating corporations as a category apart, these concerns are worrisome.⁵⁷ Might it be, then, that the discussions about the utility of corporate criminal liability miss this broader picture, and the foundations upon which criminal justice rests?

Many would say no. Indeed, there is much excellent work refuting each of these propositions, but in some instances it too overstates the generality of a principle that may not obtain in concrete circumstances. Corporate guilt is a case in point. At one level, the fact that we frequently blame corporations is a popular rejoinder to those who argue that corporations cannot be guilty. As Samuel Buell argues, we hold BP responsible for massive damage caused by a faulty oil drill in the Gulf of Mexico, or experience moral shock that a weapons manufacturer would sell weapons to Hutu extremists at the zenith of the Rwanda Genocide, which *demonstrates* that corporations also populate our moral universe. He opines that, “[i]t is a fact of contemporary life that our conception of responsibility includes beliefs about institutional responsibility.”⁵⁸ These sorts of practice-oriented explanations for moral agency elevate corporations to a position alongside individuals as deserving of criminal blame based on common moral intuitions.

⁵⁶ L. H. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* 1509 (1969).

⁵⁷ In response to this concern, Ana-Maria Pascal argues that corporations cannot have a moral conscience, but that instead of rejecting corporate criminal liability on that basis, we should formulate an entirely different conception of crime and responsibility based on “socio-legal circumstances.” Ana-Maria Pascal, *A Legal Person’s Conscience: Philosophical Underpinnings of Corporate Criminal Liability*, in *EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY* 33–52, 49–50 (2011).

⁵⁸ Samuel W Buell, *The Blaming Function of Entity Criminal Liability*, 81 *IND. L.J.* 473, 491 (2006) (discussing the social practice of blaming institutions for crime).

Of course, intuitions might be valuable in developing stereotypes, but they are often wrong in specific contexts. So instead of crafting corporate criminal liability from common public sentiment, we are compelled to imagine an ontological basis for liability that reflects the corporation's own blameworthiness. Christian List and Philip Pettit offer a profound justification for blaming corporations along these lines,⁵⁹ and for once, it comes replete with a range of qualifications that, perhaps unbeknownst to its authors, render the account somewhat pragmatic. They start by identifying conditions for agency, which include: the ability to make a *normatively significant choice*; *judgmental capacity*, in the sense of understanding what is at stake and having the ability to access evidence; and *relevant control* to choose between the options.⁶⁰ Having posited these as necessary and sufficient conditions for agent responsibility, they hold that many group agents such as corporations can satisfy these requirements,⁶¹ but they also carve out circumstances where these standards are not met.⁶² All this means that the best conceptual justifications are sensitive to the type of corporation on trial, as pragmatism would implore.

Having established that *some* corporations can be blamed, a number of difficult practical questions arise. Where, for instance, do we look to prove a corporation's culpability? For Pamela Bucy, corporate culpability is to be located in a "corporate ethos," which is identified through inspecting the role of the board in monitoring compliance, corporate goals, emphasis on educating employees about legal requirements, compensation incentives and the like.⁶³ Models of this sort seek to capture "genuine corporate culpability,"⁶⁴ instead of depending on the double-derivative character of corporate liability in complicity cases (where an employee is derivatively liable for use of weapons by an African warlord, and the company becomes derivatively liable through the employee).⁶⁵ The corporation is an entity capable of deserving punishment in its own right, quite apart from the actions of its individual representatives. To find the

⁵⁹ CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 153–167 (2011).

⁶⁰ *Id.* at 155.

⁶¹ *Id.* at 158–63.

⁶² *Id.* at 159, 162–3.

⁶³ Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINNESOTA LAW REVIEW 1095, 1138 (1991).

⁶⁴ William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY LAW JOURNAL 647, 664 (1994) (discussing four models of corporate culpability that he considers capture genuine corporate culpability).

⁶⁵ James G. Stewart, *The End of "Modes of Liability" for International Crimes*, 25 LEIDEN JOURNAL OF INTERNATIONAL LAW 165, 188–190 (2012).

corporate culture that is the blameworthy source of responsibility, we simply look to corporate practices that reflect the organization's identity.

Admittedly, this idea of corporate culture is hotly contested, but the pragmatist acknowledges the circumstances where the proposition is true. For John Braithwaite and Brent Fisse, for instance, we should not dwell on our inability to see corporate culture in physical form—both individuals and corporations are an amalgam of observable and abstract characteristics.⁶⁶ Moreover, corporations and their representatives are not one and the same; they have symbiotic relations to one another. The Navy is constituted by the actions of individual sailors, but so too the existence of the sailor is constituted by the existence of the Navy.⁶⁷ Thus, corporations have their own separate ontology, which cannot be reduced to individual agency without turning a blind eye to the formative influence of the overarching organization and the unique role this can play in bringing about harm.

Once again, however, one wonders whether this thesis can hold true across all corporations. A behemoth bureaucracy like the Navy, for example, that deliberately attempts to shape individual behavior of members, is not necessarily the same as the relatively minute corporate structures that instigate the pillage of natural resources in modern conflict zones. Earlier, we discussed the use of “juniors” in the illegal exploitation of conflict minerals, precisely because they are closely held shells that are easily discarded to avoid detection. It is not clear to what extent there is any real symbiosis between individual and corporation within these entities, whether “juniors” have any identifiable culture, or where we are to draw the line in isolating these phenomena as companies increase in size and sophistication. Braithwaite and Fisse's otherwise outstanding explanation only speaks to a certain type of corporate reality, and therefore offers a justification that is dependent on contingencies that only pragmatism can accommodate.

The next set of arguments suffers from similar deficiencies. What of the retort that corporate criminal liability punishes innocent individuals, which forms a key part of the conceptual backlash against corporate criminal liability? A significant portion of the literature regrets the

⁶⁶ Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY LAW REVIEW 468, 476 (1988) (“The notion that individuals are real, observable, flesh and blood, while corporations are legal fictions, is false. Plainly, many features of corporations are observable (their assets, factories, decision-making procedures), while many features of individuals are not (e.g., personality, intention, unconscious mind).”

⁶⁷ *Id.* at 477–478. Braithwaite and Fisse also make a beautiful parallel to a reduction of language to words without syntax, vernacular, irony and other elements of communication.

“reputational rub-off” effect of corporate criminal liability on senior managers,⁶⁸ and more frequently, the fact that the costs of a corporate conviction tend to be borne by employees and shareholders who are presumptively innocent. If Arthur Andersen’s conviction for obstructing justice in the Enron fiasco ultimately cost 80,000 people their jobs,⁶⁹ would convicting a major diamond producer for pillaging blood diamonds from warring African states not amount to an instantaneous corporate death sentence, which would ultimately punish innocent company affiliates indiscriminately and in great disproportion to the atrocities the company had enabled?

Already, adding atrocities to this hypothetical changes the terms of the usual debate, showing the weakness of these arguments as a ground for abolishing corporate criminal liability across the board. Sometimes, the harm averted clearly outweighs that incidentally visited upon shareholders and employees, but surely not always. In any event, the double standards that lurk just beneath the surface are difficult to swallow. The sudden concern for indirect victims of corporate criminal liability sits uncomfortably with the almost total lack of empathy for the plight of family, children and community members when a person is invited to serve time. On a broader level, capitalism postulates that the brutality of forcing 80,000 people onto the streets to find new work is justifiable—nay, desirable—when market forces dictate that their employer is no longer economically competitive, but the same effects that flow from market reactions to their employer’s moral turpitude are denounced as an aberration.

But we need not decide the issue definitively in the abstract. It may be that in weighing the strengths and weaknesses of a corporate prosecution, the perceived benefit of proceeding against a corporation is superseded by the immediate negative ramifications to individuals. While the slogan “too big to fail” is politically distasteful, it should alert us to the fact that the incidental implications of corporate failure are not constant across all corporations or contained within national borders. By attempting to find categorical positions on issues that simultaneously address the family carpet company in India and Goldman Sachs on Wall Street, we risk advocating for absolute standards that have potentially tremendous ramifications when applied without sensitivity to context. Without excusing big banks, it is possible to offer a pragmatic middle ground that

⁶⁸ V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?* 109 HARVARD LAW REVIEW 1477, 1510 (arguing that reputational rub-off on corporate managers risks increasing the total penalty to exceed optimal damages).

⁶⁹ LAWRENCE M. SALINGER, *THE ENCYCLOPEDIA OF WHITE-COLLAR & CORPORATE CRIME* 574 (2005).

moves beyond black-and-white arguments whose rigidity will prove harsh if applied blindly in all conceivable scenarios.

III. CORPORATE CRIMINAL LIABILITY VERSUS CORPORATE CIVIL LIABILITY

The second set of arguments that influence the identity of corporate criminal liability relates to the relationship between corporate criminal liability and civil remedies. Might corporate criminal liability be specious given the availability of civil redress, which explicitly attaches to the corporation without upsetting basic premises in the criminal law? While this section deals with a range of arguments for and against this proposition, it bears recalling at the outset that the common law model of corporate criminal liability developed because it provided “a more effective response to problems created by corporate business activities than did existing private remedies.”⁷⁰ The same pragmatic rationale will likely necessitate corporate criminal responsibility for international crimes, although much depends on the specificities of individual cases. In many instances, both sides of the debate overlook this nuance.

A. *Qualifying the Categorical Preferences for Civil Liability*

Let us begin with the argument, already troubling to the pragmatist, that civil claims are per se superior to corporate criminal liability. According to Vikramaditya Khanna, civil liability can better capture the desirable effects of corporate criminal liability, without emulating several sub-optimal downsides. Surveying the history of corporate criminal responsibility within the United States, Khanna opines that the criminal angle appeared to be “the only available option,”⁷¹ that met the need for public enforcement and corporate liability at the time of its development, given the absence of widespread public civil enforcement prior to the turn of the 20th century.⁷² Thus, Khanna and I agree that the

⁷⁰ Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 38, 45–46 (2011). To be fair, Epstein also criticizes corporate criminal liability on the basis that it involves an unjustifiable anthropomorphism that ultimately punishes shareholders and employees disproportionately.

⁷¹ Khanna, *supra* note 68, at 1486.

⁷² *Id.* at 1486.

concept developed pragmatically to fill a perceived regulatory gap. We disagree, however, that the gap is now filled; if one accepts that corporations are operating transnationally, including in regulatory vacuums created by war and social turmoil, corporate criminal liability is still “the only available option” in many instances.

Professor Khanna offers other arguments that also seem too sweeping in breadth. For instance, he argues that reputational loss is not effective against certain corporations, since activities that harm third parties, such as environmental pollution, do not directly affect a firm’s customers.⁷³ Here again, Khanna’s reasoning is not adequately calibrated to the moral magnitude of certain systems of criminal law and the historical associations that, for better or worse, accompany them. Take the diamond industry. The tremendous success of the media campaign against furs that brought that industry to its knees more or less directly led to the Kimberley Process for monitoring conflict diamonds. Perhaps convicting a major diamond producer of war crimes last visited upon businessmen who sustained the Nazi apparatus could stimulate a comparable moral avalanche, even though the harm at issue is to African civilians in survival economies, not to consumers.

Thus the extremity of international justice helps reveal a hidden truth that cautions against rigid, categorical, or universal preferences of this sort. It may well be true that civil liability is preferable in a whole raft of instances, including for reasons Khanna so ably elucidates, but the need for qualification is unavoidable. In this instance, the sheer heterogeneity of crimes for which corporations might be held responsible, which range from possession of marijuana to insider trading and genocide, militates against conceptual positions that are so definitive.⁷⁴ The moral weight that attaches to each is, quite simply, not constant.⁷⁵ Therefore, whether consumers react in ways that promote accountability and responsibility will depend on the moral gravity of the crime, historical associations with its perpetration, the surrounding political climate and a host of other variables, all of which resist processing in the abstract for every conceivable manifestation of the problem. Consequently, pragmatism must do much more of the heavy lifting.

⁷³ *Id.* at 1500.

⁷⁴ Celia Wells agrees that “[t]he variety in corporate form, reach and activity requires a flexible response both in terms of forms of regulation and in terms of corporate liability models.” Celia Wells, *Containing Corporate Crime: Civil or Criminal Controls?* in *EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY* 13, 27 (2011).

⁷⁵ Indeed, in some cases, the “crimes” in question may arguably lack moral weight entirely. Sanford Kadish identifies certain economic crimes as “morally neutral” and argues against the use of criminal liability in such cases. Kadish, *supra* note 37, at 442.

Later, Khanna prefers civil liability because cash fines are optimal as long as the corporation is not judgment-proof.⁷⁶ Given the viability of cash claims against the corporation, he concludes that corporate criminal liability only detracts from the greater efficacy of civil sanctions.⁷⁷ But there is one problem with this explanation, which cases from the frontiers of international criminal justice again help unveil. Judgment-proof corporations are likely a relatively finite class within a single functional North American legal system, where access to justice is comparatively trouble-free, but this cannot be said for victims of transnational corporate crimes from the Global South, who are likely to have little to no access to the civil liability mechanisms we take for granted. A Syrian father of a child killed in a rocket attack cannot easily sue Russian arms vendors for contentedly furnishing the perpetrators with weapons used for the atrocity. So once the *single perfect jurisdiction fallacy* is withdrawn, it leaves a sense that the exception is actually the norm.

The essential point, though, is that criminal liability might occasionally fill accountability gaps like this where civil liability falls short. To draw a vague parallel, US prosecutors recently indicted the British weapons giant BAE Systems for violating the US *Arms Export Control Act* and making false statements concerning its compliance with the *Foreign Corrupt Practices Act*⁷⁸ when the company's tremendous political power in Britain effectively rendered it judgment-proof there for allegedly paying billion-dollar kick-backs to the Saudi government over a lucrative weapons deal.⁷⁹ The parallel with complicity and the Syrian hypothetical is loose but meaningful—criminal and civil liability may overlap to some extent, but any congruence is far from perfect, and the portion of the set outside the intersection creates opportunities for prosecutors that have no equivalent elsewhere. As a result, prosecutors may find themselves jumping through hoops that are more numerous and demanding in order to make cases in corporate criminal liability, even though alternative strategies might be preferable if the case were a uniquely domestic affair.

Issues of procedure can have a similar effect. In what he describes as “a pragmatic reassessment” of corporate criminal responsibility,⁸⁰ John Coffee references two salient examples of procedural factors that might

⁷⁶ Khanna, *supra* note 68, at 1504.

⁷⁷ *Id.* at 1534.

⁷⁸ For a helpful summary, see Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VIRGINIA LAW REVIEW 1775, 1842 (2011).

⁷⁹ For a full and harrowing account, see *Section III: Business as Usual*, in FEINSTEIN, *supra* note 16.

⁸⁰ 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, 444–448 (1980).

favor criminal rather than civil liability. The first involves the relative celerity of the criminal trial compared to civil litigation: “because criminal cases are typically concluded in a much shorter timespan than civil cases, the criminal law potentially can serve as an engine by which to expedite restitution to victims.”⁸¹ In the context of corporate responsibility for international crimes, this could be very attractive, even determinative. One of the only successful civil cases brought against corporations under the aegis of the *Alien Tort Claims Act* took 14 years in the pre-trial phase alone before Shell gallantly fell on its own sword over allegations of complicity in Nigeria.⁸² If justice delayed is justice denied, this delay may constitute a basis for prioritizing criminal cases over other civil alternatives, even if this choice comes with greater epistemic burdens for litigants.

Moreover, the criminal angle is attractive since the state brings charges and absorbs associated costs. Needless to say, this might override all other conceptual preferences, providing further incentives to pursue corporate criminal liability over routes that may well be absolutely optimal within the *single perfect jurisdiction*.⁸³ Take a seemingly banal comparative issue like the availability of contingency fees: the idea that attorneys can take cases in exchange for a percentage of any eventual award resulting from litigation they undertake on a client’s behalf. In the United States, these arrangements are by and large condoned, but “[t]he situation outside the United States is different in virtually every regard.”⁸⁴ The vast majority of foreign jurisdictions prohibit contingency fees categorically.⁸⁵ But saddled with the burden of paying their own way in private suits against powerful corporations in first-world jurisdictions (not to mention the risk of having to pay the other side’s costs), victims of transnational corporate malfeasance may rightly see corporate criminal liability instigated at a foreign state’s behest as their only hope.

Finally, criminal cases may offer real substantive advantages too. In the types of scenarios where corporations participate in international crimes, processing these incidents as civil cases would require plaintiffs to engage in lengthy litigation dealing with jurisdiction, *forum non*

⁸¹*Id.* at 447.

⁸²Jad Mouawad, *Shell to Pay \$15.5 Million to Settle Nigerian Case*, THE NEW YORK TIMES, June 9, 2009, <http://www.nytimes.com/2009/06/09/business/global/09shell.html> (last visited May 4, 2012).

⁸³Coffee, *supra* note 80, at 447.

⁸⁴D. R. Hensler, *The Globalization of Class Actions: An Overview*, 622 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 7, 22 (2009) (summarizing an extensive global study of provisions governing access to civil remedies).

⁸⁵*Id.* at 22.

conveniens, choice of law and, potentially, enforcement of foreign judgments. Each of these components erects potential barriers that can and do prove insurmountable for would-be litigants of transnational corporate crimes. By contrast, extraterritorial jurisdiction exists over international crimes most everywhere, allowing prosecutors to bypass these impediments in private international law through a more streamlined criminal framing. This resort to extraterritorial application of criminal law is certainly no panacea,⁸⁶ but it does second-guess categorical preferences for civil liability in a world where access to justice is so acutely under-developed, to the obvious benefit of corporations.

B. *Over-Generalizing the Utility of Corporate Criminal Liability*

The *single perfect jurisdiction* fallacy also appears on the opposite side of the equation. Unlike the abolitionists who view corporate criminal responsibility as an unjustifiable mistake that only obscures civil remedies,⁸⁷ the advocates for corporate criminal liability argue for the co-existence of corporate and civil remedies. This difference in argumentative strategy affects the discourse in important ways; while critics of corporate criminal responsibility are content to call for its abolition, advocates who feel they have justified using criminal law to blame corporations then shift focus to articulate the terms of the relationship between the two limbs of accountability they view as acting in concert. Part I addressed certain core philosophical arguments, leaving us to consider the arguments for corporate criminal liability relative to the private alternative. The difficulty is that advocates are also often seduced by the *single perfect jurisdiction* fallacy and their adversaries' tendency to over-generalize.

To begin, note the view that one of corporate criminal liability's real competitive advantages over civil alternatives is the criminal law's ability to transform commercial practices across an entire industry. These commercial practices are ubiquitous, requiring the expressive power of criminal denunciation. For Brandon Garrett, for instance, "[t]aking strong action against a single firm can also impact an industry to the extent that

⁸⁶ Austen Parrish, *Domestic Responses to Transnational Crime: The Limits of National Law*, SSRN eLIBRARY (2011), (last visited May 4, 2012).

⁸⁷ John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009).

the firm behaved in a manner common to other similarly situated firms.”⁸⁸ A possibility like this is enticing to prosecutors of international crimes, who face pervasive corporate offending of long historical pedigree (of which the arms and extractive industries are exemplars), severe financial pressures to get as much “justice” as possible for each dollar spent, and expectations that their work will have transformative effects in ending culture(s) of impunity that sustain international crimes. In many senses, then, these arguments are a natural fit within international criminal justice, perhaps explaining why many view corporate criminal liability as the next frontier in this trajectory.

But where does this leave civil liability? To begin, those who view civil liability as valuable but singly inadequate sometimes build models to explain when one form of liability should prevail over the other, but these models do too little to control the numerous variables of corporate criminal offending globally. Samuel Buell, for instance, supports the continued availability of corporate criminal liability, but argues that it should feature as the “sharp point” of a pyramid, which includes all range of civil remedies, including those enforced by public administrative agencies.⁸⁹ While I have no doubt that the pyramid has insightful implications for a certain class of cases, my fear is that extrapolating it across the variegated types of corporate crimes committed globally (even by American firms if one wants to limit things thus) assumes a more mature system of global accountability than we have. All things being equal, the model makes great sense, but many corporations operate in a space where opportunities for accountability seldom present in that way.

Another of the best-known divisions between criminal and civil liability draws the line between corporate actions that society wants to prohibit outright (which should be criminalized) versus practices it wants to price (which should attract civil penalties companies can pass on to consumers).⁹⁰ Regrettably, this dichotomy too translates poorly into the new corporate dimensions of international criminal law. Perhaps it suggests that the complicity of arms vendors in crimes like genocide should be criminalized because reducing human suffering of this order to economic terms would be morally outrageous, whereas the illegal

⁸⁸Brandon L. Garrett, *Collaborative Organizational Prosecution*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 154, 158 (2011).

⁸⁹Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT, *supra* note 88, at 87, 88.

⁹⁰John C. Coffee Jr, *Does “Unlawful” Mean “Criminal”?* *Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 BOSTON UNIVERSITY LAW REVIEW 193, 230 (1991).

exploitation of natural resources should figure within civil actions where legal damages can simply ratchet up the cost of laptops, cars and wedding rings. And yet, this neat division again presupposes an equality between criminal and civil opportunities for accountability, which seldom exists outside the *single perfect jurisdiction*. Once the theory is subjected to the international experimentation pragmatists demand, it often leads to no accountability at all.

Similarly, the political influence of particular industries on legislatures and law enforcement agencies is not uniform, thereby further distorting any notional equality between civil and criminal forms of redress. The point is nowhere more true than in the weapons sector. For instance, while civil litigation in the United States has had a tremendous regulatory effect on the tobacco industry, attempts to emulate that effect within the arms industry have achieved very little—cities such as Chicago, New York and Philadelphia have almost invariably lost civil suits against arms manufacturers.⁹¹ If a combination of complicity and corporate criminal liability generates better results, it will most likely be because the applicable law and procedure interacted more favorably with the countervailing constellation of power politics in concrete cases; less because some commercial practices cannot be priced.

What about having corporate criminal liability operate hand in hand with corporate civil cases? True, corporate criminal liability can also create incentives for other forms of liability, be they civil liability of the corporation or criminal responsibility of individuals. In keeping with this insight, Harry Ball and Lawrence Friedman argue that corporate criminal liability is useful insofar as it allows prosecutors to threaten “the full treatment,”⁹² that is, all heads of accountability for the single crime. The idea is that corporate criminal liability acts as a threat for cumulative accountability, unless corporations play along with prosecutors’ desires to pursue individual representatives of a business, and to a lesser extent, modulate systems of corporate governance.⁹³ By and large, this is a welcome proposition, but it still assumes a spectrum of different forms of accountability, which is frequently unlikely for disaffected communities in say Africa, who cannot draw on multiple options and will consider one a luxury. From this different perspective, the “full treatment” seems overly abstract, when treatment of any sort remains illusive.

⁹¹ TIMOTHY D. LYTTON, *SUING THE GUN INDUSTRY* (2009).

⁹² Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 *STANFORD LAW REVIEW* 197, 215 (1965).

⁹³ *Id.* at 215.

Admittedly, there are real chances that corporate criminal liability will accentuate the likelihood of civil claims. Mariano-Florentino Cuéllar ably points out as much, when he argues that “some will recognize how the presence of overlapping criminal and civil jurisdiction can facilitate the imposition of more severe civil penalties.”⁹⁴ In particular, Cuéllar suggests that the acquisition of information from one legal process might feed into the other, meaning that the two operating in tandem create results a single form of accountability would not have achieved independently. At the same time, while one certainly hopes that this type of cooperation blossoms for cases involving international crimes at the hands of corporate actors, we should not lose sight of the competing possibility that one will be used to thwart the other.⁹⁵ For international crimes involving corporations, the latter appears more probable.

Take the US *Alien Tort Claims Act*. Over the past several decades, the ATCA has emerged as the framework of choice for human rights advocates, largely on the back of the same types of pragmatic sentiment that fuelled the growth of corporate criminal liability (decades prior in Anglo-American systems, but contemporaneously in Europe). Having read international human rights into the ATCA and somewhat awkwardly borrowed complicity back into civil liability, human rights advocates brought civil cases against Yahoo! Inc, Shell, Rio Tinto and a host of other corporations for enabling human rights abuses in the four corners of the world. But if there is some synergistic effect between civil and criminal liability, where are the parallel criminal prosecutions here? There are, quite simply, none. Again, this suggests that we should be slow to adopt strong prescriptive positions about the relationship between civil and criminal liability of corporations, when context yields such disappointing outcomes.

In sum, our attempts to ascertain the relative merit of civil and criminal claims against corporations can only be definitive if we exclude certain classes of cases, thereby undermining our claim to universalism. To a large extent, pragmatism governs preferences for one system over the other, which is not to say that no theoretical explanation is relevant. This, of course, leaves the field open to the retort that the division between civil

⁹⁴Mariano-Florentino Cuéllar, *The Institutional Logic of Preventive Crime*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT, *supra* note 88, at 132, 143.

⁹⁵Sara Sun Beale, *What Are the Rules If Everybody Wants to Play? Multiple Federal and State Prosecutors (Acting) as Regulators*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT, *supra* note 88, at 202, 214. (Discussing how prosecutors may have good political reasons for favoring civil rather than criminal charges, including the fear of putting a major corporation out of business.).

and criminal responsibility of corporations is entirely arbitrary,⁹⁶ but this statement too requires qualification. In any event, if we can avoid the pragmatism that now seems inevitable in seeking justice for corporate offending globally, more stable theories will not emerge by pretending that corporations do not operate internationally or that opportunities for law enforcement are constantly ideal everywhere. To assume these things risks a collapse into what pragmatists call “philosophical escapism,” where theory loses touch with the world we live in. In reality, pragmatism seems destined to play the driving role in delineating criminal from civil forms of corporate accountability for some time to come.

III. INDIVIDUAL VERSUS CORPORATE CRIMINAL LIABILITY

Even if we suppose that corporate criminal liability will prevail over philosophical resistance to the ugly process of forcing corporations into a system built for individuals and that corporate criminal liability emerges triumphant over civil alternatives, we still face the daunting intellectual challenge of formulating a defensible philosophical rationale for distributing blame between corporations and the personnel that operate them. Here, too, the debate has struggled to conceptualize the full spectrum of corporate offending to which this philosophy must cater, in ways that assume a parochial sense of criminal justice, a world without globalization or a utopian system of global justice that remains some distance from reality. In this third part, I criticize both sides of the literature that disputes the significance of corporate criminal liability as compared with the individual criminal responsibility of corporate officers as again failing to respond to the core precepts of pragmatism.

A. *Unnecessarily “Local” Preferences for Individual Liability*

In a classic criticism of corporate criminal liability, Gerhard Mueller denounces the instrumental punishment of the corporation for acts that were undoubtedly carried out by individuals within the company. In lamenting the pragmatics that gave rise to corporate criminal liability, he famously compared the concept to a weed: “[n]obody bred it, nobody

⁹⁶*Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions*, 92 HARVARD LAW REVIEW 1227, 1311 (1979) (lamenting the arbitrariness created by broad statutory discretion in deciding between criminal and civil corporate liability, which is guided only by largely subjective standards).

cultivated it, nobody planted it. It just grew.”⁹⁷ His blanket preference for individual responsibility focused on a number of factors, but one speaks to a wider set of problems in this literature. For Mueller, “[i]t is a poor legal system indeed which is unable to differentiate between the law breaker and the innocent victim of circumstances so that it must punish both alike.”⁹⁸ But this begins a set of arguments that are premised on a very parochial notion of corporate criminal liability, which crowds out other understandings of the concept and therefore sheds too little light on corporate problems that span the globe.

Mueller’s inspiration is exclusively American. In the United States, corporate criminal liability developed in a highly pragmatic fashion, drawing heavily on tort law that eschewed traditional notions of criminal blame. As Kathleen Brickey has noted, “the early doctrine through which corporations and their managers were held criminally liable developed with little or no heed to traditional notions of culpability.”⁹⁹ The notion of *respondeat superior* epitomized this methodology; it was simply plucked out of tort law then deposited in the adjacent criminal field, regardless of its incongruence with foundational notions of criminal responsibility. So when Mueller objects to the inability of corporate criminal liability to differentiate between corporation and individual, he references the fact that *respondeat superior* makes the corporation criminally responsible for acts of all employees,¹⁰⁰ creating an objectionable guilt by proxy that flies in the face of liberal notions of punishment.

A number of very distinguished scholars emulate this approach, arguing that individual criminal liability is sufficient, at least in part, because *respondeat superior* enables vicarious liability. For example, Richard Epstein criticizes corporate criminal liability on the basis that “potency is not enough; specificity and overkill matter as well.”¹⁰¹ Corporate criminal liability may be a very sharp weapon, but it fails to calibrate punishment with responsibility, and is therefore harsh as a distributive principle. But in preferring individual criminal responsibility as a blanket rule (to function in parallel with corporate civil liability),

⁹⁷Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Liability*, 19 UNIVERSITY OF PITTSBURGH LAW REVIEW 21, 21 (1957).

⁹⁸*Id.* at 45.

⁹⁹Brickey, *supra* note 2, at 421.

¹⁰⁰*Id.* at 423.

¹⁰¹Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT *supra* note 88, at 38, 44–45. In fairness, Epstein also criticizes corporate criminal liability for its anthropomorphic character and its tendency to punish innocent shareholders and employees.

Epstein and others fail to distinguish corporate criminal liability *qua* concept from the vicarious liability model applicable as a matter of extant doctrine in the United States. This not only overlooks the extensive literature that argues for alternative theoretical models that better capture “genuine corporate culpability”¹⁰²; it is closed to the foreign versions of corporate criminal liability that stand ready to apply these alternative standards to live cases, including where American corporate interests are in question.

This oversight has no real relevance for cases that fall within a *single perfect jurisdiction*, but the same cannot be said for transnational crimes, such as those involving the complicity of arms vendors in genocide or the corporate pillage of resources from conflict zones. In these sorts of trans-boundary cases, which involve overlapping criminal jurisdictions, corporate criminal liability cannot be summarily reduced to a single monolithic doctrine. For instance, in the context of allegations that a company named Anvil Mining was complicit in a very serious massacre in the Democratic Republic of Congo (DRC), courts in Australia, Canada, the DRC and potentially the United States all enjoyed criminal jurisdiction over the case, leaving the *per se* preference for individual criminal responsibility blind to divergent potential consequences generated by very different understandings of corporate criminal responsibility in each of these jurisdictions. Is this an example of “transform[ing] purely immediate qualities of local things into generic relationships”?¹⁰³

Once again, these different sets of rules must also be seen together with procedural disparities between jurisdictions. For instance, in the United States, prosecutors have come to use the threat of corporate criminal liability as an incentive to ensure that large corporations sacrifice their guilty corporate officers for individual prosecutions.¹⁰⁴ This highly instrumentalist use of corporate criminal liability allows a very broad prosecutorial discretion to overcome rules of procedure that inhibit prosecutions of corporate officers.¹⁰⁵ But importantly, these procedural

¹⁰² Laufer, *supra* note 64, at 664 (discussing four models of corporate culpability that he considers capture genuine corporate culpability).

¹⁰³ DEWEY, *supra* note 6, at 128–129.

¹⁰⁴ WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY 5 (2006); Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT, *supra* note 88, at 62, 71.

¹⁰⁵ Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure*, 118 YALE L. J. 126, 152 (2008) (discussing the extent to which procedural rules in the United States insulate corporate officers from individual liability in ways not true of German criminal law).

hurdles do not exist in other jurisdictions.¹⁰⁶ As a consequence, theories of the optimal relationship between individual and corporate responsibility, which take transnational corporate crimes seriously, also require more holistic appreciations of surrounding legal norms. Given the complexity and heterogeneity of legal systems throughout the world, categorical solutions seem almost impossible to ascertain ahead of time.

Instead of seeking to establish that individual criminal liability is immutably preferable, it might be better to isolate *when* corporate criminal liability is *not* sufficient, i.e., when is individual criminal responsibility *necessary*? At the level of organization theory, this might occur where: (1) the financial gain to the corporation exceeds that acquired by the manager, making the manager more vulnerable to measures directed at prohibiting conduct than the corporation; or (2) where the criminal law is able to generate a deterrent effect that exceeds that which will befall a manager through internal retaliation within a company for refusing to violate a legal norm.¹⁰⁷ If a corporate manager is called to purchase blood diamonds or other conflict commodities by senior management, the less probable chance of individual criminal responsibility for a war crime may seem sufficiently unappealing to offset the very likely repercussions from higher-ups in the corporate structure.

Here too, however, one must be wary of the one-size-fits-all approach that pervades much of this discourse. In many instances, the grounds for preferring individual criminal responsibility will be perfectly banal. For instance, when US prosecutors arrested the famed “Merchant of Death” Viktor Bout on charges of attempting to sell weapons to the Colombia rebel group FARC,¹⁰⁸ there was little suggestion that his shell company Cess Air would also be tried, even though the corporate website unashamedly bragged about much greater sins elsewhere.¹⁰⁹ Cess Air had no assets, little real contact with US jurisdictions, and no good-will capable of being tarnished. To return to the theorists of corporate criminal liability, the more controversial focus on criminal responsibility of

¹⁰⁶ *Id.*

¹⁰⁷ Coffee, *supra* note 80, at 409. Coffee suggests a range of other rationales why individual criminal responsibility cannot be ignored too.

¹⁰⁸ Noah Rosenberg, *Viktor Bout Guilty in Arms-Trafficking Case*, THE NEW YORK TIMES, (November 2, 2011), <http://www.nytimes.com/2011/11/03/nyregion/viktor-bout-guilty-in-arms-trafficking-case.html> (last visited Jul 23, 2012);

For more detailed accounts, see Nicholas Schmidle, *Disarming Viktor Bout*, THE NEW YORKER, (2012),

http://www.newyorker.com/reporting/2012/03/05/120305fa_fact_schmidle (last visited Jun 4, 2012); DOUGLAS FARAH & STEPHEN BRAUN, *MERCHANT OF DEATH: MONEY, GUNS, PLANES, AND THE MAN WHO MAKES WAR POSSIBLE* (2007).

¹⁰⁹ See Cess Air’s amazing website at <http://www.aircess.com/>

corporations is often redundant in closely held companies,¹¹⁰ where the organization is a mere subterfuge for individual exploits.¹¹¹ So if individual criminal responsibility is a necessity in these situations, it is more because all other options are practically foreclosed, and less because an individual focus is optimal as a generic policy. Either way, only a pragmatic theory of corporate criminal responsibility will be supple enough to mold itself around these variants.

B. Rationales for Corporate Criminal Liability Are Only Sometimes True Internationally

How do the arguments that corporate criminal liability is necessary over and above individual accountability fare in the migration from domestic theory into international criminal law? In Part I, I discussed a host of more general consequentialist rationale for corporate criminal liability, but I saved several that deal with the added value of corporate criminal liability over individual responsibility for discussion here. These arguments are myriad, and often expressed in categorical language that may or may not make sense in specific contexts. As things transpire, many of these justifications ring true for international crimes at the hands of corporations within both the extractive and armament sectors, but as the pragmatists warn, this is not a universalizable truth that can be automatically transplanted from the local to the international. Once again, pragmatism is necessary to differentiate aspects of abstract, local, universalized corporate criminal theory that are relevant from those that are overly-general when viewed in context.

A classic argument for corporate criminal liability is that the corporation is better positioned to detect, prevent and remedy crimes perpetrated by corporate agents than the state. In an excellent series of articles, Jennifer Arlen points out the superior incentives generated by holding corporations responsible for policing their own employees, saving law enforcement agencies the great inefficiency of monitoring from without.¹¹² International crimes, perpetrated by participants in the

¹¹⁰ Pamela H. Bucy, *supra* note 63, at 1151.

¹¹¹ James Gobert, *Squaring the Circle: The Relationship between Individual and Organisational Liability*, in EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY 139, 143 (2011) ("Another instance where a prosecution of a company's directors and officers may be deemed highly desirable is where the company is merely the vehicle for executing the individual's offence").

¹¹² Jennifer Arlen, *supra* note 48. See also Richard Gruner, who sees this type of model as underlying the US Federal Sentencing Guidelines for Organizations: Richard S.

weapons sector for example, corroborate this position most intensely. If we hypothesize a case involving the complicity of corporate agents selling weapons to Angolan warlords, as was the case with the famed Merchant of Death Viktor Bout, then the company is infinitely better situated to detect behaviors that satisfy the constitutive elements of the crime than law enforcement agencies some distance from the scene. In good pragmatic tradition, Arlen's theory is vindicated by experimental testing at the coalface.

After the end of the Cold War, Viktor Bout trafficked guns to the most brutal conflicts in the world with reckless abandon.¹¹³ At one point during the Angolan war, for instance a UN Panel of Experts cited Bout as selling weapons to both sides of a brutal conflict that had spanned four decades, killing at least 500,000 civilians.¹¹⁴ For Bout, this was just the tip of the iceberg in a notorious career that spanned the most troubled regions of the globe. When he was finally brought to justice in the United States for attempting to sell weapons (apparently to be used to shoot down American civilian planes) to FARC in Colombia,¹¹⁵ proof of the charges underscored Arlen's point about placing the corporation, not state, at the forefront of internal monitoring. Incredibly, the evidence used in the trial of one of the most talked about arms vendors in the world, alleged to have sold weapons to those responsible for atrocities in the Congo, Sierra Leone, Iraq, Afghanistan and beyond, stemmed from a single sting operation carried out by FBI in Thailand.

If the trial based on this one fabricated commercial transaction grossly understated Bout's true responsibility, it helped highlight basic evidentiary problems. Whether perceived or real, the evidential constraints for law enforcement agencies in cases like this are undoubtedly greater than for implicated corporations. Stepping back from the specific example of Bout to consider investigative hurdles prosecutors will face in bringing charges against corporations for international crimes, the challenges might seem daunting: access to crime sites for representatives of foreign law enforcement agencies in, by definition, the most insecure reaches of the planet; an ability to secure forensic evidence that ties corporations (say weapons vendors) to international offenses (say massacres); the cost of bringing witnesses half way across the world to testify in foreign trials,

Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law through Federal Sentencing Reform*, 36 ARIZONA LAW REVIEW 407, 463 (1994).

¹¹³ For an overview, see FARAH & BRAUN, *supra* note 108. Discussing Bout's various misadventures in the context of the arms trade generally, A. FEINSTEIN, *supra* note 16.

¹¹⁴ For engaging histories of the conflict, including the role of arms vendors and extractive industries, see T. HODGES, *ANGOLA: THE ANATOMY OF AN OIL STATE*. (2004); K. MAIER, *PROMISES AND LIES* (2002).

¹¹⁵ *Supra* note 108.

difficulties with mutual legal assistance and extradition from Third World states; and important cultural differences in the way events are experienced, then communicated.

To some extent, global justice must inevitably grapple with all these difficulties regardless, but structuring corporate criminal liability in such a way that companies bear much of this burden seems both efficient and prudent. Given the scale of the problem, the inadequacy of traditional responses and the direct access corporations enjoy to information about their employees, it makes sense to demand that they police transactions by individual employees that may lead to massacres or involve the illegal exploitation of conflict commodities. And yet, at the same time, we should again guard against the tendency to see this explanation as a panacea—Bout’s company fully supported his nefarious project and was no more capable of monitoring or restraining the man than Western powers, the United Nations, human rights advocates or Hollywood.¹¹⁶ So constructing corporate criminal liability to incentivize internal discipline makes sense in many, but not all, instances.

What of the problem of fungible corporate employees? When there is sufficient pressure from within a corporation (or market) to violate legal proscriptions, individual criminal responsibility offers weak deterrent value, since corporations will find some employee willing to undertake their criminal enterprise. As I have argued elsewhere, this problematic represents the leitmotif for all international crimes—very few atrocities are so dependent on the acts of any one individual that we can say with confidence that they would certainly *not* have transpired absent any one accused’s individual agency.¹¹⁷ Most atrocities depend on a collective apparatus, usually a state, military group, political party or criminal organization, meaning that international criminal justice has some considerable experience struggling with that thankless task of isolating individual responsibility from within collective structures. Perhaps it offers lessons to corporate criminal theory?

Consider the responsibility of individual board members of companies that enabled apartheid in South Africa. In addressing the painful history of Western commercial influence on apartheid, the South African Truth and Reconciliation Commission concluded that ‘[c]ertain businesses were involved in helping to design and implement apartheid policies. Other businesses benefited from cooperating with the security

¹¹⁶ The Hollywood movie *Lord of War* (Lions Gate Films, 2005), starring Nicolas Cage, was loosely based on Viktor Bout. There are also rumors that Bout personally assisted in its production.

¹¹⁷ James G. Stewart, *Overdetermined Atrocities*, forthcoming J INT. CRIM. J (2012).

structures of the former state.¹¹⁸ Many of these actions constituted complicity in or direct perpetration of crimes, but allocating responsibility to individual board members raises complex normative problems—if a company’s board passed a motion to assist apartheid crimes by a bare minimum (i.e., 8 votes to 7 in a board composed of 15 members) then each board member who cast an affirmative vote *did* make a difference to the downstream consequences, but in any other voting configuration, the company would have acted as it did regardless of any individual vote.

In response to these problems, many of the best scholars in international criminal justice call for collective responsibility. As George Fletcher has argued, “the liberal bias toward individual criminal responsibility obscures basic truths about the crimes that now constitute the core of international criminal law. [They] are deeds that by their very nature are committed by groups and typically against individuals as members of groups.”¹¹⁹ To return to the argument in corporate criminal theory, a turn towards the collective entity may not only allow us to bypass these cumbersome problems in blaming corporate officers, it may also generate a degree of deterrence for collective entities that is hard to bring home to individuals, who know full well that someone else will perpetrate the crime even if they personally defect. And yet, we are reminded of the contingencies that will affect the legitimacy of this course in concrete cases.

This brings us to one of the most often cited justifications for corporate criminal liability. For very many criminal theorists, corporate criminal liability can act as a kind of “convenient surrogate” that at least achieves some accountability when “we cannot identify the real [individual] decision-maker.”¹²⁰ This thesis has wide currency politically too—in calling on all European states to promulgate corporate criminal

¹¹⁸ *Institutional Hearing: Business and Labor, Principles Arising out of Business Sector Hearings*, The Truth and Reconciliation Commission of South Africa, Volume 4, Chapter 2, 161; N. CLARK, *MANUFACTURING APARTHEID: STATE CORPORATIONS IN SOUTH AFRICA* (1994).

¹¹⁹ George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 *YALE L.J.* 1499, 1514 (2001); For other excellent discussions, see Mark A. Drumbl, *Collective Responsibility and Postconflict Justice*, in *ACCOUNTABILITY FOR COLLECTIVE WRONGDOING* 23–60 (Tracy Isaacs & Richard Vernon eds., 2011).

¹²⁰ John C. Coffee Jr, *supra* note 80 at 229; Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions, *supra* note 96, at 1371 (“Where it is difficult or impossible to determine which individuals are responsible for illegal activity, liability can only be imposed on the corporation.”). See also Mark Pieth & Radha Ivory, *Emergence and Convergence: Corporate Criminal Liability Principles in Overview*, in *9 CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK* *supra* note 51, at 3, 4–5.

law within their criminal codes, the European Union openly pointed to “the difficulty, due to the often complex management structure in an enterprise, of identifying the individuals responsible for the commission of an offence.”¹²¹ In simplistic terms, corporate criminal liability is essential in order to prevent the corporate veil from acting as a protective cloak that defeats normal forms of criminal accountability.¹²² Once again, this important insight is unlikely to be anywhere near a categorical truth.

Trawling through evidence that supports just some of these international cases, it quickly becomes clear that the present stage of development is prior to even the earliest phases of corporate criminal liability domestically. We live in a world where there is perfect impunity for international crimes perpetrated by corporate actors and their agents, broken momentarily after WWII and in one or two sporadic instances in the past decade. Understandably, businesses and their employees have become utterly complacent. To cite one example, the chairman of one important multinational described company conduct in a warring African state in the 1980s in terms that may well amount to a more or less verbatim confession to the war crime of pillage—and this in the company’s annual report. If evidence against prominent corporate individuals is hard to come by in many domestic contexts, the same is not self-evident internationally.

This insight again underscores why we should hesitate to take even the most erudite theoretical explanations for corporate criminal liability as gospel truth for every manifestation of the phenomenon they describe, since some received wisdoms are incompatible with the realities of specific corporate crimes. Instead, the task may be to develop a much more sophisticated set of factors that are relevant in seeking justice for corporate wrongdoing, and to identify many of the variables we have taken for granted until now. At the level of responsibility, however, there may be ground for viewing the company and its employees as co-perpetrators of international crimes. If one regards the corporation as a repository of a particular ethos that can support the allocation of criminal blame, the argument that this corporate ethos is frequently complicit in the individual officer’s crime is compelling.¹²³ As always, however, the pragmatists’ reminder that so much depends on context is a helpful check

¹²¹ Council of Europe Recommendation, *supra* note 7, at 1.

¹²² Brent Fisse and John Braithwaite, *supra* note 66, at 494 (citing “enforcement overload; opacity of internal lines of corporate accountability; expendability of individuals within organisations; corporate separation of those responsible for the commission of past offences from those responsible for the prevention of future offences; and corporate safe-harboring of individual suspects.”).

¹²³ James Gobert, *supra* note 111, at 146.

on our desire for all-encompassing theories, which always miss the mark somewhere in the real world.

IV. CONCLUSION: A PROBLEM MORE COMPLEX

This article has presented a criticism of the literature addressing the identity of corporate criminal liability, offering reflections from the far peripheries of the subject. To be clear, much of the theory of corporate criminal liability is highly illuminating in plotting factors for consideration, even if it frequently arrives at conclusions that do not square with all variations of the phenomena they describe. This arises because much of the literature has adopted parochial concepts of corporate criminal law, categorical positions that are not sensitive to the complexities of reality, and philosophical positions that downplay the intensity of transnational commercial ventures as part of an increasingly globalized marketplace. If cases from international criminal justice help expose this reality, they may have some role in generating new holistic theories that better account for the problem of corporate misconduct in its full sense. These theories must move from absolute overstatement to reveal more of the hidden variables, understand the applicable laws as best possible, and develop conceptual factors that favor one path over the next on a provisional not fixed basis. Until we inhabit a more orderly global society where opportunities for corporate accountability are drastically improved, a pragmatic theory of this sort is inescapable.