Evil Corporations

Law, Culpability and Regulation

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Chapter 9

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Timothy D. Peters[1]

Introduction

A fundamental aspect of modern criminal law is the responsible individual. In its key distinctions between intent and action, *mens rea* and *actus reus*, criminal law presupposes an intentional, acting individual that can be held morally and legally culpable for their actions. As has been well canvassed, the challenge of corporate criminal responsibility is how to deal with the individualised focus of criminal law when it comes to corporate entities. Nominalist approaches see the corporation only as a shorthand name for the collection of individuals and criminal responsibility can only be that of the individual, which may then be attributed to the corporation notionally or vicariously. Realist approaches, on the other hand, recognise that corporations have an independent existence separate to their members and that they can be culpable for criminal activity at an organisational level. The tension between these two positions highlights the way in which the corporation itself functions as a mediating device *between* the individual and collective action.

This chapter examines this mediating notion of the corporation by developing a theory of 'corporate office' that looks to the way in which the corporation 'exists' through the effectiveness of the acts performed on its behalf. It argues that the exercise of corporate power is constitutively vicarious – that is, always exercised on behalf of another – and, therefore, never fully reducible or attributable to a particular agent or actor. This constitutive vicariousness gives rise to a structural irresponsibility at the core of the corporate

1 This research is funded by the Australian Government through the Australian Research Council Australian Discovery Early Career Researcher Award (project number DE200100881), examining 'New Approaches to Corporate Legality: Beyond Neoliberal Governance'. Thanks to Penny Crofts for the invitation to be part of this collection, and to all the participants in the 'Evil Corporations' workshop for the stimulating discussion and feedback. All errors are my own.

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form, which attempts to impose responsibility come up against. In particular, corporate criminal responsibility is an attempt to reconnect the mechanism of responsibility that the paradigm of corporate office – the constitutive vicariousness of corporate power – disconnects.

The chapter proceeds with four substantive sections. The first section takes up Scott Veitch's work on law's irresponsibility, focusing on the way in which legal constructions of roles and role responsibility function *both* as a 'technology of responsibility' *and* as producing irresponsibility. The second section turns to the way in which corporate law, despite its focus on responsibility and accountability, is constitutive of irresponsibility – not in terms of breaches of the law but the adherence to corporate legality that gives rise to mass harm and suffering. A particular instance of this is found in the nature of role responsibility and the constraints it places upon corporate officers. In the third section, this material on legal role responsibility and the corporate officer is situated in relation to the theorisation of office – both as a mode of responsibility, articulating the rights and obligations of the person fulfilling the office, as well as a mode of irresponsibility, separating the individual from the effectiveness of their actions. This theorisation understands the nature of the corporation and corporate power as something that is constitutively vicarious – always performed by someone who is acting on behalf of another – and, whilst performed by the individual, not reducible to the individual. The fourth section uses this theorisation of office – and the constitutive vicariousness of corporate power – to think about corporate criminal responsibility. It considers whether the imposition of criminal responsibility on the corporation renders inoperative the paradigm of corporate office *or* whether its underlying vision of the 'good' corporation is, in fact, an extension of it. The conclusion briefly considers a turn from the imposition of responsibility to a recognition of a more fundamental notion of corporate obligation.

Technologies of Responsibility: Legal Roles and Irresponsibility

In his book, *Law and Irresponsibility: On the Legitimation of Human Suffering*, Scott Veitch argues that whilst 'law and legal institutions can, and do, hold actors responsible for harmful acts … these same institutions can, and do, contribute to the organisation of irresponsibility that legitimates … suffering.'[2] He highlights the asymmetry that exists between the large-scale production of suffering and the generation of responsibility: 'the greater the

2 Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge 2007) 1.

suffering caused, the less responsibility can be established for it'.[3] Rather than accounting for such suffering as an 'excess', exceeding the capacity of the law to deal with it,[4] what is *more* at stake is the way in which the law functions to both legitimate suffering and 'disavow' responsibility for it.[5] Focusing not on illegal but legal activities that cause massive harms, Veitch analyses three social structures complicit in the disavowal of responsibility: the division of labour and role responsibility; processes of individualisation; and the transference of responsibilities between social systems (in particular between the political and the economic).[6] Whilst each of these is applicable in relation to the harm or suffering that corporations cause, I will focus here on the first – role responsibility.

Drawing upon the work of Max Weber, Stanley Milgram and Zygmunt Bauman, Veitch highlights the way in which the bureaucratic nature of the modern organisation of society involves a 'dehumanisation' process whereby the 'individual becomes merely the *conduit* for larger processes and definitions *over which* he or she has little, or no control'.[7] In contrast to the vision of humans as autonomous, self-willing agencies engaging in self-defined activities, modern society is made up of a range of roles, tasks and offices. These roles (from the factory worker to the minister of state) and their responsibilities are generally not established by the agent themselves but by the institution that they are part of.[8] It is in the performance of these roles that the individual's actions and responsibilities come to be defined: 'official roles or tasks simultaneously connect responsibility with technical capability for a circumscribed range of activity – that is, they limit responsibility to roles – and thus disconnect alternative value bases of accountability or agency'.[9] The result is a '*separation* between intention and consequence' which 'is firmly entrenched through a limitation of responsibility only to the defined task at hand'.[10]

In this fashion, the fulfilling of the responsibilities of one's role *also* becomes a form of non-responsibility through that very fulfilment:

> under the various roles that the individual occupies and over which he or she has little or no defining capacity, the actor's *lack* of responsibility applies not only to distant consequences, but *even to his or her own*

3 Ibid. 2.
4 On corporate criminal responsibility as 'excess', see Penny Crofts, 'The Horror of Corporate Harms' (2022) 38 *Australian Journal of Corporate Law* 23.
5 Veitch, (n 2) 2.
6 Ibid. 41.
7 Ibid. 44. Emphasis in original.
8 Ibid. 48.
9 Ibid. 43.
10 Ibid. 44. Emphasis in original.

> actions in that role. Under such conditions, the actor, "no longer sees himself as the efficient cause of *his own* actions", this having been subsumed under and attributed to the role itself.[11]

This produces an 'agentic state' which, as Milgram notes, involves 'a fragmentation of the total human act; no one man decides to carry out the evil act and is confronted with its consequences. The person who assumes full responsibility for the act has evaporated.'[12] It is in this way that Veitch argues that 'responsibility practices' can be used as a '*technology*' or a 'normative device' that organises 'how role responsibilities are parcelled out, and … the terms of their function and limits'.[13] The effect of this 'technology' of responsibility is that 'acting responsible' means acting in accordance with the obligations of the 'task, office or status' and it is 'irresponsible not so to act'.[14] The failure to fulfil the obligations of one's role may lead to censure in relation to the role, but '[b]eyond the defined role is a realm of non-responsibility'.[15]

Law has a privileged position in the constituting of roles and responsibility because legal categories themselves 'define forms of acting that simply *are* constitutive of role responsibility'.[16] A prime example is the corporation that, through separate legal personality and limited liability, involves the creation and structuring of particular rights, responsibilities and authority. Veitch takes the limitation of liability for corporate shareholders as exemplary of the way '[l]egal role responsibilities … provid[e] ways in which legal actors can understand and use that role to nullify or distance themselves from the causing of harms'.[17] This is because, as Veitch notes,

> the legal rights of a shareholder in a corporation will not be deemed to make him or her responsible for the outcomes of the management decisions of the corporation, nor for activities that the corporation carries out that cause extensive, although legally authorised, harms such as deforestation, sweatshop labour, etc.[18]

11 Ibid. 45. Emphasis in original. Quoting Stanley Milgram, *Obedience to Authority* (Harper and Row 1974) xii.
12 Milgram, (n 11) 11; Veitch, (n 2) 45.
13 Veitch, (n 2) 48. Emphasis in original.
14 Ibid.
15 Ibid.
16 Ibid. 74. Emphasis in original.
17 Ibid. 79.
18 Ibid. 78–79. For a defence of the separation of the shareholder from the corporation, see James D. Nelson, 'The Separation of Ownership and Conscience' (2023) 48 *The Journal of Corporate Law* 577.

Veitch's analysis aligns, therefore, with a broader critical literature on the corporation that highlights the way in which structures that are promoted as providing economic and social benefit are also constitutive of significant harms and irresponsibility.[19]

'Evil Corporations' and Corporate Irresponsibility

Veitch's argument about law's involvement in the co-constitution of responsibility and irresponsibility and, in particular, the way the legal categorisation of roles involves both a demarcation of responsibility and its disavowal, is crucial to a consideration of both the involvement of corporations in the commission of harms and the ability to hold them responsible. This is because the legal mechanisms of responsibility and accountability are constitutive of the corporation and the positive benefits it provides to society, whilst also giving rise to the topic of this collection: 'evil corporations'. The question that arises, however, is whether 'evil corporations' – those that cause enormous harms – are an excess or aberration, functioning in breach of the law and, therefore, need to be held to account, or whether they are simply instances of corporate law 'working'. That is, do corporations sometimes *become* evil because of the actions and greed of particular individuals, poor systems of control, lack of compliance and an over-exuberant seeking of profits, or are corporations, as Gerry Spence argued, 'inherently evil'?[20] This question, though potentially more mutedly framed, has been raised by the literature on corporate irresponsibility that has responded to the plethora of corporate scandals – economic and financial, environmental and social – over the past three decades. Whilst recognising particular failures of policies, oversight and systems of control, this literature raises larger questions of potential inherent or structural issues in relation to the corporation. These include critiques of the nature of corporate personhood, limited liability, shareholder primacy, the drive for shareholder wealth maximisation and profit or more broadly the aggregation of wealth and power that corporations enable.

Over 20 years ago, American jurist Lawrence Mitchell, in his book *Corporate Irresponsibility: America's Newest Export*, located the drivers for corporate irresponsibility in the combination of the corporate social norm of shareholder wealth maximisation and the form of role morality that functions in relation to the corporation – particularly in regards to directors and managers, but which is then also passed down to other employees and

19 See, for example, Joel Bakan, *The New Corporation: How "Good" Corporations are Bad for Democracy* (Vintage Books 2020).

20 Gerry Spence, *From Freedom to Slavery* (1993) 71. Quoted in Douglas Litowitz, 'Are Corporations Evil?' (2004) 58 *University of Miami Law Review* 811, 812.

agents.[21] Whilst, like Veitch, he highlights the insulation of the shareholder from responsibility through limited liability as part of the structure of corporate irresponsibility, he also identifies two other constraints built into the corporation: 'the combination of law and structure that narrowly constrains the corporation in the ends it is permitted to pursue' (primarily profit); and 'the limited and morally stunted role that corporate actors (directors, officers and stockholders) are required to play in directing the corporation to achieve this goal'.[22] These constraints inhibit 'the freedom of the corporation and its directors to act in the manner they think most consistent with the behaviour of a full moral person.'[23] Whilst directors have a large discretion in terms of how they pursue the 'best interests of the corporation', this is only a contingent morality because the freedom they have is only to achieve the ends of the corporation – defined as maximising shareholder profit. For Mitchell, this framework propels corporate irresponsibility because '[t]he corporation that behaves ethically and responsibly is a corporation that incurs greater costs than corporations that choose to comply only with the minimal requirements of law'.[24] Even if an ethical reputation generates greater revenues, some of this will be offset by the greater costs involved.[25]

Mitchell highlights the way in which this framework is built on forms of role morality – 'the rules of behaviour and social expectations we have of people who perform specific functions in the course of performing those functions.'[26] He notes that society has constructed a range of roles, 'each of which has its expected norms of behaviour'[27] and that '[b]ecause we have agreed to create the roles, the norms of behaviour that go with them provide an adequate moral defence for those who are acting within them'.[28] Such roles are diverse, including both 'doctors, clergy, parents, policemen, spouses, and friends' as well as 'mafia bosses, drug kingpins, prostitutes, and terrorists'.[29] Mitchell distinguishes between the first set as 'socially desirable' requiring a 'set of rules that define them in order to fulfil their function'[30] and the second, 'socially undesirable' set, where 'the rules that define them and constrain them are illegitimate (and generally illegal)'.[31]

21 Lawrence E. Mitchell, *Corporate Irresponsibility: America's Newest Export* (Yale University Press 2001).
22 Ibid. 66.
23 Ibid. 68.
24 Ibid. 70.
25 See also Bakan, *The New Corporation*.
26 Mitchell, (n 21) 76.
27 Ibid. 77.
28 Ibid.
29 Ibid.
30 Ibid 77–78.
31 Ibid.

Given this categorisation, Mitchell asks whether the role of a corporate director falls within the first or second set. He questions the social legitimacy of corporations, given that: they are artificial persons 'whose sole objective is to maximize stockholder wealth'; and corporate law presumes, or even encourages, the self-interested actions of its constituents.[32] The legitimacy of the role of a corporate director is, therefore, *also* questionable. Given they are called to act on behalf of an organisation whose purpose is to maximise shareholder value, rather than contribute to society, '[h]ow can we reasonably expect responsible, accountable, and moral behaviour from the enterprise in which this takes place? We have already structured and constrained its morality'.[33]

This argument resonates with the renewed debates over whether corporations should have a broader purpose than simply shareholder wealth maximisation. Alongside increasing interest in social enterprise and benefit corporations, which involve an explicit incorporation of social purposes, strong industry statements of the importance of delivering value for all corporate stakeholders including customers, employees, suppliers, communities, as well as long-term value for shareholders, are being made.[34] Furthermore, projects such as the British Academy's 'The Future of the Corporation', led by Colin Mayer, argue that corporations should be legally required to set out their social purpose and have mechanisms in place to measure and ensure the corporation's accountability to that purpose.[35] In particular, Mayer argues that profit should not be the goal of the corporation but rather its product.[36]

From these perspectives, the problem with defining the corporation's purpose as the maximisation of shareholder wealth is that it 'not only gives managers, stockholders, and workers the excuse to behave badly, but also encourages them to do so'.[37] Otherwise upstanding, ordinary and ethical individuals are required, when acting as a director or manager of a corporation, to take on the 'personality or role of stockholder price maximiser to the

32 Ibid. 78, 81–82.

33 Ibid. 94.

34 Business Roundtable Business Roundtable, 'Statement on the Purpose of a Corporation' 2019) https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationwithSignaturesApril2022.pdf accessed 11 April 2024; Larry Fink Larry Fink, 'A Sense of Purpose' (*BlackRock,* 2018) https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter accessed 11 April 2024; Klaus Schwab, 'Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution' (*World Econ Forum,* 9 December 2019) https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/ accessed 11 April 2024.

35 The British Academy, 'Reforming Business for the 21st Century: A Framework for the Future of the Corporation' (2018); Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford University Press 2018).

36 Mayer, n 35. The British Academy, 'Reforming Business for the 21st Century' 8.

37 Mitchell, (n 21) 97.

exclusion of all others' – a role that would ordinarily be considered pathological.[38] Furthermore, directors are then protected in performing this role and absolved of 'responsibility and accountability for their actions' by being permitted to reduce the 'corporation's costs of production by shifting them outside the corporation onto those most vulnerable, the workers, the environment, the consumers, and the community'.[39] Given this is the case, solutions that attempt to align director and shareholder interests by, for example, structuring remuneration packages around shareholder value metrics do not make the corporation more responsible but more irresponsible. Instead, for Mitchell, the solution is to sever the tie or connection between shareholders and directors and management through, for example, removing the ability for shareholders to vote in directors or, at the very least, extending their terms to reduce a focus on short-term metrics. The focus of directors and management could, then, be on a broader social purpose rather than purely shareholder wealth maximisation. Mayer also recommends measures that insulate management from the pressures of short-term shareholder wealth maximisation.[40]

Whilst critical, these approaches still acknowledge and recognise the economic benefits and efficiencies that the corporation produces.[41] As such, proposals to adjust the purpose of the corporation and to whom the board is responsible sustain the underlying *form* of the corporation. This can be seen, in particular, in relation to Mitchell's concern over the way in which role morality produces unethical behaviour but his solution is *not* to address the form of role morality itself, but rather to address the purpose for which it is deployed. In doing so, the underlying structure remains: directors' roles remain constituted by a form of vicariousness in that they exercise powers that are not their own but on behalf of others (whether understood as the corporation or shareholders). Arguments around corporate purpose do not address, therefore, what can be referred to as the constitutive vicariousness of corporate power – vicarious, because the agents exercising corporate power do so on behalf of another and not themselves, and constitutive because the corporate form itself is premised on this vicarious exercise of power.

Corporate Office and the Constitutive Vicariousness of (Corporate) Power

At one level, the claim that corporations can only perform actions through others would appear banal.[42] At the same time, it is only by holding in

38 Ibid. 98; Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Simon & Schuster 2004).

39 Mitchell, (n 21) 81.

40 See Mayer, (n 21) 120–22, 59–65.

41 For a critical discussion, see Nelson, 'The Separation of Ownership and Conscience'.

42 *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 3 All ER 918 at 923 per Lord Hoffman.

mind the constitutive vicariousness of corporate power that an appropriate consideration of the mechanisms of addressing corporate irresponsibility can be gained. This is a point made by Douglas Litowitz in his piece 'Are Corporations Evil?', where he argues that it is not the legal form of the corporation that is the issue,[43] but rather what happens when organisations reach a certain scale:

> When a business attains a certain size, the entity itself takes on a kind of transcendental force, converting everyone into mere role players to serve the higher purposes of the institutional empire. Massive size is also correlated with bureaucracy and an advanced division of labor, which ensure that managers remain far removed from the effects of their actions. All of the wrongdoing is mediated through endless layers of agents and advisors, with the result that no single person caused the problem and therefore no one individual is responsible.[44]

For Litowitz, these institutions (which are not limited to corporations) give rise to a 'disturbing paradox' that parallels, but then takes further, Mitchell's concern with the role morality of directors. This is because the 'agents of the corporation feel compelled to engage in morally objectionable conduct to serve the corporation, yet the "corporation" doesn't really exist apart from its agents'.[45] The paradox is that the corporation is made up of 'a vicious circle of endless agents trying to further the interest of an invisible principal.'[46] For Litowitz, this 'borders on idolatry, creating an artificial entity and then claiming that the entity has commanded one to act in a certain way'.[47]

Litowitz draws, as Veitch does, on both Hannah Arendt's notion of the 'banality of evil' and Milgram's concept of the 'agentic state' – the submission of an individual to a form of authority where they no longer see themselves as responsible for their own actions but rather the instrument of another.[48] For Litowitz, corporate scandals are 'part of a larger problem of agency within totalizing institutions (whether in corporate form or not)' and the idea of the 'agentic state' resonates with 'corporate law because agency is the cell form of business organisation'.[49] Such a claim aligns, at one level, with the articulation of the 'core' task of corporate governance as addressing 'agency

43 Litowitz, (n 20) 812.
44 Ibid. 815.
45 Ibid. 834.
46 Ibid.
47 Ibid.
48 ibid. 836–841.
49 Ibid. 839.

costs' that arise from the 'separation of ownership and control'.[50] However, as David Westbrook has pointed out, accounts of the corporation based purely on the modern law of agency – and, in particular, the notion that such agency relations are grounded in contract – fail because they do not recognise the social form of the corporation itself, which is premised on delegations and hierarchies of authority.[51] This can be seen in the sense that the premise of 'agency costs' is that an agent may *not* act in the interests of the corporation – emphasising the distinctiveness of the action of agents from the actions of their principals.[52] At the same time, the notion of 'corporate action' performed by an agent – and the concept of the 'agentic state' whereby the agent is *not* exercising their own power, but that of another – emphasises a connection or unity between the agent and the corporation. Litowitz's articulation of the corporation as a form of idolatry – a 'vicious circle of endless agents trying to further the interests of an invisible principle'[53] – highlights the constitutive vicariousness of corporate power. The source or origin of corporate power functions through a continuous deferral whereby agents are acting on behalf of the corporation, but the authorising of those agents *by* the corporation is, itself, performed by other agents.[54]

This understanding of the vicarious extension of power can be placed within a longer genealogy of thinking about the effectiveness of human actions as separate from the subjective intention of the actor performing them. Italian philosopher Giorgio Agamben traces such a genealogy in terms of the paradigm of 'office' that sought to develop 'a praxis that would be absolutely and wholly effective'.[55] He sees the key location of this development in the translation by the Church fathers of the Greek and Roman sources on office in their attempt to articulate the effectiveness of Christian 'liturgy' performed by the priest. The notion of priestly praxis – in which, in carrying out the liturgical ritual of the Eucharist, the priest acts as an 'animate instrument' of Christ and whose actions are independent 'of the qualities of the subject who officiates it' – provides, Agamben argues, a paradigm of human action that has constituted 'for the secular culture of the West a pervasive and constant pole of attraction'.[56] It is here, therefore, that we find

50 Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure (1976) 3 *Journal of Financial Economics*; Adolf A. Berle and Gardner C. Means, *The Modern Corporation and Private Property* (Comerce Clearing House 1932).

51 David A Westbrook, 'A Shallow Harbor and a Cold Horizon: The Deceptive Promise of Modern Agency Law for the Theory of the Firm' (2012) 35 *Seattle University Law Review*.

52 Ibid. 1387–1388.

53 Litowitz, (n 20) 834.

54 See Westbrook, (n 51) 1384–1388.

55 Giorgio Agamben, *Opus Dei: An Archaeology of Duty* (Stanford University Press 2013) xii.

56 Ibid. xii, 22–28.

the theological development of the structural paradigm of role responsibility that interests Veitch, Mitchell and Litowitz.

Whilst emphasising the notion of 'priestly praxis', Agamben begins his consideration of 'office' with Cicero's *De Officiis* – a treatise 'on what is respectable and appropriate to do according to the circumstances, above all taking account of the agent's social condition'.[57] Cicero uses the term *officium* not to refer to what we would understand as duty (as modern translations of the term render it) but rather to define the actions of a subject according to their status and situation. Cicero writes: 'no phase of life, whether public or private, whether in business or in the home, whether one is working on what concerns oneself alone or dealing with another, can be without *officio*.'[58] Demonstrating the broad use of the term, Agamben quotes Roman authors who describe the *officium* of the prostitute as opposed to that of the matron and, in a negative sense, the 'office of the rascal'.[59] Agamben concludes, therefore, that

> *officium* is what causes an individual to comport himself in a consistent way – as a prostitute if one is a prostitute, as a rascal if one is a rascal, but also as a consul if one is a consul and, later, as a bishop if one is a bishop.[60]

This understanding, therefore, calls into question Mitchell's distinction between social roles that are 'legitimate' and 'illegitimate' because, instead of an office being about what is 'good' or 'bad', it is a particular paradigm of social expectation and obligations that constitute and govern the way a person of that office is to behave. This would also, therefore, call into question Mitchell's critique of the morality of the role of a corporate director over and above other roles, for the very notion of 'role morality' is one that paradigmatically defines what behaviour *is* moral or appropriate – from prostitute to consul, bishop to corporate director.

We can therefore see a link between the critique of role morality, Agamben's genealogy of office and the broader literature on the ethics of office. Conal Condren, for example, in his study of early modern England outlines the way in which the vocabulary of office carries with it both 'a positive register of rights, liberties, duty, rule and service to the office' as well as a 'negative register imputing neglect, oppression, licence and tyranny' in relation to a failure to appropriately carry out the office.[61] These were explicitly articulated in an

57 Ibid. 67.
58 Ibid. 69–70; Quoting Cicero, *On Duties* (Cambridge University Press 1991).
59 Ibid. 70.
60 Ibid. 72.
61 Conal Condren, 'The *Persona* of the Philosopher and the Rhetorics of Office in Early Modern England' in Conal Condren, Stephen Gaukroger and Ian Hunter (eds), *The Philosopher in Early Modern Europe: The Nature of a Contested Identity* (Cambridge

'oath of office', where an individual would commit themselves to undertaking and performing their obligations of office. Taking this up, Susan Watson has recently traced the modern duties of corporate directors back to the oaths that governors and committees of the chartered trading corporations swore, which included 'faithfully to perform their said Office'.[62] With the rechartering of the East India Company in 1657, the oath included a commitment 'to be faithfull and true', to 'favour and affect' the 'good estate of the adventurers' and to 'maintaine and preserve' the 'priviledges graunted unto them'.[63] In contrast to accounts that see directors as trustees for shareholders, Watson makes the case that the notion of trust referred to in the early cases of directors' duties was an expectation of trustworthiness in the exercise of office originally articulated in these oaths.[64] This encompassed *both* a sense of public responsibility *and* a responsibility to shareholders whose interests they were to protect.[65] As Condren highlights – and Watson demonstrates in relation to the role of directors – the vocabulary of office institutes a certain expectation about what fulfils the official's good behaviour and what is a failure or abuse of office.[66]

At the same time, whilst the ethics of office articulate the appropriate use of office, Agamben's genealogy highlights the way in which acts of office have a mode of effectiveness that stands independent from the moral qualities of those performing them. This demonstrates the way in which role responsibility can function, as Veitch argues, as a mechanism of *irresponsibility* because the fulfilment of an office renders inoperative the attribution of moral responsibility to the individual. For Agamben, this is most rigorously developed in terms of the 'priestly praxis' found in the theological doctrine of the effectiveness of the sacraments. Here, the role of the priest in performing the Eucharist distinguishes between the *opus operatum*, which refers to the effectiveness or 'effective reality' of the act itself, and the *opus operans* or *opus operantis*, which refers to the action as carried out by the agent and is 'qualified by his moral and physical dispositions.'[67] The liturgical praxis of the Church is, according to Agamben, defined by 'the independence of the objective effectiveness and validity of the sacrament from the subject who concretely administers it.'[68] In recognising the institutional validity of such

University Press 2006) 67; see also Conal Condren, *Argument and Authority in Early Modern England: The Presupposition of Oaths and Offices* (Cambridge University Press 2006).

62 Susan Watson, *The Making of the Modern Company* (Hart 2022) 85.

63 Ibid. 86.

64 Ibid. 92–94.

65 Ibid. 93, 95–96. *The Charitable Corporation v Sutton* (1742) 2 Atk 400, 26 ER 642 per Lord Harwicke at 644.

66 See Condren, (n 61) 6. Watson, (n 62) 82–87.

67 Agamben, (n 55) 21.

68 Ibid.

acts, what becomes determinative is no longer the right intention of the agent but only the *function* that his or her actions carry out. The personal content of the action of the priest is emptied out and he becomes an 'animate instrument', to use St Thomas Aquinas's term, an 'instrumental cause' of a mystery that transcends him, whilst exercising an action that is still in some sense his own.[69] The result is a 'paradoxical ethical paradigm' whereby the connection between the subject and his action is broken and reconstituted on another level: 'an act that consists entirely in its irreducible effectiveness and whose effects are nonetheless not truly imputable to the subject who brings them into being'.[70]

The paradigm of office, therefore, separates an agent from his or her action and, in doing so, leaves open the question of responsibility for such an action. As Nicholas Heron has set out, power here is constitutively vicarious because it is 'irreducible to the nature of the one who exercises it'.[71] At the same time, because the exercise of this power is 'always on behalf of another, yet only to the extent that it is for the sake of another again', it is rendered ethically indeterminate – it 'is essentially unlocalizable and hence constitutively irresponsible'.[72] Given the modern corporation is premised on this form of agentic and official power, attempts to locate the responsibility for corporate actions always come up against the constitutive irresponsibility of official action performed on behalf of the corporation.

Corporate Criminal Responsibility: Limiting or Extending the Paradigm of Office

If, as has been argued above, the exercise of corporate power is constitutively vicarious then the debates over corporate criminal responsibility involve an attempt to reconnect the mechanisms of responsibility that the paradigm of office disconnects. A key consideration is whether criminal culpability arises only from individuals or whether there can be *corporate* criminal actions and, in the context of the latter, what level of liability should apply to the corporation, the individuals directly involved and those responsible for its oversight. Mechanisms of corporate criminal responsibility are generally progressed through the characterisation of certain acts, intentions or states of mind of individuals as being, in some fashion, those of the corporation and for which the corporation should be held responsible and liable. Traditionally the focus has been on the individual, with corporate

69 Ibid. 21, 25.
70 Ibid. 82.
71 Nicholas Heron, *Liturgical Power: Between Economic and Political Theology* (Fordham University Press 2018) 12.
72 Ibid. 10.

responsibility only being attributed in a 'derivative' fashion from individual actions. More recent approaches focus on the corporation as an independent organisation and legal person, which can be independently held criminally liable for corporate acts. A risk of organisational approaches is that, in emphasising the corporate nature of criminal acts, the fact that all corporate acts are performed by individuals that have some degree of responsibility for them is not sufficiently recognised. At the same time, emphasising individual liability may fail to recognise the way in which the nature of acts performed by an individual in an official capacity – in relation to, or on behalf of, the corporation for whom they act – are not the same as actions performed by an individual on their own account. The significance of the theory of corporate office is that it provides a way of thinking the nature of corporate activity as co-constituted between the actions of individuals and the corporate roles that they perform. That is, whilst individuals perform corporate actions they do not do so on their own account but as 'animate instruments' exercising a power that is recognised as independently effective, having been performed on behalf of, and authorised by, another (the corporation).

In this context, the question is whether forms of corporate responsibility and fault are able to address and render inoperative the constitutive vicariousness and irresponsibility of corporate power or whether they function as an extension or continuation of the paradigm of official power upon which the corporation functions. At first glance, derivative approaches to corporate attribution would seem to be most closely aligned to the paradigm of office. This is because they involve an assessment of whether or not the particular individual was engaged in 'official' action. Models of attribution based on agency and vicarious liability look to hold the corporation liable for all actions of directors, managers, employees and agents performed within the scope of their authority and, at least in part, for the benefit of the corporation.[73] This approach retains a sense of individual responsibility because both the action and intent are performed by the individual, but because of their official status, the corporation is deemed to be liable. Criminal law principles struggle with this approach because it appears to hold a legal person criminally liable for an action they did not, themselves, commit.[74] At the same time, the hierarchical nature of agency law would highlight the responsibility of the corporation for acts taken by individuals they have placed in a position of authority.[75]

73 See Australian Law Reform Commission, 'Corporate Criminal Responsibility' (2020) [4.50]–[4.57].

74 Ibid. 457; Ross Grantham, 'Attributing Responsibility to Corporate Entities: A Doctrinal Approach' (2001) 19 *Company & Securities Law Journal* 13, 171–172.

75 See Westbrook (n 51).

In contrast to vicarious liability, Commonwealth jurisdictions have developed theories of identification and the 'directing mind and will'.[76] This approach, whilst also derivative of the individual, is articulated as a form of direct liability in which the conduct and state of mind of certain high level individuals are held to be the embodiment of the corporation.[77] More recent judicial approaches have sought to focus less on determining who was, in general, the 'directing mind and will' of the corporation but rather 'whose act (or knowledge, or state of mind) was [for a particular purpose] intended to count as the act etc of the company?'[78] In both instances certain individuals are held not to be acting on behalf of, but *as*, the corporation. The performance of an 'official' act is not attributed to the individual but to the corporation for which they act as an 'animate instrument'. This raises two questions. First, if the individual is acting as the corporation then is it logically inconsistent to hold them personally liable as well? This is because their act, whilst performed by themselves as an individual, is *not* an act on their own account but, by definition, an act of the corporation.[79] Such is a legal accounting of Milgram's 'agentic state', whereby the individual is no longer the 'efficient cause' of their actions but rather an 'instrumental cause', exercising authority on behalf of the corporation. Second, identification approaches to corporate attribution are more applicable to smaller corporations where the connection between a 'directing mind and will' and the actual performance of the criminal acts is more easily demonstrated. In larger corporations, the diffusion of authority, knowledge and intent – and their distribution across multiple officers, employees and agents – makes it difficult to identify a 'directing mind and will' as having been the one engaged in a specific criminal action.[80] Such highlights the way in which the approach of identification theory, whilst attempting to specifically attribute corporate responsibility *to* the corporation, becomes, in effect, a mechanism of what Veitch would refer to as the 'disappearing' of responsibility. The corporation will only be held liable if the corporate act can be attributed to a 'directing mind and will' and, in other circumstances, only the individual (if anyone

76 Australian Law Reform Commission, 'Corporate Criminal Responsibility' [4.58]–[4.72]; Grantham, (n 74).

77 *Lennard's Carrying Co. Ltd v. Asiatic Petroleum Co. Ltd* [1915] AC 705; *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153.

78 *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 3 All ER 918 at 924 per Lord Hoffman.

79 See Grantham, (n 74) 178–180. As Grantham notes, for policy reasons this does not necessarily mean limiting the criminal liability of the individuals involved. In Australia, the principle of accessorial liability has been used to hold individuals liable as accessories to the corporate acts that they, themselves, performed: *Hamilton v. Whitehead* (1988) 166 CLR 121.

80 Australian Law Reform Commission, (n 76) [4.68]–[4.69], [9.149]–[9.57].

at all) will be liable, ignoring the official capacity in which the actions were performed.

Organisational approaches to corporate fault, by contrast, hold the corporation responsible for acts that are understood as corporate rather than individual. 'By their very nature', as the Australian Law Reform Commission has noted, 'a corporation's decisions, omissions, acts, and behaviours are generally the accumulation of states of mind and conduct of multiple people'.[81] Recognising the way in which corporate fault functions across multiple individuals, relations and systems within the corporation is necessary to prevent 'a corporation from deliberately structuring its business in such a way to avoid criminal responsibility by ensuring that conduct and intention are diffuse'.[82] Corporations should be held criminally liable for the failure to have in place appropriate policies, procedures and systems of control, as well as the failure to respond appropriately to the commission of offences by corporate officers and employees.[83] Culpability is, therefore, not based on the combined criminal intent and conduct of an individual acting in official capacity, but based on the structures of the corporation that (explicitly or implicitly) authorise, permit or encourage criminal conduct.[84] The creation of an environment that produces forms of role morality, which encourage criminal or negligent behaviour, a culture of non-compliance or that encourages criminogenic behaviour is considered evidence of corporate criminal intent.[85] Such approaches, therefore, address the individual irresponsibility of the 'agentic state' by ensuring responsibility at the level of the corporation. At the same time, regimes of individual liability – for both those involved directly in the corporate criminal acts and, at times, directors and senior managers who have failed in their oversight of the corporation – function alongside corporate liability, in a recognition of individual involvement, even if in an official or agentic capacity.[86]

Models of organisational blameworthiness, therefore, provide a way of holding corporations responsible for criminal acts that recognises the nature of the constitutive vicariousness of corporate power. They envision, and are premised on, a perfection of the paradigm of official power – the recognition that the criminal conduct performed by an individual can be separated from the criminal intent attributed either to other corporate actors or the (lack of) policies, procedures and systems of control. The effectiveness of the individual's action (the performance of the criminal act) is separated from

81 Ibid. [6.42].
82 Ibid.
83 For discussion of these approaches, see ibid. [4.4]–[4.19], [4.73]–[4.79].
84 Ibid. Ch. 6.
85 Ibid. [4.4]–[4.15], [6.95]–[6.120].
86 Ibid. Ch. 9.

their intention (the criminal intention being found elsewhere). The ethically indeterminate status of the corporate officer or actor as 'animate instrument' is addressed by imposing responsibility at the level of the corporation. The paradigm of organisational blameworthiness, therefore, parallels the arguments around the purpose of the corporation. Just as the calls for corporations to engage in a more social purpose do not seek to address the underlying structures of the corporation and the role morality of corporate officers, but simply puts them to different ends, organisational blameworthiness does not render inoperative the constitutive vicariousness of corporate power but rather functions as an extension of it.

This is most clearly seen when we consider the underlying vision of the 'good' corporation that models of organisational blameworthiness encompass. Such approaches involve a defence of having in place appropriate policies and procedures with the aim of incentivising or encouraging a more compliant corporation that will, therefore, reduce the likelihood of corporate criminality. However, the strong policies, procedures and systems of control, hierarchical forms of decision-making and clear delegations of corporate authority that such a vision encourages are the *same* structures that Veitch, Milgram, Mitchell and Litowitz critique as *producing* forms of role morality that sees personal responsibility being fulfilled in the adherence to the requirements of the role or the compliance with policy. That is, the very paradigm of corporate responsibility achieved through a compliance culture and robust policies and procedures involves a 'disappearance' of responsibility – it being limited to compliance with those policies and procedures. What is left out is the way in which a compliance culture involves a *limit* to responsibility for harms that corporations cause in the world which may, and do, extend beyond actions that are criminal or in contravention of the law. The more fundamental question is not addressed: whether the evil that corporations do and the harms that they cause are a result of breaching the law (for which they should be punished) or whether it is the deployment of the mechanisms of corporate legality and responsibility themselves that 'fram[e] out other worlds' where those harms are felt.[87]

Conclusion: From Responsibility to Obligation

The theory of corporate office that I have sketched here highlights the way in which the exercise of corporate power is constitutively vicarious and, as such, involves a particular rendition of responsibility as the fulfilment of authorised activity. An individual's personal responsibility is separated from the ultimate effects of the actions taken, emphasising instead the fulfilment

87 Lilian Moncrieff, 'On the company's bounded sense of social obligation' in Daniel Matthews and Scott Veitch (eds), *Law, Obligation and Community* (Routledge 2018) 79.

of the duties and requirements of the role or office to be performed. Whilst methods of corporate criminal responsibility that focus on organisational blameworthiness seek to hold the corporation responsible, they do so by promoting a perfected form of bureaucratic authority – a 'compliant' corporation – that *reduces* responsibility. This is because it emphasises the processes that corporations are already effective at – the redefining of the complexity of the world and the multiple relations and affective ties that make up both the social substrata of the corporation and its connections to the world in terms of the corporation's own 'sense of right'.[88] The responsibility of the corporation thus comes in a form of limit – the need to have certain policies and systems in place in order *not* to be held liable for a criminal act – rather than a recognition of the harms (whether legally defined or not) that the corporation produces.

What is needed, therefore, are not only mechanisms that hold corporations responsible for the criminal acts that they engage in but new lines of accountability that encourage corporations to recognise their boundedness and obligations as a result of being part of the world and the harms they cause. This requires a recognition of the underlying affective relationships that form the basis of corporate activity and to use these to ground a form of corporate *obligation* rather than responsibility. Obligation, in this sense, is seen as something primary within which social and legal relations are always-already founded, rather than something that is to be imposed *upon* the corporation after the fact.[89] This would require a rendering inoperative of the effectiveness of corporate actions that separate them from the individual performing them and a redefining of corporate and collective action as one that is obligated to each other, to community and to a corporate being together in the world. It is only in thinking corporate office in such a trajectory that we might be able to more fundamentally address the evil that corporations do.

88 Ibid. 79.

89 See, in general, Daniel Matthews and Scott Veitch, *Law, Obligation, Community* (Routledge 2018).