**The Autonomous Corporation: the acceptable mask of capitalism**

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**1 Introduction**

In January 2018, responding to the collapse of the construction giant Carillion, UK Prime Minister Theresa May promised: “for the first time, businesses will have to demonstrate that they have taken into account the long-term consequences of their decisions…Our best businesses know that is not a responsible way to run a company and those who do so will be forced to explain themselves.”[[1]](#footnote-1) The May government is yet to announce exactly who will be “forced” to explain themselves, and how. And we are becoming very used to a long line of Prime Ministers issuing empty threats to business.[[2]](#footnote-2)

Indeed, even the most significant reforms that have sought to encourage corporate responsibility in recent years are widely criticised for having had little effect. The Companies Act 2006 and the Corporate Manslaughter and Corporate Homicide Act 2007 were introduced more than a decade ago and both were heralded by the Labour government of the day as marking a major shift in the legal responsibilities of corporations. The former contained a series of revised measures on a wide range of issues, including a new provision clarifying the duties of directors to ensure they can have regard to a range of matters relating to the social responsibilities of the corporation. These include: the long term consequences of the decisions they make, the interests of the corporation’s employees, the need to foster relationships with suppliers, customers and others, and the impact of the company’s operations on the community and the environment. The latter introduced a new mechanism for holding corporations accountable in criminal law for causing the deaths of workers or members of the public. The law enabled businesses and other organisations to be held guilty of corporate manslaughter (or corporate homicide in Scotland) where serious management failures result in a gross breach of a duty of care.

These reforms seemed to counter the prevailing trend in policy during a period in which lack of government action against irresponsible and law-breaking businesses had become deeply ingrained in contemporary neo-liberal economies. Elsewhere I have shown that both empirically and theoretically there is an overwhelming case to suggest that contemporary capitalist economies both encourage corporate law-breaking, and create major disincentives against regulatory action to prevent corporate law breaking.[[3]](#footnote-3) On one hand, then, we can say that a lack of government action is par for the course in the neo-liberal period.

But as this paper will argue, the type of reforms encapsulated in the Companies Act and the Corporate Manslaughter and Corporate Homicide Act never intended to precipitate a significant shift in neo-liberal policy making: they did not significantly challenge the organization of power in contemporary economies or significantly shift the dominance of the corporation in those economies. The paper will argue that this is because reforms such as those do not significantly challenge the *autonomy* of the corporation. Indeed, such solutions to corporate “irresponsibility” and wrongdoing offered by policy makers generally take the *autonomy* of corporations as actors for granted.

Understanding how corporations can be said to have autonomy means recognizing how the long history of the business organization has been characterized by a complex combination of politically constructed permissions, developments in statutory and case law, and in custom and practice. This article does not deal with the “myth” of corporate autonomy in an exclusively political sense: the corporation’s relative autonomy in relation to states and markets.[[4]](#footnote-4) Rather the article focuses on the way that the institutional architecture of the corporation is constructed, in theory and practice, as an autonomous entity with a singular identity. Corporate autonomy has been constructed in a range of ways, through a range of disciplines and professional practices, as well as through law. This construction arises notably in the history of royal charters (whereby the right to conduct a particular role is gifted to the entity itself rather than a specified group of individuals[[5]](#footnote-5)), in the legal concept of the ‘corporate person’, and in the cultural understanding of corporate identity in ‘branding’ or in corporate social responsibility (CSR) demands for the corporation to act according its own principles or values. [[6]](#footnote-6) By seeking to identify a common dynamic in the construction of the corporation, this paper will argue that we should reject the construction of corporate autonomy as either inevitable or desirable.

There is a lack of sustained attention to the development of corporate autonomy in the research literature.[[7]](#footnote-7) The paper will show how the principle of autonomy provides the material basis for corporations’ ability to cause widespread harm and socially destructive practices. The principle of autonomy at the same time ensures that owners and shareholders will never pay the full costs of the social harms caused by corporations. The paper will therefore argue that the corporation has a dual function: to protect the interests of a narrow class of owners, and at the same time to mask this process. The conclusion to the paper considers the wider implications of this discussion by contemplating whether corporations could ever be an “acceptable face of capitalism.” In the section that follows I begin the paper by emphasising a general effect of CSR claims that has already been alluded to: the promotion of particular forms of social relationships that always imply the extension of corporate autonomy.

**2 Autonomy and Corporate Social Responsibility**

A significant and growing body of contemporary scholarship argues that the purpose of CSR initiatives is to cultivate particular forms of *social relationship* between corporations and a range of other actors: governments, regulators, communities and workers. In this analysis, CSR is not simply seen as a smokescreen, or cynical marketing ploy, but as something much more fundamental to a corporation’s survival (indeed, capitalism’s survival) and success.[[8]](#footnote-8) CSR can be understood as a measure of how far the ‘corporation’ as an entity is capable of continuing and developing its social relationships. CSR has thus been crucial in corporate efforts to enter or extend activities in markets which seek to build the allegiance of consumers, workers and publics and to create new forms of emotional ties to particular companies and brands,[[9]](#footnote-9) not least by embracing social entrepreneurship, community voluntarism[[10]](#footnote-10) and even, in recent years by adopting the language and symbolisms of resistance.[[11]](#footnote-11) CSR strategies also seek to reposition the *regulatory* relationship between governments and corporations. As Shamir argues convincingly a primary effect of CSR initiatives is that they have tended to neutralise regulation, as part of a more general strategy to “block the use of legal methods” for taming corporations.[[12]](#footnote-12) In summary, robust CSR strategies are seen by governments, and in the academic literature by the mainstream ‘compliance school’ of regulation as more desirable than external regulation and law enforcement. [[13]](#footnote-13)

Those contributions are significant for how we think about the concrete limit on corporate social responsibility. Such analysis take us to the heart of the corporation as an institution that enabled particular forms of social relationship to flourish. It is through the corporation that real people earn wages and are managed by other groups of real people. It is through the corporation that real people are able to enrich themselves by distributing, marketing and selling products, or by renting property and the rights to property. And it is through the corporation that the profits that real people accumulate are channeled. Yet when those social relationships become assumed by a corporate identity, we lose sight of the basic character of those relationships as *social*.

So, just as the literature noted above argues in a range of ways, CSR allows those real relationships to be repositioned and exploited for the purposes of ‘the corporation’. But it also has another, more basic function that is equally important, if rarely analysed. A core function of corporate social responsibility is to mask those social relationships, and assert the corporation in a highly abstract sense. One of the most striking and common features of the academic literature, government policy, and NGO reports on CSR is the *abstracted* way that corporations are spoken about. The corporation is generally objectified as a singular entity, mimicking (as we shall see later in the paper) the way accounting convention and corporate law constructs a singular entity. Thus we find endless assessments of the ‘corporation’s’ behaviour, or assessments of how the ‘corporation’ can become a better ‘citizen’. This point becomes particularly obvious – and contradictory - in discussions about regulatory law and criminal law and the corporation, not least debates on how we punish the ‘corporation’. In almost all of its guises, corporate social responsibility, as a discourse, or strategy, generally takes the corporation as the object of its intervention and analysis. After all, it is the corporation as an object or ‘brand’ that seeks to enhance ‘its’ place in the ‘community’ when it funds a school or donates to a hospital and so on.

Even in the more grounded versions of CSR discourse, where the focus is on changing the behaviour of directors or shareholders, the stress is on how these groups change ‘the corporation’, as if it had a life and personality of its own, somehow acting independently. It is through this reified fascination with the autonomous corporation that the realities of the human relationships encapsulated by the corporation become obscured from view. For it is from the perspective of this reified fascination that corporation functions as a proxy for understanding real social relationships.

The most extreme abstraction of the corporation as a proxy for real social relationships is perhaps best illustrated in the strand of CSR scholarship that exhibits the tendency to *anthropomorphise* the corporation. In this literature, the contemporary corporation can be trusted as a moral decision maker that resembles something approximating human beings; it is capable of feeling and caring about its environment and its social impacts. Thus, as some have argued, the corporation has now acquired a “soul.”[[14]](#footnote-14) At the extreme end of this literature, scholars talk of ‘corporate emotions’[[15]](#footnote-15) and even ask whether corporations can express ‘love’.[[16]](#footnote-16) As one CSR scholar has noted recently:

“Corporate emotions are plural pre-reflective self-awareness of shared affective concerns…they [corporations] can have “slow” emotions such as confidence, happiness, or grief.”[[17]](#footnote-17)

Strange as it may be to find commentators willing to take the corporate *person* to its logical endpoint - the corporation as sentient, emotional, being – such understandings of the emotional corporation are merely an extreme version of the process of *abstraction* that is discussed above. This is the crucial point here. To talk about the corporation having emotions is a logical conclusion to set of arguments that, in more general terms, projects the corporation as autonomous.

The formal constitution of corporations as legal persons with an identity that is wholly separate from the executives that control it, and the owners and shareholders of the corporation (and we come to discuss the legal concept of the ‘corporate person’ in more detail later in the paper) implies for some commentators “that companies are potentially independent and autonomous in terms of the law and autarchic in the sphere of economy.”[[18]](#footnote-18) In this sense, there is a residual assumption in much of the CSR literature that corporate autonomy “reflects not only a formal description of independence in juristic terms, but also refers to the factual ability of a company to follow what is defined as its intent, in particular to act according to its own principles, including standards for ethical conduct, restricted only by the rights of others and by national and international law.”[[19]](#footnote-19)

The key effect of CSR is not merely that it allows the ‘acceptable face of capitalism’ to be projected outward to the corporation’s public audience, but much more fundamentally that it reinforces a way of thinking about the corporation: that the corporation has a singular identity and that this means it can make decisions and take action with a singular will. In many ways then, the question of whether or not it represents the “acceptable face of capitalism” or not is not the real issue at stake. The corporation represents capital (as opposed to the capital*ists* that own and control it). Acceptable or not, it is the corporate person that has become ‘face of capitalism’, rather than the real faces of the real people that stand behind it.

CSR discourses thus activate the corporation in the public imagination in a very particular way. And it is through this process that some commentators are able to imagine corporations as autonomous, self-regulating corporate ‘citizens’. It is a very peculiar imagination. How could the autonomous corporate citizen be expected to act with the same ethical and emotional capacities as real citizens? How can the institutional edifice of the corporation match the liberal ideal of the *rational* or *moral* decision maker?[[20]](#footnote-20) Early claims about CSR were primarily based on something approximating the Tocqueville concept of ‘enlightened self-interest.’ In this formulation, the capacity of corporations to make rational decisions (just as the liberal construction of the rational thinking individual contends) means that they will generally avoid damaging relationships with stakeholders or communities because it is not likely to be in the long term commercial interests of the corporation to do so. The advocates of CSR therefore imagined the corporate citizen in the same way as liberal political and legal scholarship imagines real flesh and blood citizens: as an autonomously acting rational actor that takes decisions that are largely based upon the costs and benefits for the corporate “self” or “citizen”.[[21]](#footnote-21)

In sum, the argument here is that CSR strategies seek to develop a very particular form of social relationships that always imply the extension of corporate autonomy. Thus, CSR usefully distorts and masks real relations of power that are encompassed in the corporation. By reinforcing the autonomy of the corporation, CSR discourses ultimately acts mask the real groups of people who gain form the corporations’ activities, since they become abstractly embodied in the corporation: the edifice of the corporation thus masks class interests. In the argument that follows, we begin to see how those class interests are materialized through corporate autonomy in a much more concrete sense. The following section provides an overview of what corporate autonomy means in accounting practice.

**3 Corporate Autonomy and the Accounting ‘Entity’**

In the discipline of accounting, the concept of the ‘entity’ provides a starting point for conceptualizing corporate autonomy. ‘Entity theory’ provided a break from the earlier concept of “proprietary theory” (where no fundamental distinction is drawn between a legal entity and its owners[[22]](#footnote-22)) that guided the discipline. The corporation, for the purposes of counting its inputs and outputs, and assessing its overall financial performance, stability and so on, is regarded as a discreet unit. All calculations about financial flows take this discreet unit as their object.

Kurunmäki has usefully summarised the process of creating an ‘entity’ for accounting purposes:

“The concept of an accounting or economic entity presupposes a more or less common agreement that something concrete, bounded and whole exists, and that accounting numbers are capable of reflecting that objective…To define an economic entity is thus to create and construct, to make and mould rather than merely reflect… Yet the making of an accounting entity is a political process with potentially significant implications. The boundaries which delineate an organization as an economic unit separate from other organizations are not as clear-cut, natural or fixed as the accounting entity assumption implies. The actors who identify entities and define their limits are many and varied, and may speak on behalf of legal, economic, social, political, aesthetic and professional interests.”[[23]](#footnote-23)

The process of creating accounting entity, thus creates its object for a particular purpose. And the making and moulding of the entity always has consequences for how a range of differing interests in the organization are positioned. This section focuses on two major implications of moulding the corporate entity through accounting practice: first, how this practice repositions the beneficiaries of the organization, and second how it enables the key costs of doing business to be removed from corporate accounting.

Let us deal with the first implication now. Once a corporation is treated as an entity, its accounts become formally separated from those of shareholders, managers and other significant groups of individuals that comprise the corporation. In other words, entity theory allows accounting to be solely focused upon the revenue, expenditure, assets, future value and so on of the *corporation* in isolation from its owners, or major shareholders. This approach is taken regardless of the ‘type’ of commercial organization we are talking about: partnerships, unincorporated commercial organisations, and incorporated privately owned and publically traded corporations alike. The practice of treating the corporation as an entity in accounting, was probably commonplace as the profession established itself at the begging of the 19th century.[[24]](#footnote-24) The accounting ‘entity’ takes on a particularly significant role in capitalist economies at the end of the 19th and beginning of the 20th century. This is the period in which we begin to see a clear (formal) separation of ownership and control, whereby owners of the business do not control the day-to-day decisions made in the business. Thus, the majority of shareholders are not generally involved with operational decision-making in the corporations they have a stake in.[[25]](#footnote-25) This effect is overstated in terms of making a significant change to the class composition of the manager-owner class in practice, but it is an important dynamic for understanding how and why entity accounting is universally used in corporate accounting by the beginning of the 20th century.[[26]](#footnote-26) The separation of ownership and control, or the dualism that Ireland has described as functioning capitalist (executives) and money capitalist (those that invest as passive rentier shareholders),[[27]](#footnote-27) rested on entity accounting as a tool for both. The accounts of the entity were separated from the accounts of individual shareholders. The former could be made transparent - through the publication of annual reports and accounts - for the purposes of informing both the functioning and the money capitalist. Corporate accounting thus became a key technique in organizing the economy along the strict formal segregation of management and ownership functions.

Treating the corporation as an entity for accounting purposes has very significant implications for how we account for the beneficiaries of the organization. As soon as we treat the accounts of the corporation as entirely distinct from the accounts of the owners of the corporation, the income and the assets of the corporation become wholly separate from the income and assets of the individual.[[28]](#footnote-28) This seems a fairly innocuous distinction to make. Yet its function is a significant one. It distorts how we ‘see’ class interests here. The separation of accounts between the owners and controllers of the corporation and the corporation itself means that the value/profits accumulated by the corporation are seen as exactly that: value/profits accumulated by an abstract entity. Now this value/assets is of course distributed to the shareholders/owners and some is distributed to the senior managers and executives. But in the case of the former it is not immediately clear how much is distributed to whom. This is because the corporation – the entity - acts as a proxy for the real profits accruing to real people.

The first implication, then, is that by creating an entirely separate system of accounting for profit, the entity masks the true class interests at stake here. The second implication of entity accounting is a more material one: it *facilitates* the process of value accumulation to shareholders and owners. Following Bruno Latour’s more general discussion in relation to technology/scientific systems, entity theory encourages a ‘black box” approach to accounting, because it enables a very specific type of story to be told about the corporation.[[29]](#footnote-29) Entity theory, as this section of the article will argue, allows a discreet set of inputs and outputs to be counted. It operates like a black box because in the process the internal and external workings of the organization are wholly obscured from view. ‘CSR accounting’ is a precise illustrator of Latour’s ‘black box’ because accounting convention allows the incorporation of very limited evidence of ‘CSR’ inputs and outputs but at the same time masks the social damage and harm caused by corporations that is not accounted for in convention. An equally important function of corporate accounting is that is able to deconstruct and reconstruct the boundaries of the ‘black box’. The corporation can be disaggregated into a number of smaller separate sub-entities, and the relationship it has with subsidiaries and sister companies can be manipulated through the changing the accounting relationship.

In general, corporate balance sheets only reflect particular costs; the standard forms of corporate accounting (mercantile or general purpose bookkeeping, based on financial statements) privilege some costs and benefits over others.The costs incurred by communities because of environmental damage, or by workers due to injuries simply do not appear in a company’s annual accounts because more often than not, corporations will not have to pay those costs. Related costs may be counted, if for example civil proceedings have been made to recover them, or there is a criminal/regulatory fine to pay, or they may be indirectly costed in the form of an insurance premium for example. The costs that typically *are* counted are the standard inputs of commercial or productive activity: the costs of raw materials, of processing these through energy and using technologies, the costs of building or renting and maintaining premises and the costs of labour.

Industrial injuries and diseases and environmental pollution involve major social costs that are never fully included: those costs are what economists call ‘externalities’. The ‘externalities’ of commercial incineration or landfill sites might include, for example:

• external costs related to greenhouse gases causing climate change;

• external costs of conventional air pollutants and some airborne toxic substances causing e.g. health effects;

• external costs of leachate to soil and water;

• external effects of the impact of facilities on local environment, e.g. visual effects, noise, smell and litter. [[30]](#footnote-30)

Those types of costs that might be factored into government decisions about granting permission to locate a particular industrial facility or not, but in the operation of such a facility, the owner or the operator would in all likelihood be liable for only a small proportion of the costs, if any at all. The bulk of those costs are born by individuals (as losses of earnings to a family when someone is made ill by industrial activity) or they are socialised (for example as a burden on the National Health Service). Quite simply, in standard systems of accounting, some costs of doing business are counted and other costs are not. It is this principle that enables corporations, to paraphrase Joel Bakan, to act as “externalising machines.” [[31]](#footnote-31) Accounting for the corporation as ‘entity’ thus has the function not merely of accounting *for* things, but also of *not* accounting for things.

Now, the principle of externalizing costs does not arise as a result of ‘entity’ theory p*er se*. If we cannot say that ‘entity’ theory is the origin of externalities, we can say that this is the *modus operandus for* keeping particular inputs and outputs off the books. Treating the corporation as an accounting ‘entity’ is central to enabling it to account for economic activity in discreet, individualised units. It is by establishing the corporation as a discreet accounting unit that they are able to aggregate assets and value in ways that do not recognize externalities. Accounting practice in the projection of the revenue generated though a national economy may take account of the depletion of natural resources, or carbon emissions, for example, but this is never done on a firm-by-firm basis. Resource depletion may also be an issue for the estimation of the value of a particular industrial sector (mining companies need to take account of the depletion of ore, or coal, or whatever is being mined because it affects market price, the projection of the value of the firm etc.), and this will have an impact on the valuation of a corporation. But even in the case of the extractive industries, the full costs of depletion, measured in more general social or economic terms will not be absorbed by the ‘entity’. Thus, as Bebbington and Larringa put it:

“In accounting terms, financial accounting is enabled by, and constitutes, the boundary between an organization and its environment. This framing of the organization, based in the ‘entity concept’, dictates that accounting should be only interested in some costs (that is, those borne by the entity) even though this obscures social and ecological impacts that arise at a wider scale. By ignoring these wider impacts, financial accounting contributes to the construction and maintenance of a bounded organization that ignores its full character.”[[32]](#footnote-32)

In this sense, we can say that the autonomy provided for by the accounting ‘entity’ is one that ensures the corporation, or more accurately its beneficiaries, will never have to pay the full costs of its activities. Indeed, we might go further in this assertion. There are a number of ‘creative’ accounting practices that are made possible by the treatment of a corporation as a discreet, ‘black box’. Tax-structuring, secrecy-structuring and such practices designed to avoid or evade the law are made possible by the creation of long chains of ownership in which financial transactions can be masked by locating a series of different corporate entities in different jurisdictions. It is the complex relationship between those discreet entities that enables legal requirements to be avoided or evaded, activities to be masked. Indeed, in many ways the development of corporate accounting procedures in the 20th century laid the ground for flexible ways of accounting for market value and commodity price fluctuations that allowed the ‘entity’ model to bridge the gaps between boardroom strategies and the collection and *manipulation* of data[[33]](#footnote-33), and ultimately enables their ‘concern’ with a wider range of stakeholders to always be subordinated to a principle of shareholder primacy.[[34]](#footnote-34)

In summary, as a result of conventional accounting practices, corporations are generally not required recognize some of the most significant inputs and the costs involved in their business. The fact that businesses don’t pay the full social costs or externalities, makes us rethink the premise of corporate social responsibility: that corporations can be made more responsible for their activities. If many of those activities are not *accounted* for in the first place, then accounting itself then the accounting black box presents a major obstacle to imagining how they might be accounted for. If corporate autonomy in accounting – the ‘entity’ - is based on those same principles, then we are in a weak position to calculate the full social costs of doing business, before we can expect any board of directors or senior management team to do any thing about it. Thus, when CSR reform initiatives demand ‘environmental accounting’ or ‘CSR accounting’, they are not talking about full cost accounting in the true sense of the term, rather they are asking for a very limited form of account reporting that retains control over how those estimates are made.

Lazy parallels are often made between the legal concept of ‘corporate person’ and the accounting entity. Yet the influences on the development of the accounting ‘entity’ can also be traced separately to range of key institutional influences on accounting practices, not least the City of London and Wall St.[[35]](#footnote-35) Thus, it is important to note that although the legal shifts of the 19th century were important influences on shifts in dominant accounting practice (and may have ‘lagged’ behind for the best part of a century[[36]](#footnote-36)) the consequences of ‘entity theory’ for understanding the corporation are very different.[[37]](#footnote-37) The following section will outline the basis for corporate autonomy in law in order to deepen this analysis.

**4 Autonomy and the ‘Corporate Person’**

In corporate law, the development of legal personhood throughout the long history of the modern corporation was based upon the creation of a singular entity for the purposes of conducting business.[[38]](#footnote-38) Although the basis for legal personhood has always varied widely across time and across national jurisdictions, there are two aspects that are generally held in common in contemporary liberal democratic states: first, corporations are recognized by a particular state or sovereign authority as ‘entities’ distinct from the people who own or control them; and second, they are able to conduct commercial functions as if they were individuals (most notably, to enter into commercial agreements as contracting parties). In a commercial sense, through their capacity to act as a formally autonomous ‘entity’, corporations (and indeed public authorities) came to be broadly regarded in exactly the same way as the sole proprietor of a business is.

The reason for the incorporation of such organisations was always in some sense related to reducing the *commercial* risks or the liabilities of the individual members of the organisation. One of the earliest recognised advantages of incorporation was that the entity would not die – it remained immortal - so did not pay death duties that would otherwise have been owed by an individual owner or investor’s estate.[[39]](#footnote-39) Similarly, if a ‘partner’ or ‘shareholder’ became bankrupt, the entity’s assets could not be used to pay the debts as the assets belonged to the entity rather than the individual shareholder. Thus, by creating a formally autonomous organization – a corporation - individuals could be protected from liability for any particular losses. The neutralization - or at least the diminution - of liabilities was a core principle behind combinations of wealth that existed for centuries before the principle of limited liability became fully established in law in the early 19th century.[[40]](#footnote-40)

Limited liability is a concept that captures the process that is used to limit the liabilities of the owners of corporation. Because the corporation is wholly distinct as an entity, it formally becomes constituted as the owner of assets and the party responsible for liabilities. The legal personhood assumed by the corporation implies a complex relationship between the nominal owners (shareholders) of the corporation and the corporation itself. As a result of this relationship, shareholders of incorporated companies are thus able to ‘limit’ their liabilities to the value of the sum invested; the value of their ‘share’. By restricting the financial exposure of shareholders to the principal sum they had invested, they are generally not held responsible for the debts or other liabilities of the company, or for the costs of any legal proceedings that may arise from its activities. A major commercial advantage for companies and their investors is thus created by establishing a separation between the liabilities held by the corporation and the liabilities held by the members of the corporation.[[41]](#footnote-41) Corporate lawyers thus use the term ‘corporate veil’[[42]](#footnote-42) to describe the protective shield that exists to protect the shareholders of the corporation from liability for the harms caused by the corporations.

There are numerous related commercial advantages associated with treating the corporation as a ‘legal person’. The corporation can assume formal duties that allow it to trade as an independent commercial entity; to own, buy and sell property; and to enter into agreements as the contracting party, and so on. Not least of these advantages is that the *corporate* person is for legal purposes regarded as the employer, rather than any flesh and blood person. Thus, just as the owners of the company are not held directly responsible for any liabilities that arise from the labour relationship, nor do they have any obligation to know about, far less do anything about, the labour conditions faced by workers in the companies that they own. In complex chains of ownership, the autonomy granted to each unit in the chain as a separate and autonomous employer makes it easy for both individual shareholders and executives to avoid responsibility for their subsidiaries' unfair labour practices or acts of employment discrimination. Supply chains and chains of ownership insulate primary owners and buyers from liability for violations of rights at the labour intensive end of the supply chain. The corporate veil in tort cases involving multinationals has, with a few scattered exceptions, prevented workers from seeking compensation.[[43]](#footnote-43) The right of corporations to make claims in arbitration courts and in human rights courts as legal persons very often aims to neutralize the regulation of product safety and workplace safety standards.[[44]](#footnote-44) There is thus therefore a profound and general conflict between corporate law and labour rights.[[45]](#footnote-45)

It is barely analysed in the literature, but the corporate veil, in a rather different form of is extended into regulatory and criminal law.[[46]](#footnote-46) By ensuring that it is the company that is generally punished for legal infractions and serious offences, the corporate veil works in a *de facto* sense to shield directors, executives and senior managers. This *de facto* criminal corporate veil has a history that closely parallels the settlement of limited liability in the 19th century.[[47]](#footnote-47)

The first Factory Acts, for example, carried a sliding scale of fines to be imposed on Factory masters. However, as Carson’s history of the emergence of Factory legislation shows, both the factories inspectors and the courts very quickly developed ways of ensuring those crimes went unpunished: the social power of the factory owners ensured that those crimes became ‘conventionalized’ and ‘routinized’ as normal business practice.[[48]](#footnote-48) There is a history that shows the legal category of strict liability developed in these cases to ‘normalise’ and ‘conventionalise’ the offences into a separate category of crime. Strict liability thus enabled factory crimes to be seen as less serious, as “not real crime” and thus lessened the social opprobrium and indeed allowed the courts to legitimately deal with them by fines rather than custodial sentences.[[49]](#footnote-49) But strict liability had another crucial function. This route to establishing guilt was ideally suited to the prosecution of the company: because liability for the offence is held without the need to find fault it does not require the prosecution to show *mens rea*. Companies could therefore be found guilty of a strict liability without the impossibility of establishing corporate *mens rea*.

The proportion of ‘companies’ (as opposed to real persons) prosecuted for breaches of the Factory Acts in the mid 19th century varied between 30% and 40%.[[50]](#footnote-50) By the end of the 19th century, 50% of prosecutions for such breaches were laid against corporate persons. By the end of the 20th century, in most areas of corporate regulation, the vast majority of prosecutions were laid against corporations rather than individuals. Although there has been an ongoing debate about the enforcement of the law against criminal individuals,[[51]](#footnote-51) illegal practices in banking and finance have generally been dealt with by imposing large fines against corporations in procedures that circumnavigate the courts, and rarely involve the prosecution of individuals (with the notable exception of the Serious Fraud Office (SFO) which was established primarily to investigate the role of individuals in major corporate frauds[[52]](#footnote-52)). And this practice is being consolidated in both US and European regulatory systems in recent years. Multi-million pound fines levied on financial institutions for illegal practices are now commonplace on both sides of the Atlantic.[[53]](#footnote-53) In cases of environmental disasters and the killing of workers, the same *de facto* criminal corporate veil remains intact.[[54]](#footnote-54) In the case of breaches of safety law by employers against workers in the UK, only around 3% of prosecutions are laid against directors or senior managers; directors and senior managers are penalized in only the rarest cases, and it is normally only in the smallest companies that those individuals face punishment.[[55]](#footnote-55)

The development of the autonomous corporation in a legal sense has enabled (some) rights and responsibilities that would normally be associated with a property-owning individual to be ascribed to the corporation. The corporate veil acts as a structure of impunity for the key beneficiaries of the corporation: in most circumstances, individuals cannot be generally held liable in a civil or criminal law, even when major social consequences arise from corporate activities. It is through this legal principle that the concept of corporate autonomy is upheld to limit the liabilities of both owners (in terms of their civil liabilities) and senior managers (in terms of their criminal liabilities as a *de facto* corporate veil). This ability to shield the full costs of doing business from the key beneficiaries of the business thus supplements the externalizing effect of the accounting ‘entity’ described in the previous section.

At this point in the paper, the conclusion we must draw is a relatively simple one: that the process of creating corporate autonomy is highly problematic if we genuinely seek to limit the social harms caused by corporation. This is quite simply because the extension of corporate autonomy in the spheres of accounting and law is a mechanism for both masking and diffusing the responsibilities of the real beneficiaries and the most highly remunerated people in the corporation. In those spheres, we see same process of abstraction that dominates the ‘CSR’ literature and policy: attention is focused upon the corporation as an abstract entity, rather than the concrete social relationships that comprise the corporation. In this sense our conclusion has to be that CSR upholds a reified notion of the social problem it seeks to deal with. And if policy reforms, such as those briefly introduced in the introduction to this paper are to be effective, they must not take the autonomy of the corporation for granted and look instead at dealing with the real processes of power encapsulated by the corporation. As the conclusion to this paper will argue, such a task also means looking at ways to break the structures of impunity that are sustained by corporate autonomy.

Before the paper returns to this discussion, however, the next section explores corporate autonomy in a little more depth, by returning to the reforms introduced at the beginning of the paper and probing those reforms in the light of the preceding discussion. It is through this discussion that we begin to uncover a deeper aspect of corporate autonomy as a process of abstraction.

**5 Corporate Autonomy and Law Reform**

There is a well-documented history of how, through the 20th century the courts in England and Wales sought to resolve the question of corporate criminal liability with a circuitous form of reasoning. This reasoning ultimately failed to attach the offence of manslaughter to the corporation, and in doing so, exposed the contradictions of corporate personhood in criminal law.[[56]](#footnote-56) In his oft-cited attempt to understand how a corporate ‘state of mind’ could be understood for the purposes of law, Lord Denning famously argued:

“A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work….Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and it is treated by the law as such.”[[57]](#footnote-57)

This was the conceptual leap necessary in English law that was used later to develop a legal construction of the corporate *mens rea* in criminal cases. Viscount Dilhorne in *Tesco Supermarkets Ltd. v. Nattrass* refined the Denning formulation of the controlling mind further in an attempt to make it fit the crime of manslaughter, imagining a corporate person:

“...who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders.”[[58]](#footnote-58)

The principles established in those judgments became known as the ‘identification doctrine’. The key problem for the courts in a series of cases that followed was how a series of connected decisions made by a number of ‘controlling minds’ in the corporation might be aggregated together to add up to a corporate *mens rea*. In those cases the courts failed to use the principle of aggregation to resolve the contradiction between the corporate person and the real persons that might together represent the controlling will of the corporation.[[59]](#footnote-59) The common law offence of gross negligence manslaughter was used successfully against small organization, and indeed a number of directors of small companies have been convicted of this offence. However the same fate is yet to meet any director of a large corporation.[[60]](#footnote-60) For some of commentators, the real barrier to the courts making this formulation work were merely legal, but the truth is that it was simply too politically unpalatable to attach full criminal liability and expose respectable Directors and senior managers to conviction for series offences arising in the course of doing business.[[61]](#footnote-61)

Although, as we have seen in the previous section, the concept of strict liability enables corporate prosecutions for a range of regulatory offences, the Corporate Manslaughter and Corporate Homicide Act 2007 sought to resolve the corporate *mens rea* contradiction in more gross negligence manslaughter. In seeking resolution on this issue, the Act explicitly exonerated individuals from any connection to the ‘corporate offence.’ It was only after it was confirmed that no executives or directors would end up in the dock as a result of the offence, the organisations that represent these individuals collectively, including the Institute of Directors and the Confederation of British Industry lined up to support the reforms encompassed in the Act. The trade unions almost unanimously expressed disappointment in the final form of the Act, because of a “fundamental public concern” that culpable company directors would escape prosecution for manslaughter.[[62]](#footnote-62)

Now there are practical issues that suggest the use of fines against corporations will not secure accountability precisely because they are aimed at the corporate person. This is partly a question of ensuring that the *de facto* corporate protects directors and executives, but it is also a question of ensuring the protection of shareholder and owners from absorbing any pecuniary penalty. First, if we take the large fines noted above, they are very often not particularly large when taken in comparison with the profits of the companies they seek to penalise. They are even less significant when set against the annual turnover of a company.[[63]](#footnote-63) Second, the size of the fine may have little effect anyway. Largely because fines are levied on the corporation as an entity, rather than targeted at a particular group within it, those costs can be absorbed by the organisation in whichever form the senior management sees fit. The costs of even the largest fine might be offset against a particular budget heading (they might result in cuts to running or maintenance costs that may even worsen the management of safety in an organisation), or they may be passed onto customers and clients in the form of price rises, or to suppliers by reducing the market value of a product. The costs of fines may even be passed onto workers - those most endangered by safety offences - in the form of wage cuts or adverse changes in working conditions. Little wonder, then, that studies on the impact of pecuniary penalties on the corporation generally find little correlation between the imposition of fines and a deterrent effect.[[64]](#footnote-64)

This discussion is significant, because it indicates a great deal about the class character of the law in this sphere. In the case of the Corporate Manslaughter and Corporate Homicide Act 2007, by holding out the promise of punishing the ‘corporation’ the policy makers were able to claim to a public audience that justice would be delivered against those most powerful interests, whilst at the same time the law exonerated an entire class of senior managers from criminal liability. The law reverted to the principle of corporate autonomy. It is likely that policy makers in this case were nervous both of upsetting groups that hold significant power – in this case directors and the organisations that represent them – and of creating a shift towards imposing duties on directors and thus disturb the basic principles of corporate law.

In corporate law, the roles of shareholders and senior managers are very clearly proscribed: general strategic decisions about what the corporation does and how it operates are, by law, taken outside the boardroom and made in annual meetings of shareholders. It is shareholders meetings that ratify decisions about how to distribute profits and losses and about key investment decisions. The directors of the corporation (those who are charged with its overall management at the most senior level) have particular duties in law to maximize the value of the company. Now there is an extensive literature that goes back and forward debating the finer points of the nature of Directors’ fiduciary duties. This literature draws from voluminous case law decisions and legal opinions to agree more or less that company law in Anglo-Saxon jurisdictions – but increasingly revealed as a universal global principle - is founded on the principle of ‘shareholder value’.[[65]](#footnote-65) There has therefore been a high degree of legal convergence around this principle: that whilst directors have some discretion to pursue policies that might benefit other groups (workers, consumers and so on) they can only do so if such policies can, in the final reckoning, be regarded as being in the interests of shareholders.[[66]](#footnote-66)

The Companies Act 2006 which received royal assent 18 months earlier than the Corporate Manslaughter and Corporate Homicide Act 2007, had sought through corporate law to reform the fiduciary duties that are imposed on Directors in ways that would encourage greater scope for the consideration of other stakeholders. The Act sought to impose a modified version of directors’ duties, “enlightened shareholder value.” The “enlightened” bit referred to the claims that accompanied the legislation that it would enable a “stakeholders” approach that rejected the exclusivity of shareholders interests and stressed the long term success of the company as dependent on safeguarding the interests of a range of stakeholders. [[67]](#footnote-67) A genuinely pluralist approach to stakeholders’ interests - that permitted shareholders interests to be subordinated to other stakeholders quickly rejected in the consultation process.[[68]](#footnote-68)

The NGO community worked hard to force inclusion of an enlightened approach that would permit directors to consider stakeholders. Key lobbying group CORE coalition noted following the introduction of the Act:

“The Corporate Responsibility (CORE) Coalition and the Trade Justice Movement have welcomed the Companies Act, given royal assent this week, as a step forward towards greater corporate responsibility, but warn the new legislation has not gone far enough to ensure that British business will work for people and planet as well as profit.”[[69]](#footnote-69)

Their caution in welcoming the Act was justified. Indeed, as Keay’s analysis shows, the mechanism through which it achieved this was merely to strengthen the existing principle of shareholder value. Moreover, there was nothing in the legislation that might allow the wider interests of stakeholders being elevated in practice:

“Because ESV [enlightened shareholder value] does not make directors accountable to non-shareholder stakeholders, and there are likely to be few occasions when any breach against the interests of non-shareholders will be enforced…practice it is likely that the Anglo-American position that advocates shareholder value remains quite strong.”[[70]](#footnote-70)

Thus, whilst the Act did indeed seek to include a broader remit for directors, it did so by codifying and thus reasserting the core principle of existing fiduciary duties. By limiting corporate reporting requirements, the Act probably weakened other (namely market) pressures on directors to consider the interests of ‘stakeholders’ [[71]](#footnote-71)

It is not insignificant that the Act frames these duties as the “duty to promote the success of the company.”[[72]](#footnote-72) Now there is a huge volume of literature that interrogates the precise meaning of the principle of shareholder value. If we read the key texts on this question, it is significant that the argument always proceeds cautiously and precisely before it gets to the part of the assessment that the ‘long term interests’ or the ‘value’ of the company is actually reducible to the interests or the value accrued by shareholders.[[73]](#footnote-73)

Paddy Ireland has pointed out that the term ‘they’ rather than ‘it’ was widely used in legal cases in the 1830s.[[74]](#footnote-74) It may seem like a trivial observation but this linguistic detail was significant in the conceptual turn that emptied the corporation of its human content.[[75]](#footnote-75) The Companies Acts of the mid 19th century were important in that they conferred legal status of ‘corporation’ upon the joint stock model which had been largely an economic concept, and therefore had the task of cleansing the corporation of people.[[76]](#footnote-76) There are key subtle differences in the language used in the 1856 and 1862 Companies Acts, whereby the former noted that investors “formed themselves into an incorporated company” and the latter in which this wording was dropped to indicate that: “A company was made *by* them but not of them.”[[77]](#footnote-77)

When the question of shareholder value comes into focus, precisely the same conceptual turn comes into play. This turn is normally staged in two parts: the first asserts that Directors’ discretion in the execution of company policy is ultimately limited by a primary duty to act in the interests of the *corporation*. The second, is that either by legislation or by interpretation by the courts, this is taken to mean that corporations must be managed for the benefit of shareholders. Thus, in the key section 172 of Companies Act 2006, the “Duty to promote the success of the company” is supplemented with “for the benefit of its members as a whole.” This is a significant distinction that is reinforced as the Act brings into play the interests of “stakeholders.” Those interests are not in the first instance subordinated to the interests of shareholders, but to the company. Thus, the rest of section 172 sets out the “need to foster the *company's* business relationships with suppliers, customers and others; the impact of the *company's* operations on the community and the environment and the desirability of the *company* maintaining a reputation for high standards of business conduct.

This formulation in law is significant, since it reinforces the point that the company is the principal focus of those duties; ‘enlightened shareholder value’ arises from the successful conduct of the business, rather than the other way around. Thus, shareholder interests do not need to be crudely set against stakeholder interests. The corporation is the proxy here, and it Acts as a conduit for the promotion of both. In the Act, however, as elsewhere, the promotion of the company is reducible to a principle of shareholder value. And the integrity of the corporate veil is protected.

The linguistic and conceptual turn taken in the Act serves as a pretty accurate motif for how the principle of corporate autonomy is generally applied: the veil is be upheld in law, even at the moment the law is really pulling the veil away. We find exactly the same contradictory logic at work in other spheres of law. Under some limited circumstances, the veil is can pierced by the courts (normally, though not always) when the interests of shareholders are at stake.[[78]](#footnote-78) For example, in a series of cases, the European Court of Human Rights has assiduously found that limited liability companies have distinct legal personalities and thus maintain the corporations rights as distinct and independent from their shareholders.[[79]](#footnote-79)

The contradictions in those cases result from a system-preserving tendency in law. Although the ownership and the rentier rights of individual shareholders must be upheld, they cannot be upheld in ways that compromise or undermine the more general principles that ensure continuity in the economy, or in the basic functioning of capital and property rights. The courts must seek, as far as possible, to rule in ways that avoid piercing the veil between shareholders and the corporation, otherwise they risk setting precedents that challenge the basic premise of corporate autonomy (not least those that have been discussed in this paper: ‘entity’ status and corporate personhood). What is really going on in those decisions, then, is a precarious game in which the courts are seeking to ensure the compatibility of shareholder rights claims with the principles of corporate autonomy without risking piercing the veil. Put another way, in upholding class interests at stake here, the courts are at the same time struggling to mask those class interests.[[80]](#footnote-80)

And the ideal of corporate autonomy - reified through the conceptual trickery and the contradictory twists and turns of corporate law - ensures that although the law says the beneficiary is the ‘corporation’, the corporation can only ever be a proxy for the real flesh and blood beneficiaries of capitalism.

**Conclusion**

The purpose of corporate autonomy in all of its forms is on one hand to shield the main beneficiaries of profit-oriented corporate activities from liability, and on the other to throw a mask over the real class interests at stake. Corporate autonomy ensures that owners and shareholders will never pay the full costs of the immense social harms caused by corporations. This is the case whether those harms are measured in terms of ‘externalities’, or in terms of the civil and criminal liabilities that ultimately fall on the artificial ‘corporate’ person.

What is described in this paper is essentially a process of reification through law.[[81]](#footnote-81) Corporate autonomy – the corporation as ‘entity’ or ‘person’ thus provides a convenient mask thatobscures the complex class character of *capitalist* social relations. In this sense, the corporation has become the acceptable face/mask of capitalism. The corporation as employer, buyer, seller, exporter, investor and so on, masks the real people that benefit from relationships that are in law and custom defined as relationships with the corporation. In reality, they are class relationships. The social relations that the corporation masks are nothing more nor less than the social relations of capital. The concept of corporate autonomy, as it is constructed in accounting and in law enables the true costs of doing business to be masked, whether this means the exploitation of workers, or whether it means killing and injuring them with impunity.

Yet CSR strategies, and law reform strategies, when they accept the concept of corporate autonomy at face value, anticipate that corporations can be encouraged, or even forced somehow to use their autonomy to benefit the lives and livelihoods of workers and consumers, or indeed to ensure the ecological sustainability of markets, or systems of production, and ultimately the sustainability of the planet.

The implications of the argument made in this paper lead us to the opposite conclusion: that the contradictory edifice of the autonomous corporation must be dismantled. To make corporations truly responsible, we must remove the their ability to act as singular entities, as persons, in the form that they are currently permitted to. Otherwise, we will never be able to fully account for – or hold anyone accountable for - the social harmful effects of capitalist systems of production, distribution, consumption and finance.

Of course, this is an easy thing to propose in an academic journal and a much harder thing to think through in practice. The cultural dominance of the corporation in our everyday lives makes it an overwhelming ontological task to even contemplate how we could dismantle it. But this piece offers a modest starting point in thinking through this task. This starting point is to hold up any proposed interventions that claim they will improve corporate social responsibility to a serious test: do they allow corporations to retain their formal autonomy, or do they seek to break down the conditions of this autonomy? It is only when such interventions imply the loss of autonomy for corporations they become about something else. In the context of the discussion outlined here this would mean the removal of the arcane privileges that exempt owners from having to account for the full extent of the social damage they benefit from. And it would mean withdrawing or significantly limiting shareholders rights in law in order to allow them to bear the full economic risk of the activities they profit from. Those are the kinds of intervention that might begin the task of dismantling the contradictory edifice of the autonomous corporation, because their focus is on the class interests that stand behind the corporation. They are the types of intervention that might make corporate social responsibility a serious proposition.

1. https://www.theguardian.com/commentisfree/2018/jan/20/boardroom-excesses-no-longer-tolerated-theresa-may [↑](#footnote-ref-1)
2. Those include the creation of the first minister responsible for the promotion CSR in Tony Blair's second government to encourage “responsible business practices” in the UK. Precisely the same formulation informed Gordon Brown’s invective on ‘moral capitalism’ (<https://www.yorkshirepost.co.uk/news/brown-urges-new-moral-capitalism-backed-by-europe-1-2340073>), David Cameron’s stalwart defence of business “corporate responsibility” initiatives (<https://www.gov.uk/government/speeches/business-in-the-community-speech--2>) and Theresa May’s rather empty earlier demand for “responsible capitalism” (https://www.ft.com/content/d7d17eb6-4760-11e6-8d68-72e9211e86ab). [↑](#footnote-ref-2)
3. David Whyte and Jorg Wiegratz, ‘Neoliberalism, moral economy and fraud’ in David Whyte and Jorg Wiegratz (eds.) *Neoliberalism and the moral economy of fraud* (Routledge, 2016); Steve Tombs and David Whyte, *Regulatory Surrender: death, injury and the non-enforcement of law* (Institute of Employment Rights, 2009). [↑](#footnote-ref-3)
4. Steve Tombs and David Whyte, *The Corporate Criminal: why corporations must be abolished* (Routledge, 2015), 16-21. [↑](#footnote-ref-4)
5. Indeed, many of those charters (for example those that applied to the first colonial corporations) granted an early form of limited liability to investors or ‘adventurers.’ John Micklethwaite and Adrian Woolridge, *The Company: a short history of a revolutionary idea* (Phoenix, 2005). [↑](#footnote-ref-5)
6. For different interpretations of the concept of corporate autonomy, see: N. Oman, ‘Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria,’ *Denv. UL Rev.* (2005) 83; L. Peres, ‘The resurrection of autonomy: organization theory and the statutory corporation’, *Australian Journal of Public Administration* (1968) 27 (4), 360–370; J Roloff and M. Aβländer, ‘Corporate Autonomy and Buyer—Supplier Relationships: The Case of Unsafe Mattel Toys’, *Journal of Business Ethics* (2010) 4: 517–534; and John Sutherland, ‘Corporate Autonomy and X-inefficiency’, Journal of Post Keynsian Economics (1980) II (4), 549–565. [↑](#footnote-ref-6)
7. There are some sparse exceptions which apply a concept of corporate autonomy to a specific or narrow field of inquiry. In economics and managements studies see the articles cited in footnote 6. Although it is not described as ‘corporate autonomy’, the perils of consolidating corporate personhood as a result of demands for criminal and civil liability is developed in some of the best critical legal scholarship on the corporation, for example, Harry Glasbeek, *Wealth by Stealth: corpprate crime, corporate law and the perversion of democracy* (Between the Lines, 2002); Grietja Baars, ‘Its Not Me, It’s the Corporation: the value of corporate accountability in the global political economy,’ *London Review of International Law* (2016) 4 (1) 127-163. [↑](#footnote-ref-7)
8. H. J. Glasbeek, ‘The Corporate Social Responsibility Movement-The Latest in Maginot Lines to Save Capitalism,’ *Dalhousie LJ*, (1987) 11: 363. [↑](#footnote-ref-8)
9. Naomi Klein, *No Logo* (Fourth Estate, 2000). [↑](#footnote-ref-9)
10. Lesley Sklair and David Miller, ‘Capitalist Globalization, Corporate

    Social Responsibility and Social Policy’ *Critical Social Policy* (2010) 30 (4), 486-7. [↑](#footnote-ref-10)
11. P. Fleming and M. Jones, *The End of Corporate Social Responsibility: Crisis and Critique* (Sage 2013) 76-8. [↑](#footnote-ref-11)
12. Ronan Shamir, ‘The De-Radicalisation of Corporate Social Responsibility’,

    *Critical Sociology* (2004) 30 (3), 7. [↑](#footnote-ref-12)
13. Frank Pearce and Steve Tombs, ‘Ideology, Hegemony and Empiricism: compliance theories of regulation’, *British Journal of Criminology* (1990) 30 (4), 423-443; Frank Pearce and Steve Tombs, ‘Policing Corporate “skid rows”: a reply to Keith Hawkins’, *British Journal of Criminology*, (1991) 31 (4), 415-426; Frank Pearce and Steve Tombs, ‘US Capital versus the Third World: Union Carbide and Bhopal’, in Frank Pearce and Michael Woodiwiss, (eds.) *Global Crime Connections* (Macmillan, 1993); see also C. J. Bradshaw, *Corporations, Responsibility and the Environment*, unpublished PhD Thesis (University College London, 2013) chapter 6. [↑](#footnote-ref-13)
14. R. B. Stevenson, ‘Corporations and Social Responsibility in Search of the Corporate Soul’ *Geo. Wash. L. Rev.* (1973) 42, 709. [↑](#footnote-ref-14)
15. H. B. Schmid, ‘The feeling of being a group: Corporate emotions and collective consciousness’, in M. Salmela and C. von Scheve (eds.) *Collective Emotions: Perspectives from Psychology, Philosophy, and Sociology* (Oxford University Press, 2014). [↑](#footnote-ref-15)
16. J Shaw, ‘CSR: Where is the Love?’, *Social Responsibility Journal*, (2006) 2(1), 112-119. [↑](#footnote-ref-16)
17. H. B. Schmid, ‘The feeling of being a group: Corporate emotions and collective consciousness’, in M. Salmela and C. von Scheve (eds.) *Collective emotions: Perspectives from psychology, philosophy, and sociology* (Oxford University Press, 2014). [↑](#footnote-ref-17)
18. Roloff and Aβländer, 2010, op. cit., 520. [↑](#footnote-ref-18)
19. ibid.: 520. [↑](#footnote-ref-19)
20. Those questions are squarely argued in Pearce and Tombs’ characterisation of the corporation as ‘amoral’ with a basis of ‘rational’ decision making that is highly proscribed and carefully delineated: Pearce and Tombs, 1990, op. cit.; Pearce and Tombs, 1991 op. cit. [↑](#footnote-ref-20)
21. Archie Carroll, ‘The Four Faces of Corporate Citizenship’, *Business and Society Review* (1998) 100-101: 1–7. [↑](#footnote-ref-21)
22. Waino Soujanen, ‘Accounting Theory and the Large Corporation’, *The Accounting Review* (1954) 29 (3) 391-398. [↑](#footnote-ref-22)
23. Liisa Kurunmaki, ‘Making an accounting entity: the case of the hospital in Finnish health care reforms,’ *European Accounting Review* (1999) 8 (2), 219–220. [↑](#footnote-ref-23)
24. Ruth D. Hines, ‘Financial Accounting Knowledge, Conceptual Framework Projects and the Social Construction of the Accounting Profession’, *Accounting, Auditing & Accountability Journal* (1989) 2 (2), 72-92. [↑](#footnote-ref-24)
25. Adolph Berle, *The 20th Century Capitalist Revolution* (Harcourt, Brace and World, 1954); Adolph Berle and Gardiner C. Means. *The Modern Corporation and Private Property* (Harcourt, Brace and World, 1967) [↑](#footnote-ref-25)
26. Maurice Zeitlin, ‘Corporate ownership and control: The large corporation and the capitalist class,’ *American Journal of Sociology* (1974) 79 (5), 1073–1119. [↑](#footnote-ref-26)
27. Paddy Ireland, Finance and the Origin of Modern Company Law, Grietje Baars, and Andre Spicer (eds.) *The Corporation: a critical, multi-disciplinary handbook* (Cambridge University Press, 2017) [↑](#footnote-ref-27)
28. G. R. Husband, ‘The entity concept in accounting,’ *The Accounting Review*, (1954) 29 (4), 552–563. [↑](#footnote-ref-28)
29. Bruno Latour, *Pandora's hope: essays on the reality of science studies* (Harvard University Press, 1999). [↑](#footnote-ref-29)
30. This list is taken from European Commission, DG Environment, *A Study on the Economic Valuation of Environmental Externalities from Landfill Disposal and Incineration of Waste*, Final Main Report, October (European Commission, 2000). [↑](#footnote-ref-30)
31. Joel Bakan, *The Corporation: the pathological pursuit of profit and power* (Viking Canada, 2004): 60. [↑](#footnote-ref-31)
32. J. Bebbington and C. Larrinaga, ‘Accounting and sustainable development: An exploration, *Accounting, Organizations and Society* (2014) 39 (6), 395–413. [↑](#footnote-ref-32)
33. Margaret Levenstein, *Accounting for growth: information systems and the creation of*

    *the large corporation* (Stanford University Press, 1999). [↑](#footnote-ref-33)
34. R. W. Roberts and L. Mahoney, ‘Stakeholder conceptions of the corporation: Their meaning and influence in accounting research,’ *Business Ethics Quarterly* (2004) 14 (3), 399–431. [↑](#footnote-ref-34)
35. W. P. Hackney, ‘Accounting Principles in Corporation Law’, *Law and Contemporary Problems* (1965) 30 (4), 791. [↑](#footnote-ref-35)
36. Soujanen, 1954, op. cit. [↑](#footnote-ref-36)
37. Y. Biondi, A. Canziani, and T. Kirat, *The Firm as an Entity: Implications for Economics, Accounting and the Law* (Taylor & Francis, 2007); Husband, 1954, op. cit. [↑](#footnote-ref-37)
38. Paul Johnson, *Making the Market: the Victorian origins of corporate capitalism* (Cambridge University Press, 2010). [↑](#footnote-ref-38)
39. Rebecca Spencer, *Corporate Law and Structures: Exposing the Roots of the Problem* (Corporate Watch, 2004) [↑](#footnote-ref-39)
40. R. Harris, *Industrialising English Law: Entrepreneurship and Business Organization*, 1720–1844 (Cambridge University Press, 2000) [↑](#footnote-ref-40)
41. Harry Glasbeek, *Class Privilege: how law shelters shareholders and coddles capitalism* (Between the Lines, 2017). [↑](#footnote-ref-41)
42. This principle is by no means universal, and there are a series of significant cases in whioch the courts have been prepared to pierce the corporate veil. John Matheson, ‘The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context’, *N.C. L. Rev.* (2009) 87, 1091-1155; Stephen M. Bainbridge, ‘Abolishing Veil Piercing’, *J.*

    *Corp. L.* (2001) 26, 479-535; David Milton, Piercing the Corporate Veil, ‘Financial Responsibility, and the Limits of Limited Liability’, *Emory L.J.* (2007) 56, 1305-1382. [↑](#footnote-ref-42)
43. M. Anderson, ‘Transnational corporations and environmental damage: Is tort law the answer?’ *Washburn Lj* (2001), 41, 399-426; Stephanie Khoury and David Whyte, *Corporate Human Rights Violations: global prospects for legal action* (Routledge, 2017), 77-8. [↑](#footnote-ref-43)
44. Harry Glasbeek, ‘Contortions of Corporate Law: James Hardie reveals cracks in liberal law’s armour,’ *Aust Jnl of Corp Law* (2012) 27, 132–168. [↑](#footnote-ref-44)
45. Bill Wedderburn, *The Future of Company Law: fat cats, corporate governance and workers* (Institute of Employment Rights, 2004); Dan Plesch and Stefanie Blankenburg, *How to Make Corporations Accountable* (Institute of Employment Rights, 2008). [↑](#footnote-ref-45)
46. This idea is proposed in Tombs and Whyte, 2015, op. cit. [↑](#footnote-ref-46)
47. David Whyte, 'The Criminal at the heart of the State’, in Grietje Baars and Andre Spicer, (eds). *The Corporation: A critical, interdisciplinary handbook* (Cambridge University Press, 2017). [↑](#footnote-ref-47)
48. Those estimates are derived from the author’s as yet unpublished analysis of the prosecution tables produced in the annual reports of the HM Factories Inspectorate between 1854 and 1904. [↑](#footnote-ref-48)
49. W.G. Carson, ‘The Conventionalization of Early Factory Crime’, *International Journal for the Sociology of Law* (1979) 7, 37-60. [↑](#footnote-ref-49)
50. Those estimates are derived from the author’s as yet unpublished analysis of the prosecution tables produced in the annual reports of the HM Factories Inspectorate between 1854 and 1904. [↑](#footnote-ref-50)
51. J. Treanor, J. and J. Rankin, ‘Banks May Be Ordered to Find £27bn to Fill Shortfalls’, *The Guardian*, 19th June 2013. [↑](#footnote-ref-51)
52. The SFO prosecutes approximately 20 individuals every year. Of course, we are not comparing like with like, and it is important to recognise that SFO prosecutions are considerably more complex and costly than prosecutions for the average criminal offence. Yet consider the SFO’s prosecution rate in relation to other offences that are generally dealt with through the prosecution of individuals. The SFO’s 20 per year average compares to around 120,000 prosecutions across England and Wales for theft and handling stolen goods and around 30,000 prosecutions for burglary each year. [↑](#footnote-ref-52)
53. As this article was being written, Barclays Bank agreed to pay $2bn (£1.4bn) to the US Department of Justice to settle a case over the misspelling of mortgage-backed securities in the run-up to the financial crisis. One estimate put the total fines levied against banks in the US since the 2008 crash as $243bn. The UK regulatory system is also significantly increasing the level of fines relating to financial offences; https://www.thetimes.co.uk/article/watchdog-punishes-city-with-tenfold-rise-in-fines-6x8tzg6cr. [↑](#footnote-ref-53)
54. David Whyte, ‘An Intoxicated Politics of Regulation’, in Hannah Quirk, Toby Seddon, and Graham Smith, (eds.) *Regulation and Criminal Justice* (Cambridge University Press, 2010). [↑](#footnote-ref-54)
55. Steve Tombs and David Whyte, *Safety Crimes* (Willan, 2007). [↑](#footnote-ref-55)
56. Celia Wells, *Corporations and Criminal Responsibility, 2nd edition* (Oxford University Press, 2001). [↑](#footnote-ref-56)
57. *H L Bolton (Engineering) Co. Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159. [↑](#footnote-ref-57)
58. *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1. [↑](#footnote-ref-58)
59. Gary Slapper, *Blood in the Bank: social and legal aspects of death at work* (Ashgate, 1999). [↑](#footnote-ref-59)
60. Steve Tombs, ‘The UK’s corporate killing law: Un/fit for purpose?,’ *Criminology & Criminal Justice* (first published, Aug. 2017) DOI: 10.1177/1748895817725559 [↑](#footnote-ref-60)
61. Slapper, 1999, op. cit. [↑](#footnote-ref-61)
62. This quote from evidence to the public consultation on the draft Bill submitted by the Communication Workers’ Union (https://publications.parliament.uk/pa/cm200506/cmselect/cmhaff/540/540we108.htm) reflected the view of most of the trade unions who commented on the draft Bill and the Act once it was passed. [↑](#footnote-ref-62)
63. The fine noted in footnote 52, for example, equated roughly the same amount that the Barclay’s revenue had increased between 2015 and 2016: https://www.independent.co.uk/news/business/news/barclays-bank-results-profits-triple-to-32-billion-jes-staley-a7594686.html [↑](#footnote-ref-63)
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75. ibid., 45 [↑](#footnote-ref-75)
76. ibid., 45 [↑](#footnote-ref-76)
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78. See footnote 42. [↑](#footnote-ref-78)
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