

INTRODUCTION

Penny Crofts*

Abstract

Most moral philosophy is anthropocentric and does not engage with questions of corporate culpability. Whilst conceptions of evil are contingent, the majority of definitions of evil have some concept of harm at their centre. Given the centrality of harm to philosophical definitions of evil, the failure to consider corporations as moral entities is particularly stark. Corporations cause a proliferation of harms that radically exceed the capacity of even the most villainous individual, but the language with which we as a community, and in legal circles specifically, engage with corporate harms lacks the depth of moral discourse. We tend instead to frame many corporate harms as accidents, tragedies or disasters, as though there is no responsible agent to hold accountable. This leaves us in an intractable situation – if there is no responsible agent, then these harms cannot be prevented – and yet – as shown in this book, many of the harms caused by corporations *are* eminently preventable. As a society we are increasingly dependent on corporations, they are becoming more and more capable of causing ever larger harms, and yet it seems less and less likely that they will be held accountable at law. Indeed, a common critique of *Evil Corporations* is that these harms are framed as an acceptable cost of economic well-being. Given this capacity for harm, the question of whether corporations can be conceptualised as evil is urgent.

INTRODUCTION

There has long been awareness of massive systemic harms inflicted by corporations, harms that in recent times have exponentially increased. However, this awareness has rarely led to any effective legal means to prevent and/or respond adequately to these harms. Lawyers and legal theorists appear to be stuck asking the same questions, yielding the same ineffective answers. Part of the reason for the apathetic legal response to corporate harms is the insufficient theoretical interrogation into the nature of corporations as responsible, moral agents. This includes whether the harms caused by corporations due to the acts of a few ‘bad apples’, structures enabled and required by law, or are corporations inherently evil?ⁱ To break this stasis, this book considers corporate culpability by focusing on the

question of whether corporations can be evil from diverse disciplines including law, theology, literature, philosophy and political science. *Evil Corporations* contributes to a technical account of how and why corporate wrongs and harms are caused, exploring the extent to which the legal system facilitates corporate wrongdoing. The essays presented here offer normative accounts of whether corporations can and should be regarded as responsible and culpable agents and how this might be evidenced and reflected in law.

Whilst the concept of evil is often associated particularly with religious discourse,ⁱⁱ there are many important and persuasive secular models of wickedness, including early influential ideas from the ancient Greeks of evil as lack or dearth.ⁱⁱⁱ Furthermore, definitions of evil are contingent, changing across time and place. In *Evil in Modern Thought*, Susan Neiman asserts that in the 18th century, the concept of evil referred both to acts of human cruelty and instances of human suffering, which included natural disasters such as earthquakes and floods.^{iv} Accordingly, natural evil did not require a responsible moral agent, although some theists argued that natural disasters such as the 1755 Lisbon earthquake was a punishment and warning from God.^v The Lisbon earthquake led Voltaire to argue that any rationalistic defence of God in light of such horrendous suffering was unbearable. Contemporary models of evil require responsible moral agents, which Neiman argues is a shift from blaming God for the state of the world and taking responsibility for it on our own.^{vi} There have been further shifts in conceptions of evil in response to various challenges and events. The mass atrocities of the first half of the twentieth century resulted in a rethink of conceptions of evil,^{vii} and there was a revival of interest in the study of evil after President George W. Bush's State of the Union address in 2002 attributing responsibility for the attack on September 11 to the Axis of Evil.^{viii} *Evil Corporations* argues that the proliferation of harms caused by corporations is likewise a challenge to update our models of evil. Corporations are entities created by humans and law, and it is vital and urgent that we take responsibility for the actions of these entities.

In contemporary philosophy, some thinkers are sceptical about the label of evil. For example, political theorist Phillip Cole argues that the label of evil does not give us any explanatory insight into why a person has done something, instead it places them as a character in a mythological narrative of a battle of good and evil.^{ix} For Cole, labelling a person evil puts

them outside the borders of humanity, precludes any possibility or necessity of communication, and justifies and requires extreme measures. Whilst Cole's arguments are salient, he focuses on only one model of wickedness, that of a mythical, monstrous wickedness, outside the borders of humanity. This model is present in contemporary legal narratives, constructing (some) terrorists, paedophiles and those who perpetrate particularly heinous crimes as monstrous, resulting in extreme (legal) measures to these threats.^x There are, however, other, different models of wickedness, that do not require a supernatural agent or inhuman humans.

Although arguments by sceptics are an important reminder of the way in which the rhetoric of evil can dehumanize and demonize, many moral philosophers assert the need for a coherent account and evaluation of terrible events and people. For example, in *The Death of Satan: How Americans have lost their sense of evil*, Delbanco argues that although the twentieth century has a 'rich repertoire of evil', producing spectacles of unparalleled cruelty, we have a 'crisis of imagination', with 'no language for connecting our inner lives with the horrors that pass before our eyes in the outer world'.^{xi} Although not the subject of Delbanco's book, as we know from innumerable government inquiries, media reports and examples recounted in this collection, corporations are responsible for many of the horrors that occur in our world. And yet, the language with which we as a community, and in legal circles specifically, engage with corporate harms lacks the depth of moral discourse. We tend instead to frame many corporate harms as accidents, tragedies or disasters, as though there is no responsible agent to hold accountable.^{xii} This leaves us in an intractable situation – if there is no responsible agent, then these harms cannot be prevented – and yet – as shown in this book, many of the harms caused by corporations *are* eminently preventable. *Evil Corporations* contributes to the argument of the urgent need to develop a nuanced account of corporate responsibility and culpability.

This need for an examination of corporations as moral entities is reflected and reinforced in moral philosophy. When teasing out ideas about evil, moral philosophers tend to focus on individuals – particularly those who have caused harms – whether criminals, people who made (bad) decisions during extreme events such as war, and/or fictional characters. Despite including fictional creatures in analyses of evil, most moral philosophers do not engage with

corporate entities as moral creatures. The legal treatise writer Coke influentially asserted that corporations are *persona ficta*, created in the imagination of the law.^{xiii} Given engagement with other fictional creatures in philosophies of wickedness, such as Satan, Iago and Hannibal Lecter, one could argue that the very fictionality of corporations likewise renders them a subject for analysis.^{xiv}

At the same time, accounts of the reality of corporate entities have seen some engagement with questions of moral responsibility and group agency.^{xv} Chapple develops List and Petit and applies their ideas to a philosophical argument about the moral responsibility of corporations.^{xvi} Stephanie Collins' recently published book *Organizations as Wrongdoers*, explicitly engages with the question of corporate blameworthiness from a philosophical perspective.^{xvii} In this collection, Luke Russell considers the question of whether corporations do evil or can be considered as evil, within the discipline of philosophy. On the most part however, there is an anthropocentric and individualistic bias in philosophies of wickedness – as though individuals are the only moral agents. This individualistic bias is likewise reflected and reinforced in criminal legal doctrine and theory.^{xviii} The criminal law was constructed around the archetypal legal subject – the responsible human being.^{xix} Thus even though corporations have long been recognised as legal subjects, it has proven very difficult to even imagining applying criminal law to the bulk of corporate wrongdoing. Honni van Rijswijk and I have argued elsewhere that this failure to criminalize corporate harms is horrific, because a central justification for criminalization is public harm, and corporations cause a proliferation of mass harms.^{xx} *Evil Corporations* is not an argument against individual responsibility. Individual responsibility is still very important for accounts of corporate responsibility, as shown by contributions by Liz Campbell, Tim Peters and Lisa Siraganian in this collection. Rather, *Evil Corporations* is an attempt to address the balance and add depth and nuance to accounts of culpability so that they include corporations. Given that we have created corporations it is urgent that we construct meaningful narratives of responsibility for the harms that corporations cause.

Most definitions of evil have some form of harm at their centre. For example, in his summary of philosophies of wickedness, Calder argues that harm is an 'essential component of evil'.^{xxi} Theorists like Kekes argues that harm of evil must be serious and excessive.^{xxii}

Other theorists emphasise the quality of the harm. For example, Claudia Card argues that wickedness involves ‘intolerable harms’^{xxiii} - that is, harm that makes life not worth living from the point of view of the victim, including severe physical or mental suffering, and deprivations. Luke Russell asserts that wickedness ‘must be appropriately connected to an actual or possible extreme amount of harm’^{xxiv} – a definition which includes the equivalent of attempts in criminal law, where an accused intended but did not succeed in causing the prohibited harm. Given the centrality of harm to philosophical definitions of wickedness, the failure to consider corporations as moral entities is particularly stark. Corporations are capable of causing, and do cause, systemic harms on an industrial scale. For example, critical criminologist David Whyte asserts:

[a]fter taking into account studies from across disciplines and after treating official data with the necessary analytical revision, at least 50,000 people die every year as a result of working in the United Kingdom alone. That’s more than 1,000 a week. And, according to established research by the restrained UK safety watchdog, the Health and Safety Executive (HSE), as many as three-quarters of those workers are killed because of criminal breaches of the law. Put differently, the number of people criminally killed by their employer *every week* in the United Kingdom is roughly comparable to the number killed by interpersonal murder *every year*. Globally, there are many times more people killed by illness and injury at work and by the toxic environmental consequences of profit-making every year than are killed in wars and conflicts. And yet, studies of safety crimes are few and far between, and are dwarfed by the burgeoning literature in terrorism and political violence studies, or indeed the literature on war crimes.^{xxv}

Corporations cause a proliferation of harms that radically exceeds the capacity of individuals – except perhaps a (fictional) nefarious and ambitious super-villain.^{xxvi} Given this capacity for harm, the question of whether corporations can be conceptualised as evil is urgent. As a society we are increasingly dependent on corporations, they are becoming more and more capable of causing ever larger harms, and yet it seems less and less likely that they will be held accountable at law.^{xxvii}

Part of the reason why a narrative of corporations as evil is essential is that criminal law, whether national or international, is an expressive system of blaming – that is, criminal trials

make findings as to *guilt*.^{xxviii} Criminal law is a powerful moral discourse, communicating right and wrong, backed by legitimate sanctions of the state. A common argument against criminalising corporate wrongdoing is that criminal law is a toothless tiger, and corporations do not overly worry about the application of criminal law. On the contrary, there is a power in the label of crime – beyond the sanctions attached. This was shown in the Australian Royal Commission into Misconduct, Banking, Superannuation and Financial Services, where the banks did everything they could to avoid the label of criminal, much preferring to be regarded as immoral or incompetent.^{xxix} There is, accordingly, an expressive power in the label of criminal which corporations prefer to avoid. In fact, in his Chapter, Mihailis Diamantis argues strongly in favour of prosecutors using this expressive aspect of criminal law to stigmatize wrongdoing by corporations and to restate and protect society's basic norms. Criminal law communicates that some behaviour is categorically prohibited.^{xxx} Whilst imposing a finding of guilt on an offender expresses that the behaviour was wrong, the failure to criminalise corporate harms is also a message. That is, instead of harms being conceptualised as wrongs, they can be reduced to a cost-benefit analysis,^{xxxi} whereby a corporation will decide if it can afford to compensate those who are harmed, or worse, the cost of harms may simply be externalised.^{xxxii} Likewise, in their Chapter, Hui Chia and Jeannie Paterson emphasize the normative potential of the law, arguing that civil law also has an expressive function, with tort sending a message that the defendant wronged the plaintiff. Chia and Paterson lament the absence of negligence as a standard of product liability, arguing that the strict liability regime reduces harms to a cost-benefit analysis rather than a normative assertion that the production and distribution of dangerous products is reprehensible and will not be tolerated.

There are all too many arguments against corporations being held to account in criminal law. Much of the focus is on issues of mechanics – of how to impose existing criminal law doctrine that was developed around the archetypal legal subject, that is, the responsible human being, to corporations. In part, this is a movement away from quantitative models of wickedness (which focus on harm) to qualitative models (which focus on motive, intention and desires). Criminal law reflects and reinforces what Midgley has labelled a positive model of wickedness – the intentional or knowing infliction of evil.^{xxxiii} Whilst the criminal legal system claims to enshrine subjective blameworthiness as central to accounts of culpability,

the exceptions far outnumber the rule.^{xxxiv} Nevertheless, much of the focus of criminal law theory regarding corporate culpability is how best to attribute fault or *mens rea* to corporations.^{xxxv} How can we determine what a corporation knew or intended? In this collection different answers and techniques are proposed.^{xxxvi}

A precursor to dealing with the question of mechanics of how to apply criminal law to corporations is the question of whether and how corporations can be evil. Moral philosophy spends some time seeking to distinguish between the bad and the wicked.^{xxxvii} In contrast, criminal law tends to focus on the bad, rather than the wicked – that is, whether an accused is sufficiently blameworthy to justify the application of criminal sanctions. Indeed, wickedness can exceed criminal law categories.^{xxxviii} This issue may arise for corporate harms, which due to their sheer size, number and type, can exceed existing categories of harm recognised by the criminal legal system *and* the capacity of the criminal legal system to investigate or prosecute.^{xxxix} *Evil Corporations* aims to interrogate the question of whether corporations can be sufficiently blameworthy to justify the imposition of criminal sanctions. It does this by teasing out types of corporate harms and how they come about, and whether and how corporations can be blameworthy. It proffers a meaningful engagement with corporations as agents capable of making choices – whether good or bad.^{xl} Philosophy can assist with teasing out and thinking through the implications of choices and the application of different models of evil.

Evil Corporations is a result of a symposium held in December 2022 at the University of Technology Sydney (UTS), funded by the University of Technology Sydney and the Australian Research Council. I invited theorists and specialists from a range of different disciplines, including legal theorists, cultural critics, philosophers, criminal law experts and corporate law specialists, challenging them to think through ideas about corporate/group responsibility with a twist of wickedness. For the corporate and criminal law theorists, this required adding a twist of evil to their thinking. Moral philosophers were challenged to think through whether corporations could be moral agents and what this might mean. The symposium was fun, highly productive and constructive, with all invitees pushing the parameters of their work and providing feedback to each other. The resulting book has a theoretical depth and coherence that is – like the corporations itself – is more than the sum

of its individual parts. The chapters speak to each other but are not necessarily in agreement. Instead, the aim of the symposium was to start a conversation about different ways of thinking through questions of corporate culpability.

There are, accordingly, multiple definitions of evil within this collection, disagreement about whether corporations are inherently evil, how and why corporations harm, and some scepticism as to the label of evil. For example, in the opening chapter, James Martel asserts that the *raison d'être* of archism is death itself – which he regards as the definition of evil.^{xli} Many of the chapters make some reference to Hannah Arendt's idea of the banality of evil,^{xlii} whether to emphasize thoughtlessness, lack of care, the sheer ordinariness of corporate harms, and/or the ways in which bureaucracies make people cogs in administrative machinery and dehumanizes them. The book contributes to thinking through corporate responsibility with a particular resonance for legal conceptualisations and responses to corporate wrongdoing. A common theme in *Evil Corporations* is that of the vast harms caused by corporations, and the critique that these harms are framed as an acceptable cost of economic well-being. This then leads Timothy D Peters to ask whether these harms are an aberration, functioning in breach of law, or if they are simply an instance of corporate law 'working'.^{xliii} If nothing else, this theme highlights an urgent need to respond and re-imagine corporate responsibility.

THE STRUCTURE OF EVIL CORPORATIONS

Part A of *Evil Corporations* interrogates whether corporations are doomed to be evil. **James Martel** starts the collection with a continuation of his ideas from *Anarchist Prophets: Disappointing Vision and the Power of Collective Sight*, arguing that capitalism is the purest manifestation of what he labels *archism* – a parasitical system based on hierarchy and false projections of authority onto screens of God, nature or reason. Martel points out that archism is justified by a Hobbesian anarchic threat that in the absence of law, the state, and other archist institutions, we would be killing each other.^{xliv} Consistent with Fisher's assertion that it is easier to imagine the end of the world than the end of capitalism,^{xlv} Martel argues that archism is so pervasive that it does not have or need a name – we do not

see it as a choice, rather it is a given. In providing a name, Martel is emphasising that archism is a choice – and thus we can (and should) make different choices. This is particularly because for Martel, capitalism, and thus corporations, are always evil – ‘rotten to the core, perfectly violent and without redeeming features. Worse yet, it implies that it has a form of malice that is often disguised by blandishments, that it seeks only destruction and its own power over that of all others.’^{xlvi} For Martel, liberalism supplies capitalism with a benign face – but this is a false promise, enshrining and protecting hierarchy.

In contrast to Martel, **Luke Russell** argues that corporations can do evil but are not doomed to be evil. Russell adopts a psychologically thin account of evil that does not require malice or intent, instead placing harm at the centre of his definition of evil as a culpably wrong action that is ‘appropriately connected to an actual or possible extreme amount of harm.’^{xlvii} Russell draws upon philosophical arguments that groups of humans can function as agents, and thus corporations can be moral agents that are responsible in and of themselves for harms that they have caused. Many theorists have argued that corporations are inherently evil, including Martel’s claim that archism is inherently destructive, Tombs and Whyte’s assertion that corporations are criminal and should be abolished, and Glasbeek’s argument that corporations are a menace.^{xlviii} In contrast, Russell emphasises the philosophical distinction between evil actions and evil persons to argue against corporations as essentially evil, that is, that they are not ‘strongly and highly fixedly disposed to perform evil actions, a corporation that we should not hope to reform, but one that should be contained and isolated or destroyed.’^{xlix} In contrast, Russell offers some hope by arguing that corporations are more flexible in their disposition than human beings, and thus, can be reformed or changed. These arguments link to Comino’s concluding analysis in this collection that changes to culture are possible.

Stephanie Collins also offers an optimistic account of corporations that is highly original. Collins argues that corporations can be agents in their own right – a ‘corporation can have a vice that no role-bearers have, and a corporation can fail to have a vice that all role-bearers have.’¹ In keeping with her argument that corporations can be moral agents, she seeks to articulate the criteria of what it would mean to be a good or bad corporation. Collins draws upon a neo-Aristotelian framework to consider the telos of corporations. Picking up on

contemporary arguments about corporate purpose, Collins adopts an instrumental approach, arguing that the virtue or vice of a corporation should be evaluated by how well it serves human flourishing. That is, instead of regarding corporate flourishing as intrinsically valuable, we evaluate corporations as good or bad based on their contribution to human flourishing. The advantage of Collins' approach is also that it allows for corporate diversity, in terms of what corporations do and the purposes that they serve. We can then evaluate whether a specific (type of) corporation serves human flourishing (e.g. nursing homes versus mining companies) and also whether they have gone off-script from their original purpose.

Part B articulates some of the many harms by corporations, and contributes to arguments of how these harms come about, which is explored further in Part C. In Chapter Four, **Joanna Kyriakakis** makes a strong argument for the creation of an offence of ecocide in international criminal law. Kyriakakis notes that international criminal law is especially concerned with evil – indeed, Claudia Card built her model of evil around atrocities which form the basis of core international crimes.^{li} In *Corporations, Accountability and International Criminal Law: Industry and Atrocity*, Kyriakakis advocates the application of international criminal law to corporations,^{lii} and argument that she extends in this Chapter by exploring the role of corporations in ecocide: the mass destruction of the environment which may irreparably damage the social survival of groups. She argues that by failing to address ecocide, international law risks becoming complicit in the structural environmental violence of modern industrial societies. In keeping with Martel's insights, Kyriakakis argues that 'devastating environmental damage is an inherent product of modern industrial societies',^{liii} and that international criminal law is needed to intervene to shift the normative boundaries of what is acceptable in the pursuit of economic growth. An advantage of the international forum is that it may bypass weaker state regulations and impose an overall standard of care.

In Chapter Five, **Marc Trabsky** and **Jacinte Flore** continue with the idea of acceptable harms through an analysis of corporate responsibility for the opioid epidemic. Trabsky and Flore note that at least half a million people have died in the US due to the opioid epidemic since 1999. In *Death: New Trajectories of Law*, Trabsky argued that legal institutions have not only witnessed but have reified the economic value of death in the twenty-first century,^{liiv} an argument that is consistent with Martel's contention in Chapter One that capitalism is a

death cult. Trabsky and Flore argue that in the practice of developing, manufacturing and marketing drugs, pharmaceutical companies are 'always already entangled with an economisation of life and death'.^{lv} Rather than conceptualising death as a negative of biopolitics, Trabsky and Flore are at pains to stress that death is normalised as allowable by the state.

In Chapter Six, **Hui Chia** and **Jeannie Marie Paterson** continue the theme of allowable or acceptable harms through their analysis of Ethicon for the nasty harms that its pelvic mesh caused. Chia and Paterson argue that product liability regimes arose in response to outrage at injuries caused by unsafe products, but that it was difficult to prove knowledge or intention by the corporation. As a consequence, strict liability models were introduced to ease the burden on plaintiffs so that they could mount a case for compensation without proving corporations intended the harm. The intention of the scheme was that this would encourage corporations to make their products safer. A defence of a state-of-the-art or unforeseen risks is available – that is, corporations will not be liable if they can prove that the defect in their product could not have been discovered given the state of scientific and technical knowledge at the time the goods were supplied. Chia and Paterson point to pelvic mesh to highlight the perverse effect of the state-of-the-art defence – it can encourage corporations to neglect developing scientific knowledge about potential safety risks to improve their chances of relying on the defence. Rather than discouraging corporations from producing and distributing dangerous products, product liability regimes encourage corporations to regard injuries as a cost of doing business. As Chia and Paterson note, women are particularly negatively affected by this cost-benefit analysis because they are cheaper to compensate than men. Given the legislative regime, this cost-benefit analysis is completely rational, and horrific.

Olivia Dixon continues the idea of corporations undertaking a cost-benefit analysis with her focus on how location sharing data prioritises profit over privacy, security and physical safety. Chapter Seven reads almost as a dystopian fantasy that is increasingly becoming a reality, with price discrimination and undermining of physical safety. Dixon argues that part of the problem is that we, as consumers, thoughtlessly accept terms and conditions. But,

ultimately, she slates responsibility home to the state and legislation, which encourages a cost-benefit analysis.

Contributors to Part C meditate on the mechanics of evil corporations, that is, how harms come about. My chapter starts with the premise that evil corporations are a staple of the horror genre and interrogates how audiences recognise that those corporations are evil. The horror genre wallows in our worst fears and taboos. Although evil corporations in horror may inflict a proliferation of supernatural harms (such as a zombie apocalypse), the workings and reasons of evil corporations are all too understandable and recognisable. They cause harms for instrumental reasons (such as the pursuit of profit) and insulate themselves from any knowledge or responsibility for harms to values that we as a society hold dear. Horror films represent literally how corporations externalise harms through design and architecture. In horror, corporations are regarded as evil, not because they intend to cause harm to a particular person, but rather they pose a generalised threat to humans and the environment. Criminal law and philosophy need to update categories to recognise posing a generalised threat as a form of subjective culpability.

In Chapter Nine, **Timothy D Peters** considers the question of responsibility with his analysis of corporations and the way that they create distance between action and consequences. Peters argues that the exercise of corporate power is constitutively vicarious, that is, it is always exercised on behalf of another. This means that there is a structural irresponsibility at the core of the corporate form – no action is ever fully reducible to a particular agent or actor. Through an analysis of the role of office, Peters explores the way that employees can be involved in the wrongs of a corporation in a way that they would never defend as an individual. The corporation separates individuals from his or her actions and is thus constitutively irresponsible. Peters' argument that models of corporate responsibility are just an extension of the constitutive vicariousness of corporations also speaks to Part A, and the idea that corporations are inherently evil. Peters tentatively proposes that instilling a form of corporate obligation as a result of being part of the world may be a solution.

In Chapter Ten, **Lisa Siraganian** explores the intersection of individual and corporate responsibility through an analysis of HBO's *Succession* (2018-). Siraganian is particularly

interested in thinking through legal models of collective knowledge and wilful blindness, and how these are manifested in practice. Siraganian argues that whilst there is knowledge within the corporation of a culture of crime and cover-ups, only Tom and Greg have the 'office' of designated sin-eaters. Siraganian points to the way that they incorporate past wrongs of the corporations, and act as though they are impotent and it is something happening to them, when there are things that they could do. They are contaminated by, and rewarded for, their knowledge. Siraganian argues that far from an easy tallying up and apportioning of collective corporate knowledge, it is instead 'a complex and reflexive psychological, social, and political drama'.^{lvi}

In Chapter Eleven, **Liz Campbell** continues with the issues of corporate knowledge and individual responsibility with an analysis of the misuse of legal professional privilege. Campbell argues that evidence is important because it is needed to prove corporate wrongdoing, and yet corporations have a powerful and distinctive capacity to control information (also flagged by Elise Bant in her chapter), in terms of the structure of the corporation, the sheer volume of information and the mis/use of legal privilege. Legal professional privilege is one of many procedural protections that were developed to protect the rights, dignity and freedom of the ordinary citizen against the arbitrary power of the state. But how can and should these protections work for corporations, some of which may well be larger and/or have more power than the state?^{lvii} Campbell uses two case studies to highlight systemic use by corporations through (individual) lawyers of legal professional privilege to obscure the nature of corporate behaviour and block enforcement actions.

Part D concludes with tentative recommendations as to future engagement with corporations. **Mihailis E. Diamantis** critiques the tendency of many academics and prosecutors to use a sanitized law and economic language when describing corporate wrongdoing. Diamantis argues instead in favour of normative language. In keeping with arguments that he has developed elsewhere about branding miscreant corporations,^{lviii} Diamantis argues that prosecutors should use stigmatic language which would validate victims of corporate crime, stimulate public outrage and encourage or shame corporations to obey the law. He turns to the horror genre to excavate tools to overcome the usual obstacles for talking about corporate responsibility. Horror film 'portrays morally inert,

morally ambiguous, and morally ambivalent entities as evils that are to be condemned, feared, and resisted'. Zombies may not be moral agents, but films like 'Night of The Living Dead' leave no ambiguity about the stance we should adopt toward them.'^{lix} Prosecutors should start acting like corporate crime is evil to instil repugnance and disgust for harms inflicted by corporations in a cost-benefit analysis.

In Chapter 13, **Honni van Rijswijk** and I also turn to horror to interrogate corporate responsibility for past harms. Given the potential immortality of corporations, it is vital to think through corporate responsibility for past wrongs. We use the haunted house as a conceptual metaphor to explore the afterlives of slavery. Along with others, we argue that slavery was not incidental to corporations and capitalism, but instead is a key part of capitalism. *In re African-American Slave Descendants Litigation*,^{lx} the courts adopted a linear approach to time that foreclosed any arguments that the descendants of slaves were disadvantaged – instead holding that the harms were in the past and limited in time by the life-span of the victims who suffered directly under conditions of slavery. This belies the inter-generational trauma of slavery which affects the past, present and future – and the extent to which the legal system was imbricated in practices of slavery. It also fails to take into account the material benefits of slavery that form the foundations of corporations. We draw upon popular culture representations of the haunted house to consider what is required in response to past wrongs. A true accounting of the benefits and harms of slavery may seem to be immeasurable but denial is insufficient – the haunting will continue and worsen. We argue, at a minimum, corporations and the legal system must investigate their role, acknowledge past injustices and seek to compensate those afflicted by past wrongs.

In Chapter 14, **Elise Bant** builds on her arguments that corporations manifest their states of mind through their systems of conduct, policies and practices. Bant argues that corporations utilise systems of conduct to enable them to achieve their corporate purposes and this is the only way that corporations can engage purposefully with the real world. Bant applies her theory of system intentionality to the real-life example of banks charging fees for no services, which she argues was not due to omission or failure, but a choice by the banks manifested through systems, policies and practices. She then draws persuasively on Kafka's *The Trial*, to note that 'none of the Court's members, employees or agents actually

understands fully how the system operates.’ And yet, the Court is geared to operate, consistently and in a co-ordinated way to achieve its ends. This analysis dovetails in a nuanced way with some of the issues pointed to by Siraganian and Campbell in their Chapters.

In Chapter 15, **Rebecca Wallis** and **Simon Bronitt** also propose a system’s approach to corporations and corporate harms. Drawing on complex adaptive systems theories, they examine how corporations are structured and function across micro-, meso-, and macro-levels in ways that are both highly adaptive and highly resilient to change or intervention. A complex adaptive systems perspective has implications for the design of regulatory responses by providing a framework within which to identify and map key systemic drivers and risks of corporate misconduct at the level of individuals, departments, corporations and within the state and broader society. Rather than viewing corporations as ‘unnatural’ beings beyond redemption, the authors remain cautiously optimistic that a complex adaptive systems perspective can guide the further development of responsive regulation that can more effectively hold corporations responsible for the wrongs and harms they cause.

Vicky Comino concludes the collection with an exploration of how corporate culture can change for good. Comino notes that her arguments are consistent with Bant’s ideas about system intentionality as a way of understanding how regulators can and should regulate corporate culture, particularly if they wish to address the drivers of wrongdoing within corporations. Comino points to changes to the Commonwealth Bank of Australia’s governance, culture and accountability structures and practices under an enforceable undertaking with Australian Prudential Regulatory Authority. The focus of the regulator was not on formal policies, but on the instantiated, de facto, real policies and how they are embedded, audited and buttressed through practices throughout the organisation. Comino is cautiously optimistic of the capacity of regulators to achieve real change to corporate culture.

Evil Corporations highlights significant harms caused by corporations, ponders how these harms come about, and suggests ways to prevent and respond to corporate wrongdoing.

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ⁱ Douglas Litowitz, ‘Are Corporations Evil?’ (2004) 58 *University of Miami Law Review* 811.

ⁱⁱ See for example, Thomas Aquinas, *On Evil* (2003rd edn, Oxford University Press 1274); Brian Davies, ‘Introduction’ in Brian Davies (ed), *Thomas Aquinas: On Evil* (Oxford University Press 1274); Augustine, *The Confessions of St Augustine* (Edward Pusey tr, Collier Books 1961).

ⁱⁱⁱ Aristotle, *The Nicomachean Ethics* (J Thomson tr, Penguin 2004); Todd C Calder, ‘Is the Privation Theory of Evil Dead?’ (2007) 44 *American Philosophical Quarterly* 371; Mary Midgley, *Wickedness: A Philosophical Essay* (Routledge 2001).

^{iv} Susan Neiman, *Evil in Modern Thought* (Scribe 2002) 3.

^v Neiman (n 4), Ch 4.

^{vi} *ibid* 4.

^{vii} Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin 1994); Zygmunt Bauman, *Modernity and the Holocaust* (Polity 1989); Stanley Milgram, *Obedience to Authority* (Harper and Row 1974).

^{viii} John Hamm, ‘“High Crimes and Misdemeanours”: George W. Bush and the Sins of Abu Ghraib’ (2007) 3 *Crime Media Culture* 259; Luke Russell, ‘Evil-Revivalism versus Evil-Skepticism’ (2006) 40 *The Journal of value inquiry* 89; Richard Bernstein, *The Abuse of Evil: The Corruption of Politics and Religion since 9/11* (Wiley 2006).

^{ix} Phillip Cole, *The Myth of Evil* (Edinburgh University Press Ltd 2006).

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