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Bioethics, Complementarity, and Corporate Criminal Liability

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Abstract

This article provides a brief introduction to some contemporary challenges found in the intersection of bioethics and international criminal law involving genetic privacy, organ trafficking, genetic engineering, and cloning. These challenges push us to re-evaluate the question of whether the international criminal law should hold corporations criminally liable. I argue that a minimalist and Strawsonian conception of corporate responsibility could be useful for deterring the wrongs outlined in first few sections and in answering compelling objections to corporate criminal liability.

Keywords

bioethics; complementarity; corporate responsibility; corporate criminal liability; international criminal law; ICC (International Criminal Court)

1 Introduction

This article provides a brief introduction to some contemporary challenges found in the intersection of bioethics and international law involving genetic privacy, organ trafficking, engineering, and cloning. Some forms of harm involving genetic material and

information are divorced from location, making new types of international crimes possible. For example, misuse of genetic samples or information can cause harm without any physical incursion to a foreign state or victim's body. These harms, as well as harms dealing with cloning, genetic engineering, and organ trafficking, often involve (or would likely involve) corporations. These challenges push us to re-evaluate the question of whether the international criminal law should hold corporations criminally liable.

Human rights discourse and bioethics both ascended after World War II. In bioethics there has been a transition from focus on Hippocratic beneficence to individual rights and autonomy. Rather than understanding moral obligations to patients and the public solely in terms of the practitioner's expert opinion on what would increase their well-being, other principles such as autonomy, justice, informed consent, and confidentiality became prominent. These principles can trump welfarist concerns. Likewise, the human rights approach has become a prominent feature of international law. This increased role of rights in both international law and bioethics is a promising precedent for the international criminal law. As Andorno observes, '[t]he enterprise of setting common standards in the biomedical field, although difficult, is possible because international human rights law presupposes that some basic principles transcend cultural diversity'.¹ Human dignity is one of the transcendent principles. The approach of this paper denies legal positivism's separation thesis that morality is external to law. The correct interpretation of existing laws, and the status of written law as *law*, cannot be entirely insulated from morality. Transcendent moral principles have a role to play within law. A prolonged discussion of the separation thesis is beyond the scope of this article. I work within the integrated approach to international law recently defended in this journal.²

This approach allows bioethics to take a more prominent role in

¹ Roberto Andorno, 'Biomedicine and international human rights law: in search of a global consensus', *Bulletin of the World Health Organization* 80(12) (2002) 959.

² Anja Matwijkiw, 'Introduction: Ethics in the Making—From Controversy to Criterion for International Criminal Law', *International Criminal Law Review* 16(12) (2016) 177-200.

international criminal law. Of course the international arena already includes the unanimously adopted soft law UNESCO Declarations on the Human Genome and Human Rights (1997), the International Declaration on Human Genetic Data (2003), and the Universal Declaration on Bioethics and Human Rights (2005). The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (1997), commonly known as the Oviedo Convention, has been cited many times by the European Court of Human Rights.³ In what follows I will argue for an increased role for bioethics both in international criminal law *sensu stricto* and what may more aptly fall under the category of transnational criminal law [TCL].⁴

Genetics and biotechnology make possible new forms of international wrongs. These may be new species of types of wrongs already criminalized by the international law, or may be entirely new and call for new laws. Misuse of genetic material or information can harm an individual from any location. My genetic material or information can be transmitted to parties in other countries who can then violate my privacy and autonomy. There is no necessary physical connection between the harmed party and the offender. A party in one state can harm someone in another without any incursion of the nation or, for that matter, the body. This does not match the character of the war crimes and human rights violations

³ For examples, see *Costa and Pavan v. Italy* App no 54270/10 (ECtHR, 28 August 2012); *Evans v. the United Kingdom* ECHR 2007-I 353. For illuminating discussion of both cases see Francesco Seatzu and Simona Fanni, 'The Experience of the European Court of Human Rights with the European Convention on Human Rights and Biomedicine', *Utrecht J. Int'l & Eur. L.* 31 (2015) 5.

⁴ Boister argues for an emerging conception of transnational criminal law (and its suppression treaties) that is distinct from international criminal law and domestic criminal law. His argument considers several factors but we can focus on the normative case for distinguishing TCL. Transnational criminal laws involve norms that are different from the norms underpinning fully international crimes like genocide because 'the threat suppressed is not sufficiently serious to engage a sufficient consensus in international society to use ICL to suppress it'. Of course, on this view TCL is still based in shared norms. 'TCL is to suppress inter- and intra-state criminal activity that threatens shared national interests or cosmopolitan values'. It uses conventions and treaties to project substantive criminal norms beyond national boundaries. Bassiouni, on the other hand, considers this sort of TCL to be part of ICL. See M.C. Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework', in *International Criminal Law* (Transnational Publishers, 1999); see N. Boister, 'Transnational criminal law?', *European Journal of International Law* 14(5) (2003) 953-976.

that shape our conception of international criminal law, such as the human experimentation atrocities of World War II. These new sorts of harms often (or the hypothetical harms of human cloning and human reproductive genetic engineering likely would) involve multinational entities or corporations and are difficult to fully address through merely domestic means.

This article first considers three possible reasons that bioethics should play a greater role in international criminal law. First, contemporary bioethics addresses wrongs that might already qualify as international crimes when the law is interpreted properly. With an interpretive approach, these wrongs become a proper focus on international criminal law. Second, contemporary bioethics identifies wrongs (and potential wrongs) that warrant new international criminal laws. Harms involving DNA privacy, cloning, and genetic engineering of humans may require new international laws. In consideration of these two options I provide evidence from the current literature. The third option leads to my original contribution. International criminal law could be an effective tool (or the necessary tool) for bringing about needed changes in domestic legal systems. For example, we may need new legislation to protect genetic privacy. If there are impediments to particular states enacting such laws, then perhaps international law should spur change via the complementarity principle (according to which individual states have first priority for prosecuting a given international crime as long as the conduct is criminalized under their own laws).

Our second question deals with corporate responsibility. Does the intersection of bioethics and international law force us to re-evaluate whether or not corporations should be held criminally liable? This overlaps with the third option: if the harms identified in the literature survey change our understanding of corporate criminal liability, the international law might be the necessary tool for encouraging domestic states to accept a (limited, contextual, and tightly circumscribed) form of corporate criminal liability.

Let us first consider whether some wrongs identified by contemporary bioethics fall under existing laws when properly interpreted.

2 The Interpretive Approach

Negri identifies the rise of a 'darker side of transplant practice' involving illegal organ trafficking and transplant tourism that has 'infiltrate[ed] medical practice globally' and perhaps affects ten per cent of all transplants.⁵ Negri argues that international organ trafficking in some cases qualifies as a crime against humanity. Her 'interpretive' approach is one useful lens for analysing the intersection of bioethics and international criminal law, since it could expand the scope of existing law. She also argues that this crime implicates not only individuals, but entire health systems and corporations.

Negri observes that the removal of organs as the purpose for trafficking explicitly counts as exploitation in many international instruments such as the 'Additional Protocol to the Palermo Convention [United Nations Convention against Transnational Organized Crime] (Article 3), the Council of Europe Convention on Action against Trafficking in Human Beings (Article 4), and the EU Directive 2011/36 on Combating and Preventing Trafficking in Human Beings (Article 2)'.⁶ Note that General Assembly Resolution 59/156 (2004) 'encouraged Member States to exchange experience in and information on preventing, combating and punishing the illicit removal of and trafficking in human organs'. Negri also explains that non-consensual removal of organs falls under:

Article 8, para. 2.a.(ii) of the International Criminal Court (ICC) Statute, as constituting grave violation of the four Geneva Conventions of 12 August 1949, and by para. 2.c.(i) as serious violation of common Article 3 concerning non-international armed conflicts. In fact, Article 13 of the III Geneva Convention and Article 32 of the IV Geneva Convention, as well as their common Article 3, enunciate the prohibition on mutilations and medical experiments as amounting to the crimes of torture and inhuman treatment. The prohibition on mutilation is integrated

⁵ Stefania Negri, 'Transplant Ethics and the International Crime of Organ Trafficking', *International Criminal Law Review* 16(2) (2016) 288.

⁶ Negri, *supra* note 5, p. 298.

by Article 11 of Protocol I to the Geneva Conventions, which expressly forbids the removal of tissue or organs for transplantation purposes.⁷

However, the ICC's role in this context is conditional, requiring the existence of an armed conflict.

Negri answers this limitation by arguing that outside of armed conflicts, organ trafficking can be treated as a crime against humanity even though it is not explicitly covered by ICC Statute. Trafficking organs and harvesting from unwilling donors amounts to torture and inhumane acts. If so, trafficking should be covered by Article 7 of the Statute. It would then fall under ICC jurisdiction.⁸ The European Court of Human Rights recently made a similar interpretive ruling in *Elberte v. Latvia*. Tissue was removed from a deceased man's body and sent to a pharmaceutical company in Germany. His wife had no knowledge of this and did not consent. The Court found violations of Article 8 (right for respect to private and family life) and Article 3 (prohibition of inhuman or degrading treatment).⁹

The analysis of this specific case also bears on the general question of corporate criminal liability. '[S]ince trafficking in human organs cannot occur without some form of involvement of the medical or public health institutions, the Convention [Council of Europe Convention against Trafficking in Human Organs] also establishes corporate liability for these offences'.¹⁰ We return to this issue in the final section.

This interpretive approach could be used to categorize new forms of harm made possible by genetics, biotechnology, and medical advances into existing international criminal law. It can be a model for future work. Let us now consider harms that may call for new international criminal laws.

⁷ Negri, *supra* note 5, p. 302.

⁸ *Ibid.*, p. 302.

⁹ *Elberte v. Latvia* (Application no. 61243/08) [2015] ECHR 1.

¹⁰ Negri, *supra* note 5, p. 299.

3 Wrongs that May Demand New International Laws

Sharing of genetic data offers the possibility of tremendous benefits and the risk of substantial harms. The law can augment the former and constrain the latter. We consider both biobanks and forensic DNA databases.

Biobanks collect and store biological samples and data. These are then used by the biobank for research or distributed to researchers elsewhere. The research is open-ended. Collected material may eventually be used for unforeseen purposes. According to Rothstein, Knoppers, and Harrell, '[i]t is this indeterminate nature of the future research that raises many of the distinct ethical, legal, and policy implications of biobanking. The issues are further magnified and complicated by the increasing international sharing of data derived from such resources'.¹¹ Thorogood and Zawati argue that 'biobanks attract a surprising range of overlapping national and international norms, on human rights, data protection, biomedical ethics, research ethics, genetics, and biobanks'.¹² Data sharing of biobanks intersects with human rights in at least two ways. Positively, there is the human right to share in the benefits of medical research. Negatively, autonomy and genetic privacy require protections that might limit biobank practices.

The World Medical Association's Declaration of Helsinki, which contains principles for protecting privacy and confidentiality of research subject data, was modified in 2008 to include 'research on identifiable human tissue and identifiable data,' 'thereby drawing genomic biobanks within its ambit'.¹³ The WMA Declaration of Taipei on Ethical Considerations regarding Health Databases and Biobanks (2002) addresses the ethical collection, storage, and use of health information and biological material.¹⁴ 'The UNESCO declarations require consent for the use or disclosure of 'personal

¹¹ Mark A. Rothstein, Bartha Maria Knoppers, and Heather L. Harrell. 'Comparative Approaches to Biobanks and Privacy', *The Journal of Law, Medicine & Ethics* 44(1) (2016) 161-172.

¹² Adrian Thorogood and Ma'N H. Zawati. 'International Guidelines for Privacy in Genomic Biobanking (or the Unexpected Virtue of Pluralism)', *The Journal of Law, Medicine & Ethics* 43(4) (2015) 690-702.

¹³ *Ibid.*, p. 693.

¹⁴ World Medical Association, *Declaration on Ethical Considerations regarding Health Databases* (2002), Article 4, <<http://www.wma.net/en/30publications/10policies/d1/>>

information’ as well as for ‘genetic data’¹⁵

However, Thorogood and Zawati identify forces threatening the privacy of the information held by biobanks. The amount of information being stored and shared is increasing because the costs of genetic sequencing and data storage are dropping. Biobanks are ‘increasingly being used as ‘universal research infrastructures’ accessed for broad, future uses by researchers from various fields, sectors, and nations’. The scale of individual biobanks and the networking links between them are increasing in order to ‘achieve the sample sizes needed to explore the complex causes of common diseases’.¹⁶

Rothstein, Knoppers, and Harrell argue that such threats to privacy, and surprisingly also threats to data sharing, raise human rights issues. They outlines how the Global Alliance for Genomics and Health’s Framework for Responsible Sharing of Genomic and Health-Related Data ‘considers data sharing to be founded not only on bioethical norms, but on two ‘actionable’ human rights found in the Universal Declaration of Human Rights of 1948 (art. 27) and made legally binding in countries in the 1966 International Covenant of Economic, Social and Cultural Rights (art. 15)’.¹⁷ These actionable human rights are for all humans to benefit from medical research (requiring genetic data from as wide a sample of humanity as possible) and the right of scientists to be recognized for their contributions. The statement concludes that when persons consent to data sharing, these rights should be safeguarded. It also argues for a proportional approach to privacy safeguards. Policies safeguarding against risks of potential re-identification of genetic samples and data should be proportional to the realistic (not merely hypothetical) likelihood of breaches.¹⁸

The positive human rights aspect deals with giving all of humanity the possibility of benefitting from medical research. ‘The lack of international regulatory harmonization has been shown to impede data sharing for translational research in genomics and

¹⁵ Thorogood and Zawati *supra* note 12, p. 694.

¹⁶ *Ibid.*, p. 690.

¹⁷ Rothstein et al., *supra* note 11, p. 170.

¹⁸ *Ibid.*

related fields'.¹⁹ That provides a welfarist basis to increase harmonization and sharing. There are also human rights reasons:

The Universal Declaration of Human Rights and the legally binding International Covenant of Economic, Social and Cultural Rights (1966) outline the right of all citizens to the benefits of science, the right to be recognized for one's intellectual contribution, and the right to scientific freedom. The UDHGHR [Universal Declaration on the Human Genome and Human Rights] and IDHGD [International Declaration on Human Genetic Data] insist that states and researchers promote international cooperation and data sharing, particularly between industrialized and developing countries.²⁰

Regarding the negative human rights aspect, '[a]n individual's right to be free from arbitrary and unlawful interference with privacy is a firmly established human right. The United Nations' Universal Declaration of Human Rights states: 'No one shall be subjected to arbitrary interference with his privacy''.²¹ The International Covenant on Civil and Political Rights (1966) and the UN Convention on the Rights of the Child (1989) codify this right. But the distinction between permissible and arbitrary interference is unclear.²² In this context, forensic DNA databases pose a threat. They raise similar issues as biobanks as well as worries about civil liberties, equal treatment, and presumption of innocence. For example, the European Court of Human Rights found that the United Kingdom's forensic DNA database violated privacy rights guaranteed by the European Convention. 'The European Court was especially troubled by the indefinite retention of genetic information taken from children and adults who were never convicted of a crime, stigmatizing them as if they were convicted criminals.' The court found that this 'disregards the presumption of innocence accorded to

¹⁹ Mark A. Rothstein and Bartha Maria Knoppers. 'INTRODUCTION: Harmonizing Privacy Laws to Enable International Biobank Research'. *The Journal of Law, Medicine & Ethics* 43(4) (2015) 673.

²⁰ Thorogood, and Zawati *supra* note 12, p.697.

²¹ Thorogood and Zawati *supra* note 12, p. 692.

²² *Ibid.*

citizens in a democracy'.²³

The sharing of DNA databases (and many other types of information) in Europe enabled by the Prüm Convention (2005) raises further issues. The convention deals with cross-border sharing of DNA, vehicle registration, fingerprint, and other data. However, national legal protections of DNA storage and analysis, and data protection standards, vary across countries that participate in the Convention.²⁴ '[D]ata are managed according to the laws of the country where the data are at any given moment. Data used in Norway may have been collected according to laws from elsewhere; data gathered in Norway may wind up being stored and used elsewhere according to laws Norwegians have little knowledge of or influence over.'²⁵ Constraints are only present when data enter the system, and nations vary on permissible rationales for entering data. Once genetic information is in the system, it is fair game throughout regardless of how or why it was obtained.

Biobanks rely on consent, forensic DNA databases do not. If a forensic DNA database is used for new research purposes, those on the database cannot withdraw consent, since it was never given.²⁶ '[E]ven though 'participation' is non-voluntary, or perhaps all the more so when participation is non-voluntary, issues of trust and transparency become important in relationship to forensic DNA databases'.²⁷ Concerns of autonomy, confidentiality, equality, and fair treatment (racial profiling, presumption of innocence) all bear on that debate. 'Retention of samples requires that we not only trust the government today, but also that of tomorrow (since we do not know what will be doable with the genetic material in the future).

²³ D. Roberts, 'Collateral Consequences, Genetic Surveillance and the New Biopolitics of Race'. *Howard LJ* 54 (2010) 567 (577); see *S. & Marper v. United Kingdom*, 4 Eur. Ct. H.R. at 30562 (2008).

²⁴ Eric Töpfer, 'Searching for Needles in an ever expanding haystack: Cross-border DNA exchange in the wake of the Prüm Treaty', *Statewatch Bulletin* 18(3) (July-September 2008).

²⁵ Johanne Yttri Dahl and Ann Rudinow Sætman. 'It all happened so slowly'—On controlling function creep in forensic DNA databases', *International Journal of Law, Crime and Justice* 37(3) (2009) 83-103, at 97.

²⁶ Dahl and Sætman *supra* note 25, p. 97.

²⁷ *Ibid.*, see also R. Williams, P. Johnson, *Genetic Policing: The Use of DNA in Criminal Investigations* (Willan Publishing, London, 2008).

The possibility of data-sharing across borders requires further that we trust other governments over whom we hold no democratic sway'.²⁸ As we will see in the next section, we may hold a different kind of sway via the international criminal law and the complementarity principle.

Forensic databases also raise social worries that transcend harms to individuals. 'Familial searching, for instance, may confront citizens, with previously unknown family ties. The use of ethnic inference borders on the ethically dubious practice of racial targeting'.²⁹ If persons are only added to the forensic DNA database upon arrest or conviction, and there is racial disparity in arrest and conviction rates, then forensic DNA databases amplify racial disparities in criminal justice.

Contra the European Court ruling against the United Kingdom, Kaye argues that we protect privacy and ensure fair treatment by having everyone in the database. We ought to replace forensic DNA databases with tightly controlled universal databases that are not administered by the criminal justice system. This counteracts discrimination in the composition of the database and changes society's attitudes towards the risks of abuse. '[I]ncluding every citizen's profile avoids the public attitude that the system is for 'them,' not 'us,' and hence that abuses will affect only criminals, not the rest of us. As a result, it would force the legislative and executive branches to take the greatest care in fashioning and implementing the system so as to protect privacy'.³⁰

The need to keep forensic DNA database private is not merely hypothetical. Corporations have exploited forensic databases without individual consent. 'According to Genewatch research has already taken place on the NDNAD. This research has ranged from studying the efficiency of the database and the validity of its statistics to developing new commercial products. Research has used both the DNA profiles from the database and the stored DNA samples'.³¹ Addressing these issues may require stronger treaties.

²⁸ Dahl and Sætnan *supra* note 25, p. 99.

²⁹ *Ibid.*, p. 101.

³⁰ David H Kaye, 'Two Fallacies About DNA Data Banks for Law Enforcement', *Brooklyn Law Review* 67 (2001): 179.

³¹ Dahl and Sætnan *supra* note 25, p. 99; see GeneWatch, 2006a, 'The DNA Expansion Programme: reporting real achievements', online at <http://www.genewatch.org/uploads/>

Cloning and genetic engineering also may require new international constraints. Annas, Andrews, and Isasi call for the international criminalization of initiation of a pregnancy for cloning purposes and initiation of pregnancy using genetically-altered embryos.³² They argue that this should be accomplished by a treaty that takes a human rights perspective. Existing laws are being outpaced by the technology, while existing conventions do not clearly ban reproductive cloning and germ line interventions, are ambiguous, and lack clear sanctions. They conclude this criminalization ought not (only) be achieved through the interpretive approach towards crimes against humanity but through new transnational laws.³³

We have introduced some contemporary challenges in the intersection of bioethics and international criminal law. We considered two reasons that bioethics should play a greater role in international criminal law: the interpretive approach and the argument that bioethics identifies entirely new wrongs that demand new laws. According to both views, there are strong reasons to think many of these harms implicate institutions and corporations. Let us examine how the international law and norm projection might help us constrain those harms, as well as re-evaluate the question of corporate criminal liability. This will also let us explore the third reason that bioethics might need to play a stronger role in international law---that it is a necessary means to spur needed changes to the various systems of domestic law.

4 Norm Projection, Corporations, and Criminal Liability

The International Military Tribunal at Nuremberg held that '[c]rimes against international law are committed by men, not by abstract

f03c6d66a9b354535738483c1c3d49e4/DNAexpansion_brief_final.pdf.

³² George J. Annas, Lori B. Andrews, and Rosario M. Isasi, 'Protecting the endangered human: Toward an international treaty prohibiting cloning and inheritable alterations', *Am. JL & Med.* 28 (2002):151.

³³ '[W]hile we believe these crimes should be subject to the jurisdiction of the international criminal court, this may not be possible in the near future, and it is more important to establish them as international crimes than to broaden the definition of 'crimes against humanity' as it applies to the international criminal court at this time.' (*ibid.*, p.157.)

entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.³⁴ Such punishment is necessary, but is it sufficient?³⁵ Perhaps holding corporations to account is also required.

Corporations are not explicitly held liable under international criminal law. They are under some domestic systems of law, not others. The United States' history of corporate criminal liability originates in *New York Central & Hudson River R.R. Co. v. United States*. Also, the United States' Alien Tort Statute allows foreigners to bring charges in US courts for human rights violations committed anywhere. Australia enacted laws with universal jurisdiction over natural and legal persons engaged in war crimes, crimes against humanity, or genocide. 'Interestingly, the international offences inserted into Australian law came about as a result of Australia's ratification of the ICC Statute and for the explicit purpose of empowering Australia to take full advantage of the principle of complementarity, in a context of federal criminal law that does not distinguish between corporate and natural persons'.³⁶ Kyriakakis outlines how Belgium, Canada, the Netherlands, and the United Kingdom have done likewise. 'However, without the potential

³⁴ See 'Judicial Decisions: International Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946', 41 *AM.J. INT'L L.* 172 (1947).

³⁵ The IMT and ICC reference corporate entities but do not make them directly liable. 'There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of the organizations or groups or in both capacities.' (Article 1 "London Agreement" Charter of the International Military Tribunal); 'The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes' (Article 6 Charter of the International Military Tribunal); 'For the purpose of paragraph 1, an attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack' (Article 7 (2) ICC Statute (Crimes against humanity)); See also Cassese, 'Crimes against Humanity' in *The Rome Statute of the International Criminal Court: A Commentary* (2 vols), A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), Oxford, 2002, p. 356-357; see also ILC Commentary 18, Draft Code 1996.

³⁶ Joanna Kyriakakis, 'Corporations and the international criminal court: the complementarity objection stripped bare'. *Criminal Law Forum* 19(1) (2008) 115-151 at p. 147.

compulsion to surrender corporate offenders to the ICC whether these laws will be applied remains to be seen'.³⁷

The ICC has jurisdiction only over natural persons. The variety of domestic approaches to this issue shows how far we are from consensus, making the ICC position sensible. However, perhaps the intersection of bioethics and the international criminal law, and the evidence that corporations are commonly involved (or would be involved) in the types of wrongs introduced in the first three sections, require us to revisit the issue of corporate criminal liability. I will argue this is the case and offer a tentative response to the problem that should be investigated further.

Let us first look at the issue of corporate criminal liability in general, with no concern for bioethics, and then consider how contemporary challenges in bioethics and international law might change the debate. Slye gives several arguments that corporations should be subject to international criminal liability. The first is simply that the arguments for holding sovereign states criminally liable apply to corporations. Second is that since corporations enjoy rights under international law (including human rights treaties), and they are already subject to international liability, they should be subject to international criminal law. 'It would be illogical to grant corporations rights under international law, including international human rights law, while simultaneously allowing them to avoid responsibility for the most egregious violations of that same body of law'.³⁸

One could object that since individuals can already be called to account for violations of international criminal law, responsibility is not avoidable. Individual state and corporate actors can be held responsible and punished without holding corporations themselves criminally liable. However, Slye argues that corporate structures can interfere with this form of holding to account.

(1) collective action is likely to result in greater harm than

³⁷ *Ibid.*, p. 148.

³⁸ Ronald C. Slye, 'Corporations, Veils, and International Criminal Liability', *Brook. J. Int'l L.* 33 (2007) 955, at 959.

individual action; (2) the individual actions of each corporate employee may be insufficient to hold any one of them liable under international law, even though a wrong has clearly been committed; and (3) effective deterrence of collective actions requires systemic punishment.³⁹

Likewise, Stephens argues that the multinational scope of corporations, which wield tremendous economic and political power, cannot be controlled by the national scope of legal systems. ‘Multinational corporations have long outgrown the legal structures to govern them, reaching a level of transnationality and economic power that exceeds domestic law’s ability to impose basic human rights norms’.⁴⁰ These arguments provide *prima facie*, defeasible reasons for the transnational criminal law (and perhaps also the international criminal law *sensu stricto*) to hold corporations criminally liable.

New and potential harms involving medical and biotechnology demand some pre-emptive constraint. For example, forensic DNA databases raise a genie-out-of-the-bottle risk---once a particular forensic practice becomes common it is much more difficult to constrain.⁴¹ The wrongs identified in the first two sections are urgent issues for both domestic and international criminal law, and they potentially strengthen the case for corporate criminal liability. The power of modern molecular biology is corporate, either through corporations, universities, or governments. Biobanks, human engineering, reproductive cloning, and forensic DNA databases can cause significant harms and are enabled by corporations. ‘In addition to wielding enormous economic power, corporations increasingly engage in state-like activity as a result of the privatization of traditional state functions (e.g., the management of prisons, public welfare programs, public utilities, and wars) and the tendency of corporations to elect to operate in environments where state power is weak or non-existent’.⁴² State and corporate power are especially intertwined in the harms identified in the first three sections.

³⁹ Slye, *supra* note 38, p. 960.

⁴⁰ Beth Stephens, ‘The Amoralty of Profit: Transnational Corporations and Human Rights’, 20 *Berkeley J.Intl’LL* 45, 58 (2002): p. 54.

⁴¹ See Dahl and Sætnan *supra* note 25.

⁴² Slye, *supra* note 38, p. 961.

We can supplement this with a pragmatic argument to address the economic disincentives for bioethics regulation. ‘An argument against home state (and in fact the enforcement of host state) regulation is that it will create a commercial disadvantage to those states that do chose to regulate’.⁴³ If international law can create more uniformity this can counter the commercial disadvantage of strong constraints. This is an example of the third rationale for an increasing role of bioethics in the international criminal law---it could be an effective tool (or the necessary tool) for bringing about needed changes in domestic legal systems. The international criminal law can create a level playing field with stronger constraints than domestic legal systems would provide. ‘Indeed the ICC mechanism particularly commends itself as the complementarity model encourages the application of existing national criminal legislation, as well as serving as a means for states to politically divest their responsibility for the act. They have the ability to say, we either do this, or the ICC will’.⁴⁴ A state having comparatively strong laws guarding, say, genetic privacy may encourage companies to invest elsewhere. This incentivizes having weaker laws. If international law can create more harmony among the various domestic systems, then those incentives can perhaps be mitigated. The point is generalizable: if there are strong moral reasons to criminalize some behaviour, but also strong disincentives for a state to have more robust constraints on that behaviour than other states, then the international law could be a useful tool for setting minimal standards for domestic constraints on that behaviour. I will now explain how Luban’s conception of norm projection bears on this issue, then consider how this relates to the law and literature on biobanks, and finally discuss how it might be extended to cover other wrongs.

The international criminal law could encourage domestic legal systems to adopt specific norms about the wrongs identified in the first two sections. It could also encourage a norm that, in some

⁴³ Kyriakakis *supra* note 36, p. 148. *See also* Sarah Joseph, ‘Taming the Leviathans: Multinational Enterprises and Human Rights’, 46(2) *Netherlands Int’l L.R.* (1999) 171, 176-181.

⁴⁴ Kyriakakis *supra* note 36, p. 148.

contexts, corporations should be criminally liable. Luban's conception of the essential function of the international criminal law can provide resources to address both problems in the paper: the lack of regulation of new types of harms and the lack of corporate criminal liability.

[I]nternational judicial institutions can nudge the political system; once created, they can speak law to power. Speaking law to power is, in my view, the major point of [international criminal justice]. Its mode of functioning is expressive, and its aim is norm projection, the dissemination through trials, punishments and jurisprudence of a set of norms very different from the Machiavellian brutality of the past.⁴⁵

The function of international criminal law is to project norms onto domestic legal systems, onto institutions, onto individuals. The mode of its functioning is expressive: the law, trials, and punishments convey judgments and affirm norms. Via expressivism, the international criminal law can change norms, behaviours, and the criminal law in particular states. This is facilitated by the complementarity principle, which gives individual states the first priority for prosecuting a given international crime as long as the conduct is criminalized under their own laws. The ICC plays only a complementary role.

Viewed in light of an expressive vision of international criminal law as an instrument of moral transformation, perhaps its single most important achievement has been the complementarity built into the ICC's institutional design. To avail themselves of complementarity, states must revise their own criminal codes to mirror the substantive law of the Rome Statute. As they do so, new norms get spliced into the DNA of domestic law. That is norm projection at work. It matters as much, or even more, for changing political imagination than a handful of international trials.⁴⁶

⁴⁵ David Luban, 'After the Honeymoon Reflections on the Current State of International Criminal Justice'. *Journal of International Criminal Justice* 11(3) (2013) 505-515. (509)

⁴⁶ Luban, *supra* note 45, p. 511.

Even if complementarity only generates domestic laws that rarely lead to trials, there still is a payoff, since '[e]ven an under-enforced domestic law against war crimes can be effective if it becomes part of military training.'⁴⁷ Perhaps the international criminal law could be similarly effective for constraining biotech firms, healthcare systems, forensic DNA databases, and biobanks.

However, one might accept Luban's view of the purpose of international criminal law, be convinced that it should somehow address the wrongs identified in the first two sections, yet doubt that the norm of corporate criminal liability should be projected. Corporate criminal liability is controversial. Different states share norms about specific harms yet disagree on the necessary means to address those harms. Different legal systems exhibit conflicting stances on whether the criminal law should only hold individual corporate actors responsible or also hold corporations responsible. There is reasonable disagreement over whether corporations should be subject to criminal liability. Perhaps norm projection should be restricted to whatever is outside the scope of reasonable disagreement? If so, and if bioethics' relationship to the international law does not change our understanding the problem of corporate criminal liability, then the international criminal law should continue to apply only to natural persons. We consider the following arguments against international corporate criminal liability: that it violates the complementarity principle and that it is a category mistake to ascribe responsibility to corporations.

Kyriakakis simplifies the various forms of the complementarity objection to the following basic worry. The ICC preferences national jurisdictions. Whenever possible, the ICC will have a domestic legal system prosecute. If the ICC holds corporations to account, it would undermine the complementarity relationship between the ICC and the various domestic legal systems. That is because so many states do not recognize corporate criminal liability, therefore they would forfeit their normal right to prosecute to the ICC.⁴⁸ Frulli emphasizes the lack of uniformity among different national systems on this

⁴⁷ *Ibid.*

⁴⁸ Kyriakakis, *supra* note 36, p.117.

issue.⁴⁹ Wexler thinks this lack of uniformity makes the implementation of international corporate criminal liability ‘practically difficult’.⁵⁰

Luban’s account of norm projection can help us answer these objections. No state is automatically and permanently unable to assert their right to prosecute corporations. They are only unable if they resist the norm being projected by the international law. This is the force of norm projection—to take advantage of complementarity in some domain, a state’s domestic law must map onto international law. Any state can do this. Note that if international criminal law changed to hold corporations criminally liable, it would only be for a very limited number of wrongs. The complementarity principle would generate pressure for domestic legal systems to create corporate criminal liability only for those wrongs that are covered by international criminal law. Therefore, the worry about complementarity reduces to the problem of the domain of appropriate norm projection. If the intersection of bioethics and international criminal law provides nothing new to the topic of corporate criminal liability, it is likely still not an appropriate norm to project. If the problems found in that intersection push us to endorse corporate criminal liability, it may be an appropriate norm to project.

The issue of corporate responsibility in this context reveals fault lines in two different conceptions of the function of international criminal law. Luban argues that the role of international criminal justice is norm projection. Punishment is merely a means to that, and is a minor contributor to the international criminal law’s ability to project norms. A quite different conception is found in Hasnas’ argument that ‘[c]riminal law is penal law. Its purpose is punishment. It is not designed to compose disputes, provide compensation to wronged parties, or impose administrative sanctions. It is designed to punish’.⁵¹ Hasnas’ view is that the

⁴⁹ Micaela Frulli, ‘Jurisdiction Ratione Personae’, in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary, Vol. 1* (Oxford: Oxford University Press, 2002), pp. 527, 532-533; see also Developments – International Criminal Law, 114 *Harv. L. Rev* (2004). 1943, 2031.

⁵⁰ Leila Sadat Wexler, ‘Model Draft Statute for the International Criminal Court Based on the Preparatory Committee’s Text to the Diplomatic Conference, Rome, June 15-July 17, 1998’. 13 *Nouvelles études pénales* (1998) 42.

⁵¹ John Hasnas, ‘The Centenary of a Mistake: One Hundred Years of Corporate Criminal

criminal law's punishments have intrinsic value, and his conception of justifiable punishment is based in desert. 'Criminal law's punitive purpose limits the range of application of its sanction to those persons and entities that can be deserving of punishment---to those capable of acting in a morally blameworthy way'.⁵² Children, incompetents, and the insane are excluded because they are incapable deserving such punishment. Corporations are excluded *for the same reason*.

That leads us directly to the category error objection. The category mistake objection assumes that an entity can be criminally responsible only if it can be morally responsible. Since corporations cannot be morally responsible (in virtue of lacking the capacities that make humans morally responsible), they cannot be criminally responsible. Treating them as such is a category mistake. Hasnas provides a useful summary of various attempts to establish that corporations can be morally responsible because they possess characteristics that make us morally responsible.⁵³ French argues that corporations' internal decision structures enable them to act intentionally.⁵⁴ They are capable of being 'full-fledged moral persons' responsible for their actions. Thomas Donaldson provides a similar but less bold view that corporations can use moral reasons in decision making and therefore can be responsible for their actions.⁵⁵ Patricia Werhane argues that corporations are authors of some actions carried out by their agents and representatives and are therefore morally responsible for such actions.⁵⁶ Michael J. Phillips argues that corporations make possible some actions that no natural person could cause or intend or be negligent with respect to, therefore they should be considered responsible for those actions.⁵⁷

Liability', *American Criminal Law Review* 46 (2009) 1329-1358, p. 1330.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Peter A. French, 'The corporation as a moral person', *American Philosophical Quarterly* 16(3) (1979) 207-215.

⁵⁵ Thomas Donaldson, *Corporations and Morality* (Englewood Cliffs, NJ: Prentice-Hall, 1982).

⁵⁶ Patricia Werhane, *Persons, Rights, and Corporations* (Englewood Cliffs, NJ: Prentice-Hall, 1985).

⁵⁷ Michael J. Phillips, 'Corporate moral personhood and three conceptions of the corporation', *Business Ethics Quarterly* 2(4) (1992) 435-459.

Hasnas contrasts that family of views with the position that it is 'logically incoherent to attribute moral responsibility to corporations'.⁵⁸ If corporations cannot be morally responsible in the way natural persons are, they cannot be held criminally liable. Corporations can be regulated and held civilly liable, but it is incoherent to hold them criminally liable given Hasnas' view that the primary function of criminal law is to give deserved punishment. He, rightly in my view, cites Velasquez as providing the strongest incoherence objection.⁵⁹ Velasquez starts with the premise that criminal liability requires moral responsibility, and moral responsibility only applies to intentional acts of agents. He then argues that corporations are not agents, they do not act intentionally, they are incapable of feeling the shame and suffering of punishment, and they are not causally responsible for the acts of their employees. Since this all entails corporations are not morally responsible, they are not directly subject to criminal liability. Individual corporate actors are the proper concern of criminal justice. They act intentionally. They are causally responsible for what corporations do. Combined with Hasnas' view of the primary purpose of criminal law as punishment, this means that corporations are outside the domain of criminal law.

I will not directly attack the incoherence arguments of Hasnas and Velasquez or argue that corporations are capable of being morally responsible in the same way as natural persons. I will instead reply by analysing the nature of responsibility, the reasons for and against holding particular kinds of entities responsible, and how the wrongs discussed in the first few sections should inform our thinking on these matters.

The argument against holding parties responsible without warrant seems to rest on the premise that this *wrongs* them and the premise that moral responsibility is a necessary condition for deserved punishment. These are linked; it wrongs them *because* they are not morally responsible. The harms of punishment are underserved on that basis. The underserving entities Hasnas cites (children, the incapacitated, the insane) would be wronged by the

⁵⁸ Hasnas, *supra* note 51, p. 1331.

⁵⁹ Manuel Velasquez, 'Debunking Corporate Moral Responsibility'. *Business Ethics Quarterly* (2003) 531-562.

underserved suffering caused by punishment and by the false judgment of culpability expressed by the punishment. Now, what possible wrong is there in holding corporations responsible? The harms involved are fines or other penalties. This is the same as civil penalties for corporations, which are far less controversial. Even if corporations cannot genuinely deserve criminal punishment, if those punishments amount to fines and other penalties already accepted within civil liability, why not be purely consequentialist about corporate criminal liability? Corporate criminal liability is not a matter of incarcerating or otherwise causing suffering to a conscious entity. Corporations cannot experience suffering any more than they can be morally responsible on the Hasnas/Velasquez view; only individual corporate actors can experience the suffering of punishment. This weakens the analogy to wrongly holding human beings criminally liable and makes it dubious to lump corporations with children, the incapacitated, and the insane. When it comes to legal rather than natural persons, we can be more straightforwardly consequentialist about punishment in ways that we ought not be for persons who can suffer. Even if there is some form of logical incoherence in holding corporations criminally liable, if there is no *wrong*, the question is then whether corporate responsibility is a useful fiction. Are good consequences generated by holding corporations criminally liable?

Now, one could grant that punishing a corporation despite its lack of moral responsibility does not wrong it, but that it does wrong shareholders, who can experience suffering. Hasnas argues it is as incoherent to punish shareholders as corporations. The function of criminal law is punishment, and punishing shareholders is incoherent both in terms of retribution and deterrence.

The defining characteristic of the modern corporation is the separation of ownership and control. The shareholders, who own the corporation, have no direct control over or knowledge of the behavior of the corporate employees who commit criminal offenses. Hence, inflicting punishment on a corporation's shareholders is punishing those who are

personally innocent of wrongdoing for the offenses of others.⁶⁰

On Hasnas' view, punishing a corporation punishes its shareholders, but this is incoherent on a retributive basis and impermissible on a deterrence basis. Retributive rationales for punishment make no sense, since shareholders lack control and knowledge of the behaviour of employees who break the law, and are therefore not morally responsible for what the corporation does. In terms of deterrence, he does not deny that punishing shareholders could deter corporate malfeasance. Rather, he argues that deterrence has limits, and punishing those who are undeserving in virtue of not being morally responsible is unacceptable.

Yet we already do the equivalent to shareholders via regulation and civil penalties. What is the difference if we do so via criminal penalties? The separation of ownership and control cited by Hasnas can be taken as a reason to think the expressivist content of corporate punishment does not trickle down to shareholders and therefore does not wrong them. Treating the corporation as responsible does not entail always judging shareholders responsible because of the separation of ownership and control as well as the shareholders' limited access to information about corporate policies and deliberations. If the judgment expressed by a criminal corporate punishment ever attaches to shareholders it must be in virtue of intentionally supporting the corporation's criminal conduct or having enough shares to exert control. A criminal punishment for a corporation expresses judgments that cannot trickle down to shareholders who have ownership solely in virtue of investing through passive, broad-based stock index funds that track entire markets or in virtue of choosing amongst a very limited number of active mutual funds in one's retirement plan.

If the judgments expressed in corporate criminal punishments do not apply to shareholders, then even though they can be harmed by corporate punishment, there is no incoherent retributivist component. They can be harmed by the punishment in terms of falling share price, but they are not wronged. All sorts of criminal punishments exhibit such collateral damage. The shareholders are not wronged, so the punishment can be understood solely in terms

⁶⁰ Hasnas, *supra* note 51, p. 1339.

of deterring corporate malfeasance. Perhaps we need the ICC and the complementarity principle to achieve forceful constraint of the bioethics wrongs identified in the first two sections. If this is all a matter of shaping corporate behaviour, there is nothing incoherent or immoral in subjecting shareholders to the same harms that can stem from regulation and civil penalties. Holding a natural person responsible when they are not, and punishing them without warrant, wrongs them because they experience undeserved, intentionally inflicted suffering and the punishment expresses a false judgment about their responsibility. But shareholders are merely harmed by corporate punishment, not themselves punished or wronged. An error in holding a natural person to account is one thing, since the punishment can cause suffering they do not deserve. But by the internal logic of the corporate category mistake, even if responsibility ascriptions and punishments are unwarranted for corporations, there is no undeserved suffering analogue. Why not be pure consequentialists about corporate criminal liability?

We can also transcend this dispute over the logical coherence of whether corporate criminal liability requires the capacity to be morally responsible in the way Strawson tries to transcend the dispute over whether free will and moral responsibility rely on a compatibilist or incompatibilist account of human agency.⁶¹ Compatibilists believe free will can exist in an entirely deterministic causal system, incompatibilists do not. The existence of free will, then, hinges on whether human action occurs in a deterministic or indeterministic system. Strawson rejects this picture and argues that moral responsibility is not justified by any particular metaphysical conception of free will. When confronted with a specific action, we can take either the reactive stance or the objective stance towards the person. The reactive stance is the normal stance we take towards other competent human beings and involves such 'reactive attitudes' as resentment and gratitude. The objective stance is what we take towards Hasnas' examples of those who cannot be fully responsible: children, incompetents, the insane. Which stance we take depends on factors other than the metaphysical account of the behaviour's

⁶¹ Peter Frederick Strawson, *Freedom and Resentment and Other Essays* (Routledge, Abingdon, 2008).

ultimate causal origins. Rather, Strawson argues that it is warranted to treat normal human agents as responsible for three reasons. First, to treat nobody as responsible would be to take the objective stance universally. Then the distinction between the behaviour of normal agents and incapacitated agents would no longer make sense, nor would the distinction between the behaviour of free agents and coerced agents. If so, that is a *reductio ad absurdum* of the view that responsibility must require some particular metaphysical conception of free will. Second, we are simply incapable of giving up the reactive stance entirely. It is inextricably bound up with our form of life. Third, even if we could abandon the reactive attitudes on the basis of a metaphysical argument about the lack of free will, the form of human life in which we see ourselves and each other as responsible is more valuable than a form of human life in which we do not.

We can apply the same reasoning to corporations and ask ourselves, given their power and their newfound ability commit wrongs involving violations of genetic privacy, bodily autonomy, cloning, organ trafficking, and germ-line engineering, are we going to be better off taking the reactive or objective stance? This Strawsonian approach to the issue has been mostly ignored in the literature. David Silver provides a notable exception, though he is focused on justifying ascriptions of moral responsibility to corporations, not with criminal liability.⁶²

Consider our linguistic habits, our criticism of corporate malfeasance, the various divestment campaigns---do we not already take the reactive stance to corporations? Recall that contemporary medical and biotechnology makes it possible to internationally wrong someone without physically crossing the border of the nation or the body. Corporations can redefine what we are through engineering and reproductive cloning. If our lives will be better if we treat corporations as agents capable of being criminally liable, if it is the best way to constrain the wrongs outlined in the first two sections, then why not do it? This is a conditional claim, the antecedent of which must be studied further.

Silver gives a Strawsonian explanation for the intelligibility of

⁶² David Silver, 'A Strawsonian Defense of Corporate Moral Responsibility', *American Philosophical Quarterly* 42, (4) (2005) 279-293.

holding reactive attitudes towards corporations. Our negative individual reactive attitudes are in response to flaws of character, while our negative corporate reactive attitudes are in response to flaws in corporate culture. If corporate culture shapes and influences the behaviour of individual agents within the corporation, the reactive attitudes are intelligible.⁶³ By extension, if corporate criminal liability can change a corporate culture, then it can improve the behaviour of individual corporate actors. For example, a corporate culture that affirms human rights are always subordinate to profit can lead to corporate actors violating human rights. The reactive attitudes, when applied to corporations, might be able to constrain and limit such cultures and by extension improve the actions of the employees and directors.

Based on the evidence in the previous section that bioethics identifies harms highly linked to corporations, I support this tentative conclusion. The question then is whether our lives will be better by projecting the norm of international criminal liability. This is an empirical question I am not able to answer here. My thesis is that new wrongs (and potential wrongs) identified by contemporary bioethics implicate corporations and force us to re-evaluate this issue.

There are two ways we can be consequentialists about this. The first is the straightforward sense of deterring harm. Would international corporate criminal liability, directly and via the complementarity principle, help deter the wrongs identified in the first two sections? Do these specific sorts of wrongs change the analysis of the costs and benefits of corporate criminal liability? We should look to policy experts, law and economics, and other empirical disciplines to settle that matter.⁶⁴ We should not be

⁶³ *Ibid.*, p. 288.

⁶⁴ For Law & Economics perspectives on corporate criminal liability in general see Arlen, Jennifer. "The potentially perverse effects of corporate criminal liability." *The Journal of Legal Studies* 23, no. 2 (1994): 833-867; Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 692 (1997); Arlen, Jennifer 'Corporate Criminal Liability: Theory and Evidence' in *Research Handbook on the Economics of Criminal Law*, A. Harel & K. Hylton, eds., Edward Elgar (2012) (NYU Law and Economics Research Paper No. 11-25); Byam, John T. "The Economic Inefficiency of Corporate Criminal Liability." *The Journal of Criminal Law and Criminology* (1973) 73, no. 2 (1982): 582-603; Khanna, Vikramaditya S.

concerned with the alleged logical incoherence of corporate criminal responsibility or worry that it wrongs anyone. Let us be strict consequentialists with a Strawsonian account of corporate responsibility. Even if it relies on a fiction, it could be a useful one.

The second consequentialist aspect has to do with reactive attitudes and corporate cultures. What corporate cultures do we want, given the new potential wrongs identified in the earlier sections? Do we want corporate cultures that see each individual's genetic information as a resource to be exploited regardless of their consent or risks to their welfare? Or cultures that see the organs of vulnerable persons as just another natural resource to exploit? Do we want corporate cultures that would make germ-line modifications with no concern other than profit? If not, and if corporate liability is the best way to constrain such cultures, that is all the reason we need.

5 Conclusion

I briefly outlined new and potential wrongs made possible by advances in medicine and biotechnology. There are compelling arguments both that some of these wrongs are already international crimes according to the interpretive approach and that new laws are required. Most of these wrongs implicate (or would implicate) corporations. The increasing reach and power of multinational corporations, amplified by the tools of genetics and biotechnology, is a consequence of human choice. It is not a natural fact. From a Strawsonian perspective, the decision whether or not to hold an entity responsible is determined not merely by facts but also by values. What life do we want to live—one in which we see ourselves as responsible or not? For Strawson, no metaphysical fact determines the issue. So too, I argue, for corporations, and also that the wrongs identified and predicted by contemporary bioethics must influence our choice. What life we want to live should be formed by our best evidence about the consequences of holding corporations responsible, not by arguments that corporations are or are not analogous to responsible humans. I argued that corporate criminal

"Corporate criminal liability: what purpose does it serve?." *Harvard Law Review* (1996): 1477-1534; Lott Jr, John R. "Corporate criminal liability." *Encyclopedia of Law and Economics* 5 (2000): 492-501.

punishment wrongs neither the corporation nor the shareholders, that the expressivist content of such punishment does not generally trickle down to shareholders, that there is no logical incoherence in such punishment, and that international corporate criminal liability does not threaten the complementarity principle. If the evidence is that these new and potential harms change the costs and benefits of holding corporations responsible, then perhaps corporate criminal liability is an appropriate norm to project through the international criminal law and the complementarity principle.

What if a Strawsonian reactive stance is necessary to deterring these specific corporate harms? Kyriakakis observes that ‘it has been argued that punishment of the corporate entity directly, as opposed to individuals therein, is more likely to create lasting results’.⁶⁵ Clough argues that punishing corporations creates incentives for them to monitor and improve their culture and decision-making processes.⁶⁶ Ratner argues that corporate liability encourages shareholders to monitor corporate behaviour.⁶⁷ With a Strawsonian account of responsibility we can further investigate the efficacy of corporate liability in light of the present and looming threats outlined in the first two sections. It could be a powerful tool to deter these wrongs and to change corporate cultures that are malignant from a bioethics perspective.

⁶⁵ Kyriakakis *supra* note 36, p. 149.

⁶⁶ Jonathon Clough, ‘Not-so-innocents Abroad: Corporate Criminal Liability for Human Rights Abuses’, 11 AUSTRALIAN J. HUM. RTS. 1, 10 (2005).

⁶⁷ Steven R. Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’, 111 YALE L.J. 443, 461-473 (2001).