

# SOME REALISM ABOUT CORPORATE CRIME

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## I

### INTRODUCTION

A lot can happen in twenty years. Since publication of the Holder Memo in June of 1999,<sup>1</sup> we have experienced recurring corporate misconduct, from the accounting frauds at Enron and WorldCom, to the BP oil spill, to the Volkswagen emissions scandal. At least in part due to ongoing frustration with such misconduct, we have also seen multiple efforts by the Department of Justice to update, tweak, clarify, or refine the U.S. government's approach to the problem of corporate crime.<sup>2</sup> Last, but certainly not least for purposes of this Article, we have seen the reemergence of interest among criminal law scholars in how to deal with the "special nature" of the corporate person.<sup>3</sup>

The revival of interest in the nature of the corporate person has not been limited to criminal law scholars. Indeed, at least when it comes to popular perception, the issue of corporate personhood in criminal law has been of secondary importance. In 2010, the United States Supreme Court decided *Citizens United v. FEC*,<sup>4</sup> which held that the First Amendment to the United States Constitution protects the right of corporations to spend unlimited amounts of money on politics.<sup>5</sup> And in 2014, the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*,<sup>6</sup> holding for the first time that for-profit corporations are eligible to claim religious exemptions from general laws.<sup>7</sup> Together, *Citizens*

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1. See Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., to All Component Heads and U.S. Att'ys on Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter Holder Memo on Prosecuting Corporations], <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> [<https://perma.cc/2YNX-KBW5>].

2. See *Resources*, CORP. PROSECUTION REGISTRY, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/resources.html> [<https://perma.cc/KH3H-3MAD>] (featuring links to Department of Justice documents related to federal corporate prosecution guidelines).

3. The Holder Memo uses this phrase at the end of its section entitled "Charging Corporations—Factors to be Considered." See Holder Memo on Prosecuting Corporations, *supra* note 1.

4. 558 U.S. 310 (2010).

5. *Id.* at 365–66.

6. 573 U.S. 682 (2014).

7. *Id.* at 692.

*United* and *Hobby Lobby* have begotten a revival of historical debates about what rights the corporate person should enjoy.<sup>8</sup>

In these debates, there appears to be a widely shared intuition that issues of corporate personality in criminal law, on the one hand, and in constitutional law, on the other, are closely related.<sup>9</sup> Both involve questions about the moral status of corporations and how the law should treat them in light of that status. And yet the possibilities for intellectual arbitrage between the two fields have not been fully exploited. This Article seeks to take a step in that direction.

More specifically, this Article aims to distill some lessons from those who have adopted and advanced a realist approach to questions of corporate rights.<sup>10</sup> Following critiques of corporate theory in the early decades of the twentieth century, especially the powerful arguments offered by John Dewey, the realist approach to rights seeks to bracket—or at least to deflate—the intractable debates about the corporation’s metaphysical status. In their place, realists about corporate rights have urged that we take a pragmatic approach that focuses on the “concrete facts and relations” that should guide the law’s treatment of corporations.<sup>11</sup>

In the remainder of this Article, I will try to synthesize four lessons from realists about corporate rights and suggest how they might be leveraged by scholars of corporate crime. Part II is about the needless invocation of abstract concepts in reasoning about corporate entitlements. This lesson is likely most familiar to scholars of corporate crime, but the persistence of conceptualism

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8. The literature in this area is vast. A search of Westlaw’s Law Reviews & Journals database for “corporate personhood,” for instance, returned 797 results since 2010. Search Results for “Corporate Personhood” since 2010, *Secondary Sources – Law Reviews & Journals*, WESTLAW, <https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=%28sc.Default%29> (select “Secondary Sources” from the drop-down menu in the main search bar; type “corporate personhood” into the search bar and press enter; set date range from “01/01/2010”). An identical search in Google Scholar returned 3,640 results since 2010. Search Results for “Corporate Personhood” since 2010, GOOGLE SCHOLAR, <https://scholar.google.com/> (type “corporate personhood” into the search bar and press enter; then set custom date range from 2010 to 2020).

9. See, e.g., N. Craig Smith, *Introduction: The Moral Responsibility of Firms: Renewed Interest in a Perennial Question of Business Ethics*, in *THE MORAL RESPONSIBILITY OF FIRMS* 1, 2 (Eric W. Orts & N. Craig Smith eds., 2017) (“Recent court cases in the USA, that seem to give corporations rights of religious expression and freedom of speech normally reserved for individual human beings, also heighten the importance of [corporate blame, punishment, and deterrence] questions.”); Eric W. Orts, *Conclusion: The Moral Responsibility of Firms: Past, Present, and Future*, in *THE MORAL RESPONSIBILITY OF FIRMS*, *supra*, at 206, 214 (discussing “[t]he recent high-profile US Supreme Court case of *Burwell v. Hobby Lobby Stores, Inc.* (2014), which recognized a right of some family-owned firms to resist legal obligations on religious grounds”).

10. See, e.g., Richard Schragger & Micah Schwartzman, *Some Realism about Corporate Rights*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 345 (Micah Schwartzman, Chad Flanders & Zoe Robinson eds., 2016); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565 (2013); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH. L. REV. 1629 (2011). Although the legacy of legal realism is contested, this Article focuses on realist arguments that have appeared in the corporate rights literature, especially those made by scholars following John Dewey.

11. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 673 (1926).

about the corporate person recommends at least a brief rehearsal of the main lines of argument.

Part III addresses the related, though importantly distinct, question regarding what should replace conceptualism about corporations once the realist critique is absorbed. In other words, the realists were—and are—especially good at destruction of airy theoretical concepts, but they are not typically known for their constructive suggestions. Is there any positive program that results from the realist critique? This Part suggests that there is, at least in the sense of outlining an appropriate methodology to answer questions about corporate entitlements.

Part IV then engages the most overtly critical aspect of the realist tradition, namely, the idea that abstract concepts are not only indeterminate, but also serve as vehicles in which parties to a particular “struggle” smuggle their ideological or political priors.<sup>12</sup> The argument in this Part focuses on the ways in which conceptualism about corporate personality has led to cooptation by powerful business interests, and how continuing to propound such conceptualism only invites further appropriation.

Finally, Part V addresses the ultimate realist question: What are we supposed to do about corporate crime? It does not attempt to provide a solution by prescribing a particular course of reform. Instead, it offers something more in the way of a modest caution against proposals that would seek to radically restructure the corporation. Considering the failures of corporate criminal law over the last twenty years, the impulse to seek such radical reforms is understandable. But, in the realist spirit, I argue that we ought to have a practical accounting of likely costs and benefits before we abandon core features of the corporate form.

## II

### REALISM ABOUT PERSONHOOD

In the corporate rights literature, *Citizens United* rekindled interest in theories of corporate personality.<sup>13</sup> The case involved a constitutional challenge to a federal law prohibiting corporations from spending treasury money on certain kinds of political communications.<sup>14</sup> The opinion itself was largely agnostic on deep questions of corporate personhood, resting much of its weight on the argument that the First Amendment protects listeners’ right to hear messages conveyed by corporations.<sup>15</sup> This approach, moreover, aligned with the

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12. *See id.* at 665.

13. *See, e.g.,* Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 Wis. L. Rev. 999 (2010).

14. *Citizens United v. FEC*, 558 U.S. 310, 318–19 (2010) (describing the provision of the Bipartisan Campaign Reform Act that prohibited corporations and unions from using treasury funds for “electioneering communications”).

15. *See id.* at 336–66; *see also id.* at 465 n.72 (Stevens, J., dissenting) (“Nothing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession, a nexus of explicit and implicit contracts, a mediated hierarchy of stakeholders, or any other recognized model. . . . It is not necessary to agree on a precise theory of the corporation to agree that corporations differ from natural persons in fundamental ways, and that a legislature might therefore need to regulate them differently if

Court's longstanding preference for focusing on the constitutional interests of individuals rather than on the nature of the corporation.<sup>16</sup> Nevertheless, in scholarly as well as popular conversations, *Citizens United* functioned as an open invitation to revisit debates about corporate personality.

Those debates were once prominent in the legal and philosophical literature. They typically involved controversies about whether the corporation was a concession of state power, an aggregation of individual stockholders, or a real entity with its own independent standing in the political community.<sup>17</sup> But these debates were intractable and interminable—the discourse about corporate personality seemed as fruitless as it was “endless.”<sup>18</sup> And although it took at least a few years to sink in, the conventional historical view is that John Dewey's intervention was a “stunning eulogy” that put these debates to rest for decades to come.<sup>19</sup>

In his analysis of the ongoing debates, Dewey took pains to show that theories of corporate personality are indeterminate.<sup>20</sup> These theories, he argued, could just as easily be invoked by one side of any controversy as by the other. This flexibility—or flippability—was due to the fact that abstract theories about the nature of corporations do not contain normative premises to evaluate corporate treatment. To be sure, Dewey was attentive to the possibility—indeed, the likelihood—that such theories could be deployed effectively by those who argued for certain policy positions. In that way, they might be thought to have some argumentative “tilt.”<sup>21</sup> But on Dewey's account, the theories themselves do not have any independent normative purchase. Theories of corporate personhood, in other words, do not provide reasons for supporting one side or the other. Those reasons must come from elsewhere, and the various theories were simply conceptual vehicles in which to smuggle one's policy preferences.<sup>22</sup>

Drawing on Dewey's insights, contemporary corporate rights scholars have urged that we avoid reviving moribund questions about corporate personhood.<sup>23</sup> Those theories, as Dewey showed, are not helpful in determining how the law should treat corporations or in determining what kinds of entitlements they should have. On this view, it is best to skip—or to bracket—deep metaphysical

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it is human welfare that is the object of its concern.”) (internal citations omitted); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 155–58 (2010) (arguing that both the majority and the dissent in *Citizens United* emphasized listeners' interests).

16. See Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015).

17. See, e.g., Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (1990).

18. See Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932).

19. Mark, *supra* note 17, at 1480.

20. See Nelson, *supra* note 10, at 1572–74 (discussing Dewey's indeterminacy critique).

21. For an argument along these lines, see Horwitz, *supra* note 17, at 175–76.

22. See Nelson, *supra* note 10, at 1573.

23. See sources cited *supra* note 10.

questions about corporate personality and to get right to the pragmatic task of evaluating the concrete social facts and relations that obtain in the real world.

Much as in the corporate rights literature, questions about corporate personhood have enjoyed a similar revival among those concerned with the problem of corporate crime.<sup>24</sup> The bulk of this revival revolves around the question whether corporations are moral agents.<sup>25</sup> For proponents of moral agency, the basic argument typically goes something like the following. Corporations are capable of recognizing and conforming their behavior to a set of morally relevant obligations. Given this capacity to respond to moral reasons—that is, to function in the space of obligations—corporations are “conversable” agents. And in virtue of this status as conversable agents, we are then justified in thinking of corporations as “persons.”<sup>26</sup>

This functional personhood, in turn, is said to make corporations suitable for certain responsibilities.<sup>27</sup> Since they can respond to moral obligations, that is, it makes sense to impose those moral obligations upon them. And since the criminal law is one important means of enforcing moral obligations, corporations are fit to be held criminally responsible.<sup>28</sup> To put these points together succinctly, characterizing corporations as persons makes it appropriate to subject them to certain liabilities, including criminal liabilities.<sup>29</sup>

To be sure, this schematic argument has not gone without vigorous challenge. Some commentators contend that corporate moral agency is an illusion or, at best, a metaphor standing in for the real behavior of human beings.<sup>30</sup> Others resist

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24. See Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453, 455–56 (2019) (discussing recent literature).

25. See, e.g., THE MORAL RESPONSIBILITY OF FIRMS, *supra* note 9.

26. See CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 174–78 (2011); see also Philip Pettit, *The Conversable, Responsible Corporation*, in THE MORAL RESPONSIBILITY OF FIRMS, *supra* note 9, at 15, 23 (“That corporations and other such bodies are conversable agents means, in quasi-legal parlance, that they are persons.”).

27. See Pettit, *supra* note 26, at 32.

28. Pettit is perhaps more cautious in this final conclusion, though he does say, “I believe that their fitness to be held responsible . . . argues for the appropriateness of holding corporations responsible in the criminal law.” *Id.* at 33. Other scholars who follow his basic argument about functional or “pragmatic” personhood, however, have been more decisive in concluding that corporations should be held criminally responsible. See, e.g., W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. U. L. REV. 479, 504 (2018) (“I disagree that legal personhood is insufficient to give rise to criminal liability. What it means to be a legal person is to be able to participate in the space of legal rights and obligations, which includes being held responsible for violating these obligations. One paradigmatic feature of that space is criminal law and punishment.”).

29. See John Hasnas, *The Phantom Menace of the Responsibility Deficit*, in THE MORAL RESPONSIBILITY OF FIRMS, *supra* note 9, at 89, 98 (“[T]he reason why the corporate moral responsibility debate is such a lively one is that most of the advocates of corporate moral responsibility believe that it is important to be able to impose punishment on corporations as collective entities, and they recognize that moral responsibility is necessary for such punishment.”); see also *id.* (“A just legal system imposes criminal sanctions only on morally responsible agents. Therefore, moral responsibility is (or should be) a prerequisite for criminal punishment.”).

30. See David Rennegard & Manuel Velasquez, *On (Not) Attributing Moral Responsibility to Organizations*, in THE MORAL RESPONSIBILITY OF FIRMS, *supra* note 9, at 123, 139 (criticizing “collectivist” accounts of corporate moral agency).

the argument from personhood on the grounds that corporate criminal liability imposes vicarious punishment on innocent stakeholders.<sup>31</sup> These skeptical accounts, however, seem to share the basic assumption that some form of personhood is necessary to justify corporate criminal liability.<sup>32</sup> These skeptics may contest the idea that corporations are persons, but they seem to concede that this “threshold question” has significant implications for how the law should treat them.<sup>33</sup>

It is at this point that the realist’s “cynical acid” might be most useful.<sup>34</sup> In recent years, realists about corporate rights have reminded us that one need not answer metaphysical questions about the corporation’s status to determine how they should be treated.<sup>35</sup> Descriptions of the nature of the corporation do not produce the normative premises necessary to make arguments about corporate entitlements. Those premises can only come from an investigation of the values and interests that we care about as a political community—that is, from our political morality.<sup>36</sup> Those underlying principles of political morality will then drive our conclusions about whether and how the law—including the criminal law—might be deployed to vindicate our values.

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31. See Hasnas, *supra* note 29, at 97–102.

32. See *id.* at 99; see also Ronnegard & Velasquez, *supra* note 30, at 140 (arguing that moral agency is “necessary for moral responsibility”).

33. See Diamantis & Laufer, *supra* note 24, at 455 (discussing the “threshold questions of agency”); see also DAVID RONNEGARD, *THE FALLACY OF CORPORATE MORAL AGENCY* 5 (2015) (arguing that conclusions about the moral agency of corporations have “important wider ramifications”); Thomas Donaldson, *Preface* to *THE MORAL RESPONSIBILITY OF FIRMS*, *supra* note 9, at v (“[T]he arcane, abstract issue of moral agency has weighty practical consequences . . .”).

34. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). The basic realist point—that claims about corporate personhood are not necessary to make determinations about how corporations should be treated—is not entirely absent from the criminal law literature. Indeed, Steven Walt and William Laufer made a version of this argument nearly three decades ago. *Why Personhood Doesn’t Matter: Corporate Criminal Liability and Sanctions*, 18 AM. J. CRIM. L. 263 (1991). In their article, they defended the claim that “imposition of corporate criminal liability does not require references to persons or features peculiar to individuals.” *Id.* at 264. Although their arguments rested on the logical relationship (or lack thereof) between ontological status and normative conclusions rather than on appeals to pragmatism, their conclusions are consistent with those reached by the realists. Their article is cited often in debates over the moral status of firms, but its important lessons typically go unheeded.

35. See sources cited *supra* note 10. At first glance, it would appear that John Hasnas has argued along similar lines. Indeed, Hasnas invoked another famous legal realist—Felix Cohen—to argue that theories of corporate personality are “transcendental nonsense.” See John Hasnas, *Where is Felix Cohen When We Need Him?: Transcendental Nonsense and the Moral Responsibility of Corporations*, 19 J.L. & POL’Y 55, 58 (2010). But Hasnas goes on to make a stronger ontological claim when he insists that the corporation is “not a thing,” and then infers from that idea a further normative claim that we should not recognize corporate criminal liability. See *id.* at 69. This method of reasoning, however, runs contrary to the realist account I rehearse above. On that account, the corporation may or may not be “a thing”—that is a deep and difficult question of metaphysics that we are not yet in a position to resolve confidently. But regardless of how—or whether—we resolve that question, we can still make normative claims about how corporations should be treated by the criminal law based on the interests and values we identify as important to our political morality. The question of corporate personhood, that is, can simply drop out of the analysis.

36. See Schragger & Schwartzman, *supra* note 10, at 368.

A defender of corporate personhood might respond in the following way. For the criminal law to work—that is, to achieve its goals, whatever they may be—we need to know that the corporation is the kind of thing that can respond to its injunctions. On this view, if the corporation is not a moral agent in the sense that it can function in the space of obligations, then it makes no sense to subject it to criminal sanctions.

It may be true that you need to make some claims about the nature of groups—what they are and how they function—to explain complex social behavior. This is a question about the best theory of social scientific description, and for this question, it is quite possible that methodological individualism is mistaken. But explanations of corporate behavior do not provide justifications for how corporations should be treated. That is, social scientific descriptions of how corporations function do not provide reasons for treating them one way or another. Those reasons can only come from moral and political theory. And it is perfectly plausible to say that, as a matter of moral and political theory, we should punish corporations (or not punish them, as the case may be) regardless of whether they count as persons.<sup>37</sup>

In short, following renewed interest in corporate personhood after *Citizens United* and *Hobby Lobby*, realists about corporate rights have reminded us of Dewey's admonition to focus on the facts and interests at play rather than on whether the corporation counts as a person. The problem of corporate personhood may present intriguing metaphysical questions, but, lucky for us, we need not wait until those questions are resolved to decide how the law should proceed. Instead, deep disagreements about corporate status can simply be put to the side as we deliberate about what to do with corporations. These insights would seem to apply just as forcefully in the context of designing and implementing corporate criminal law as they do in the context of corporate rights.

### III

#### REALISM ABOUT CORPORATIONS

Realism has always been particularly good at telling us what *not* to do. We shouldn't treat the law as if it were a matter of deductive logic. We shouldn't reify concepts. And we shouldn't pretend that those who use those concepts are doing so in a neutral way, without political or ideological motivation. But realism's track record with regard to defining a positive program is more checkered. In other words, the realists were particularly good at destruction, not always so great at construction.<sup>38</sup>

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37. See Amy J. Sepinwall, *Denying Corporate Rights and Punishing Corporate Wrongs*, 25 BUS. ETHICS Q. 517, 527 (2015) (“[W]e might have good reasons to hold corporations responsible for their wrongs even if they do not satisfy the criteria for moral agency.”); see also Steven Walt & Micah Schwartzman, *Morality, Ontology, and Corporate Rights*, 11 L. & ETHICS HUM. RTS. 1 (2017) (arguing that corporate personhood is neither necessary nor sufficient to determine corporate entitlements).

38. See Nelson, *supra* note 10, at 1575; see also BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 210 (1998) (arguing that Robert Hale's “skeptical, deconstructive analysis offered little guidance” on questions of

Does realism about personhood offer any kind of positive program? This Part argues that it does, or at least that it points us in the right direction as a matter of methodology. The critical strand of realism is well known. Conceptualism about law—or about many other things, including morality—is unhelpful, and so we should ditch it. But there is another strand of the realist program that seems to tell us more about what we should do *after* we ditch conceptualism. That strand of realism, following Dewey again, tells us that we ought to focus on the facts of real life. In other words, we should take a social scientific approach to the law, bringing an empirical spirit to understanding, and eventually solving, the problems that we face.<sup>39</sup>

At first glance, however, it is hard to see how social science fits within the realist program described in Part II. That is, if we are supposed to start with the values and interests that we care about as a matter of political morality, rather than on conceptions of the person, then where do the “facts” on the ground come in?

Once again, it seems that realists about corporate rights have provided a helpful roadmap. According to this roadmap, deciding how corporations should be treated—that is, deciding what entitlements they should have—involves two distinct steps. First, we have to determine what values and interests we are trying to protect or promote. This is the normative question, to be answered as a matter of political morality.

Once we answer this first question, we then ask: How do those values and interests play out in different kinds of organizations, including in corporations? And here is where social science becomes critically important. To determine how the law might promote certain values and interests, it turns out that we need to know a lot about how different organizations and institutions function. And when it comes to determining whether corporations will promote the values and interests that we have identified as a matter of political morality, we need to dig into the institutional details of firms and markets to understand how they work.<sup>40</sup>

Sometimes the realist program is misunderstood as being anti-theoretical. But the realists about corporate rights have been careful to show that this is not the case. The first step of determining corporate entitlements is still a theoretical

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policy); Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 427–28 (2020) (discussing Fried’s analysis of Hale).

39. See Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1240–59 (1985); see also Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 639 (2007) (discussing “the association between legal realism and the mobilization of social sciences for the purposes of legal discourse”). For an account of the realist legacy that focuses on naturalism and pragmatism, see Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 312 (1997) (“The Realists give us the philosophical motivation and cues for how we should proceed, even if they do not carry off the project themselves.”). As Leiter points out, Dewey’s pragmatism was closely related to his naturalism. See *id.* at 315 n.206. For an excellent historical overview of the connection between legal realism and scientific naturalism, see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 74–94 (1973).

40. See Nelson, *supra* note 10, at 1573–74; Pollman, *supra* note 10, at 1670–75; Schragger & Schwartzman, *supra* note 10, at 368–69.

one—what are the values and interests that we care about and want to promote as a political community? It’s just that the theory involved at this first step is moral and political theory, not metaphysics.

This first step, moreover, is indispensable—we cannot simply skip over it and ‘get right to the facts.’ And that’s because, as in any area of social scientific inquiry, there are an infinite number of facts in the world waiting to be discovered. That is, there is an infinite mound of data waiting for the social scientist to collect and to investigate. To determine which facts matter—which facts are worth collecting and investigating—we need to have a theory of relevance. We need to have a theory to identify the questions we are trying to answer, which then tells us what kinds of data would help answer those questions. For questions of corporate entitlements, that theory comes from our political morality, not from corporate metaphysics.<sup>41</sup> Or, as Dewey might put it, we need to focus on “interests,” not on “beings.”<sup>42</sup>

Fortunately, in the literature on corporate rights, we have some exemplars of this realist-inspired methodology. To begin with, some scholars have recently brought considerable quantitative expertise to the study of corporate rights, particularly in the free speech area.<sup>43</sup> Others have focused on the historical development of corporations, and in particular the rise of the modern, widely held public company.<sup>44</sup> Still others have highlighted the degree to which developments in modern capital markets have come to confound many of the

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41. See Schragger & Schwartzman, *supra* note 10, at 360; see also Walt & Schwartzman, *supra* note 37, at 14 (“moral theory determines the moral significance of facts about corporations with which the theory must be consistent.”); Waheed Hussain & Joakim Sandberg, *Pluralistic Functionalism about Corporate Agency*, in *THE MORAL RESPONSIBILITY OF FIRMS*, *supra* note 9, at 66, 69 (“when it comes to the important social, moral, and political questions that surround business corporations in contemporary liberal democracies, [the] metaphysical or pre-institutional sense of collective agency is largely irrelevant.”). For more general statements of this realist methodology, see Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 163 U. PA. L. REV. 1889, 1896 (2015) (“[Realists] realize that value judgments are indispensable not only when evaluating empirical research, but also when simply choosing the facts to be investigated.”); Dagan, *supra* note 39, at 649 (“A prescription for sensitivity to situations and facts is vacuous without general normative commitments.”); see also Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 849 (1935) (“The collection of social facts without a selective criterion of human values produces horrid wilderness of useless statistics.”); *id.* (“Legal description is blind without the guiding light of a theory of values.”); Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931) (“[V]alue judgments must always be appealed to in order to set objectives for [empirical] inquiry.”).

42. Dewey, *supra* note 11, at 662.

43. See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923 (2013) [hereinafter Bebchuk & Jackson, *Shining Light*]; Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides*, 124 HARV. L. REV. 83, 117 (2010); see also John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015). For the argument that economic analysis of law “is reasonably understood as a continuation of the Realist program,” see BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 1, 81–102 (2007).

44. See Pollman, *supra* note 10, at 1674 (arguing that we must “[take] account of the corporate context and the dynamics of people underlying corporations”).

traditional assumptions that lawyers and judges make about corporations.<sup>45</sup> All of these accounts draw heavily on social science; none of them turns on the nature of the corporate person.

Realists about corporate rights have also shown the importance of appreciating the diversity of our institutional landscape, including vast differences among different kinds of corporations.<sup>46</sup> Once again, this realism follows Dewey, who saw how concepts like corporate personhood had a tendency to flatten the normative universe by yoking together groups that have very different social functions.<sup>47</sup> Some of the realists about corporate rights have focused on the differences between publicly held and privately held corporations.<sup>48</sup> Others have instead highlighted contrasts between for-profit and nonprofit organizations.<sup>49</sup> At a time when the instinct to flatten the organizational universe is strong,<sup>50</sup> and the law has become more receptive to that instinct,<sup>51</sup> we should not lose sight of deep organizational diversity in the real world.<sup>52</sup> Understanding the many grooves and contours of the organizational landscape, in turn, can point us toward a better understanding of which kinds of institutions and organizations are good at promoting which kinds of interests. Just as importantly, remaining sensitive to the division of institutional labor in society can help us determine which kinds of organizations are *not* well suited to advance those social interests.<sup>53</sup>

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45. See Anne Tucker, *The Citizen Shareholder: Modernizing the Agency Paradigm to Reflect How and Why a Majority of Americans Invest in the Market*, 35 SEATTLE U. L. REV. 1299 (2012); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course: The Tension between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 390 (2015); Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71 (2015).

46. See Pollman, *supra* note 10; Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 63–84 (2014) [hereinafter Pollman, *Privacy*].

47. See Dewey, *supra* note 11, at 671.

48. See Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009); Pollman, *Privacy*, *supra* note 46, at 62–84.

49. See James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461 (2015).

50. See, e.g., Patricia Bromley & John W. Meyer, “*They are All Organizations*”: *The Cultural Roots of Blurring Between the Nonprofit, Business, and Government Sectors*, 49 ADMIN. & SOC’Y 939 (2017); see also M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571 (2009) (arguing against tax law distinction between nonprofits and for-profits that perform charitable work).

51. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 363–64 (2010) (rejecting the relevance of speaker identity for purposes of free speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710–18 (2014) (rejecting the proposed line between for-profits and nonprofits for purposes of claiming religious liberty rights). *But see* Nelson, *supra* note 49 (defending the for-profit/nonprofit distinction in freedom of association law).

52. See Pollman, *supra* note 10, at 1631 (arguing that we need to be attentive to “the realities and dynamics of the modern business corporation”).

53. For an argument that for-profit corporations are not well-suited to promote interests of conscience, see Nelson, *supra* note 10. For a discussion of the “institutional division of moral labor,” see JOSEPH HEALTH, MORALITY, COMPETITION, AND THE FIRM: THE MARKET FAILURES APPROACH TO BUSINESS ETHICS 94 (2014).

At this point, a critic might argue that deep disagreement about criminal law's core values poses a problem for translating the realist's two-step methodology. On this view, any attempt to apply the methodological lessons from realists about rights would get stuck at step one, where questions about the interests we are seeking to promote through the criminal law are deeply contested. If we cannot decide whether the criminal law is best justified in terms of consequentialist, deontological, expressivist, or other values, the critic might say, then how are we supposed to know which facts are relevant at step two?

But criminal law's value multiplicity is nothing new for the realist methodology.<sup>54</sup> To see why, consider that realists about corporate rights have made many of their arguments in the context of controversies over free speech. The normative grounding of free speech rights, in turn, is at least as contested as that of the criminal law. First Amendment scholars have argued that free speech promotes, among other things, the values of democratic self-government,<sup>55</sup> checking abuses of power,<sup>56</sup> promoting toleration,<sup>57</sup> and protecting individual freedom of thought.<sup>58</sup> The realist method, however, is robust to these varied normative interests—that is, it can be applied fruitfully regardless of the particular value or combination of values we endorse. To be sure, realists about corporate speech rights have to answer a contested question at step one, namely, what is the best account of the interests served by the freedom of speech? And just as surely, there is bound to be disagreement among reasonable people about the normative weight or priority assigned to each value. But it is important to keep in mind that the terrain of this contest is political morality, not the nature of the corporation.

The same methodology should apply, *mutatis mutandis*, to the problem of corporate crime. On the first step, we might have serious disagreements about criminal law's normative foundations. But that fight should happen on the terrain of political morality, not in the realm of metaphysical concepts. And once a reasonable ordering of criminal law's political values is specified, then it is time to draw on the best social science available to help us understand the way those values can be promoted in the modern corporate world.

Indeed, the corporate crime literature already has its own exemplars of such a realist approach that jettisons conceptualism in favor of a hard-nosed look at

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54. For a pluralistic account of criminal punishment, see Michael T. Cahill, *Punishment Pluralism*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* 25 (Mark D. White ed., 2010).

55. See Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

56. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523.

57. See LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

58. See Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011).

the facts and relations on the ground.<sup>59</sup> This work shows how fruitful it can be to bypass thorny conceptual questions about corporate personality and to take a pragmatic pass at the social problems involved in corporate crime. Given the warm reception these realist accounts have received,<sup>60</sup> then, perhaps it is those who work on corporate rights who need most reminding of this second realist lesson.

#### IV

#### REALISM ABOUT RESPONSIBILITY

Now back to the critical strand of realism. In Part II of this Article, I argued that the realists showed us that it is not necessary to answer questions about corporate personhood to decide how corporations should be treated. In the literature on corporate rights, this realist point means that when we try to determine whether corporations should be eligible to claim certain entitlements, we need not make any kind of determination about corporate personality. I then suggested that, given the recent revival of similar questions in the corporate crime literature, scholars working in this area would do well to take a page from the realists about corporate rights and avoid unnecessary questions about the nature of corporations.

The advice to avoid unnecessary questions, however, might take a weak form and a strong form. The weak form would hold that, since questions about corporate personality are unnecessary, we would be best advised to skip those questions and move on. In other words, we should simply bracket the deep questions that are being asked by the corporate metaphysicians, given that they are not likely to be resolved anytime soon and that we are able to go forward and function without answering them. Perhaps this is what Dewey had in mind when, at the end of his famous essay, he said that if we focus on facts and relations, retaining the word person will “do no great harm.”<sup>61</sup>

This Part, however, focuses on the stronger form of the critical argument. It is one thing to claim that theories of corporate personality are indeterminate, and therefore they are not helpful in solving our real social problems. But the realists did not stop there. Instead, they were very attentive to the ways in which indeterminate concepts can be used as ideological weapons, to be deployed according to the “interest and purpose of a writer.”<sup>62</sup> Indeed, Dewey was

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59. For an especially good example, see BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* (2014).

60. See, e.g., Richard H. McAdams, *How Should Prosecutors Punish Corporate Criminals?*, *NEW RAMBLER REV.* (June 24, 2015), <https://newramblerreview.com/book-reviews/law/how-should-prosecutors-punish-corporate-criminals> [<https://perma.cc/352P-YJUW>] (reviewing GARRETT, *supra* note 59); Jed S. Rakoff, *Justice Deferred is Justice Denied*, *N.Y. REV. BOOKS* (Feb. 19, 2015), <https://www-nybooks-com.proxy.lib.duke.edu/articles/2015/02/19/justice-deferred-justice-denied/> [<https://perma.cc/RB2N-X9SZ>] (same).

61. Dewey, *supra* note 11, at 673.

62. *Id.*; see also Dagan, *supra* note 39, at 633 (“[R]ealists typically approach their normative inquiries in a critical and pluralistic spirit.”).

particularly attuned to the ease with which various theories of corporate personhood are flipped to support different ideological or political goals.<sup>63</sup> The theories of personhood, on this account, are not merely inert or idle distractions. They are the tools used by “some party to a struggle” to rationalize their own claims of power.<sup>64</sup>

In the field of corporate crime, it is not hard to see how discourse about the moral agency of firms might be flipped to suit the interests of the powerful. The primary goal of those seeking to establish corporate personhood is to close the ‘responsibility gap.’<sup>65</sup> The idea here is that if we can demonstrate that corporations are moral agents, then we can show that they are “fit” to be held responsible by the criminal law. And if we can show that they are fit to be held responsible by the criminal law, then we will have some way to make up for the fact that it can be hard to pin responsibility on any particular individual when complex organizations misbehave. When we cannot hold individuals responsible under the criminal law—and perhaps even when we can—the corporation can be a target for our residual store of blame.

But if we embrace the idea that corporations are moral agents, fit to be held responsible by the criminal law, we can easily anticipate how businesses will try to flip the argument. For example, if corporations are moral agents that are proper subjects for a host of responsibilities, then businesses are likely to argue that such moral agency should entitle them to certain claims of dignity and moral rights. To put the point another way, if we use the language of personhood to bolster corporate responsibility, what’s to stop businesses from using those same arguments to fend off the harsh sanctions of criminal law?<sup>66</sup>

Indeed, in other areas of the law, we have already seen a similar dynamic play out. For decades, scholars and advocates promoted the idea of “corporate social responsibility” as a way to tame corporations, particularly those that were operating in weak legal environments.<sup>67</sup> The basic idea was that if corporations could be moralized, then maybe we could avoid some of the abuses of corporate power to which we had all become accustomed. But a funny thing happened on the way to taming corporations. In recent years, more and more businesses have

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63. See Schragger & Schwartzman, *supra* note 10, at 358.

64. Dewey, *supra* note 11, at 665; see also John Dewey, *Logical Method and Law*, 10 CORNELL L. REV. 17, 26 (1924) (observing that “the slogans of the liberalism of one period often become the bulwarks of reaction in a subsequent era”) [hereinafter Dewey, *Logical Method*].

65. See, e.g., Pettit, *supra* note 26, at 33 (discussing the “shortfall in the regulatory effects that our responsibility practices are generally designed to achieve”); Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171, 194–97 (2007) (discussing the “deficit in the accounting books” that results when only individuals are punished for corporate behavior). For discussion of the “responsibility gap” more generally, see Samuel W. Buell, *The Responsibility Gap in Corporate Crime*, 12 CRIM. L. & PHIL. 471 (2018).

66. See Meir Dan-Cohen, *Sanctioning Corporations*, 19 J.L. & POL’Y 15, 22–24 (2010) (discussing moral reasons for criminal law’s special substantive, procedural, and evidentiary constraints).

67. For an excellent historical overview, see C. A. Harwell Wells, *Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 U. KAN. L. REV. 77 (2002).

come to deploy the language of corporate social responsibility not to hold themselves to a higher standard, but instead to avoid legal regulation.<sup>68</sup>

To take one recent example, in the litigation leading up to *Burwell v. Hobby Lobby*, businesses invoked the idea of corporate social responsibility to avoid legal requirements to provide their employees with health insurance that covers contraceptives.<sup>69</sup> The basic structure of the claim went as follows. If businesses can have moral responsibilities, as proponents of corporate social responsibility had long claimed, then they could also have moral rights to exemptions from laws with which they disagree.<sup>70</sup> And perhaps not surprisingly, these arguments proved successful in the Supreme Court. In his majority opinion, for example, Justice Alito observed that if corporations can pursue various socially responsible objectives, then “there is no apparent reason why they may not further religious objectives as well.”<sup>71</sup> This reasoning, in turn, cleared the way for the Court’s ultimate conclusion that for-profit companies can claim religious exemptions from general laws.<sup>72</sup>

This dynamic of co-optation has a long pedigree. Dating back to the *Lochner* era, we saw businesses effectively co-opt the liberal principle of freedom of contract and re-direct it to protect their own interests in avoiding commercial regulations.<sup>73</sup> More recently, we have observed a very similar dynamic, in which businesses have flipped the freedom of speech protected by the First Amendment from a shield for minority and dissenting voices to a tool for aggrandizing corporate power.<sup>74</sup> In the life of the law, there has been little to stop powerful

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68. See James D. Nelson & Elizabeth Sepper, *Converting Corporate Social Responsibility* (unpublished manuscript) (on file with author).

69. For a favorable review of these arguments, see Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 *GEO. MASON L. REV.* 59 (2013).

70. For other examples of this argumentative strategy, see Brett H. McDonnell, *The Liberal Case for Hobby Lobby*, 57 *ARIZ. L. REV.* 777, 780 (2015) (“Corporations may be used to pursue moral goals that aim to make the world a better place—an idea that resonates with the (generally left-of-center) corporate social responsibility movement. Where such goals are rooted in religious principles, a corporation may, and should, be able to invoke RFRA protections.”); Dylan Scott & Sarah Kliff, *Leaked Regulation: Trump Plans to Roll Back Obamacare Birth Control Mandate*, *VOX* (May 31, 2017), <https://www.vox.com/policy-and-politics/2017/5/31/15716778/trump-birth-control-regulation> [<https://perma.cc/FH6G-5BAH>] (discussing leaked draft of proposed Department of Health and Human Services rule, which stated: “Businesses large and small take positions on matters of social justice, community benefit, and ethical concerns beyond profit . . . [T]herefore, the Departments consider it appropriate to exempt any entity possessing religious beliefs or moral convictions against the coverage required by the Mandate, regardless of its corporate structure or ownership interests.”).

71. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 712 (2014).

72. *Id.* at 719.

73. See J. M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *DUKE L.J.* 375, 383–84 (1990).

74. See *id.* at 384–85; Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 *VA. L. REV.* 1 (1979); Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 175 (Lee C. Bollinger & Geoffrey R. Stone, eds., 2002); Leslie Kendrick, *First Amendment Expansionism*, 56 *WM. & MARY L. REV.* 1199 (2015); Amanda Shanor, *The New Lochner*, 2016 *WIS. L. REV.* 133 (2016).

forces from appropriating the arguments of their critics and turning them toward their own purposes.

One might object at this point that there is a principled distinction between holding corporations responsible and granting them various moral and legal rights.<sup>75</sup> A proponent of this objection might argue that the same set of moral and political values that supports holding corporations responsible for the harms they cause does not entail rights claims that augment corporate power.<sup>76</sup> Or, in the alternative, one might distinguish the moral agency of firms, which makes them responsive to certain obligations, and the dignity of individual persons, which makes them eligible for criminal law's special constraints and protections.<sup>77</sup>

Both of these arguments are logically sound. But as Oliver Wendell Holmes, Jr. famously observed, “the life of the law has not been logic: it has been experience.”<sup>78</sup> Perfectly fine logical distinctions—such as those between rights and responsibilities or between agency and dignity—often crumble in the face of politics and power. And if there is one thing that our experience with expanding corporate rights has taught us, we should think twice before we doubt the power of businesses to use any arguments at their disposal to promote their own interests.<sup>79</sup>

## V

### REALISM ABOUT REFORM

Reflecting on the last twenty years, it is hard not to despair over the prospects for reform of corporate criminal law. The standard approaches to the problem of corporate crime, including the increasingly technocratic focus on optimal deterrence and the design and refinement of intricate compliance programs, have come to seem insufficient. Frustrated by the failure of these standard approaches, some commentators have begun to entertain more drastic measures. Although these measures differ in their details, they are united around the common belief that there is something rotten with the corporation itself. If we are ever to make any real progress toward eradicating corporate crime, on this view, we need to stop looking at problems with particular corporations and start looking at problems with *the corporation*.<sup>80</sup>

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75. See Walt & Laufer, *supra* note 34, at 274.

76. See *id.*; see also LIST & PETTIT, *supra* note 26, at 175–85 (arguing that group agency justifies special responsibilities but not special rights).

77. See Dan-Cohen, *supra* note 66, at 44.

78. See O.W. HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown & Co. 1881).

79. See generally KEVIN M. KRUSE, *ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA* (2015); ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018).

80. See, e.g., Samuel W. Buell, *supra* note 65, at 490 (“The problem is the firm.”); SAMUEL W. BUELL, *CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA’S CORPORATE AGE 251* (2016) (“[T]he corporate age has left us with many problems. These include the problem of responsibility—of how to hold one another accountable for harms and wrongs—when they’re committed within, and seriously enabled by, large nonhuman institutions that are designed to limit responsibility. The contemporary pattern of corporate crime prosecutions is evidence for the responsibility deficit, not

Once again, scholars working on issues of corporate rights have faced their own set of calls for drastic reform. As academic and popular dissatisfaction with the rising tide of corporate rights began to grow, particularly in the wake of *Citizens United*, some progressive reformers called for a constitutional amendment declaring that corporations are not entitled to constitutional rights.<sup>81</sup> Such proposals gained wide support, both among grassroots groups and among prominent public figures. For example, Occupy Wall Street made elimination of all corporate constitutional rights a centerpiece of its populist movement.<sup>82</sup> And wholesale elimination of corporate constitutional rights captured the attention and support of several candidates during the 2016 presidential campaign, as well as more than a dozen states and over two hundred members of Congress.<sup>83</sup>

In response, realists about corporate rights have worked to deflate these drastic reforms, calling instead for a more focused inquiry into the practical costs and benefits of particular constitutional rights.<sup>84</sup> To be sure, this inquiry would not seek to deny the real social harms caused by the recent extension of corporate rights. Indeed, realists about corporate rights have offered serious and sustained critiques of the Court's reasoning in *Citizens United* and *Hobby Lobby*.<sup>85</sup> For

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its cure.”); David Ciepley, *Can Corporations Be Held to the Public Interest, or Even the Law*, 154 J. BUS. ETHICS 1003, 1013–16 (2019) (arguing that to prevent corporate crime, we need to make some fundamental changes to the structure of the modern corporation); STEVE TOMBS & DAVID WHYTE, *THE CORPORATE CRIMINAL: WHY CORPORATIONS MUST BE ABOLISHED* 173 (2015) (“[T]he key task must be to attack the legal basis upon which corporate power and irresponsibility is constituted—legal personhood, from which follows so many of the features of the corporate form.”); see also Grietje Baars, “*It’s Not Me, It’s the Corporation*”: *The Value of Corporate Accountability in the Global Political Economy*, 4 LONDON REV. INT’L L. 127, 127 (2016) (“[S]ometimes the challenge extends beyond the individual corporation to the concept of the corporation *per se* . . .”).

81. See, e.g., *We the People Amendment*, MOVE TO AMEND, <https://www.movetoamend.org/amendment> [<https://perma.cc/D4RL-AERL>] (proposing a constitutional amendment stating, “We, the People of the United States of America, reject the U.S. Supreme Court’s *Citizens United* ruling and other related cases, and move to amend our Constitution to firmly establish that money is not speech, and that human beings, not corporations, are persons entitled to constitutional rights”); *The Democracy Amendments*, FREE SPEECH FOR PEOPLE, <https://freespeechforpeople.org/democracy-amendments/> [<https://perma.cc/Y3S4-HU5T>] (expressing support for The People’s Rights Amendment, S. 736, 116th Cong. (2019), which declares, in relevant part, that “The words people, person, or citizen as used in [the U.S.] Constitution do not include corporations, limited liability companies or other corporate entities . . .”).

82. See WINKLER, *supra* note 79, at 374–76 (describing an Occupy Wall Street resolution proposing that “human beings, not corporations, are persons entitled to constitutional rights, and that the rights of human beings will never again be granted to fictitious entities or property”).

83. See KENT GREENFIELD, *CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT)* 7 (2018).

84. See, e.g., Pollman, *supra* note 10, at 1663. For extended criticism of proposals to amend the constitution to eliminate corporate personhood, see GREENFIELD, *supra* note 83, at 6–26; Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309 (2015). For an argument that logic must be “relative to consequences rather than to antecedents,” see Dewey, *Logical Method*, *supra* note 64, at 26.

85. See, e.g., Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639 (2016) [hereinafter Pollman, *Constitutionalizing Corporate Law*]; Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 149 (Micah Schwartzman, Chad Flanders & Zoe Robinson, eds., 2016); Schragger & Schwartzman, *supra* note 10.

example, a number of scholars have shown in great detail how the *Citizens United* Court's casual assumptions about "the procedures of corporate democracy" were radically out of touch with the actual facts on the ground in modern corporations.<sup>86</sup> And others have shown that the *Hobby Lobby* Court made unwarranted—and indeed outright false—assumptions about the impact of corporate religious exemptions on the interests of employees.<sup>87</sup>

But while recognizing the serious costs of their expansion, realists about corporate rights have remained sensitive to their benefits.<sup>88</sup> Chief among those benefits is the corporation's right to own property in its own name, separate and distinct from the property owned by individual shareholders.<sup>89</sup> If corporations were to be stripped of property rights, as some reformers appear to prefer, then we would lose much of what makes the corporate form such an efficient structure for large-scale economic projects. Whatever one thinks about the costs of corporate free speech and religious liberty rights, any sober analysis would need to consider the downsides accompanying wholesale revocation of corporate rights.

In the remainder of this Part, I suggest that those who propose to reform the corporate structure in the name of reducing corporate crime should remain similarly attentive to the corporation's benefits. To be clear, I do not mean to suggest that reformers are wrong about the ways in which the corporate structure contributes to corporate crime. Indeed, much as it seems plain that there are serious costs that have come with the expansion of corporate rights to free speech and religious liberty, there are also real costs of maintaining a legal form that has been the incubator of so much criminal behavior. Instead, I wish to make the more modest point that promoting social wealth through an efficient corporate governance system is also part of our political morality, and that we ought to have a more fulsome account of the corporate structure's core benefits before we go down the path of drastic reform.<sup>90</sup>

Take, for example, the provocative proposal that we abolish the corporate form.<sup>91</sup> The motivation behind this proposal seems to be the sense that the very idea of the corporation as a separate entity is misbegotten. We have erected new legal beings, on this account, capable of amassing huge resources and deploying them in their own interests. But by breathing life into these new beings, it is said

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86. See, e.g., Pollman, *Constitutionalizing Corporate Law*, *supra* note 85; Bebchuk & Jackson, *Shining Light*, *supra* note 43.

87. See Nelson Tebbe, Richard Schragger & Micah Schwartzman, *Hobby Lobby's Bitter Anniversary*, BALKINIZATION (June 30, 2015), <https://balkin.blogspot.com/2015/06/hobby-lobbys-bitter-anniversary.html> [<https://perma.cc/5A52-FKWJ>] (disputing the *Hobby Lobby* Court's claim that third-party costs of a corporate religious exemption would be "precisely zero").

88. See, e.g., Pollman, *supra* note 10, at 1663.

89. See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000).

90. For an account of corporate separation's moral benefits, see James D. Nelson, *The Morality of Corporate Separation* (unpublished manuscript) (on file with author).

91. See TOMBS & WHYTE, *supra* note 80.

that we have created monsters that we are no longer able to control. The tweaks and refinements we have tried over the years, including those in the criminal law, cannot save us from these monsters. We need to pull the plug on our own creations.<sup>92</sup>

To carry the day, however, this reform proposal would need to contend with the “essential” contributions of corporate separateness to modern economic life.<sup>93</sup> The most important feature of the corporate form is that it creates a distinct pool of assets that is owned by the firm itself and separates those assets from shareholders’ personal property.<sup>94</sup> Corporate separateness, in turn, carries considerable economic benefits. To begin with, it allows firms to use their own assets to bond contracts—that is, firms can pledge their own assets to business creditors in assurance that they will satisfy their obligations.<sup>95</sup> In doing so, it subordinates the claims of shareholders’ personal creditors, which means that business creditors need not concern themselves with the personal finances of a numerous—and constantly shifting—group of equity investors.<sup>96</sup> To properly assess the terms on which to extend credit, a creditor can instead rely on information about the assets owned by the business itself. Creditors are likely to find it much cheaper to monitor these assets, given that they will be more clearly delineated and they will be more familiar to creditors. Lowering the cost of creditor monitoring, in turn, will allow firms to obtain credit on more favorable terms and expand their ability to pursue socially valuable projects.<sup>97</sup>

A second economic benefit of corporate separateness is that it prevents shareholders—or their personal creditors—from prematurely liquidating firm assets.<sup>98</sup> In the typical case, the value of a firm is greater as an ongoing business than it would be if all its assets were liquidated. But this “going concern” value would be in danger if shareholders or their personal creditors had the power to suck money out of the firm at will. Such power would not only destroy firm value in instances where shareholders actually exercise liquidation authority, but also in cases where shareholders leverage the mere threat of liquidation to extract private benefits. By blocking this threat of liquidation, corporate separateness makes it much more difficult for investors or their creditors to engage in such value-destroying practices.<sup>99</sup>

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92. See, e.g., *id.*; see also MARY W. SHELLEY, *FRANKENSTEIN; OR, THE MODERN PROMETHEUS* (1818). For a recent critique of corporate demonization, see William S. Laufer & Matthew Caulfield, *Wall Street and Progressivism*, 37 *YALE J. ON REG. BULL.* 36 (2020).

93. See Hansmann & Kraakman, *supra* note 89 (providing the leading account).

94. This form of separateness is particularly important, given that it could not feasibly be accomplished by contractual means alone. See *id.*

95. See *id.* at 392.

96. See *id.*

97. See Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 *HARV. L. REV.* 1335, 1343–50 (2006).

98. See Hansmann & Kraakman, *supra* note 89, at 402.

99. See *id.* at 403; Hansmann et al., *supra* note 97, at 1348; see also Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 *UCLA L.*

Finally, when a firm owns its own assets and can use those assets to bond contracts with firm creditors, shareholders do not have to concern themselves with the personal finances of other shareholders.<sup>100</sup> That is, the terms that a business is able to obtain from its creditors are determined by the assets owned by the firm itself, and they do not turn on the personal finances of individual investors.<sup>101</sup> If things were otherwise, a firm's cost of capital would depend on the creditworthiness of individual investors, and those investors would then need to monitor each other so that personal finances do not infect the firm's own financial position. Such monitoring costs—multiplied over each firm in which a shareholder invests—would make it more expensive for shareholders to diversify their investments. And it would also impair the tradability of corporate shares, given that transfers among differently situated investors would affect the value of the firm itself.<sup>102</sup>

This rehearsal of economic benefits is not meant to be dispositive on questions of corporate reform. Instead, the point of detailing some of the corporate form's attractive economic features is to urge a full accounting of both the costs and the benefits of the corporate structure. The realists' plea here, in turn, is not that we come to any particular conclusion about how these costs and benefits stack up against each other. It is simply that the benefits of corporate separateness must be considered alongside its costs when contemplating drastic corporate reforms. To return to the theme of this Article, in other words, the "facts and relations" that we care about when it comes to thinking through how the law should treat corporations include the many ways in which the corporate form promotes economic efficiency and social wealth.

## VI CONCLUSION

There are some striking parallels between the resurgence of debates about the nature of corporations among corporate rights scholars and renewed interest in similar questions within criminal law. In the wake of *Citizens United* and *Hobby Lobby*, questions of corporate personhood took center stage in conversations about what kinds of rights corporations should be able to claim. Following the methodology recommended by John Dewey in the early twentieth century, a small group of scholars revived the realist approach to problems of corporate rights. Realists about corporate rights have emphasized the indeterminacy of theories of corporate personality. They have recommended an empirically informed, social scientific approach to understanding how

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REV. 387 (2003) (arguing that the ability to lock in capital in the corporate form contributed to the rise of the business corporation in the Nineteenth Century).

100. See Hansmann et al., *supra* note 97, at 1348–50.

101. See *id.* at 1350. But see Douglas G. Baird & Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcies*, 105 COLUM. L. REV. 2310, 2368 (2005) (finding that small-business owners had personally guaranteed the corporation's debt in 56% of bankruptcy cases in their data set).

102. See Hansmann et al., *supra* note 97, at 1350.

corporations actually function. At the same time, they have documented a long history of businesses coopting discourses of corporate responsibility and using them to augment corporate power. And finally, they have urged that efforts at legal reform should pay close attention to the benefits that corporations provide as well as the costs they impose.

This Article has suggested that realist arguments about corporate rights, in one way or another, can be fruitfully leveraged by those studying parallel developments in corporate criminal law. Just as conversations about corporate rights have gained clarity and focus from realist insights, so too might conversations in criminal law benefit from some realism about corporate crime.