IN DEFENSE OF CORPORATE CRIMINAL LIABILITY

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Corporations move like poltergeists through our material world: We register their presence by the tangible evidence of their actions, whether it be the construction of a manufacturing facility, the termination of employees, or the sponsorship of a sporting event. And yet corporations are regarded as more than mere ghosts. Like the actions of a corporeal person, the conduct of a corporation has consequences, and so we believe the law should set similar limits on the behavior of each. Indeed, it has become commonplace for federal and state governments to seek to impose criminal liability upon corporations for their actions in such areas as tax, securities, antitrust, insurance and environmental law.

Notwithstanding the ubiquity of federal and state corporate criminal liability regimes,[1] there has been surprisingly little studied consideration by American jurists and legal commentators of the *raison d'être* for corporate criminal liability.[2] Critics of corporate criminal liability have recently sought to correct this oversight. In his article, *Corporate Criminal Liability: What Purpose Does It Serve?*,[3] Professor V.S.

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1. Though corporate criminal liability has existed in some form since at least the 1800s, the number of criminal prosecutions against corporations has in recent years increased dramatically. *See* Sean Bajkowski & Kimberly R. Thompson, Note, *Corporate Criminal Liability*, 34 AM. CRIM. L. REV. 445, 445 (1997); Note, *Growing the Carrot: Encouraging Effective Corporate Compliance*, 109 HARV. L. REV. 1783, 1783 (1996).

2. *See* Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320 (1996) (noting that "[t]he doctrine of corporate criminal liability has developed . . . without any theoretical justification").

3. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996).

Khanna concludes, on efficiency grounds, that corporate criminal liability in fact serves no purpose whatever: "After all," Khanna writes, "corporations cannot be imprisoned," and "it is not clear that corporate criminal liability is the best way to influence corporate behavior."[4] And in their essay, *Corporate Crime*, Professors Daniel R. Fischel and Alan O. Sykes likewise conclude that, because corporations cannot be imprisoned, criminal liability ultimately "is inferior as a practical matter to an appropriate corrective on the civil side."[5]

In response, I suggest that these critics of corporate criminal liability may be incorrect—that corporate criminal liability is not without purpose. The problem lies in a foundational premise of the critics' arguments: By centering the case for eradicating corporate criminal liability exclusively upon its asserted inefficiency as a deterrent to unlawful acts, Khanna, Fischel, and Sykes overlook retribution as a normative basis for criminal liability and accordingly fail fully to appreciate that, even in the corporate context, moral condemnation remains a valid aim of the criminal law. Indeed, the attributes of modern corporate existence support the argument that corporations, like individuals, can and should be morally condemned for actions that transgress the law.

This Essay proceeds thus: In Part I, after briefly visiting the history of corporate criminal liability, I review the arguments made by the critics who regard corporate civil liability as superior to criminal liability in terms of social desirability. In Part II, I suggest that, in associating social desirability exclusively with efficient deterrence, Khanna, Fischel, and Sykes slight the retributive rationale for criminal liability. To provide a framework for analysis, I sketch Kantian and expressive retributive theories of criminal liability. This leads to a discussion in Part III of the applicability of these retributive theories in the corporate context. I argue that corporations are susceptible to expressive retributive concerns because they have independent identities in the community, based upon attributes—identifiable personae and a capacity to express moral judgments—that substantively distinguish them from their owners, managers and employees. In Part IV, I address

4. *Id.* at 1478.
5. Fischel & Sykes, *supra* note 2, at 322.

the question whether the goals of expressive retribution in the corporate context can be duplicated by civil liability regimes. Concluding that civil liability cannot capture the retributive concerns of criminal liability, I argue in Part V that corporations should continue to be subject to the same dictates that the community imposes upon individuals insofar as criminal conduct is concerned.

I.

At the time of the framing of the United States Constitution, private corporations lurked at the periphery of the American commercial landscape, and corporations did not share in the rights and liberties the Constitution promised natural citizens. It was not long, though, before lawyers representing corporations began to challenge accepted understandings of the corporate form's supposed limitations. In an 1809 case, *Bank of the United States v. Deveaux*,[6] Chief Justice John Marshall addressed the question whether a corporation could invoke the diversity jurisdiction of the federal courts. The Chief Justice answered in the negative, stating that a corporation "is certainly not a citizen," for a corporation is an "invisible, intangible, and artificial being, . . . [a] mere legal entity."[7]

By mid-century, the Supreme Court had reconsidered this view. In the 1853 case *Marshall v. Baltimore & Ohio Railroad Company*,[8] the Court held that, while a corporation is an artificial being, it may invoke diversity jurisdiction in the federal courts under the legal fiction that its stockholders are presumed to be citizens of the state of incorporation.[9] And so, notwithstanding their "invisibility" and "intangibility," corporations gained entry into the federal judicial system as participants equal in standing to individuals.

Some fifty years later, the Supreme Court ushered in the modern age of corporate criminal liability in *New York Central & Hudson River Railroad Company v. United States*.[10] In that case,

6. 9 U.S. (5 Cranch) 61 (1809).

7. *Id.* at 86.

8. 57 U.S. (16 How.) 314 (1853).

9. *See id.* at 328-29; *see also* Carden v. Arkoma Assocs., 494 U.S. 185, 189 (1990) (observing that "the rule regarding the treatment of corporations as 'citizens' has become firmly established").

10. 212 U.S. 481 (1909).

the government alleged that New York Central had violated the Elkins Act,[11] section 1 of which provided, among other things, that

> anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act .... In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier, as well as that of the person ....[12]

Appealing its conviction for Elkins Act violations to the Supreme Court, New York Central urged the Court to hold the Act's authorization of corporate criminal liability unconstitutional on the ground that Congress had "no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution by reason of the things charged."[13] Harking to the corporation's "invisibility" and "intangibility," the railroad maintained that "owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime of the nature charged in this case."[14]

Drawing from the civil law of tort, the Supreme Court rejected New York Central's argument. On the facts, the Court found no impediment to holding "that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting."[15] The

11. Act of Feb. 19, 1903, ch. 708, 32 Stat. 847 (repealed 1978).
12. *Id.* § 1
13. *New York Central*, 212 U.S. at 492.
14. *Id.*
15. *Id.* at 494.

public policy interests to which the Court alluded, moreover, were straightforward: Reasoning that corporations conduct a vast amount of business in interstate commerce, the Court concluded that to immunize corporations from criminal liability based upon the "exploded" doctrine that corporations lack the capacity to commit crimes would eliminate perhaps the sole means of controlling corporate conduct.[16]

In *Corporate Criminal Liability: What Purpose Does It Serve?*, Khanna speculates that the public nature of the harms allegedly caused by corporations in no small part inspired the Court's policy-based decision in *New York Central*. While civil enforcement was possible in the early 1900s, mature civil enforcement mechanisms did not exist. Khanna accordingly concludes that "corporate criminal liability appears to have been the only available option that met both the need for public enforcement and the need for corporate liability."[17] Though government developed effective civil enforcement mechanisms over time, courts and commentators have to this day essentially accepted the existence of corporate criminal liability without question;[18] as Fischel and Sykes observe in *Corporate Crime*, "the common-law rule that corporations cannot commit crimes is now nothing more than a historical curiosity."[19]

Given that the chasm between government's civil and criminal enforcement powers has now narrowed considerably,

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16. *See id.* at 494-96. The Court noted that "interstate commerce is almost entirely in their hands." *Id.* at 495.

17. Khanna, *supra* note 3, at 1486; *see also* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1117-18 (1991) (noting that at the time of *New York Central*, "administrative regulation and supervision was in its infancy") [hereinafter *Corporate Ethos*].

18. In the United States today, the scope of corporate criminal liability is broad. A corporation may be liable for nearly any crime, "except acts manifestly requiring commission by natural persons, such as rape and murder." Khanna, *supra* note 3, at 1488. To impose criminal liability on a corporation, typically three requirements must be met. First, a corporate agent must have committed an illegal act with the requisite state of mind. This state of mind can be proven by showing either that a particular agent had the necessary state of mind, or by showing that the "collective knowledge" of the employees reflects the requisite state of mind. *See id.* at 1489; *see also* United States v. Bank of New Eng., 821 F.2d 844, 856 (1st Cir. 1987) ("A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability."). Second, the agent must have been acting within the scope of employment, which includes any act that occurs "while the offending employee was carrying out a job-related activity." Khanna, *supra* note 3, at 1489 (internal citations omitted). Finally, "the agent must have intended to benefit the corporation." *Id.* at 1490.

19. Fischel & Sykes, *supra* note 2, at 337.

the critics question whether corporate criminal liability remains "socially desirable" today.[20] Viewing social desirability through the prism of economic analysis and operational efficiency, Khanna argues that to determine whether the imposition of corporate criminal liability is socially desirable, "one must compare the net benefits of imposing alternative liability strategies,"[21] such as a civil liability regime. Khanna maintains that the comparison is a fair one because both criminal and civil liability share two characteristics: the imposition of liability on the corporation and the goal of deterrence.[22] Indeed, in undertaking this comparison, Khanna expressly considers deterrence to be "the aim of both corporate criminal liability and corporate civil liability."[23]

Under an economic analysis, criminal liability fares poorly as compared to civil liability. Khanna notes that the continuum of sanctions available to deter unlawful corporate conduct—cash fines, probation, debarment, loss of license and related penalties—"are or can easily be made available in corporate civil liability regimes."[24] And he discounts the potential stigmatizing effect of a criminal conviction. Defining reputational stigma in the corporate context as "the reluctance of others, such as customers and workers, to deal with the corporation in the future,"[25] Khanna reasons, for example, that an organization will be unlikely to suffer a reputational loss for engaging in activities such as environmental pollution, because such third-party harm is unlikely to affect a firm's customers directly.[26]

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20. Khanna, *supra* note 3, at 1491.

21. *Id.*, at 1492; *see also* GARY S. BECKER, ACCOUNTING FOR TASTES 144-45 (1996) (discussing economic approaches to the criminal law); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985) (same).

22. *See* Khanna, *supra* note 3, at 1493.

23. *Id.* at 1494.

24. *Id.* at 1499. Khanna, Fischel, and Sykes assume that nonmonetary penalties, such as imprisonment, are not applicable in the corporate context. *See id.*, at 1478; Fischel & Sykes, *supra* note 2, at 320.

25. Khanna, *supra* note 3, at 1500.

26. In further support of his assertion that corporate criminal liability is not socially desirable, Khanna argues that criminal procedure protections are inefficient in the corporate context. He suggests, for example, that the quantum of evidence to obtain a criminal conviction—proof beyond a reasonable doubt—works optimally when the expensive criminal trial serves to avoid the social cost of wrongful imprisonment. Because Khanna believes this is not a factor in the corporate context, he advocates a lower standard of proof as a more efficient deterrent. *See id.* at 1516-17. Along the same lines, Khanna suggests that criminal

In regard to the public enforcement characteristics of criminal liability regimes—perhaps, in Khanna's view, the underlying concern in the *New York Central* decision—Khanna notes the importance of such enforcement in circumstances in which private actors could not effectively police corporate behavior:

> If, for example, a firm emits toxic waste into a neighboring area, residents may not know that the waste is harming them. Even if they did, they would probably lack the resources needed to single out the offending firm from surrounding nonoffending firms. In this context, public enforcement would promote efficiency.[27]

Khanna asserts that this public enforcement goal can be most efficiently accomplished through civil liability regimes. As an example, Khanna points to the recent emergence of a new legal tool, the civil investigative demand,[28] which "suggests that public civil proceedings may allow for information-gathering powers similar to those available in criminal proceedings."[29] And so in this regard as well, corporate civil liability presents the socially desirable option for realizing the beneficial objective of corporate criminal liability—the deterrence of unlawful conduct.[30]

Like Khanna, Fischel and Sykes challenge the notion that a criminal liability regime can create effective incentives for

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procedural protections, which focus upon preventing false convictions, should have little play in the corporate context, again on efficiency grounds. *See id.* at 1517-19; *see also* Fischel & Sykes, *supra* note 2, at 331-32 (stating that when "incarceration is not an issue and the goal is merely to force cost internalization, . . . the civil standard of proof and other rules of civil procedure ought function as well in cases involving corporate crime as elsewhere").

27. Khanna, *supra* note 3, at 1521 (internal citation omitted).

28. The "civil investigative demand" ("CID") confers the power "to compel the production of documents, to compel written answers to written interrogatories, and to compel oral testimony whenever [there is reason to believe] the person may have information relevant to a civil antitrust investigation." Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 595 (1994) (discussing the CID powers of the Department of Justice Antitrust Division) (footnote omitted). Currently, the Department of Justice Antitrust Division, the Securities and Exchange Commission, and the Inspectors General, among other federal enforcement agencies, enjoy CID powers. *See* Khanna, *supra* note 3, at 1523-24.

29. Khanna, *supra* note 3, at 1522.

30. Khanna reasons, for example, that a "government agency . . . can balance, on a case-by-case basis and in the context of its budgetary constraints, the costs of using more powerful and expensive enforcement tools against the likely deterrence benefits of using such tools." *Id.* at 1530.

corporations to engage in socially optimal behavior.[31] They begin with the presumption that corporations are nothing more than "webs of contractual relationships consisting of individuals who band together for their mutual economic benefit,"[32] and that the task of the law is to create incentives for the individuals in corporations to monitor themselves in order to prevent the commission of unlawful acts.[33] In light of this goal, they question the relative value of reputational stigma in the corporate context:

> Criminal convictions may lower the value of the firm because they reveal information to its customers about a pattern of misconduct toward them or because they encourage a spate of civil actions by private plaintiffs. These same effects should follow to a considerable extent from civil actions against corporations by the government and to some degree from private actions as well.[34]

Fischel and Sykes warn that a powerful stigmatizing effect, such as might accompany a criminal conviction, is not necessarily desirable: Such stigmatization, in their view, could result in overdeterrence, which, in turn, would lead to an inefficiently high level of investment in internal corporate monitoring to prevent misconduct.[35]

II.

The critics of corporate criminal liability assume that deterrence of unlawful conduct is the exclusive aim of corporate liability regimes. Deterrence traditionally has been viewed as a central justification for criminal liability generally, in conjunction with rehabilitation and incapacitation.[36]

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31. *See* Fischel & Sykes, *supra* note 2, at 342-43 (arguing that while the Exxon Valdez oil spill caused substantial harm, "nothing was gained by prosecuting Exxon criminally").

32. *Id.* at 323.

33. *See id.* at 323-24.

34. *Id.* at 332. Khanna likewise insists that corporate criminal liability is neither the only means by which to communicate a message of condemnation, nor the most effective: "The government presumably could use many other tools, such as news conferences, corporate civil liability, and managerial criminal liability, to accomplish this end." Khanna, *supra* note 3, at 1531.

35. *See* Fischel & Sykes, *supra* note 2, at 324, 332. Khanna undertakes an econometric analysis of stigma, concluding that stigma is socially more expensive in the corporate context than an optimal cash fine sanction. *See* Khanna, *supra* note 3, at 1511-12.

36. *See Developments in the Law—Corporate Crime: Regulating Corporate Behavior*

Deterrence offers a consequentialist rationale for criminal liability, in the sense that deterrence is concerned with promoting "certain socially desirable consequences,"[37] or "good" ends. The potential imposition of punishment for wrongdoing accordingly serves to encourage lawful behavior by creating incentives to engage in responsible conduct. Optimal deterrence of misconduct in the corporate context requires that the law offer such incentives up to "the point at which . . . marginal cost would exceed the marginal social gain in the form of reduced social harm" from unlawful activity.[38] As Khanna, Fischel, and Sykes demonstrate, economic analysis indicates that on the whole, civil liability regimes may deter unlawful conduct in the corporate context more efficiently than criminal liability regimes.[39]

But deterrence has never been regarded as the sole justification for criminal liability.[40] Retribution, too, has long been seen as providing normative support for criminal liability regimes. Oliver Wendell Holmes, Jr. in 1881 acknowledged the view that "the fitness of punishment following wrong-doing" could be regarded as "axiomatic."[41] Holmes was referring to principles whose origins may be traced to the classical, retributive framework of Immanuel Kant. Under Kant's theory, individuals in civil society have an intrinsic human dignity that is denied them when the state seeks to employ the criminal justice system to serve consequentialist ends, such as deterrence.[42] To accord an individual's inherent dignity the

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Through Criminal Sanctions, 92 HARV. L. REV. 1227, 1231 (1979) [hereinafter *Developments*].

37. *Id.*

38. Fischel & Sykes, *supra* note 2, at 324.

39. *See* Khanna, *supra* note 3, at 1533 (concluding that "pursuing corporate criminal liability results in society bearing the higher sanctioning costs of stigma penalties and the increased costs of deterring corporate misbehavior created by the procedural protections of criminal law"); Fischel & Sykes, *supra* note 2, at 322 (concluding that the economic arguments for corporate criminal liability are "ultimately unpersuasive").

40. *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 350 (1996) ("The idea that a single normative theory does or should determine the shape of all criminal doctrines is exceedingly implausible.").

41. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 42, 45 (Little, Brown 1923) (1881).

42. *See* IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 138 (John Ladd trans., Hackett Pub. Co. 1999) (1797) [hereinafter ELEMENTS OF JUSTICE]; *see also Developments*, *supra* note 36, at 1232 (under a Kantian retributive justification for criminal liability and punishment, "[i]mposing criminal sanctions on a guilty

appropriate respect, the state must punish individuals who violate the law because they have violated the law and *only* because they have violated the law—without regard, that is, for the consequences that might flow from the imposition of punishment.

To illustrate this theory of retribution, Kant explained:

> Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment . . . .[43]

While this illustration, as H.L.A. Hart remarked, "may well be a parody of modern retributivism,"[44] the pure Kantian theory nonetheless remains a benchmark in discussing retributive theories of punishment in the criminal justice context.[45]

Expressive theory offers an alternative and, perhaps, more palatable, retributive rationale for criminal liability. This approach reflects the sense that the commission of an act the community, through its laws, deems wrong should be met with disapprobation for the sake of the victim and the sake of the community.[46] The expressive view posits:

> Social norms enable rational behavior by defining how persons (or communities) who value particular goods—whether the welfare of other persons, their own honor or dignity, or the beauty of the natural environment—should

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person is justified, not because of the consequences which will result, but because it is morally proper to punish that person"). The modern articulation of the general theory of retribution contains three assertions:

> first, that a person may be punished if, and only if, he has voluntarily done something morally wrong; secondly, that his punishment must in some way match, or be the equivalent of, the wickedness of his offence; and thirdly, that the justification for punishing men under such conditions is that the return of suffering for moral evil voluntarily done, is itself just or morally good.

H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 231 (1968).

43. KANT, ELEMENTS OF JUSTICE, *supra* note 42, at 140.

44. HART, *supra* note 42, at 232.

45. *See, e.g.*, Khanna, *supra* note 3, at 1494 n.92 (referring the reader to Kant's *Metaphysical Elements of Justice* for the basis of the retributive rationale).

46. *See* JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 98-101 (1970); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

> behave. Actions that conform to, or defy, these norms thus express a person's (or a community's) attitude toward these goods.[47]

On this view, conduct that evinces disrespect for established valuations of persons and goods is regarded as criminal. For example,

> [a]long one dimension—say, personal wealth—theft might hurt a person as much as being outperformed by a business competitor. The reason that theft but not competition is a crime . . . is that against the background of social norms theft expresses disrespect for the injured party's worth, whereas competition (at least ordinarily) does not.[48]

Criminal liability in turn expresses the community's condemnation of the wrongdoer's conduct by emphasizing the standards for appropriate behavior—that is, the standards by which persons and goods properly should be valued.[49]

The expressive retributivist's commitment is "to assert[] moral truth in the face of its denial."[50] Criminal liability asserts this truth by countering "the appearance of the wrongdoer's superiority and thus affirm[ing] the victim's real value."[51] The expressive rationale, like deterrence theory, is instrumental: There is, as Jean Hampton maintains, a *telos* to the expressive design. The expressive goal is "to establish goodness" by reinforcing the understanding among community members that persons and goods should be valued in certain ways.[52] Contrary to a pure, Kantian view of retribution, then, the expressive approach can be regarded as consequentialist, a means to an end.

Notwithstanding the frequent invocation of deterrence to justify criminal justice regimes, retributive theories continue to provide viable rationales for the criminal law. With this point

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47. Kahan & Nussbaum, *supra* note 40, at 351.

48. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597-98 (1996) (footnote omitted).

49. *See* Kahan & Nussbaum, *supra* note 40, at 351-52.

50. Jean Hampton, *The Retributive Idea*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111, 125 (1988); *see also* Kahan, *supra* note 48, at 598 (noting that by imposing criminal liability, "society says, in effect, that the offender's assessment of whose interests count is wrong").

51. Hampton, *supra* note 50, at 130; *see also* Kahan & Nussbaum, *supra* note 40, at 352 (arguing that criminal liability reaffirms the political community's "commitment to the values that the wrongdoer's own act denies").

52. Hampton, *supra* note 50, at 126.

in mind, the next question is whether, as Khanna, Fischel, and Sykes suppose, something peculiar to the incorporeal nature of corporations immunizes them from retributive justifications for criminal liability and punishment.

III.

The view that criminal liability in the corporate context serves only to deter unlawful conduct finds support in the work of numerous commentators.[53] The argument, simply stated, is that the corporation *qua* corporation is an incorporeal entity that lacks the capacity to suffer moral condemnation.[54] Khanna, for example, assumes this is the case, noting that corporate decisions and processes are the result of the determinations of managers and agents within the corporation.[55] And Fischel and Sykes maintain that the corporation is nothing more than a collection of individuals that lacks a substantive independent identity.[56] The corporation accordingly is immune from retributive concerns; we can no more condemn the organization for a criminal act than we could the glass and steel office building its managers

53. *See, e.g.*, Shayne Kennedy, Note, *Probation and the Failure to Optimally Deter Corporate Misconduct*, 71 S. CAL. L. REV. 1075, 1084 (1998) (stating that "[t]he general goal of corporate liability is to deter misconduct"); John T. Byam, Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 583-85 (1982) (arguing that retributive theory is inapplicable in corporate context because corporation cannot be morally blameworthy); *see also* 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, 448 (1981) (taking a dim view of efforts to anthropomorphize corporations for purposes of the criminal law).

54. *See, e.g.*, Albert W. Alschuler, Introduction Comment, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 311-12 (1991) (criticizing "efforts to stigmatize aggregations of people, most of whom are blameless").

55. *See* Khanna, *supra* note 3, at 1494 & n.91 (regarding "deterrence, not retribution, as the aim of both corporate criminal liability and corporate civil liability"). I do not question that corporate managers and agents should also be susceptible to criminal liability as a general matter. *See* Lawrence Friedman & H. Hamilton Hackney III, *Questions of Intent: Environmental Crimes and "Public Welfare" Offenses*, 10 VILL. ENVTL. L.J. 1 (1999). Like Khanna, Fischel, and Sykes, I focus in this essay upon the issue of criminal liability and punishment of the corporation *qua* corporation.

56. *See* Fischel & Sykes, *supra* note 2, at 323 (describing corporations as "webs of contractual relationships consisting of individuals who band together for their mutual economic benefit"); *see also* Byam, *supra* note 53, at 584 (arguing that a corporation, "as distinct from its board of directors and managers, is not a person and has no 'mind'").

and agents occupy.[57]

So far as pure Kantian retribution is concerned, the critics of corporate criminal liability may well be correct. The Kantian justification for criminal liability is concerned with the moral fitness of citizens. This theory assumes a certain conception of the wrongdoer: that the wrongdoer is equal to other individuals in civil society, and possessed of an inherent dignity that affords him or her an intrinsic worth—a value that is "above all price and admits of no equivalent."[58] The imposition of punishment for—and only for—wrongdoing sanctifies the individual's intrinsic worth. Absent such punishment, the individual would be denied his or her equal dignity.[59] Whether the individual's inherent dignity and intrinsic worth derive from the human capacity for rational thought or some other source, to view the corporation as possessing such qualities would seem to be—as the critics of corporate criminal liability contend—an exercise in anthropomorphism. Acknowledgment of this reality necessarily undermines the argument that the corporation is susceptible to Kantian retributive concerns.[60]

But the expressive rationale for retribution, being teleological, involves a different conception of the wrongdoer. Unlike Kantian theory, the expressive rationale is concerned primarily with the wrongdoer's assessment of the worth of particular persons or goods as communicated through conduct, and the end of the criminal process is seen as the defeat of that incorrect valuation.[61] Expressive theory accordingly entails a relatively "thin" conception of the wrongdoer, as an individual in a community who, through his or her conduct, can express attitudes toward particular persons or goods—attitudes either in conformity with, or in opposition to, the proper valuations of

57. *See* Alschuler, *supra* note 55, at 313 (reasoning that attaching blame "to an artificial person" makes no more sense than attributing blame "to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime").

58. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 53 (Lewis W. Beck trans., Liberal Arts Press 1959) (1797).

59. *See* KANT, ELEMENTS OF JUSTICE, *supra* note 42, at 138 (discussing the purposes of punishment).

60. *See* Byam, *supra* note 53, at 585 (advising rejection of attempts to anthropomorphize corporations for retributive purposes).

61. *See, e.g.*, Hampton, *supra* note 50, at 125 (by retributive punishment, the wrongdoer is defeated "at the hands of the victim (either directly or indirectly through an agent of the victim's, e.g., the state)").

those persons or goods as established in the law.[62]

A corporation thus can be considered as similarly situated to an individual for purposes of the expressive rationale if it has a discrete identity within a community and expressive potential—that is if, *contra* Khanna, Fischel, and Sykes, a corporation objectively can be viewed as having an identity apart from its owners, managers, and employees to which expressive conduct can be ascribed. In this respect, one might be tempted to argue that, because a corporation can enter into contracts, sue and be sued,[63] and own property,[64] it has such an identity and, therefore, is properly subject to criminal liability.[65] This argument, however, falls short as a justification for expressive retribution in the corporate context: While a corporation's possession of such rights suggests a separate identity, that identity's distinguishing features are relatively insubstantial. Indeed, that identity may represent nothing other than the sum of the rights the organization possesses in aid of its business[66] and enjoys at the sufferance of the legislature.[67]

For the purposes of expressive retribution, a corporation must possess an identity upon which the community's judgment can be focused in a meaningful way. The modern corporation, being a complicated creature, possesses at least two attributes that testify to its independent identity within the community by substantively distinguishing it from its owners, managers and employees: an identifiable persona and a capacity to express moral judgments in the discourse of the

62. *See id.* at 138 (acknowledging the applicability of the expressive rationale even absent a Kantian conception of individual human dignity).

63. *See, e.g.*, Buckman v. Gordon, 42 N.E.2d 811, 813 (Mass. 1942) (stating that a corporation "has the capacity to make contracts not in contravention of any statute, and may sue and be sued thereon").

64. *See, e.g.*, Hubbard v. Worcester Art Museum, 80 N.E. 490, 491 (Mass. 1907) (discussing common law recognition of corporate right to hold property).

65. *See* Fischel & Sykes, *supra* note 2, at 321 (calling this argument "naive").

66. *See* 6 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2785, at 259 (rev. ed. 1997) (noting that corporation's implied right to own property is properly limited to acquisition of "whatever real property is needed in its business and suitable to the accomplishment of the objects for which it was incorporated").

67. *See* St. Louis, Iron Mountain & St. Paul Ry. v. Paul, 173 U.S. 404, 408 (1899) (observing that "[c]orporations are the creations of the State, endowed with such faculties as the State bestows and subject to such conditions as the State imposes"); *see also* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987) (recognizing that corporate "existence" is "a product of state law").

public square. I consider each attribute in turn.

A.

The modern corporation has an identifiable persona, to which we ascribe expressive conduct as a matter of course. By "identifiable persona," I refer to that sense in which the corporation has a presence in the community quite apart from that of its owners, managers and employees. Anecdotal evidence confirms that, unlike the inanimate matter of steel and glass office buildings, corporations have such a presence in the community. Consider, for example, the 1999 protests in the wake of bids to purchase the Vermont ice cream concern Ben & Jerry's. The movement's proponents sought to "save" the corporation on the belief that a takeover would "destroy the company's unique personality."[68] Indeed, one protestor described Ben & Jerry's as "a living, breathing organism that is continually benefiting our planet and communities."[69]

Such a statement betrays the public's perception that corporations are "alive," and can act, through their agents, in specific ways. It reflects a truism that employment-seekers in the corporate world know only too well: All corporations are not alike. Each corporation has its own culture, its own way of training employees, its own preferred practices. These aspects of corporate life have a cumulative weight, and the institutionalized relationships and practices of each corporation collectively denote a unique character. And so we tend to speak of corporations "as 'real' entities in ordinary language and in moral discourse,"[70] and to describe their personae as we would an individual's personality—as "staid" or "flexible," "welcoming" or "cold," even "good" or "bad."

This view of corporate persona finds support in the scholarship of Pamela H. Bucy, who argues that corporations possess an "ethos" that distinguishes them from the specific individuals who control or work for the organization.[71] Focusing upon corporate culture and corporate decision-

68. William Lowther, *US in a Stir Over Ice Cream Hippies*, MAIL ON SUNDAY, Dec. 19, 1999, *available in* 1999 WL 21947574.

69. *Id.*

70. Eric Colvin, *Corporate Personality and Criminal Liability*, 6 CRIM. L.F. 1, 24 (1995).

71. *See* Bucy, *Corporate Ethos*, *supra* note 17, at 1099.

making, Bucy defines "corporate ethos" as the "abstract, and intangible, character of a corporation separate from the substance of what it actually does, whether manufacturing, retailing, finance or other activity."[72] Whether the corporation's "ethos" is reflected in such superficial matters as the employee dress code, or in the substantive goals and policies of the organization, Bucy concludes that "each corporation is distinctive and draws its uniqueness from a complex combination of formal and informal factors," and that the formal and informal structure of a corporation "is identifiable, observable, and malleable."[73] Significantly, these formal and informal factors and structures serve to inform and encourage the conduct and actions of the corporation through its employees and agents.[74]

The development and refinement of the factors and structures that comprise a corporation's ethos are ongoing, as the corporation seeks to define itself in relation to the organizations and individuals in its particular business and political communities. Such development may be largely a matter of survival in the marketplace, reflecting a corporation's economic need to differentiate itself from its competitors in order to attract investors, employees and clients. Regardless of its genesis, the development of these structures inevitably reveals the personae by which we regularly distinguish a corporation from other corporations and from its individual owners, managers and employees, and thereby recognize the corporation as a singular presence within the community.

B.

The modern corporation also can be substantively distinguished from its owners, managers and employees by its capacity to express independent moral judgments in the discourse of the public square, and so to participate in the process of creating and defining social norms. This capacity derives from the Supreme Court's reasoning in *First National*

72. *Id.* at 1123.

73. *Id.* at 1127.

74. *See* Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L.Q. 329, 339 (1992) (observing that corporate conduct often is "predictable and consistent with corporate goals, policies and ethos").

Bank of Boston v. Bellotti.[75] In *Bellotti*, the Court faced the question of whether Massachusetts could, consistent with the First and Fourteenth Amendments, "forbid[] certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals."[76] The appellant banks and businesses sought to spend corporate money to publicize their views on a proposed state constitutional amendment that would have permitted the legislature to enact a graduated income tax.

A majority of the Supreme Court viewed the issue not as whether corporations have First Amendment rights *per se*, but, rather, as whether the Massachusetts statutory limitation on corporate speech unconstitutionally abridged expression. The Court concluded that the speech at issue was within the First Amendment's protective ambit, because that speech related to matters of public concern: "If the speakers here were not corporations," the Court stated, "no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[77]

In the Court's opinion, the corporate identity of the speaker did not deprive the speech of constitutional protection: "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."[78] The Court viewed the legislative attempt to limit speech in this instance as particularly noxious, because it appeared as though the legislature had sought "to give one side of a debatable public question an advantage in expressing its views to the people."[79] The Court found neither the state's interest in

75. 435 U.S. 765 (1978). The origins of this capacity may be traced to the Supreme Court's nineteenth century determination that corporations may be considered as "persons" for purposes of the Fourteenth Amendment's "liberty" protection. *See* Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886) (treating corporations as "persons" protected by the Fourteenth Amendment); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (assuming that corporation can challenge punitive damages award on substantive due process grounds under the Fourteenth Amendment).

76. 435 U.S. at 767.

77. *Id.* at 777 (internal citation omitted).

78. *Id.* at 784-85.

79. *Id.* at 785.

"sustaining the active role of the individual citizen in the electoral process," nor its interest in "protecting the rights of shareholders whose views differ from those expressed by management," sufficiently compelling to justify the statutory limitations on corporate speech.[80]

In holding unconstitutional the Massachusetts restrictions on corporate speech, the *Bellotti* Court adverted to the democracy-enhancing value promoted by the Free Speech Clause.[81] Free expression is a necessary predicate to self-rule.[82] Democratic governance begins with individual participation in community debate over issues of public concern. Individuals participate through engagement with neighbors, friends, and colleagues in the discourse of the public square—on the editorial pages of the local newspaper, in opinion polls, and at meetings of legislative committees and local boards. Public discourse, in turn, both reflects and serves to shape social norms and, eventually, the laws of the community in which the individual resides.

Individual participation in public discourse is thus a democratic act—one, importantly, that involves the exercise of moral judgment. The societal inclinations that emerge as laws from the cacophony of the public square ideally represent, among other things, the community's definitions of right and wrong conduct—the standards by which the community establishes how persons and goods should be valued. Debate about environmental degradation, for example, attracts the attention of legislators, who then debate the issue as well. This debate leads ultimately to laws that set baselines for the proper valuation of such goods as clean air and water, with criminal

80. *Id.* at 787-95.

81. The Free Speech Clause secures many values. Principally, it recognizes the importance of expression as a means of individual self-definition, self-actualization and self-fulfillment. *See* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (1966). Freedom of expression allows individuals to define themselves within a particular community, whether that community is a neighborhood, municipality, state or nation. *See* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty, in* THE BILL OF RIGHTS IN THE MODERN STATE 225, 233 (Geoffrey R. Stone et al., eds. 1992) (discussing the importance of free expression as an extension of personal autonomy). The *Bellotti* Court did not suggest that corporations share in this aspect of First Amendment freedom. *But see supra* notes 68-74 and accompanying text.

82. *See* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (observing that "speech concerning public affairs is more than self-expression; it is the essence of self-government").

penalties for those individuals whose conduct denies the valuations the law establishes.

Under *Bellotti*, corporations are equivalent to individuals with regard to the democracy-enhancing aspects of the First Amendment's free speech clause.[83] The Court reasoned that in the public square, corporate speech regarding matters of public concern has worth relative to other speech in the public square—that is, relative to the speech of individuals. Critical to this reasoning is the foundational assumption that, to the extent corporations participate in public discourse, they do so in their capacities *qua* corporations, their voices distinct from those of the individual shareholders and managers who own and control them.[84] *Bellotti* thus implicitly acknowledges that the voice with which the corporation speaks in the public square represents an interest distinct from that of the individuals, or groups of individuals, who manage or work for the corporation. The Court recognized, in other words, the capacity of the corporation to express unique viewpoints, attitudes and moral judgments.

As a measure of the dimensions of one's identity within a community, an equal voice in the democratic arena of public affairs is no small matter. As Michael Walzer has explained, "[w]hat counts [in democracy] is argument among the citizens. Democracy puts a premium on speech, persuasion, rhetorical skill. Ideally, the citizen who makes the most persuasive argument—that is, the argument that actually persuades the largest number of citizens—gets his way."[85] Though the corporation *qua* corporation cannot vote, *Bellotti* validates its community identity by sanctioning corporate contributions to "what counts in democracy": discussion and debate about a

83. This holding naturally raises significant free speech and corporate governance issues. *See* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 IOWA L. REV. 995 (1998) (arguing that political action by business corporations implicates no true First Amendment values). It remains, however, that *Bellotti* is the law, and the decision accordingly must inform our understanding of corporate existence and identity.

84. *See Bellotti*, 435 U.S. at 784 (stating that speech does not lose First Amendment protection "simply because its source is a corporation," and discussing the corporation as "spokesman" and "speaker"); *id.* at 807 (White, J., dissenting) (acknowledging that curtailment of corporate speech still "would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts").

85. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 304 (1983).

community's problems, fears and hopes, including determinations about that conduct which should be deemed laudable, and that conduct which should be condemned. Corporations, like individual members of a community, participate in the process of creating and defining social norms, and in so doing distinguish themselves from those individuals.

C.

This understanding of corporate identity differs fundamentally from the assumption underlying the analyses of Khanna, Fischel, and Sykes—that corporations cannot be susceptible to retributive concerns because they consist of nothing more than the individuals of which they are composed and, therefore, lack independent identities in the community. That assumption fails to account for the modern corporation's identifiable persona, and to reflect the fact that, as a matter of law, corporations have the capacity to express judgments and attitudes that may be entirely unrelated to the personal views of their owners, managers and employees. Possessed of these attributes, corporations can be substantively distinguished from their owners, managers, and employees, and from each other.

So understood, corporations are not inherently immune from expressive retributive concerns. Because they possess discrete identities within the community to which expressive conduct can be ascribed, corporations satisfy the thin conception of the wrongdoer required by the expressive rationale. Consequently, the corporation *qua* corporation can suffer moral condemnation for its wrongdoing through criminal conviction and punishment, thereby vindicating the proper valuation of persons and goods whose true worth was disparaged by the corporation's conduct—just as in the case of an individual wrongdoer.[86]

Because corporations satisfy the conception of the wrongdoer contemplated by the expressive rationale, cases in which the

86. A logical extension of this proposition would be closer attention to the standards for proving corporate intent. The work of commentators who have proposed new frameworks for understanding corporate intent provides an important start. *See, e.g.*, Bucy, *Corporate Ethos, supra* note 17, at 1121-51; Ann Foerschler, Comment, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CALIF. L. REV. 1287, 1303-11 (1990).

government secures a criminal conviction of a corporation can be viewed as the effectuation of expressive retribution, just as in cases involving individual defendants. In *United States v. Wilson*,[87] for example, the government had charged two corporate entities—Interstate General Company and St. Charles Associates—and Interstate's Chief Executive Officer with felony violations under the Clean Water Act.[88] The resulting criminal convictions of the individual and corporate defendants served to counter the valuation of a particular natural resource—the waters of the United States—that the defendants' actions expressed.[89] More recently, following the 1996 ValuJet crash that claimed 110 lives, the government indicted SabreTech on charges of violating federal hazardous materials transportation and handling laws.[90] The resulting conviction of the aircraft manufacturing company signified the moral condemnation of conduct that expressed denial of the true worth of human health and safety. Regardless of its deterrent effect, the finding of criminal liability in each of these cases furthered the ends of the expressive rationale.

IV.

Having established that the corporation *qua* corporation can be subject to expressive retribution, the question remains whether a civil liability regime can more efficiently accomplish this retributive end in the corporate context than a criminal liability regime. Recall that so far as the consequentialist aim of deterrence is concerned, the critics of corporate criminal liability maintain that a civil liability regime would more efficiently prevent corporate wrongdoing than a criminal liability regime—that is, a civil regime would deliver the social

87. 133 F.3d 251 (4th Cir. 1997).

88. *See* 33 U.S.C. § 1319(c)(2)(A) (1994) (providing that anyone who knowingly violates any of a number of the Clean Water Act's provisions commits a felony); *see also* Sean J. Bellew & Daniel T. Surtz, Note, *Criminal Enforcement of Environmental Laws: A Corporate Guide to Avoiding Liability*, 8 VILL. ENVTL. L.J. 205, 214-16 (1997) (discussing criminal liability provisions of the Clean Water Act).

89. *See* Friedman & Hackney, *supra* note 55, at 1-2 (discussing the Clean Water Act and environmental laws as reflections of societal concern for environmental protection).

90. *See* Catherine Wilson, *Firm Convicted of Errors that Led to ValuJet Crash*, BOSTON GLOBE, Dec. 7, 1999, at A18 (discussing conviction of SabreTech on federal charges and indictment of SabreTech on state charges of murder and manslaughter in connection with the 1996 ValuJet crash).

good of deterrence at a lower cost to the community than would a criminal regime. This is so in part because criminal prosecutions are more expensive than civil enforcement actions.[91]

The aim of expressive retribution is the defeat of the wrongdoer's valuation of the worth of some person or good. Unlike deterrence, this objective cannot be accomplished more efficiently via a civil liability regime; indeed, it cannot be accomplished at all through civil liability. Notwithstanding the retributive character of some aspects of civil liability (a punitive damages award, for example), only criminal liability is understood against the background of social norms, codified by the criminal law, as conveying the particular moral condemnation that expressive retribution contemplates.[92]

Civil and criminal liability have distinct social meanings; we freight a judgment of liability with a different content in the civil context than in the criminal context.[93] The grammar of the civil action speaks to such matters as fault and damages, in service of an ultimate factual and legal determination as to whether and how to fix valuations, as measured in dollars, of persons and goods. The grammar of the criminal action, by contrast, speaks to such matters as knowledge and intent, to the end of determining the factual and legal relationship of the defendant's alleged conduct to valuations of persons and goods already established. Though they may concern the same or similar persons and goods, in each context the parties proceed from different assumptions about the valuations of those persons and goods: In the civil context, valuations are a proposition to be proved; in the criminal context, they are a given to be presumed. Because they derive from different assumptions about how persons and goods should be valued, findings of civil and criminal liability mean different things in

91. *See* Fischel & Sykes, *supra* note 2, at 325 (the "social cost" of crime "must be understood to include not only the direct costs to victims but also the costs of the criminal justice system").

92. *See* Hart, *supra* note 46, at 405 (stating that a criminal conviction represents "a formal and solemn pronouncement of the moral condemnation of the community").

93. *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995) (defining "social meaning" as "the semiotic content attached to various actions, or inactions, or statuses, within a particular context"). I seek here simply to describe the social meanings of civil and criminal liability. *See id.* at 951-56 (discussing the "fact" of social meaning).

respect to those valuations.

In light of their distinct social meanings, findings of civil and criminal liability are not transmutable for purposes of moral condemnation. The expressive rationale eschews commodification; it operates from the presumption that the community has determined, and expressed through its laws, that there are circumstances in which persons and goods have a certain inherent worth that must be respected. To properly counter the wrongdoer's incorrect assessment of those persons or goods, the retributive act must recognize that the wrongdoer denied their inherent worth, whatever that may be. In other words, the finding of liability must recognize that, in the circumstances, the victim or object's value is beyond price. Because in the criminal context valuations are presumed to be established, it follows that a finding of criminal liability—a criminal conviction—is understood as the vehicle of moral condemnation.

Anecdotal evidence supports this impressionistic analysis of the relative meanings, and significance, of civil and criminal liability. There is a societal sense, for example, that civil liability in the wake of a failed attempt to convict an individual alleged to have committed a crime, as in the case of O.J. Simpson, does not capture the same condemnatory bite as a verdict of guilt. This sense extends to the corporate context as well. Dan Kahan has investigated the phenomenon of social meaning in the context of corporate wrongdoing and concluded:

> Just as crimes by natural persons denigrate societal values, so do corporate crimes. Members of the public show that they feel this way, for example, when they complain that corporations put profits ahead of the interests of workers, consumers, or the environment. Punishing corporations, just like punishing natural persons, is also understood to be the right way for society to repudiate the false valuations that their crimes express. Criminal liability "sends the message" that people matter more than profits and reaffirms the value of those who were sacrificed to "corporate greed."[94]

94. Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618-19 (1998) (footnotes omitted).

The critics of corporate criminal liability also have remarked upon the popular desire to hold corporations criminally liable for conduct, as in the case of the Exxon Valdez oil spill.[95]

Note that, while the expressive rationale implicates both liability and punishment, the linchpin for retributive purposes is the finding of liability, the verdict of guilt. Therein lies the community's expression of moral condemnation, akin to what Jean Hampton called the wrongdoer's "experience of defeat at the hands of the victim,"[96] albeit indirectly through prosecution by a legal authority. The punitive consequences of a criminal conviction, such as imprisonment, probation or a fine, while an essential aspect of retribution, necessarily take their expressive character "from the condemnation which precedes them and serves as the warrant for their infliction."[97] We accordingly appreciate that liberty-deprivation in the form of imprisonment is punitive, and liberty-deprivation in the form of conscription is not, because the former follows from a finding of criminal liability.[98]

Viewed through the lens of retribution, the perceived inefficiencies of a criminal liability regime for corporate conduct reflect the different expressive interests involved in the civil and criminal contexts. Consider the constitutional requirement that the government must prove liability beyond a reasonable doubt in all criminal cases.[99] Under this standard, the government, on behalf of the victims of wrongdoing and the community, cannot simply impose criminal liability with abandon; rather, the burden of proof, among other factors, requires that discretion to prosecute be exercised judiciously. In this way, the burden reflects the unique significance of the proposition to be proved, as the law seeks to ensure that

95. *See* Fischel & Sykes, *supra* note 2, at 342-43; *see also* Alschuler, *supra* note 55, at 312 (observing that "in our rush to express our indignation, we may truly personify and hate the corporation"). While critics of corporate criminal liability implicitly acknowledge the different social meanings of civil and criminal liability, they maintain that, in terms of deterrence, civil liability can adequately capture the differences. *See, e.g.*, Fischel & Sykes, *supra* note 2, at 332 (discussing reputational stigma associated with criminal liability).

96. Hampton, *supra* note 50, at 126.

97. Hart, *supra* note 46, at 405.

98. *See* Kahan, *supra* note 48, at 599.

99. *See* Khanna, *supra* note 3, at 1512-17 (discussing the undesirability of the criminal standard of proof as applied to corporate wrongdoing); Fischel & Sykes, *supra* note 2, at 331-32 (same).

liability is warranted before moral condemnation is leveled upon an alleged wrongdoer.[100] The lower preponderance of the evidence standard in civil matters, by contrast, reflects the lower expressive interests at stake in such cases.

Would it be possible to construct a corporate civil liability regime that delivered the same retributive message as a finding of criminal liability, but more efficiently? Perhaps. Such a construction would require, at a minimum, a fundamental reconception of civil liability in the context of corporate misconduct—that is, a manufactured change in the social meaning of civil liability.[101] In light of the established social meanings of civil and criminal liability, and the daily reinforcement of these meanings in schools, courts, popular culture and the media, such a reconception seems unlikely in the immediate future.

V.

Khanna concludes his article by answering his title question: The purpose served by corporate criminal liability is "almost none."[102] From a purely deterrence perspective, this may well be so. Certainly, Khanna, Fischel, and Sykes argue forcefully that criminal liability regimes may not be the most efficient means of deterring corporate misconduct, and that in dollar terms, the social utility gained by deterring corporate misconduct through civil enforcement could be significant.

But deterrence and efficiency are not the only interests in play.[103] There is also the interest in expressive retribution, which provides reason enough not to dispense entirely with corporate criminal liability. Absent the possibility of criminal

100. *See* Hart, *supra* note 46, at 411 ("If what is in issue is the community's solemn condemnation of the accused as a defaulter in his obligations to the community, then . . . the fact of default should be proved with scrupulous care.").

101. *See* Lessig, *supra* note 93, at 1008-14 (discussing techniques through which social meaning can be changed).

102. Khanna, *supra* note 3, at 1534.

103. As Professor Kent Greenfield has remarked, "[e]fficiency . . . is but one basis for public policy." Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 327 (1998). Another basis might be fairness. *Bellotti* teaches that corporations can participate in the process of norm-creation and norm-definition; in this respect, they enjoy a standing in the public square and the community akin to individuals who inevitably will be bound by the criminal law. As a matter of fairness, then, corporations should not be permitted to evade rules they indirectly helped to create: There is something intuitively unjust about allowing one to contribute to a definition of conduct she knows will not bind her.

liability, corporations would escape moral condemnation for wrongdoing, and the retributive import of criminal liability to the community would be lost. For under a civil liability regime for the corporation *qua* corporation, there would be no moral condemnation equivalent to a criminal conviction: if found civilly liable, a corporation might be deemed negligent, or perhaps reckless, but no statement, in the form of a conviction, would attest to the proper valuation of the persons or goods at issue. In the end, the financial liability imposed would come to be viewed, by both the corporation and the community, merely as a cost of doing business.

In effect, then, a corporate civil liability regime that paralleled ordinary criminal liability for individuals charged with the same wrongdoing would allow the corporation *qua* corporation to purchase exemption from moral condemnation. Such exemption would affect the expressive significance of criminal liability, as the vindication of the proper valuations of persons and goods would vary not with the conduct alleged—a distinction that rightly could affect the evaluative standard employed—but, rather, with the identity of the offender. The value of human health and safety, for example, would be regarded as less sacrosanct when denied by corporations as opposed to individuals.[104] Thus corporate exemption from criminal liability would tend to undermine the condemnatory effect of criminal liability on individuals in respect to similar conduct—and, ultimately, to diminish the moral authority of the criminal law as a guide to rational behavior.

104. The issue would be drawn in sharp relief in those state and federal prosecutions in which individuals and corporations otherwise would be co-defendants. *See, e.g.*, United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (naming as co-defendants in Clean Water Act prosecution Interstate General Company and its chief executive).