

CORPORATE IDENTITY

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Certain types of collectives count as people under the law. These “legal people” can do things—like pollute the environment or mislabel addictive medications—that subject them to sanction. Any effort to pair harms in the world with responsible collectives must draw on a theory of collective identity. The fact that collectives can be so dynamic—routinely exchanging parts, splitting and merging, changing ownership, and reworking basic operating procedures—complicates any effort to give principled identity conditions. This chapter focuses on business corporations as a salient collective whose identity has far-reaching implications. The law implicitly encodes a vision of corporate identity in doctrines for assessing corporate liability. Experimental philosophy suggests that common intuition endorses a different view. This chapter discusses both and the significance of the discrepancy.

I. Introducing Collective Identity

Legal scholars rarely talk about personal identity, even though unstated and unexamined assumptions about identity are essential to legal practice (Mott (2019); Diamantis (2019c)). Any effort to pair people with conduct for which they are responsible must draw on an implicit view of where one person ends and another begins, in both space and time. If a hand shot a gun, the law needs some criteria for saying whose hand it was. If the gun went off ten years ago, the law must determine whether that person is still around today.

Lawyers’ silence about personal identity may not be altogether surprising. Human beings are corporeally continuous creatures with relatively predictable life cycles. The terrible accidents that fascinate neuroscientists—like Phineas Gage’s exploded rod—and the fanciful thought experiments that vex philosophers—like split brains, fused personalities, and mind-controlling tumors—are rare even when they are physically possible. If such cases do occur, the law accommodates them using ad hoc exceptions to settled doctrine. There is little perceived need to wrangle with the nuances of human identity. Most practitioners implicitly assume that biological continuity is a serviceable proxy for the law’s purposes. To find out whose hand was on a gun, the law simply asks to whose body it was attached. To find out if that person is still around today, the law asks whether that body is still breathing.

Lawyers’ reticence to discuss personal identity may be more surprising when it comes to *legal* persons. Legal people are usually collectives of human beings, like business corporations and unions. The law formally designates such collectives as distinct “people” for purposes of assessing rights and responsibilities. Accordingly, corporations can be sued by private parties for offenses like discrimination and prosecuted by authorities for crimes like insider trading.

Just as for natural people, the law needs some implicit theory of identity for holding corporations accountable. The basic questions that need answering are the same: When a violation

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occurs, how can the law determine whether whatever caused it is part of a corporation? (Diamantis (2021)). And how can the law say which corporation today, if any, is the same as the one that caused the harm in the past? (Diamantis (2019d)).

It is hard to begin articulating identity conditions for corporations. There is no obvious way to generate a pre-theoretical list of constituent parts. Clearly corporations can include natural people, but which ones?¹ Unlike natural people, legal people have no scientifically discernable perimeter. No visible cue distinguishes an Apple employee from a Microsoft employee, or either from someone who has no corporate affiliation at all. Even after discovering (or stipulating) which natural people make up corporations, there are few pre-theoretical guides for determining what rearrangements and substitutions of parts corporations can survive. Corporations have no heartbeat and no uniform function by which to measure death. In life, corporations are much more dynamic than natural people. They have no predictable life-cycle.² For them, the sorts of transformations that captivate philosophers of identity are matters of course. Corporations revise their fundamental operating principles, lose and gain any of their parts, or split and merge, all with the stroke of a pen.

The stakes for finding a satisfactory account of corporate identity are high. Lawmakers recognized corporate personhood in large part to address the massive harms corporations can cause. Corporations operate on a scale—temporal, geographic, and material—that no natural person can achieve. They can darken the sky, poison entire communities, disrupt financial markets, and drive millions of people from their homes. By identifying responsible corporations and imposing penalties, the law hopes to deter corporations from socially destructive behavior and to provide some measure of justice to their victims.

And yet, the law has no explicit position on corporate identity. Part of the reason is historical. Lawmakers prefer to repurpose existing law rather than develop it anew. As the corporate form grew in social and economic significance, lawmakers responded by transposing to the corporate context an ancient Roman doctrinal framework (discussed below) that applied originally to simple master-slave relationships. Another reason is lack of philosophical reflection. It takes some creative insight, some puzzling thought experiment, or some pointed question to provoke a sense of urgency over matters of identity that we otherwise take for granted. These prompts are familiar to philosophers of identity, but they have yet to meaningfully enter legal discourse. This chapter aims to change that.

Even if it has no explicit view on corporate identity, the law is implicitly committed to some parameters defining it. The legal rules for imposing corporate liability encode assumptions about which things are parts of corporations and what transformations corporations can survive. This chapter unearths those assumptions to paint a rough picture of the law's take on corporate identity.

Corporate identity also matters to us in our ordinary lives. In our routine socio-ethical interactions with collectives, we must draw intuitive lines between them so we know which, if any, to blame, or praise, or otherwise relate to differently going forward. Experimental philosophers have made some initial inroads into understanding how these intuitions function, but much work remains. This chapter presents what is known or can be inferred from available studies. It

¹ I write “can” here because some corporations have no natural person constituents (Reyes (2021)).

² It should be noted, though, that some researchers maintain that social groups do follow predictable patterns of development (Worchel and Coutant (2002)). I suspect the patterns they identify hold less reliably for business corporations.

uncovers differences between how the law and the folk conceive corporate identity, both synchronic (Section II) and diachronic (Section III). A concluding section (Section IV) discusses the real-world significance of the discrepancy.

II. *Synchronic Collective Identity: Pairing Collectives with Constituents*

Synchronic identity refers to a thing's identity at a given time. As for natural people, a view of synchronic identity should pick out the things in the world that are constituents of a corporate people (Diamantis (2019a)). When something happens in the world, synchronic identity will help to say whether the corporation, or something else, caused it. As a starting point, it should be relatively uncontroversial that employees are parts of corporations. Beyond that, there are few clear signs about which employees matter, who counts as an employee, or whether corporations encompass anything other than employees. In corporate law, "part," "constituent," and "identity" are not defined concepts. Nor is it clear that they have a sufficiently coherent ordinary meanings to make asking people directly about those terms a worthwhile exercise.

A more productive path may be to investigate synchronic corporate identity indirectly. One issue about which legal doctrine and folk intuitions are more robust is corporate accountability. The conditions under which corporations are deemed responsible may give some insight into what corporate identity is supposed to be. For example, if an individual bribes a politician and a corporation is held to account, that is *prima facie* evidence that the corporation is functionally identifiable with that individual. As explained below, the connection between liability and identity is particularly strong in criminal law. Investigating the conditions under which we hold corporations responsible could uncover a preliminary picture of synchronic corporate identity.

A. *The Law's View*

The law assumes that corporations can only function through natural people. The law also subscribes to the "identity principle," which prohibits punishing one person for another's crimes. (*Korematsu v. United States*, 323 U.S. 214 (1944); Locke (1690); Parfit (1971)). Accordingly, when the law holds a corporation accountable for human activity, it identifies that activity as corporate activity.

Respondeat superior ("let the master answer") is the general legal doctrine for assessing corporate criminal responsibility. In conjunction with the identity principle, it says when a natural person acts or thinks as an extension of a corporation (Diamantis (2016)). It applies whenever an individual:

1. Is an employee of a corporation,
2. Operates within the scope of her employment, and
3. Has some intent to benefit the corporation.

Whatever the employee does or thinks under these conditions, she does or thinks both on her own account and as the corporation. For example, if a truck driver hits a pedestrian while speeding to make a timely delivery, then her corporate employer also hit the pedestrian.

"Employee," "scope of employment," and "intent to benefit" are legal terms of art. Who counts as an employee is a complicated question and a point of current controversy. In the interest of brevity, I skip over the nuances of labor law and focus the discussion on clear-cut, traditional

examples of employees, i.e. those with a current employment contract, an ongoing corporate relationship, and a wage from the corporation. “Scope of employment” and “intent to benefit” are a bit easier to characterize. Courts have interpreted both in very permissive ways. Scope of employment can exceed the four corners of an employment contract (United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972)). An employee may count as operating within the scope of her employment even if she acts contrary to direct orders. The only behaviors that are reliably beyond the scope of employment are victimizing one’s employer (perhaps by embezzling funds) and pursuing purely private matters away from the workplace (like mowing one’s own lawn). “Intent to benefit” is similarly broad (United States v. Sun-Diamond Growers of California, 138 F.3d 961 (D.C. Cir. 1998)). Any sort of benefit qualifies, as do intentions that are ineffectual, subsidiary, or confused.

Although *respondeat superior* does not paint a complete picture of synchronic corporate identity under the law, it does imply some general commitments. For example, according to the law, each corporation could be composed of any of its employees, from the C-suite to the custodial staff. Each one potentially embodies the entire corporation because each in isolation can incur liability for it. To illustrate the oddity of this view, suppose one employee in a corporation’s human resources department makes hiring decisions using objective criteria, another gives undue preference to men, a third gives undue preference to women, and a fourth runs compliance to make sure all hiring practices are non-discriminatory. At one and the same time, the law would say that the corporation hires in a nondiscriminatory way, engages in gender discrimination (both in favor of and against women), and tries to prevent discrimination. For any natural person, this self-undermining pattern of behavior might be symptomatic of a rare dissociative disorder; *respondeat superior* effectively prescribes it for corporate people.

When it identifies corporations with individual employees, *respondeat superior* also excludes everything else. For example, internal organizational systems are irrelevant to corporate liability, and hence to identity. The same is true of a corporation’s physical structures, brand, consumer products, technological systems, etc. The law understands these all to be incidental features of corporations or property interests held by them, not constituent parts.

Perhaps paradoxically, *respondeat superior* even excludes *groups* of employees from corporate identity. While a corporation can be liable for the misconduct of any single employee, it is not liable if a group of employees engages in conduct that, though individually innocent, collectively amounts to criminal harm (Diamantis (2019b)). For example, in one well-known case, a ferry capsized, killing nearly 200 passengers. (R. v. Her Majesty’s Coroner for E. Kent, (1987) 3 B.C.C. 636, 638 (Eng.)). Since the ferry crew operated the boat in a manner that looked to be grossly negligent, prosecutors charged their corporate employer with manslaughter. Applying *respondeat superior*, the court found that, though the collective conduct of the crew was grossly negligent, none of the individual employees’ acted with gross negligence. Accordingly, the court dismissed the manslaughter charge. This result seems to imply that a corporation can be identical to any individual employee, but not to a group of its employees, nor even to the sum total of all its employees.

B. The Folk View³

³ The studies discussed below were largely conducted on Western audiences. While Eastern audiences have different intuitions about groups, the data seem to show that they are even more

There is not much data on folk intuitions of synchronic corporate identity.⁴ Early related research investigated conditions under which people are inclined to group objects (Rock (ed) (1996)) or to identify moving groups of objects as unified loci of agency. (Bloom and Veres (1999)). As to groups of humans, researchers have described four types of groups that people intuitively recognize: intimacy groups (like families), task groups (like orchestras), social categories (like Christians), and loose associations (like people at a bus stop) (Lickel et al. (2000)). People do not think of all these types of groups in the same way. Intimacy and task groups are distinctive in that they exhibit what cognitive scientists call entitivity, a high level of coherence and interdependence/interactivity among their membership (Campbell (1958)). Entitive groups occupy a special role in our cognitive economy, similar to the role that individuals occupy (Welbourne (1999); Abelson, Dasgupta, Park, and Banaji (1998); Huebner (2016); Johnson and Queller (2003)). We come to see such collectives as unified agents with an identity distinct from, but overlapping with, the individuals who compose them (Yzerbyt, Judd, and Corneille (2004)). Corporations, with their generally hierarchical structure and profit-based organizing principle, are archetypical entitive groups (Clark (1994)). Unfortunately, there is very little research into folk understandings of entitive group constitution, let alone corporate constitution.

Once again, judgments of corporate responsibility could yield insight into a folk picture of corporate identity. On this point, there is some good data, and it gestures toward a vision of synchronic corporate identity that departs significantly from the law's. As entitive groups, corporations activate our ordinary intuitions about responsible action (Dasgupta, Banjali, and Abelson (1999)). This makes reactive attitudes, like blame, toward corporations psychologically sustainable (Sherman and Percy (2010); Knobe and Prinz (2008); Denson et al. (2006)). We seem to assess corporate responsibility in much the same basic way that we assess individual responsibility (O'Laughlin and Malle (2002)). For both, our assessment often turns on the intention (or lack thereof) behind their conduct, and we infer the presence (or absence) of intention from observed behavior and contextual clues (Bloom and Veres (1999)). We even use the same neural systems to evaluate both individual and corporate behavior (Contreras, Schirmer, Banaji, and Mitchell (2013)).

These basic observations map out some important differences between the legal and folk conceptions of corporate identity. Since people ordinarily think of corporations as unified entities, they seem to conceive of corporations as consisting of an aggregate of employees, rather than individual employees. Recall the human resources and ferry examples from the previous section. The law views each corporate employee as individually embodying their entire corporate employer, undertaking distinct courses of behavior on the corporation's behalf. Laypeople, however, appear to be more likely to see the corporations as unified agents, acting out single

inclined to exhibit the psychological tendencies I discuss (Phelan, Arico, and Nichols (2013); Huebner, Bruno, and Sarkissian (2010); Kashima, Kashima, and Chiu (2005); Menon, Morris, Chiu, and Hong (1999)).

⁴ Sociologists and social psychologists have talked about "collective identity" for decades in the context of social movements (Melucci (1989); Poletta and Jasper (2001)). For them, collective identity is a social and psychological phenomenon, bound up with individual identity, that emphasizes the first-personal perspective of people who have a distinctive shared orientation (Worchel and Coutant (2002)). This understanding of collective identity is likely orthogonal to the third-personal conception that is the focus of this chapter. (Hamilton, Levine, and Thurston (2008)).

courses of behavior or having single trains of thought, albeit through their multiple employees (Jenkins, Dodell-Feder, Saxe, and Knobe (2013)). Each employee’s behavior adds to that course of conduct and provides context in light of which we understand and evaluate the whole. As a consequence, on the folk view, the ferry company seems to have committed manslaughter (because the employees collectively acted with gross negligence) and the company with the human resources department seems to have hired applicants equitably (because they collectively hired as many men as women).

Adding detail to this skeletal folk view would require much more experimental investigation. We do not know, for example, how people decide whether an individual is part of a task group like a corporation. Available studies ask participants directly about collectives, e.g. “Microsoft” or “a university,” or, to the extent they ask about individuals, the studies explicitly introduce the individuals as members of the collective, e.g. “an employee of Microsoft” or “a university administrator.” Accordingly, they yield little insight into what it intuitively takes for an individual to be a member of a corporation.⁵ We cannot presently answer whether non-employees who are under corporate control (e.g. an independent contractors hired by the corporation) or employees who are not under corporate control (e.g. a rogue employee who disobeys orders) are intuitive constituents of corporations too.⁶

We might also wonder whether, on the folk view, corporations can have non-human constituent parts. Available data makes a tentative case for an affirmative answer. Experimental studies show that people are more likely to identify an entity with its causally effective features (Blok, Newman, and Rips (2005)). Organizational psychologists know that corporate structures—like performance metrics and institutional culture—can be more important drivers of employee behavior (and hence corporate behavior) than individual employees themselves (Coleman (1990); Lederman (2000)). And technologists know that corporations increasingly rely on algorithms to carry out functions previously assigned to human employees. So corporate structures and digital systems could plausibly play a role in the folk view of synchronic corporate identity (Diamantis (2020)). Studies directly targeted to that question, e.g. by asking whether and when corporations could be responsible for harms caused by algorithms, would be helpful.

III. Diachronic Collective Identity: Pairing Present with Past

Diachronic identity refers to identity over time, even as an entity changes. For collectives like corporations, the list of routine but potentially transformative changes is long. They may lose or gain any number of employees throughout the corporate hierarchy, abandon divisions dedicated to specific operations, pivot to totally new product lines, acquire (or be acquired by) other corporations, merge with them, spin off parts of themselves into new corporations, rebrand themselves, or rework their internal corporate structure. Sometimes, many of these changes can

⁵ Phelan, Arico, and Nichols (2013) perhaps come closest. They demonstrate that we intuitively attribute member mental states to the group as a whole only if the mental state is “saliently associated with the role of being a member of the group.” (Ibid. p. 717). The authors do not, however, test how people understand group roles or come to associate different mental states as appropriate to it.

⁶ Some research shows that group members themselves reject those among them who deviate too far from group norms (Marques, Abrams, Paez, and Hogg (2001); Marques, Yzerbyt, and Leyens (1988)).

happen in a very short span, like when a hedge fund purchases a corporation with a view to restructuring and reselling it.

As with synchronic corporate identity, there are not many explicit clues in the law or from experimental philosophy about corporate identity over time. However, there is enough to begin describing rough-hewn legal and folk views.

A. *The Law's View*

Since the law does not explicitly define diachronic corporate identity, we must once more turn to corporate liability for indirect insight. Here again, criminal law's identity principle offers an inroad. In its diachronic version, the identity principle requires that the law only punish a present-day defendant who is identical to the person who committed the past crime at issue. If there is no such defendant, e.g. because the criminal has since died or otherwise ceased to exist, criminal law offers no remedy.

There are a few bright-line legal rules for tracing corporate criminal liability through time. Some procedures "kill" a corporation and thereby extinguish any criminal liability. For example, the state under whose law a corporation is organized may revoke its charter for failure to abide by the state's requirements. Or a court may divest a corporation of all its assets, e.g. as criminal punishment or in bankruptcy, thereby bringing it and all its liabilities to an end. There are also important internal corporate changes—such as swapping owners, turning over management, or implementing compliance reform—that the law is clear do not affect corporate criminal liability. The legal reasons are slightly different for each. The doctrine of separateness, a cornerstone of corporate law, ensures that corporations have a legal status distinct from their owners. Similarly, under *respondet superior*, liability for criminal conduct attaches twice, to the firm and to the employee independently. Lastly, the fact that corporate criminal liability persists even after implementing new internal programs—like upgraded compliance protocols—is so axiomatic that few have thought to question it (Diamantis (2019d)).

For external changes that involve other corporations—like mergers and acquisitions—the law is a less settled, but overall such changes seem to have little impact on corporate identity. When two corporations merge (what philosophers might think of as "fusion cases"), the composite inherits any prior criminal liabilities that either had (Model Business Corporation Act § 11.07; *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974)). If a corporation splits off and separately incorporates some of its business operations (what philosophers might think of as "fission cases"), both resulting corporations are potentially liable for any prior criminal misconduct of predecessor.⁷

Insofar as criminal liability implies identity,⁸ these liability doctrines gesture toward a rather stubborn view of diachronic corporate identity. Short of death, nothing will terminate or compromise a corporation's identity. No matter what sort of internal changes a corporation

⁷ The legal reasoning here is a bit complex: The general rule for spin-offs is that a predecessor cannot assign liabilities to the newly formed corporation without the permission of any third parties to whom the liabilities are owed (Kotran, Katz, and Kahn (2010)). In the criminal context, the relevant third party is the government, which, so far as I know, has never agreed to such a transfer of criminal liability. As a consequence, both parent and the spin-off could be liable—at the prosecutor's option—for crimes committed before the separation.

⁸ Noonan (this volume) also describes the intuitive principle that only the doer of a deed merits punishment or reward for it.

undergoes, how large a corporation it merges with, or how large a part of itself it spins off, it fully remains the same corporation.

B. *The Folk View*

Existing data on the folk view of diachronic collective identity paints a picture that differs significantly from the law's (Hamilton, Levine, and Thurston (2008)).⁹ Three conclusions from studies about individual identity have motivated modern experimental research on collective identity. The first result is that people intuitively distinguish between "accidental" and "essential" traits, where only changes to the latter effectuate changes in identity (Strohming and Nichols (2014)). The second is that accidental traits tend to be surface level, while essential traits tend to be deeper and causally efficacious (Blok, Newman, & Rips (2005); Rips & Hespos (2015)). And the third is that the normative valence of a trait—whether it is perceived as being good or bad, rather than neutral—can make it seem more essential (Newman, Bloom and Knobe (2014); Newman, De Fretas, and Knobe (2015)).

It would be unsurprising if these results extended to folk judgments about corporate identity. As discussed earlier, entitive collectives occupy a role in our cognitive economy similar to the one occupied by individuals. People are inclined to view social groups as having underlying essences (Rothbart and Taylor (1992)), and when the group is entitive, people tend to conceive of that essence in behavioral-dispositional terms (Hamilton and Sherman (1996)). Recent studies confirm that people are more likely to judge that a collective's essential identity has changed if its normatively valenced traits have been altered (De Fretas, Tobia, Newman, and Knobe (2016)).¹⁰ In one test of this effect, experimenters presented participants with scenarios about a fictional school in Nazi Germany. The scenarios described the school undergoing various changes, and then asked participants whether the school after the change was the same school, or a different one. Participants were significantly more likely to say the school lost its identity when it changed a normatively valenced trait, like shifting its curricular focus from Nazi ideology to traditional academic subjects. Normatively neutral changes, like a turnover in administration, did not induce the same effect. Though available studies have focused on collectives like universities and rock bands, investigators believe their results could extend to other collectives, like corporations (De Fretas, Tobia, Newman, and Knobe (2016); Tobia (2015)).¹¹

⁹ Because this chapter focuses primarily on third-personal metaphysical judgments, it does not discuss work on members' perception about the continuity of their own group. Research on that topic finds two variables drive judgments of collective continuity: transgenerational transmission of core values/beliefs/traditions and narrative cohesion across different events in history (Sani et al. (2007)).

¹⁰ Though all normative changes seem to be disruptive of identity, people are more likely to register a negative change as signaling a change (Tobia (2015); De Fretas, Cinkara, Grossman, and Schlegel (2018)). For human identity, this could be because we assume that humans' core essence is overall positive (Molouki and Bartels (2017)). It is an open question whether the result would hold for business corporations, which we regard with moral suspicion (Rai and Diermeier (2015); Newheiser, Sawaoka, and Dovidio (2012)).

¹¹ It bears noting that some recent research concludes that perceived continuity of purpose is what really drive persistence judgments for social objects (Rose, Schaffer, and Tobia (2018)).

If future work bears out that prediction, then the folk view of diachronic corporate identity is significantly more nuanced than the law's. Recall that according to the law, nothing short of dissolution will extinguish a corporation's identity. In some cases, this approach aligns well with the folk view. Superficial alterations—such as a change in corporate headquarters, logo, or name—are unlikely to have much impact on the causally efficacious, normatively valenced traits to which folk pin their conception of corporate identity. However, replacing executive leadership or implementing new compliance protocols could positively impact how the corporation conducts business. While legally irrelevant, such changes could generate a change of identity on the folk view.

Along similar lines, the folk perspective departs from the law's stark approach to mergers and spin-offs. Suppose, for example, that in the course of a merger between A and B, one of predecessor A's causally effective, normatively valenced traits—perhaps a robust compliance culture—manages to subsume the analogous trait of predecessor B. Ordinary people should be more likely to identify the composite with A. For spin-offs, the folk perception of the predecessor's identity is likely to follow whichever of the two successors inherits the predecessor's salient, causally effective, normatively valenced traits. That might be both successors, but it could be just one of them if the traits were tied to a particular division within the predecessor.

IV. Does the Discrepancy Between Law and Intuition Matter?

This chapter has articulated the basic outlines of legal and folk perspectives on both synchronic and diachronic corporate identity. As to synchronic identity, the law identifies corporations with individual employees, while folk intuition is more likely to look to employees in the aggregate. As to diachronic identity, the law sees corporate identity as a very durable construct that ends only with dissolution of the corporation. Folk intuition is more nuanced. It seems to pin corporate identity to causally-effective, normatively valenced traits.

The legal and folk perspectives give different answers across routine corporate events. For corporations and those who manage them, these differences can be important. When corporations misbehave, they face liability both in the court of law and in the court of public opinion. Effective corporate management attends to both. When it comes to synchronic identity, the law is more manipulable than folk understanding. For example, one common strategy among corporate management is to distribute responsibilities across several employees so that none is likely to satisfy all the elements of a crime. While this minimizes the chance that the law will identify the corporation as the author of criminal harm, the strategy is unlikely to impact public perception when that harm occurs. For diachronic identity, things are reversed—the folk view is more manipulable. After a scandal, corporations often try reinventing themselves. As a legal matter, there is little they can do. However, business partners and customers may be more open to persuasion by measures like hiring more ethics-minded management and implementing better compliance protocols.

The discrepancy between the legal and the folk visions of corporate identity is also significant for legal policy. One goal of corporate criminal law is to satisfy “society's desire to see [corporations] responsible for misconduct punished” (Henning (2010)). To accomplish that expressive ambition, the law must understand how people identify and distinguish between responsible corporations. The law falls short when fails to identify the intuitively right corporate offender.

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