

RECIPROCITY AND THE CRIMINAL RESPONSIBILITY OF CORPORATIONS

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I. INTRODUCTION

This brief thought paper makes one simple argument in favor of corporate criminal responsibility. Corporations receive many benefits from the state by being treated as de facto persons. Thus, they owe a debt to the state in turn—a debt that, if the metaphor is not too inapt, must be paid in corporate blood.

Stated less dramatically, this thought paper argues that basic moral and psychological concepts of reciprocity require corporations to accept the responsibilities and burdens of legal personhood, which include exposure to criminal liability. This argument stands on its own, regardless of the wisdom of more metaphysical arguments about the nature of personhood or the old saw “that the corporation has neither a soul to damn nor body to kick.”¹

I call this a “thought paper” because I cannot in this short space even begin to justify the argument summarized above. Indeed, I see this paper’s sole function as fostering debate over the wisdom and weaknesses of these ideas and whether they are worth pursuing further.

This paper is organized to track the summary above. Part II, following this introduction, discusses the benefits society gives to corporations that create a corporation’s duty to give something back. Part III examines just what it is that corporations are obligated to give back and why. Part IIIA explains the moral and psychological bases for positive reciprocity (the obligation to give, and the corresponding right to get, good things) and what it

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1. John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 459 (1981).

means. Part IIIB examines negative reciprocity, or retribution, (the obligation to give, and necessity to receive, suffering). Part IIIC explores specifically when negative reciprocity requires criminal punishment. Two sorts of reciprocity are thus at work: the duty of the state to give and the offender to receive punishment for breach of certain social norms protecting collective interests, *and* the specific duty of corporations to pay for the great benefits they receive from society and the state. Part IV, the conclusion, summarizes the argument and its corollaries.

II. WHAT SOCIETY GIVES TO CORPORATIONS: RECIPROCITY'S BASES

A. "Real" Corporate Legal Personhood

Corporations have rights!! Just like people!! Do corporations have the same responsibilities?

If you got government approval of some business venture and it was proven that your negligence caused catastrophic loss, not even on par with what we are seeing in the Gulf, don't you think your ass would be in a sling right now? Forever?²

Modern corporations are legal "persons" in a way that makes them increasingly indistinguishable from human legal persons.³ Corporations have strong autonomy rights: they are free to pursue acquisitions and spinoffs; to otherwise own property; to move within and across state and national boundaries; to grow (anti-trust laws usually being ineffective); and to change their products and goals.⁴ Limited liability often enables corporations to pursue many of these actions without fear of devastating economic loss, thus making them more willing to take risks—in effect, granting them the economic conditions for greater autonomy.⁵

2. Alec Baldwin, The Huffington Post, *This Land Is Your Land*, http://www.huffingtonpost.com/alec-baldwin/this-land-is-your-land_b_611426.html (June 14, 2010).

3. Ted Nace, *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy* 16–17 (Berrett-Koehler Publishers 2003) (tracing the history of the corporation's evolution from "artificial" to "real" legal person).

4. *Id.* at 71.

5. *Id.* at 77–79.

Corporations also have strong expressive rights. They can advertise their products, give money to promote various causes, help to fund political campaigns, and lobby the government.⁶ In some ways, corporations are in fact “super-persons” because they can live an unlimited legal life (mere human persons die), can have “virtual” locations for business law purposes that differ from their physical locations, can have rights expanded by international trade and other agreements, and can often accumulate material and political resources well beyond those of any mortal man or woman.⁷

The autonomy and expressive rights of modern corporations have received constitutional recognition.⁸ Corporations are protected by the Fourth Amendment’s right to be free from unreasonable searches and seizures (thus making them part of the American “people” to whom the Amendment applies),⁹ the Fifth Amendment’s prohibitions against double jeopardy¹⁰ and against takings of property without just compensation,¹¹ and the Sixth and Seventh Amendments’ respective rights to a jury trial in criminal and civil cases.¹² Likewise, corporations have free-speech rights under the First Amendment, including the rights to engage in political¹³ and commercial speech¹⁴ and to abstain from

6. See generally Martin H. Redish, *Money Talks: Speech, Economic Power, and the Values of Democracy* (NYU Press 2001) (summarizing current corporate free-speech law and arguing for even more robust corporate free-speech rights).

7. Nace, *supra* n. 3, at 16–17, 71–86.

8. See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *Hastings L.J.* 577, 664–667 (1990) (compiling corporate constitutional decisions into list form).

9. *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (reasoning that the collection and association of individuals into a distinct legal entity does not amount to a waiver of constitutional immunities, including immunity from unreasonable searches and seizures).

10. See *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (holding a final judgment of acquittal could not be reviewed because it would place all defendants, including the corporation, in double jeopardy).

11. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414–415 (1922) (declaring that a Pennsylvania Act that forbade coal mining under streets and cities was a taking of the coal company’s contractual and property rights that required just compensation).

12. See *Ross v. Bernhard*, 396 U.S. 531, 532–534 (1970) (reinforcing that the common law recognized a corporation’s right to a jury trial when the Seventh Amendment was adopted); *Armour Packing Co. v. United States*, 209 U.S. 56, 73–77 (1908) (examining whether the packing company received its constitutional right to an impartial jury under the Sixth Amendment when subjected to a district court’s jurisdiction in a district in which it did not reside).

13. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776, 784 (1978).

14. See *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770

association with the speech of others.¹⁵ Corporations also enjoy rights to equal protection under the Fourteenth Amendment¹⁶ and to due process under the Fifth (against the federal government)¹⁷ and Fourteenth (against the state governments)¹⁸ Amendments. There are strikingly few individual constitutional rights that corporations do not share.

In some commentators' views,¹⁹ the apotheosis of corporate legal personhood is the recent First Amendment corporate campaign-funding case, *Citizens United v. FEC*.²⁰ There, Citizens United, a non-profit corporation, sought to make its documentary, *Hillary: The Movie*, available on cable television within thirty days of the 2008 primary elections.²¹ Citizens United sought declaratory and injunctive relief proclaiming that any purported prohibition on its doing so under federal campaign-finance laws was unconstitutional under the First Amendment.²² The United States Supreme Court agreed, holding that the statute in ques-

(1976) (holding that the advertising of prescription drug prices by a licensed pharmacist was protected commercial speech under the First Amendment).

15. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15–16 (1986) (deciding that the utility commission violated the utility company's First Amendment rights when it required the company to disseminate a viewpoint other than its own in a newsletter to the utility customers).

16. *Bellotti*, 435 U.S. at 781 n. 15; *Co. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (available at WL, Cases, SCT) (quoting Chief Justice Waite's statement before oral argument that the Court would not hear argument about whether the Fourteenth Amendment applied to corporations because the Court agreed it did).

17. *See Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 176 (1906) (holding the railroad company was deprived of due process of law when the successor secretary of the interior revoked the company's previously approved right of way).

18. *See Chi., Milwaukee & St. Paul Ry. Co. v. Minn.*, 134 U.S. 418, 456–457 (1890) (holding a state statute that gave a railroad commission the power to find carrier charges unreasonable and compel the carrier to charge a rate the commission believed to be reasonable was a violation of the railway company's right to due process).

19. *See* Jeffrey D. Clements, *Beyond Citizens United v. FEC: Re-examining Corporate Rights* 1–2, <http://www.acslaw.org/files/Beyond%20Citizens%20United.pdf> (Nov. 2009) (arguing corporate rights are distinct and not equal to individual rights under the Constitution); David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past and Uncertain Future of Corporate Personhood in American Law* 1–2, 54, [http://theconstitution.org/upload/fck/file/File_storage/A%20Capitalist%20Joker\(1\).pdf?phpMyAdmin=TzXZ9IzqiNgbGqj5tqLH06F5Bxe](http://theconstitution.org/upload/fck/file/File_storage/A%20Capitalist%20Joker(1).pdf?phpMyAdmin=TzXZ9IzqiNgbGqj5tqLH06F5Bxe) (Mar. 10, 2010) (arguing the Court's decision in *Citizens United* did not follow precedent defining corporations' rights under the Constitution).

20. 130 S. Ct. 876 (2010).

21. *Id.* at 887.

22. *Id.* at 888.

tion amounted to an outright ban on corporate independent-political expenditures—a ban enforceable by criminal sanctions.²³

In doing so, the Court reversed precedent and rejected arguments that the corporation is different from human individuals or collectivities of human individuals under the First Amendment.²⁴ The government argued that corporations can amass so many resources that they can dominate or distort the political marketplace of ideas,²⁵ distort the messages intended to be sent by human shareholders,²⁶ and create actual or apparent corruption of the political process.²⁷ But the Court saw any distinction between corporations and individuals as irrelevant.²⁸ Further, effective political speech always requires collective political action (corporations being one such collectivity), and political speech serves to restrain government excesses—a function that can be served well and legitimately by corporations.²⁹ The Court insisted that identity-based speech restrictions—for example, corporate identity—are usually just masks for controlling content.³⁰ Moreover, criminal punishment and its threat of imprisonment are particularly likely to chill political speech.³¹ Accordingly, corporations are not soulless artificialities, but like humans, corporations are creatures with “identities,” capable of fearing “imprisonment,” and essential to the political deliberation that defines a democracy.³²

B. Corporate Golems

In modern Eastern European Jewish lore, the “golem”—an artificial creature brought to life by humans to serve human needs, mainly to protect vulnerable communities from oppres-

23. *Id.* at 897.

24. *Id.* at 912–913 (overruling *Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990)).

25. *Id.* at 904–905.

26. *Id.* at 911.

27. *Id.* at 908–909.

28. *See id.* at 903, 913 (returning to the principle that the government may not suppress political speech because of the speaker’s identity).

29. *See id.* at 898, 904, 912 (reasoning that corporations may have expertise in areas at issue in a political campaign).

30. *Id.* at 899.

31. *Id.* at 895–896.

32. *Id.* at 895–896, 900, 912.

sion—played an important role.³³ But golems left unchecked can do great harm.³⁴

Opponents of corporate power and personhood have argued that corporations are indeed golems because they are *artificial* entities created to serve human purposes.³⁵ Yet we have forgotten their nature, treating them as real persons.³⁶ Once so treated, corporations are freed from the limitations that help to ensure that corporations serve to protect the vulnerable, instead making them *prey on* the vulnerable, effectively elevating their power over that of real humans.³⁷ As Byron Sherwin, a distinguished professor of Jewish philosophy, has explained, “Like a golem, a corporation is a body—a corpus, without a human soul. Like a golem, a corporation is impervious to physical pain. No sword or bullet can harm it. No prison can contain it.”³⁸ Accordingly, if corporate power is unchecked, says Sherwin, “corporate golems become corporate Frankensteinian monsters.”³⁹ Sherwin’s greatest worry is that corporations will engage in conduct that would unquestionably be the basis for criminal liability if corporations were truly treated like persons:

[L]ike some golems, corporations can run amok. They can expand in size and power and wreak havoc and destruction. They can manipulate governments, corrupt politicians, destroy careers, deplete the wealth of their employees and investors, cause environmental damage, avoid taxation, and commit crimes and heinous deeds—often with impunity. At the onset of the twenty-first century, corporate scandals sent tremors through the American and world economies. A new word entered the English language: “Enronization.”⁴⁰

Corporate business theorist and law professor Lawrence E. Mitchell similarly worries about the implications of making cor-

33. Bryon L. Sherwin, *Golems among Us: How a Jewish Legend Can Help Us Navigate the Biotech Century* 32 (Ivan R. Dee 2004).

34. *Id.* at 32–33 (noting that, according to legend, the golem’s creator must be conscientious when creating the golem and wise enough to know when it must be destroyed).

35. *Id.* at 157.

36. *Id.* at 182–183 (criticizing the courts for confusing corporations with real persons).

37. *Id.* at 157.

38. *Id.*

39. *Id.*

40. *Id.* at 158.

porations into people because corporations lack the conscience of individual human beings.⁴¹ Arguably, the early corporations were limited by the state in ways that tried to mimic the human conscience.⁴² But these limitations have been abandoned.⁴³ To those who argue that the corporate form is animated by humans who do have emotions and a conscience, Mitchell replies that “[i]nstead of [people] animating the corporation, the corporation animates them.”⁴⁴ By this he means that the corporation today operates under a single overriding mandate: maximize stock prices.⁴⁵ The role of corporate officers and directors makes them subservient to that mandate, mere slaves of the corporation as an independent entity.⁴⁶

Indeed, corporate officers are *legally* subservient, required to serve the corporation’s stock-value-maximization needs.⁴⁷ No matter how nice these people may be in their personal lives, their role requires them to maximize profits “even if that pursuit leads them to make decisions they wouldn’t make in their quotidian lives, or if it means cutting corners on safety, or harming the environment, or laying off old Joe or thousands of old Joes who have been with the company for their entire careers.”⁴⁸ Directors, officers, and employees are “no longer people,” foregoing “the capacity of people so prized by liberalism—the capacity for self-determination.”⁴⁹ Flesh-and-blood corporate decision-makers lacking human autonomy—indeed deprived of it *by the law* and the corporation itself—thus act for the artificial entity that the law treats as having the autonomy *definitional of, and previously reserved to, real personhood*.⁵⁰ In short, argues Mitchell, the world is

41. Lawrence E. Mitchell, *Corporate Irresponsibility: America’s Newest Export* 43 (Yale U. Press 2001).

42. See Nace, *supra* n. 3, at 71 (noting that shareholder liability and the threat of corporate-charter revocation once served to make at least some of the community’s conscience part of the corporate conscience, while customized charters, limited life spans, limited activities as specified in the charter, restricted ability to act outside of the home state, limited size, and more vibrant minority shareholder rights against management all limited corporate power).

43. *Id.*

44. Mitchell, *supra* n. 41, at 44.

45. *Id.* at 43.

46. *Id.* at 44–45.

47. *Id.* at 43–44.

48. *Id.* at 44–45.

49. *Id.* at 45.

50. *Id.*

a topsy-turvy one in which corporate persons are greater, and humans are barely persons at all.⁵¹ This would not be so, cautions Mitchell, if we remembered that corporations are artificialities, not really persons at all.⁵² Mitchell is not alone; there is a large corporate-reform movement embracing just the idea that the whole problem with the modern corporation is precisely that the law treats it as a person.⁵³ Kill its personhood, argue these critics, and real persons will be freed from tyranny.⁵⁴

C. Corporate Moral Debt and Criminal Liability

But there is one major problem with this solution: it simply will not happen in our lifetimes. Corporate personhood—*real*, not artificial personhood, in the eyes of the law—is here to stay. But there is another solution: if corporations are treated like human persons, then treat them so all the way, including identifying circumstances in which they merit criminal liability. The link between personhood and liability has long been recognized.⁵⁵ Indeed, satirist W. J. Lampton lampooned the idea of corporate responsibility in 1910 in this poem:

*It is the person, not the thing
That does the wrong, and he
Who is behind that which offends
Must pay the penalty.
The fire that burns the house is not
Called into court to stand
And answer for the crime, but he
Who wields the firing brand.
The gun that shoots the man to death*

51. *Id.* at 47 (arguing that it is a mistake of a liberal society to give rights without corresponding responsibilities to an entity that lacks its own moral framework).

52. *Id.* at 45.

53. William S. Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* 52 (U. of Chi. Press 2006).

54. *Id.* at 56 (asserting that activists often call for the abolition of corporate personhood, but proposing that reform should instead be focused on enhancing corporate responsibility); Nace, *supra* n. 3, at 228–229 (suggesting that the only way to control corporations is to confer rights only on people—not corporations); Sherwin, *supra* n. 33, at 185 (arguing that eliminating corporate personhood is a prerequisite to limiting corporate power and thereby restoring the rights of natural persons).

55. See e.g. Charles G. Little, *Punishment of a Corporation—The Standard Oil Case*, 3 Ill. L. Rev. 446, 447 (1909) (recognizing a corporate personality).

*Goes free what it has done.
But he must take the punishment
Who held the deadly gun.
The man behind the corporate crime
Must of himself make good;
The corporation merely does
What he directs it should.
It is the person, not the thing,
Who right from wrong must know,
And he must suffer for the wrong
When Justice strikes the blow.⁵⁶*

Many commentators of the time, and in the ensuing decades, challenged Lampton's logic.⁵⁷ Some commentators, like Charles Little, recognized that reciprocity required a very different view of corporate criminal responsibility.⁵⁸ Indeed, Little embraced a robust notion of the corporate person as a real person in the eyes of the law, precisely because he saw this view as necessarily entailing corporate criminal liability.⁵⁹ Thus Little urged his audience: "The sooner the idea of corporate personality as a pure legal fiction is abandoned, the sooner will some logical theory of corporate responsibility both civil and criminal be evolved."⁶⁰

Little's view better captures modern circumstances. If Hampton was ever right in rejecting corporate criminal liability, his logic no longer holds given both the modern state of corporate law and the popular understanding that the corporation has a distinct identity. To follow Hampton's logic today would be to say that the corporate "fire" is not responsible for burning but then to permit the fire to declare itself a person entitled to constitutional and other protections against its life being snuffed out. The result, of course, would be a fire blazing out of control, dying only when all in its path has been scorched. That makes no sense in terms of deterrence or moral and legal culpability. As Business Ethics Pro-

56. Laufer, *supra* n. 53, at 50–51 (quoting W. J. Lampton, *The Offender*, N.Y. Times 8 (Jan. 27, 1910)).

57. *Id.* (noting the debates at the turn of the twentieth century about whether rights and responsibilities of corporations should be recognized).

58. Little, *supra* n. 55, at 447 (arguing that a corporation, though an entity comprised of individuals, should be held responsible for the actions it commits as a collective body).

59. *Id.* at 450.

60. *Id.* at 447.

fessor William Laufer has wisely argued, if we are to treat corporations as persons then we must go all the way: hold them criminally responsible when they behave analogously to individual humans whom we hold criminally responsible.⁶¹ Look to their “corporate personality” or “ethos” as reflected in their corporate structure, policies, and behavior; infer mental state from conduct if such inferences would be permitted in the case of individuals; expect sound preventive efforts to avoid extreme harm; punish harm more harshly given awareness of unreasonable risks that are indifferently ignored; and determine whether the corporation learns from its mistakes and tries to right its wrongs.⁶²

III. WHAT SOCIETY IS ENTITLED TO RECEIVE IN TURN FROM CORPORATIONS: CORPORATE RECIPROCITY EXPLAINED

This Part elaborates on the above argument by exploring in greater detail the nature and significance of reciprocity. Part II focused primarily (but not solely) on what the state gives to corporations. This Part instead focuses primarily (but not solely) on what corporations owe the state.

This Part first examines reciprocity’s meaning and its biological and cultural roots at the individual level. Next, this Part examines how reciprocal obligations can be felt toward and between groups and even societies as a whole. This Part distinguishes between positive (doing good) and negative (doing harm, that is, retribution) reciprocity and examines the many social benefits of both types of reciprocity. Finally, this Part concludes by analyzing reciprocity’s function in the corporate context. That function is twofold: first, requiring the state to wreak retribution upon corporations that have breached obligations to the social *collective*; second, requiring the corporation to accept retributive punishment to balance out the vast benefits it receives from the state.

61. Laufer, *supra* n. 53, at 56–65 (making the general argument and summarizing other thinkers’ theories for corporate liability based on distinct corporate personhood).

62. *See id.* (discussing factors for imposing vicarious liability).

A. Positive Reciprocity (Mostly)

1. *Between Individuals*

a. Biology, Sociology, and Logic

“Reciprocity” means treating other people as they treat you; arguably, you must do so in some sense “voluntarily” rather than via compulsion.⁶³ Reciprocity likely has deep biological roots. Chimpanzees joining in a hunt expect to receive some fair share of the booty.⁶⁴ If they do not, they rebel—or at least refuse to hunt again with those same companions.⁶⁵ Capuchin monkeys likewise behave in ways that demonstrate an expectation of getting something in some sense deserved for what they give to others.⁶⁶ One well-respected view among biologists is that reciprocity encourages the spread of one’s genes.⁶⁷ Kin—by definition—share genes, so helping kin helps to spread one’s own genes.⁶⁸ Thus creatures sharing kinship have a reason to aid one another in kind.

Helping others to help oneself becomes the basis for extending reciprocal behaviors beyond kin. A donor will help a recipient with the expectation of future reciprocation, and if the cost of donation is even slightly less than the future expected benefits it makes sense to be a donor.⁶⁹ But something must enforce the expectation of later recompense. Thus “[r]eciprocity has one other necessary condition: that cheaters don’t prosper.”⁷⁰

Not all animals engage in reciprocal behaviors, and humans are unusual animals. Still, the evidence for reciprocity among humans is overwhelming. The experimental evidence, drawing on

63. Serge-Christophe Kolm, *Reciprocity: An Economics of Social Relations* 1 (Cambridge U. Press 2008).

64. Margaret Atwood, *Payback: Debt and the Shadow Side of Wealth* 18–19 (H. of Anasi Press 2008).

65. *Id.* at 19.

66. *Id.* at 16–17. For a more detailed discussion of the biological evidence from the animal kingdom, see Sarah F. Brosnan, *Fairness and Other-Regarding Preferences in Nonhuman Primates*, in *Moral Markets: The Critical Role of Values in the Economy* 77–99 (Paul J. Zak ed., Princeton U. Press 2008).

67. See Daniel Friedman, *Morals and Markets: An Evolutionary Account of the Modern World* 10–14 (Palgrave Macmillan 2008) (referring to evolution and gene reproduction as a “copying contest”).

68. *Id.* at 12.

69. *Id.* at 13.

70. *Id.*

game theory alone, is powerful. As economist Joseph Henrich and his collaborators note:

[E]xperimental economists and others have uncovered large and consistent deviations from the predictions of . . . *Homo economicus*. Literally hundreds of experiments in dozens of countries using a variety of experimental protocols suggest that, in addition to their own material payoffs, people have social preferences: subjects care about fairness and reciprocity, are willing to change the distribution of material outcomes among others at a personal cost to themselves, and reward those who act in a pro-social manner while punishing those who do not, even when these actions are costly.⁷¹

Reciprocity in humans is, however, more complex than in other primates. Environmental factors are important, particularly the existence of varying human cultures.⁷² Language also makes possible a wider array of reciprocity mechanisms, as does the human sense of past, present, and future, thus enabling longer-run planning.⁷³

b. Strength and Scope of the Reciprocity Impetus

The strength of reciprocity as a psychological force operating between individuals seems to turn on three main factors: the similarity between the individuals, their degree of direct contact, and whether they are kin.⁷⁴ The kinship factor likely has biological roots similar to those in some other primates.⁷⁵ The similarity and degree of contact factors likely turn in part on the operation of mirror neurons, neurons that fire when we observe another undergoing, for example, painful or pleasurable experiences.⁷⁶ Mirror neurons give observers a similar sense of pain, pleasure,

71. *Foundations of Human Sociality: Economic Experiments and Ethnographic Evidence from Fifteen Small-Scale Societies* 8 (Joseph Henrich et al. eds., Oxford U. Press 2004) (internal citations omitted).

72. *Id.* at 9.

73. See Kolm, *supra* n. 63, at 43–44 (indicating that communities provide sentimental reciprocities).

74. David Livingstone Smith, *The Most Dangerous Animal: Human Nature and the Origins of War* 136–138 (St. Martin's Press 2007).

75. *Id.* at 138–140.

76. *Id.* at 135–136 (discussing the findings of Italian neuroscientist, Giacomo Rizzolatti, who based his research on experimental monkeys).

or the other relevant emotions to those of the subject being observed.⁷⁷ In this way, humans can mind read.⁷⁸ The more similar to us we believe others to be, and the more we have direct and lasting contact with them, the greater our confidence in our mind reading, thus the greater our confidence in our ability to predict their future behavior.⁷⁹ We are, therefore, more willing to give them aid with the understanding that, if necessary, they will reciprocate.

But we may also give aid to beggars whom we may never see again. One explanation for this behavior is that this enhances our reputation as trustworthy, caring people, thus making it more likely that observers will aid us in the future, sure that we will return the favor.⁸⁰ Humans may also engage in chain reciprocity, such as intergenerational giving—we give to our grandchildren understanding that they in turn will give to their grandchildren—thus protecting our genes for many generations to come.⁸¹

Reciprocity also has much to do with notions of status, respect, and equality.⁸² A giver to someone unable to reciprocate has heightened social status, being perceived as in a one-up situation from the recipient but also engaging in admirable conduct as judged by others.⁸³ This creates an incentive for receivers to reciprocate, if they can, to restore their sense of social equality.⁸⁴ They

77. *Id.* (illustrating that “mirror neurons” allow one to watch a baseball player on TV and feel as though he or she is hitting the home run).

78. Andrew E. Taslitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 *Tex. Tech L. Rev.* 419, 436–437 (2009) [hereinafter Taslitz, *Social Norms*].

79. See Smith, *supra* n. 74, at 137 (discussing biases that affect one’s sympathies); Taslitz, *Social Norms*, *supra* n. 78, at 432–433 (recognizing that the “perceived similarity between spectator and subject raises the motivation to empathize and the ability to do so accurately”).

80. See Kolm, *supra* n. 63, at 61–63 (indicating that a variety of motives exist for giving). We also may give simply for the pleasure of giving, an aptitude that evolution has allowed many of us to exercise. *Id.* at 56–57.

81. *Id.* at 46–47. There can be a more generalized form of intergenerational reciprocity such as older workers paying to educate the young, both because the older persons’ educations were so paid for and because they expect the young, when grown, to pay for the next group coming up. *Id.*

82. *Id.* at 3, 63–66, 112–113, 138–139.

83. See Andrew E. Taslitz, *Judging Jena’s D.A.: The Prosecutor and Racial Esteem*, 44 *Harv. Civ. Rights-Civ. Liberties L. Rev.* 393, 398–405 (2009) [hereinafter Taslitz, *Racial Esteem*] (analyzing status and its cognate concept, esteem); Andrew E. Taslitz, *Rape and the Culture of the Courtroom* 67 (NYU Press 1999) (explaining status and one-up, one-down social relationships).

84. See Kolm, *supra* n. 63, at 64–65 (indicating gift recipients feel a “moral debt” to

also will experience a sense of indebtedness to the giver, giving the latter social power over the former, a way to compel—if only by appeals to conscience—a favor in return.⁸⁵ But even if the recipient is neither expected to nor able to give back, the resulting heightened status of the giver is not to be slighted because status brings both material rewards and inherent psychic ones, as ample research demonstrates.⁸⁶

2. Group, Communal, and Societal Reciprocity

a. Definitions and Consequences

There is a flip side. The importance of perceived similarity combines with the human tendency to think in terms of groups.⁸⁷ Members of groups viewed as different from “our” group will be seen as untrustworthy and undeserving.⁸⁸ This “them/us” thinking means that “they” (the out-group members) are not entitled to our group’s aid, while “we” (the in-group members) are so entitled.⁸⁹

Groups, of course, can be of varied sizes, overlapping, and conceived of at varying levels of generality.⁹⁰ One such level is the “community.”⁹¹ Communities are bound together either by economic necessity, ties of mutual affection, or both.⁹² “[A]ll communities have a political structure, a system of rules and regulations, and a means of enforcing those regulations on its members.”⁹³ These rules can be the result of informal practices

reciprocate).

85. *Id.* at 3, 63–66.

86. *Id.* at 112–133.

87. Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 *Mich. J. Gender & L.* 1, 22–23 (1998) [hereinafter Taslitz, *Feminist Approach*].

88. Taslitz, *Racial Esteem*, *supra* n. 83, at 399–403.

89. See Charles Tilly, *Credit & Blame* 53–60 (Princeton U. Press 2008) (explaining that people give credit and blame according to whether the recipient is one of “us” or “them”).

90. See Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 *J. Crim. L. & Criminology* 15, 61–74 (2003) (providing a discussion on the subconscious stereotypes of varying social groups and the similarities common to all human beings); Taslitz, *Feminist Approach*, *supra* n. 87, at 22–23 (noting that social identities stem from group affiliations).

91. Stephen A. Marglin, *The Dismal Science: How Thinking like an Economist Undermines Community* 20 (Harvard U. Press 2008).

92. *Id.* at 21–22, 25.

93. *Id.* at 27.

and understandings, that is, of social norms, whether the norms' role is conscious or not—though such norms might also be codified in laws.⁹⁴ Communities share at least an imagined common past and some core imagined future toward which they strive.⁹⁵ These temporal commitments link community members together but also embody a basic consensus about values.⁹⁶ Communities are, in the view of some leading commentators, at their strongest when reciprocity is high and weakest when impersonal, distant, and entirely self-interested relationships govern.⁹⁷

Generalized reciprocity occurs when the sense of debt to another extends not just to an individual but to a group—even to an entire society.⁹⁸ Here, there is no specific recipient of aid, thus no individual likely to benefit the giver. But the giver understands that by giving—whether in the form of money (taxes), self-limiting autonomy (obeying the law even if short-term benefit is to be gained by breaking it), or undertaking risk for little personal gain (military service)—the giver gains many benefits from society as a whole.⁹⁹ The strength of the impetus for generalized reciprocity turns in part on how widespread feelings of legitimacy are toward the governing bodies that enable society to function and the fairness with which they dispense justice against free-riders (those, for example, breaking the law, thus not paying their “debt,” thereby getting an undeserved benefit).¹⁰⁰ In the state's case, the element of consent involved in reciprocity—if, as some thinkers suggest, some form of consent is indeed necessary—comes from an imagined social contract, an agreement that by remaining in a society you will abide by its rules and meet your fair reciprocal obligations.¹⁰¹ Reciprocity, at both the individual and generalized levels, is thus essential to social peace, cohesive-

94. Taslitz, *Social Norms*, *supra* n. 78, at 445–446; *see also* Marglin, *supra* n. 91, at 28 (arguing that communities need shared values).

95. Marglin, *supra* n. 91, at 28.

96. *Id.*

97. *See id.* at 32–34 (contrasting a nonessential community's potential to unravel with an interdependent community's strength).

98. Kolm, *supra* n. 63, at 4–5, 77–78.

99. *See id.* at 139–140 (explaining the motivation behind generalized reciprocity).

100. *See id.* at 166–167 (discussing self-restraint as reciprocity and how self-restraint allows for societies of people who are not wholly self-interested).

101. Andrew E. Taslitz, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868*, at 3 (NYU Press 2006) (explaining the social contract).

ness, family strength, safety, freedom, and even human happiness.¹⁰²

b. Debtors, Creditors, and Narratives

Indeed, reciprocity is so important in human societies that nearly every human religion, art form, and other aspect of human culture embraces reciprocity's centrality.¹⁰³ In Christianity, for example, mankind owed a debt to God for breaking his laws.¹⁰⁴ Jesus sacrificed himself to pay this debt for humanity, but he too expects compensation: to embrace his teachings and love him.¹⁰⁵ Similar teachings arose in Judaism, Islam, and polytheisms.¹⁰⁶ Perhaps because of these religious teachings, debt—at least in Western societies—is associated with sin.¹⁰⁷ This association offers an incentive to pay our debts.¹⁰⁸

Because debts can be owed to different entities—individuals, society, and God—there are correspondingly different creditors. Remember that in any society social norms establish much of how reciprocal obligations are determined.¹⁰⁹ Experimental evidence from the branch of economics known as fair-price theory identifies two broad types of social norms: descriptive and prescriptive.¹¹⁰ Descriptive norms describe what is expected between individuals.¹¹¹ Violating such norms generally leads to fairly mild reactions, and those responses are generally limited to the parties involved or their close friends and family.¹¹² But prescriptive norms describe what *should* or should not be done in a moral

102. Kolm, *supra* n. 63, at 1–2.

103. See generally Atwood, *supra* n. 64, at 20–41 (describing goddesses of justice and “soul-judging” at death historically in mythology, religion, and culture).

104. *Id.* at 67.

105. *Id.* at 68.

106. See *id.* at 64, 66 (discussing religious myths of sacrifice and debt in Sumer, the Old Testament, the Middle East, and Greece).

107. *Id.* at 46–48.

108. See *id.* at 48–49 (explaining that people would still repay their debts under Mosaic law, which forgave debt every seven years, because of the social repercussions).

109. *Id.* at 86; Taslitz, *Social Norms*, *supra* n. 78, at 445–446.

110. See Sarah Maxwell, *The Price Is Wrong: Understanding What Makes a Price Seem Fair and the True Cost of Unfair Pricing* 32–34 (John Wiley & Sons, Inc. 2008) (defining descriptive and prescriptive norms and explaining how they are used in society).

111. *Id.* at 32.

112. *Id.*

sense.¹¹³ Violating those norms can lead to intense reactions and may be perceived as violations of the duties owed to the collectivity, not solely the injured individuals.¹¹⁴ Whether they in fact are so perceived turns on the scripts that we learn in our culture concerning whether our duty owed is a social or a selfish one.¹¹⁵ Breaches of social-level-duty norms render society the primary creditor.

Scripts matter in another way as well. Norms are triggered by cues—situational factors highlighting one norm’s application rather than another one’s.¹¹⁶ Whether those cues existed and what they meant, whether the norm was breached and to what degree, and what all this says about the character of the breaching individual turn on the narrative.¹¹⁷ A narrative requires an activity, an action, an actor, a subject, and a plot.¹¹⁸ Narratives about moral debt focus on the resulting change in the value of persons or objects, the competence of the actor to do otherwise, the degree of his or her agency (autonomy), and the degree of his or her responsibility.¹¹⁹ Crafting a narrative is both based on and contributes to fact-finding.¹²⁰ When the norms allegedly violated are moral ones owed to the collectivity, the fact-finding process must address and involve the collectivity in a ritual of collective judgment.¹²¹ In modern Western societies, that ritual is the criminal trial—in the United States, specifically the adversarial trial.¹²²

In sum, the urge toward positive reciprocity has biological and cultural roots creating an expectation that the equivalent of what is given will be returned, when needed. This reciprocal expectation can operate at the levels of the individual, the group, and society as a whole. The impetus toward aiding one another via reciprocity is powerful and essential to social peace and the operation of effective societies—especially free ones. At the socie-

113. *Id.* at 33.

114. *Id.*

115. *See id.* at 34–36 (comparing theories describing norms as either selfish or social and suggesting that scripts determine when either selfish or social norms apply).

116. *Id.* at 36.

117. Atwood, *supra* n. 64, at 81–82.

118. Tilly, *supra* n. 89, at 38–39.

119. *Id.* at 34.

120. Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. Cal. Rev. L. & Women’s Stud. 387, 417, 421–422, 436, 439 (1996).

121. Robert P. Burns, *A Theory of the Trial* 136, 139 (Princeton U. Press 2001).

122. *Id.*

tal level, powerful political norms and legal obligations work to recognize these reciprocal obligations. But what happens, particularly at the societal level when those powerful obligations are ignored? The answer: revenge.

B. Negative Reciprocity: Revenge and Retribution

1. Definitions and Proportionality

Positive reciprocity turns on the metaphor of balance.¹²³ When we owe a debt that we do not repay, the scales are out of balance.¹²⁴ If the debt is not paid as social norms ordinarily require, the scales must nevertheless somehow be balanced.¹²⁵ At the individual level, revenge restores this balance.¹²⁶ At the collective level, retribution, generally in the form of criminal punishment, restores the balance.¹²⁷ Both revenge and retribution, properly conceived, require proportionality; revenge, however, harbors an even greater risk of excessive response than does retribution, in which governmental procedures and distance supposedly limit punishment to that which is “deserved” but no more.¹²⁸

But what is proportional is no longer determined in material terms. The failure to reciprocate is a failure to pay a moral debt (not only a monetary or like one).¹²⁹ Moral debts require a greater amount in payment.¹³⁰ This is partly because of the necessity of deterrence and partly because of the need to emphasize the moral violation’s gravity, thus reinforcing the relevant social norm’s

123. Kolm, *supra* n. 63, at 2–3, 18, 22–23; see Atwood, *supra* n. 64, at 15, 17, 27, 30 (discussing the concepts of debt and balance in ancient societies, modern societies, and the animal kingdom). For example, the ancient Greek-speaking societies believed the goddess Nemesis helped balance good and bad. *Id.* at 30.

124. Kolm, *supra* n. 63, at 107.

125. *Id.* at 107, 111.

126. *Id.* at 114, 144–145; Andrew E. Taslitz, *The Inadequacies of Civil Society: Law’s Complementary Role in Regulating Harmful Speech*, 1 U. Md. L.J. Race Religion Gender & Class 306, 317 (2001) [hereinafter Taslitz, *Civil Society*].

127. Taslitz, *Civil Society*, *supra* n. 126, at 317, 348–349.

128. *Id.* at 317–318, 335, 346–347. Revenge is often excessive because victims can become consumed by hatred and resentment and may forget about proportionality. *Id.* at 317.

129. Kolm, *supra* n. 63, at 2–3, 111.

130. See *id.* at 19, 65 (explaining that moral debts transcend the individual and society and that moral debts can be very oppressive).

centrality.¹³¹ If the norm violation is perceived to injure the collectivity, the injury is perceived as a widespread one, thus requiring more than simple compensatory justice to the individual victim to right the wrong.¹³² The debt owed society is a heavy one.¹³³

2. *Communicative, Character-Based Retributivism*

Retributive theories of punishment—those turning on a notion of a debt owed to society—are many.¹³⁴ But the one that has always made the most sense to me is communicative retributivism.¹³⁵ The concept is that breach of collective social norms sends messages about relative human worth; specifically, the greater worth of the offender relative to the victim.¹³⁶ If an offender shoots a victim (but the victim luckily lives and recovers to testify at trial) and steals the victim's wallet, the offender in effect says, "My need for money and a sense of power is more important than your needs for physical and material safety because I am more important."

When, as in this example, the norm breach is a collective one, society's failure to collect the debt would send the message that the harm done to the individual is not worth society's bother.¹³⁷ In effect, the victim becomes a second-class citizen, perhaps even entirely exiled from the circle of social concern. Society must thus punish offenders to counter their demeaning messages, replacing the messages with clear statements that offenders are no better than those upon whom they prey.¹³⁸ Simultaneously, such pun-

131. Kolm, *supra* n. 63, at 3, 19; Taslitz, *Civil Society*, *supra* n. 126, at 348.

132. Taslitz, *Civil Society*, *supra* n. 126, at 346, 347 n. 126.

133. See Kolm, *supra* n. 63, at 65 (explaining that moral debt can be oppressive because of the associated social pressure and judgment); Taslitz, *Civil Society*, *supra* n. 126, at 347 n. 226 (noting that the criminal system is used to punish "more serious cases involving more public injuries").

134. Ellen S. Podgor et al., *Criminal Law: Concepts and Practice* 5 (2d ed., Carolina Academic Press 2009).

135. See *id.* at 6 (explaining that communicative retributivism is a theory that deals with asserting each person's fundamental worth in society).

136. Taslitz, *Civil Society*, *supra* n. 126, at 309, 314–315, 343–344.

137. *Id.* at 314, 368 (suggesting that society "embraces and reaffirms" the offender's message if society fails to punish the offender); Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 Wis. Women's L.J. 3, 62 (2000) [hereinafter Taslitz, *Two Concepts*].

138. Podgor et al., *supra* n. 134, at 6; Taslitz, *Civil Society*, *supra* n. 126, at 314–315, 321, 329–330, 355; Taslitz, *Two Concepts*, *supra* n. 137, at 60–61.

ishment expresses society's embrace of the norm as one of the collectivity—indeed one helping to define the collectivity—thus reestablishing the bonds that tie society together.¹³⁹ Likewise, once the offender has paid his or her debt, the offender should return as a full member of society.¹⁴⁰ These principles are too often honored in the breach, but they are still sound principles.

The particular communicative, retributive variant that I embrace relies upon a character morality. Briefly, the idea is that expressing demeaning messages reveals an evil character.¹⁴¹ No one is all “good” or “evil,” and there are degrees of each; furthermore, the real test of one's character is not simply what one thinks but also what one therefore does.¹⁴² It is the manifestation of evil character that contributes to the retributive, collective anger that must be sated.¹⁴³ In turn, this satiation is what helps to unify society and reinforce its moral codes and its fundamental rules of reciprocity.¹⁴⁴ The expression of that anger also sends the message that we as a collectivity will not tolerate insult to our members.¹⁴⁵ But the law itself insults society's wayward member if it punishes the offender excessively.¹⁴⁶ The law must thus condone only the degree of *deserved* retributive anger.¹⁴⁷ Limiting the potential ill effects of such anger, however, also requires directing it toward reintegrating the offender fully and equally into society

139. Taslitz, *Civil Society*, *supra* n. 126, at 348.

140. *Id.* at 358 (noting that rehabilitation should be part of retribution because it can help the offender to rejoin society).

141. Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 Miss. L.J. 483, 531 (2006) [hereinafter Taslitz, *Expressive Fourth Amendment*]; Taslitz, *Civil Society*, *supra* n. 126, at 337; Taslitz, *Two Concepts*, *supra* n. 137, at 45, 48.

142. Taslitz, *Expressive Fourth Amendment*, *supra* n. 141, at 531; Taslitz, *Two Concepts*, *supra* n. 137, at 48–49; see Taslitz, *Civil Society*, *supra* n. 126, at 337 (explaining how understanding the circumstances can help society to see the offender as less than totally evil).

143. Taslitz, *Civil Society*, *supra* n. 126, at 309, 348, 348 n. 231; Taslitz, *Two Concepts*, *supra* n. 137, at 50, 60.

144. Taslitz, *Civil Society*, *supra* n. 126, at 348, 356, 362; see Taslitz, *Two Concepts*, *supra* n. 137, at 59, 62 (noting that retribution can help reflect society's concerns about what type of people its members should be and about a person's value within that society).

145. Podgor et al., *supra* n. 134, at 6; Taslitz, *Civil Society*, *supra* n. 126, at 355.

146. Taslitz, *Civil Society*, *supra* n. 126, at 338, 355.

147. *Id.* at 317, 335, 337.

once the scales have been balanced.¹⁴⁸ Anger must be channeled toward redemption.¹⁴⁹

C. Corporations and Retribution

It is a short leap from character-based communicative retributivism to criminal punishment for corporations, at least in light of the underlying precepts of reciprocity. As I have explained elsewhere, both anecdotal and social science evidence reveals that most Americans conceive of corporations as entities of a sort.¹⁵⁰ They know, of course, that corporations are not biological entities, but they see each corporation as having a unitary existence reflecting a unique corporate culture embodied in its actions, practices, and words.¹⁵¹ British Petroleum (BP) is surely now thought of by many Americans as a monolithically greedy entity—indifferent to the risk of harm its drilling activities pose to human life, health, and community. It has insulted, at a minimum, the millions of Americans living in the Gulf states whose livelihoods, health, and life satisfaction have been diminished by the recent massive oil spill. BP did so, in the public's view, with at least a thoroughgoing indifference to the worth and needs of those residents—diminishing them in the process.

Whether these beliefs are justified is another matter. That is why investigation and perhaps a criminal trial will be required. But if that investigation reveals that the public's perceptions are accurate, rectifying BP's massive collective insult to its many victims and to powerful collective norms will require a collective, moral response in the form of criminal punishment. This will not be only because of public retributive anger, but because it will be deserved anger. Desert will be determined by deciding the extent to which BP's actions reflect an evil corporate personality. In other venues, I have embraced the idea that corporations do have

148. *Id.* at 358.

149. *Id.* at 358, 360.

150. Taslitz, *Expressive Fourth Amendment*, *supra* n. 141, at 533–534. As an example, during the potential sale of Ben and Jerry's (the ice cream company) in 1999, people argued that it should not be sold because Ben and Jerry's personality would be ruined. *Id.* at 533.

151. *Id.* at 533–534. The major oil companies have been described in terms of their unique personalities: Texaco as selfish and greedy, Mobil as sophisticated, Exxon as tranquil, and Shell as lordly. *Id.* at 534.

personalities (cultures) and that there are fairly specific ways to identify them, determine their nature, and judge their contribution to the harms done.¹⁵² Compensatory tort justice will thus not be sufficient to condemn evil corporate character.¹⁵³ Tort and similar remedies provide material and some emotional recompense for the individuals harmed in their role as individuals.¹⁵⁴ Social science reveals that wronged individuals also feel obligated to act on society's behalf to right the wrongs done to society if collective norms are involved;¹⁵⁵ likewise, those members of society not directly injured, and society as a whole, will seek retributive justice.¹⁵⁶ Only the criminal justice system can accomplish that task.

This brief paper has sought to strengthen these arguments by focusing on another sort of reciprocity than that underlying all criminal punishment; namely, the reciprocity dictated by corporations being treated *like* biological persons by the law. If corporations garner all the benefits that the law bestows upon them, and if they nevertheless inflict the sorts of collective harms at which the criminal law ordinarily aims, corporations should have to expect the same sort of criminal punishment that the rest of us would face. Biology should be irrelevant.

IV. CONCLUSION

I do not want my argument here to be taken as mandating corporate criminal punishment every time that a criminal law is violated. Nor am I engaging in a jeremiad against corporate America. My only goal has been to argue that as a matter of fairness, corporations must sometimes face criminal liability because of the enormous benefits they receive from our legal system.

152. See *e.g. id.* at 538–539 (discussing the idea that a corporation's personality can be identified and noting a method developed by Peter French to help determine the corporation's involvement in an activity).

153. See Taslitz, *Civil Society*, *supra* n. 126, at 346, 347 n. 226 (explaining that the tort system is useful in private retribution, but the criminal system is needed to address public injuries).

154. See Alan Calnan, *Justice and Tort Law* 8, 10 (Carolina Academic Press 1997) (explaining that tort justice focuses on individual wrongs and can include paying compensation).

155. See Maxwell, *supra* n. 110, at 36, 86–87 (discussing how individuals often act to benefit society in consumer situations).

156. Taslitz, *Civil Society*, *supra* n. 126, at 309, 348–349.

Those benefits are rooted in a conception of the corporation as a person—not an artificial person but a real person. Whether there are sound policy reasons for that conception I do not address here. What matters is that the conception is descriptively accurate. As long as corporations are treated like persons, corporations must endure (under the appropriate circumstances identified in general terms above) the same duties and penalties—including criminal punishment—that the rest of us do. If corporations are to be true citizens in the eyes of the law, they must perhaps be equal citizens but surely not greater ones. If this last sentence is itself descriptively inaccurate in terms of the reality of corporate economic and political power, at least it should be made accurate in the one realm where society seeks most strongly to enforce its most fundamental values: the realm of the criminal law.