

A Psychological Perspective on Punishing Corporate Entities

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Abstract This chapter takes a psychological perspective to examine how individuals make decisions about culpability and punishment of corporations versus people. Drawing on relevant empirical research we make the argument that while corporate crime raises the social need and public demand for retribution and deterrence, it is principally difficult to attribute mental life, character, intention, and hence, culpability to corporate entities. Since the psychology of punishment is more fitting to assess the culpability of individuals, corporations as collective entities are deemed as less responsible and less culpable compared with individuals when conducting equivalent wrongdoings, particularly those that demand intent. At the same time, corporate entities are also seen as less deserving of constitutional rights. These findings carry implications for criminal law and legal design.

1 Introduction

Humans have a tendency to attribute moral, logic and meaning to the choices, decisions and behaviors of other humans.¹ The tendency to seek meaning in the behavior of others is ingrained in human nature and is unsurprisingly suitable to constructing narratives about the motives of others people.² It is not, however,

¹ Heider (1958).

² See Kelley (1967).

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strictly applicable to the understanding of non-human entities. The legal perspective of corporate personhood,³ which promotes the view that corporations and other organizational entities are ‘people’ for many legal purposes, does not address this psychological limitation. The results, as this contribution argues, may be particularly problematic in areas of the law that rely on uniquely human qualities such as criminal responsibility and intent.

Corporations are seen as people for many legal purposes including (at least in common law systems) criminal liability, but they are not typical targets for punishment. This is not because corporations do not take part in criminal activity. On the contrary, with growing dominance in the political and economic spheres, corporations have become increasingly involved in criminal behaviors, resulting too often in tremendous damage to societies and individuals alike.⁴ While there is little argument that corporate crime is a problem, the question of whether and how corporations can carry criminal responsibility as collective entities, independently of the individuals constituting them, has been a source of relentless legal debates.⁵

The challenges surrounding corporate criminal liability are almost exclusively discussed from a legal perspective, which is theoretical in essence and involves legal experts and expertise. This chapter, however, aims at looking at this issue from a psychological perspective, drawing on social scientific framework and empirical findings. The main question addressed in this chapter is how lay people, unlike legal professionals, infer intent, assess culpability, and assign punishment to collective versus individual entities, and when they find it more easy or difficult to do so.

We argue that while corporate crime elicits individual desire and social need for retribution and deterrence, judgments of corporate culpability and blame are principally more problematic. That is because human assessments of blameworthiness are heavily rooted in uniquely human qualities.⁶ Specifically, we argue that: (a) people rely on uniquely human features such as character, motivation, and intent when they judge individuals but not when they judge collective entities; (b) individuals are usually seen as more responsible for their actions than collective entities; consequently, (c) individuals are deemed more culpable and are more severely punished compared to corporations even when they are involved in equivalent misconducts; (d) while it may be possible under some circumstances to ‘personalize’ non-human entities, the capacity to do so is always deficient in comparison to the personalization of actual people, and does not fit with modern-day mega corporate structure.

³ See *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394, pp. 394–396 (1886); and more recently, *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

⁴ See generally Laufer (2006).

⁵ See for example, Foerschler (1990), Arlen (1994), and Khanna (1996).

⁶ Tyler and Mentovich (2011).

2 Why Do We Punish Individuals and Why Should We Punish Collective Entities?

The notion that law-breaking deserves punishment is fundamental to the establishment of any law and ordered society.⁷ Punishment helps to maintain the moral fabric of societies, to regulate the behaviors of individuals, and to prevent reoccurrence of crime in the future. Importantly, the same reasons for which punishment is utilized to respond to crimes committed by people are equally (if not more) valid in the case of corporate crime.

Broadly speaking, there are two key justifications for punishment: the need for retribution and the need for deterrence.⁸ The retributive perspective holds that the main goal of punishment is to address the moral violation presented by law-breaking and the harm it caused. Therefore, according to the retributive accounts, punishment should reflect the seriousness and the severity of the moral violation and be proportional to the crime committed.⁹ Importantly, these retributive justifications hold for both individual and corporate wrongdoings. If a violation of a normatively accepted rule distorts the balance of justice in a society, and punishment is needed to restore that balance, it makes little difference whether the moral violation that caused the imbalance was perpetrated by an individual or an organization. The idea that corporate crime equally raises the need for retribution can be seen in the public demand to prosecute and punish corporations for wrongdoings, and in the manifestations of public outrage when the legal system fails to take prosecutorial or punitive measures against corporations.

In addition, a situation in which corporations are not prosecuted or punished for law-breaking which would have been otherwise prosecuted in the case of individuals can in itself violate public perception of the fairness of the legal system.¹⁰ Not only does a failure to punish corporate crime render some moral violations unanswered and fails to express the moral condemnation caused by the criminal act, but it also creates a sense of differential treatment that unjustly favors corporations. A violation of the perceived equality in the application of the law can easily be seen as a double legal standard in the prosecution of individual versus corporate crime and is likely to cause public outrage which will undermine public trust in the law and in law enforcement institutions.¹¹

⁷ Tyler and Darley (2000).

⁸ See Carlsmith et al. (2002).

⁹ See Darley and Pittman (2003).

¹⁰ See Laufer (2006), pp. 1–5.

¹¹ See Tyler (2006).

A second central function of punishment is deterrence: punishment is needed in order to deter individuals—or in our case, corporate entities—from engaging in future law-breaking. Deterrence models of punishment are based on cost-benefit concerns and are built on the premise of rationality.¹² The role of enforcement and punishment according to the deterrence perspective is to make criminal activity non-beneficial because of the risk of prosecution and the cost of punishment.¹³ Interestingly, research shows that deterrence concerns do not play a major role in shaping the behavior of individuals. People do not follow law out of the fear of being punished. Instead, they do so since the law corresponds with their internalized sense of right and wrong and because they see the law and its enforcement institutions as legitimate. Most people would not break the law even if it were worthwhile for them to do so simply because they believe following the law is the right thing to do.¹⁴

While deterrence plays a less important role in the case of law-breaking of individuals, this may not be the case for corporate crime. Corporations are artificial entities, which do not possess an internal sense of right and wrong or other intrinsic values. Corporations, like any business, operate—and are legally obligated to operate—for the goal of maximizing profit. Therefore, corporations may be more likely to break the law when enforcement is ineffective or when the profits from law-breaking exceed the cost of punishment. That suggests that corporations, unlike individuals, may be more affected by deterrence concerns. Thus, if anything, there are more reasons for why we should deter corporate versus individual crime.

It seems that individuals and societies should be, and often are, motivated to punish corporate criminal misconduct. Yet, judging the criminal or moral responsibility of an organization as a whole is a difficult task. We propose that one of the difficulties in punishing corporate misconduct is related to the psychological sense-making of culpability and punishment, and to the central role of intent and other uniquely human qualities in making inferences about the appropriate degree of blameworthiness.

Both in law and in humans' judgments of blame, the existence of a criminal act is not in itself a sufficient justification for punishment. Culpability and punishment are not dependent solely on the criminal act but also on the criminal actor.¹⁵ Even if one's action constitutes a morally or legally reprehensive behavior that resulted in severe damages, one would be punished only to the extent that he or she can be held morally responsible for their conduct. Importantly, moral responsibility for a bad action (and at times, the lack of action) is premised on the notion that it has been

¹² See generally, Tyler (2006).

¹³ See Nagin (1998) for a review.

¹⁴ See Jackson et al. (2012), Tyler (2006), and Tyler and Jackson (2014).

¹⁵ See Gardner (1993), p. 654.

carried out by a willful actor who operated volitionally. In other words, moral responsibility is linked to the mental state of the perpetrator. Criminal law in most legal systems echoes this logic. Criminal liability and punishment correspond with the mental state and the degree of intentionality and deliberation of the perpetrator. Most legal systems differentiate between at least three types of mental states (*mens rea*)—intent, recklessness and negligence. These mental states determine the degree of culpability and the severity of the punishment. Severe crimes and severe punishments typically require proof of intent.

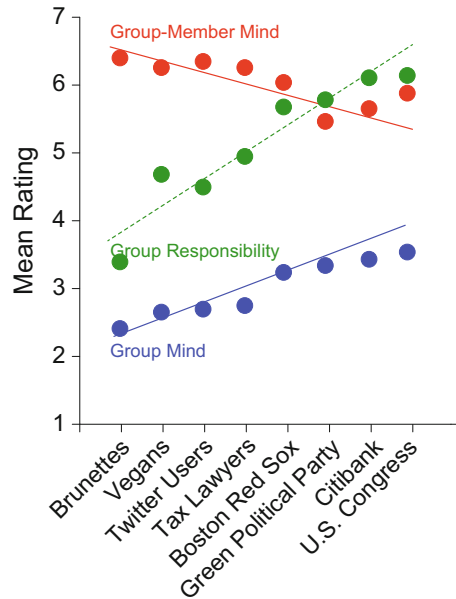
3 The Group/Corporate Mind

The first challenge with culpability being so heavily rooted in mental states is that we think mainly about people as fully capable of possessing mental processes. Such mental activity can be easily attributed to individuals, but can people attribute mental deliberations to collectives? Research shows that groups that display high group cohesion can sometimes be seen as possessing a group mind. For example, groups that share goals, appearance, and conduct joint actions can more easily be seen as having a group mind.¹⁶ More so, entities that operate in a level of randomness, yet driving towards a goal, often are attributed with similar sense of mindfulness. However, can people attribute mind to a group as easily as they do in the case of individuals? Recent research examined this question directly by presenting to people several groups (including, for example, blondes, Facebook users, McDonald's Corporation, City Bank and United Auto Workers) and asking them to rate the extent to which each group has a mind of its own (defined by, among others, the capability of forming *intentions*), as well as the extent to which respective group members possess a mind of their own.¹⁷ The results of this study showed that on the one hand, people were better able to attribute mind to groups as a function of how cohesive these groups were. However, across *all* groups presented in the study people were *always* better able to attribute mind to group members than to their respective groups. Taken together, this suggests that while it is possible to attribute mind-like qualities to collective entities this possibility is a function of the group exhibiting individual-like characteristics (having a singular goal, a unified set of values, and cohesive structure), and that in any case, individuals are always seen as a more appropriate target to attributions of mental life. For illustration of the results, see Fig. 1.

¹⁶ Bloom and Veres (1999) and O'Laughlin and Malle (2002).

¹⁷ See Waytz and Young (2012).

Fig. 1 Participants' ratings for group mind, group responsibility and group-member mind for eight selected groups, as rated by subjects in Wayz and Young (2012) (adapted from the original)



A second challenge in judging the criminal responsibility of collectives is related to the particular state of mind of intent, which is key in determining levels of blameworthiness. We do not have direct access to the intention, motivation, or will of other people. Understanding the mental state of others and particularly whether they possess intent is not directly observable and thus based on inference. The processes by which people infer intent are personalized and specifically tailored to human properties. In making inferences about intent, individuals draw heavily on what they perceive to be a person nature or characters.¹⁸ The tendency to understand one's intentions in terms of character is functional since it allows not only to explain past behaviors but also to predict future ones. That is, in assessing intent individuals move from one's actions to one's moral nature, and use this moral nature to infer intent.¹⁹ These processes, however, are individual-based and fit better to assess people rather than non-human entities.

Research shows, for example, that in the context of punishment, kids show ease of attribution of responsibility to inanimate objects when exposed to a probing situation (i.e. "who ate the last cookie, you or the doll?"), this tendency however, disappears as they grow up. Presumably, the development of a theory of mind also entails the realization that there is a difference between humans and other inanimate entities such that blame can be attributed only to living objects.²⁰

¹⁸ See Heider (1958) and Maselli and Altrocchi (1969), p. 445.

¹⁹ See Heider (1958) and Tyler and Mentovich (2011), pp. 107–108.

²⁰ See generally Piaget (1960).

4 Over-Personalization of Intent

Not only do people rely on a person's character to make inferences about intention, but also research shows that they tend to discredit situational or systematic sources of wrongdoing (which often mark corporate misconduct) in favor of explanations highlighting a person's character and personality. Personality is perceived to be immutable and relatively less susceptible to situational changes. Once personality is inferred it is easier to explain any behaviors in terms of one's personality and character. Furthermore, individuals tend to explain bad behaviors of others in terms of personality flaws and not mitigating situational factors. This tendency to link bad behaviors to personality is termed 'fundamental attribution error' and is a robust and widely replicated psychological phenomenon.²¹ When hearing about a person who has conducted misconduct—for example, used inside-trading information to make profit—people are more likely to infer that this person has a bad character (i.e. he or she is greedy, dishonest, and unethical). Situational factors—such as that this person's company explicitly or implicitly encouraged employees to use any tactic to increase profit, or that it was part of the organizational culture in the company, or that it was the only way to be promoted—are likely to be discarded in favor of the simple explanation that a bad action is done by a bad person. After inferences about the person character are made, it is also more likely that this person's behavior will be perceived as intentional.

It is easy to see how inferences of character and intent fit well to individuals but not to collective entities. Supporting this argument, studies have shown that people typically evaluate individual members of an organization (i.e., their bosses, managers or other organizational decision-makers) in terms of their perceived motives. However, when they evaluate the equivalent organization, people do no longer rely on judgments of character and intent, but rather draw on the company's policies and decision making procedures.²² One study examined this issue directly by comparing the factors that influence employees' desire to punish (i.e., by harming) their organization versus their supervisor within the organization.²³ The results of the study show that, again, judgments of character and intent were significantly more predictive of the desire to punish individuals than organization. These findings support the idea that intent is personalized, it is better inferred in the case of individuals, and ultimately better used to evaluate individuals rather than corporations.

This puts companies in a unique place. On the one hand companies are made of people, who can take the blame of actions. On the other hand, the company shields its members, allowing them to behave differently under the umbrella and mask of a corporate body. Studies in psychology of negative behavior show that the absence of individual responsibility and judgment leads people to behave less morally.

²¹ Jones and Nisbett (1972), pp. 79–94; Jones et al. (1979), pp. 1230–1238.

²² See Tyler and Mentovich (2011), p. 117.

²³ See Tyler and Mentovich (2011), p. 122.

Simply put, people are more likely to act unethically when their identity is masked or hidden via the umbrella of a company, rather than when they are directly responsible for the behavior.²⁴ Similarly, the mediating platform of correspondence is shown to affect the level of morality of one's choices. People would steal money easier when using online transactions, or money-equivalent objects, than when an actual pack of dollar bills is the thing they need to steal.²⁵

4.1 Individual Versus Organizational Based Judgments of Culpability and Punishment

If it is harder to impute intent to collective entities in comparison to real people, it also follows that real people, compared with collective entities, are seen as more culpable for their actions. And indeed, this is precisely what research suggests. First, a study looking at how people perceive the moral responsibility of several groups versus their respective group members showed that individuals are deemed as more responsible than the groups or the organizations they are part of.²⁶ Furthermore, a study that directly examined punishment of equivalent wrongdoing conducted by either a real person or a collective entity demonstrated that *the same* wrongdoing conducted by an individual is seen as more serious and deserving more severe punishment when conducted by a person compared with a corporation. In this study, participants read one of two versions of a newspaper article both describing an unlawful discrimination against women in a certain company. The only difference between the two versions of the article involved the identity of the culprit. In one version the wrongdoer was an individual (a supervisor within that company) and in a second version the wrongdoer was the company itself. This design ensures that differences in judgments of moral responsibility and punishment can *only* stem from the individual versus collective identity of the wrongdoer. The results of the study demonstrated that whether the discrimination was conducted by a supervisor or a company affected both the perceived severity of the misconduct, as well as the punishment participants thought was appropriate in this case. Discriminatory behavior of a person (versus a company) was seen as more morally reprehensible and received a harsher punishment compared with the same behavior when conducted by a company.²⁷ These results provide a direct and casual support to the claim that individuals are held more morally responsible than collective entities even when they commit an identical wrongdoing.

While in general people find it easier to see humans as more morally responsible for their actions compared to collectives, there are some likely moderating

²⁴ For a review see Darley (1992).

²⁵ Ariely (2012), pp. 436–446.

²⁶ See Waytz and Young (2012).

²⁷ See Tyler and Mentovich (2011), p. 126.

circumstances that facilitate (or hinder) this tendency. If it is hard to assess intent of collectives it is possible that assigning moral responsibility to corporations is particularly challenging in more severe wrongdoing that typically require intent. This conclusion fits well with a jury study showing that juries hold corporate to higher legal standard in assessments of negligence.²⁸ In addition, since group cohesion facilitates the attribution of group mind and increases perception of moral responsibility of the group, it is likely that it would be easier to impute intent and punish organizations that are more cohesive and comprise of similarly minded members. The punishment of big and complex mega-corporations in this case would be particularly challenging.

5 The Provision of Rights to Corporations Versus Individuals

One area in which the courts (at least in the U.S.) find it easy to attribute individual-like qualities to corporations is constitutional protection, particularly with regard to the First Amendment right of freedom of speech. In discussing state statutory limitation to corporate speech (e.g. *Bank of Boston vs. Bellotti*) the Supreme Court argued that ‘if the speaker here were not corporations no one would suggest that the State could silence their proposed speech’. The Court used this reasoning to protect corporate speech concluding that freedom of speech protection is ‘no less true because the speech comes from corporation rather than an individual’. While the identity of the speaker seems to be insignificant for the courts it is likely to matter to how lay-people judge constitutional entitlement.

Because of the same reasons that people find it hard to see corporations as moral agents for the purpose of punishment they may also find it difficult to see corporations as entitled to some legal privileges. Legal rights were originally constructed to protect the rights of individuals. These rights are specifically tailored to uniquely human qualities such as the capacity to think, to speak, to form conscience and to act upon it. It should make little sense for people to grant such protections to non-human entities. Supporting this notion, research shows that limitations to individual freedom of speech were judged more severely when targeted individual compared with corporate speech.²⁹ While, thus far, studies have focused on the constitutional right of freedom of speech, the same may be true for other legal rights such as due process, equal protection, or even Fifth Amendment protections against self-incrimination.

²⁸ See Hans (2000).

²⁹ See, Tyler and Mentovich (2011), p. 127.

6 The Legal Implications of the Psychology of Culpability and Punishment

The first question regarding the research reviewed here is whether it is relevant to the legal discourse regarding corporate criminal liability? After all, legal doctrines and practices often do not correspond with lay people's judgments, assumptions, or behaviors. In recent years, however, there has been an increasing demand for the law to reflect some degree of behavioral realism—namely, to establish legal doctrines that carry 'real world' validity and are supported by the best available scientific evidence.³⁰ This call is anchored in the realization that doctrines that correspond with how people realistically think or behave are more likely to be effective in achieving legal and policy goals.³¹

In the context of corporate criminal liability, utilizing an empirical framework to explore how people think about the culpability and punishment of collective entities can be particularly beneficial.

First, legal actors (i.e., prosecutors, defenders, juries and judges) are people too; as such the ways they assess culpability, impute intent and peruse punishment are similar to how lay individuals do so. A direct support for this notion is found in a study conducted on district attorneys in California, which showed that Californian prosecutors felt discouraged from prosecuting corporations for criminal activity due to the difficulties in establishing intent.³² This demonstrates that legal professionals are susceptible to similar psychological difficulties that characterize lay-people's assessments of culpability.

Second, while mainly theoretical, the discussion involving corporate criminal liability has highlighted legal difficulties that are remarkably similar to the psychological difficulties individuals encounter when trying to attribute blame and punishment to non-human entities. Both legal theories and human judgments of culpability and punishment have been developed in order to judge the moral and legal responsibility of individuals. Therefore, the legal conception of criminal liability is similar to that of lay people at least in the sense that both perspectives rely on individual-level understanding of crime and punishment.

7 Summary

If both people and criminal law find it hard to attribute intent to corporations using the same framework that applies to individuals then we propose that new frameworks for collective criminal liability should be developed, such that they will

³⁰ Krieger and Fiske (2006), Kang and Banaji (2006), and Mentovich and Jost (2008).

³¹ See for example Krieger (1998) and Krieger and Fiske (2006).

³² Benson et al. (1998).

account for the difficulties of imputing intent to collectives. One way to do that is to replace demands for specific intent with a violation of a specified legal standard. That would make liability inferences similar to judgments of recklessness and negligence. These, as research suggests, are not difficult to apply to corporations.³³

Another solution is for the law to specify the ways by which a collective intention can be inferred. One of the problems with the current situation is that while criminal liability was extended to collective entities, the doctrines of liability remained individual-based. That situation is problematic since we want to be able to punish and deter collectives but find it easier to assess culpability of individuals. The law can address these difficulties by delineating the specific ways in which corporate criminal intent can be imputed from the intent of specific individuals within the corporation. Existing models in the U.S. allow inferring corporate intent based on the intentions of individual members. These models, however, have been criticized as too simplistic since they require intent to be *fully* imputed to at least one corporate member as an individual. In other words, to establish corporate intent the prosecution needs to find at least one corporate officer who *fully* possesses the level of intent required for the specific crime at stake. This requirement does not capture situations—more common in complex corporate structure—in which full intent cannot be entirely reduced to one individual member within the organization, but can be found in the aggregated knowledge and intentions of several corporate members. Since people find it quite easy to assess intentions of individuals, the law can specify how individual intents can be combined to form a comprehensive corporate intent, as well as to identify the specific corporate officers whose aggregated individual intent can qualify for imputing collective intent.

Another possibility is to base criminal liability on corporate policies or actions rather than mental state. This idea is consistent with research showing that people naturally evaluate corporations based on policies and decision-making processes.³⁴ One of such suggestion, for example, posits that corporate criminal liability should be anchored in assessing whether or not the law-breaking was a reasonably predicted consequence of corporate policies and whether the corporation benefitted from the legal violation. Inferring culpability from corporate actions and policies should not encounter the same psychological difficulties that mark the assignment of intent.

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³³ See Hans (2000).

³⁴ See Tyler and Mentovich (2011).

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