List and Pettit on group agency and group responsibility

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Abstract

Criminal liability for corporations may seem quixotic insofar as corporations appear to neither have the same cognitive capacities as individuals, nor to be capable of acting except through the efforts of the individuals who constitute them. One way of clarifying the basis of corporate criminal liability is to consider whether and how corporations (and other groups) are genuine agents, capable of having attitudes and taking actions in ways that go beyond the attitudes and acts of their constituent members. In this brief essay, I consider the recent, ambitious and groundbreaking work by Christian List and Philip Pettit in this regard. I outline the major themes and positions taken, and critically discuss the connection they suggest between group agents and group responsibility.

Keywords: group agency, group responsibility, corporate criminal liability
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Sometimes people do things on their own, and sometimes they do things together. A person who makes a mess while acting on his own can typically be held responsible for it, either by blaming him or, more formally, by making him legally accountable for cleaning it up. But what about the messes that people create when they act together? Does it make sense to hold the group itself responsible, in a way that goes beyond holding the individuals responsible for his or her own particular contribution? How can a group be a subject of responsibility?

These questions appear to have a particular grip on academics interested in the possibility of criminal liability for groups as such, that is, criminal liability for the group regardless of any liability that individual group members might face. This is because, from a certain point of view, criminal liability for a group—for instance, for corporate malfeasance or, more controversially still, for state crimes—can look quixotic. Two features are crucial to this point of view: first, criminal liability is about answering for wrongdoing; and, second, the agents capable of wrongdoing are paradigmatically individuals, not groups. Taken together, the possibility of holding a group as such criminally liable might well come to seem perverse.

Legal theorists who find this view of group criminality compelling would do well to reconsider in light of Christian List and Philip Pettit’s ambitious and stimulating new book, Group Agency. In Group Agency, List and Pettit seek to loosen the grip of this view of group liability by challenging the thought that groups cannot be agents in their own right, and indeed, agents capable of just the kind of wrongdoing that the criminal law seeks to regulate. List and Pettit explicate the conditions under which groups of individual people can constitute genuine group agents—conditions describing the theoretical and practical rationality of group agents, over and above that of the individuals constituting them—and connect the fulfillment of those conditions, described in the first two thirds of the book, with group responsibility, discussed in the final third. Moreover, recognizing that groups can be agents is, they argue, both consistent with methodological individualism in the social sciences and a step toward appreciating the profound power that group agents—corporations, governments and other institutions—exert.

I propose to follow a similar trajectory in my comments here. After briefly recapitulating List and Pettit’s account of the conditions of group agency, I turn to exploring the degree to which these conditions bear on questions about whether, and when, it makes sense to hold corporations legally responsible for the things they—rather than the individuals out of which they are composed—do.

In light of the richness and significance of the book, I cannot hope to do justice to either the range of issues that List and Pettit consider, or the penetrating analysis they provide. I shall

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* My thanks to Bruce Chapman and participants at the conference on Corporate Personhood and Criminal Liability, held at the University of Toronto, Faculty of Law in May 2012, for comments on an earlier draft.

1 Christian List & Philip Pettit, Group Agency (2011). All page references are to this volume unless otherwise indicated.
instead limit my comments to a small set of concerns. With respect to List and Pettit’s account of
the conditions of group agency, I shall briefly consider the degree to which the desiderata List
and Pettit identify are equally necessary to rational group agency, as well as the possibility that a
group might satisfy those criteria only partially or sporadically. With respect to List and Pettit’s
account of responsibility and group agency, I shall focus on a trio of questions. First, should
legal regulation of group agents be restricted to those that are fit to be held responsible? Second,
if non-responsible group agents can be legally regulated, how politically and socially urgent is it
to establish the possibility of responsible group agents? And, finally, if group agents can be – as
List and Pettit provocatively suggest – persons, on what grounds can we nevertheless deny their
moral equality with individuals?

1. The possibility of group agency.

The account of group agency that List and Pettit develop is both novel and complex. Rather than
attempt to do full justice to it here, I sketch their position on a number of central points bearing
on the possibility of group agency, and raise a few questions along the way.

Is group agency mysterious? Perhaps one might be skeptical on this point. After all, groups act
only through the individuals who compose them; a “group” acts if, and only if, its properly
designated representative acts. Does this not suggest that any talk of “group” agency is inevitably
misleading or metaphorical? List and Pettit suggest not. Suppose, like much mainstream social
science, you are committed to methodological individualism—the view that the explanation of
all social phenomena should abjure appeal to “social forces other than those that derive from the
agency of individuals,” in the sense of “psychologically explicable responses [of individuals] to
one another and to their natural and social environment.”2 But, as List and Pettit reasonably point
out, it does not follow that social phenomena cannot be explained by group agents, or rely on the
proposition that “there really are group agents.” A computer may simply be a device with certain
electronic properties, but that does not mean that it cannot play chess, nor that we can usefully
interact with it as playing chess, with all the connotations of agency that go along with that.3 Just
as the computer qualifies as a “real” chess player, despite the fact that everything it does is
explicable in terms of electrical impulses, a group may qualify as a “real” agent, despite the fact
that everything it does is explicable in terms of the contributions of the individuals who make it
up. Thus, the view taken by List and Pettit is non-mysterious—it does not postulate any sui
generis collective “forces”—while also being anti-eliminativist in holding that propositions
referring to group agents need not be metaphorical, and are not readily reducible to propositions
referring only to individuals.

What does it take to be a group agent? List and Pettit suggest the following criterion for agent-
status: “an agent is a system that has representational and motivational states such that in
favorable conditions, within feasible limits, it acts for the satisfaction of its motivations
according to its representations.”4 Implicit in this notion of agency is a notion of rationality,

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2 Id. at 3.
3 Id. at 12.
4 Id. at 20.
insofar as what it takes for the representational and motivational states to be effectively action guiding is not only sensitivity to environmental cues, but also sensitivity to the agent’s other attitudes: for instance, an agent’s attitudes should be consistent with each other, both in the sense of logically coherent as well as instrumentally rational. Serious inconsistency in attitudes would undermine the action-guiding character of the agent’s attitudes. List and Pettit rely on this idea to distinguish action on the basis of a joint intention from group agency properly so-called. A group of individuals may jointly intend to accomplish some particular end (e.g., rescuing a floundering swimmer), while not evincing the requisite unified “system of belief and desire” that would underwrite treating the group as a continuing agent—that is, as an on-going concern that takes actions guided by its beliefs and desires. So although jointly intending some act may make a collection of individuals into a group, it does not make it into a group agent; for that, the group must support the ascription of a system of rationally interconnected attitudes.5

**Can groups be rational?** It is hard to quarrel with the notion that status as an agent depends on a basic level of rational coherence among the candidate entity’s attitudes. This need not present any particular conceptual problem on a view that treats the group agent as *sui generis*, but it becomes a more pressing issue for views, like List and Pettit’s, that endorse methodological individualism. In a nutshell, the problem is this: for the methodological individualist, the attitude of the group has to in some way be derived from the attitudes of the individual members. Yet, for the group to be an agent, its attitudes must be rationally coherent. How, then, to combine individual member attitudes—via what List and Pettit refer to as an “aggregation function”—in a way that preserves rational coherence among the higher-level group attitudes?

This turns out to be harder than it looks. Suppose, for instance, that A, B and C are members of a three judge panel adjudicating a tort claim, and that the success of the claim depends on finding that there was a duty and that it was breached. Now suppose that the judges have the following views:

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Under a majoritarian aggregation function, the panel believes that there was a duty and that it was breached, and yet also believes that there is no liability, a result that is clearly inconsistent with the legal rule the panel is ostensibly seeking to apply. The central theoretical problem for group agency is, accordingly, to describe aggregation functions that are consistent with the criteria for agent status.

**Aggregation functions.** List and Pettit go to some lengths to emphasize just how difficult and fragile group agency can be. Indeed, before explaining how agency-preserving aggregation functions are possible, List and Pettit first explain how they are *not* possible. In an analogy to

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5 See id. at 34 for discussion of the specific kind of joint intention “to become a group agent” that makes a mere group into a group agent.
Arrow’s impossibility theorem with respect to the aggregation of preferences, List and Pettit argue that there is no aggregation function that meets four plausible general criteria, what they refer to as “universal domain, collective rationality, anonymity, and systematicity.”  Roughly speaking, these conditions are that the aggregation function accommodate as inputs any possible individual profile of attitudes with respect to the items on the agenda; that the resultant outputs be both consistent and complete, in the sense of resolving any item on the agenda; that the relative weight accorded to an individual member’s attitudes should not depend on his or her identity; and that the group’s attitudes on any given proposition should depend only on the attitudes of the individual members toward that proposition, with the same kind of dependency exhibited across the agenda. If it is impossible for an aggregation function to jointly satisfy these four criteria, the question becomes which criterion to relax.

List and Pettit ultimately propose relaxing the systematicity requirement. As Bruce Chapman has noted, requiring both anonymity and systematicity means that the group’s attitude on any pair of propositions must be the same if the propositions have the same degree of support among the members, even if not from precisely the same individuals.  Relaxing systematicity, however, would allow for the possibility that the group’s attitude toward some items on the agenda could be made to depend on individual attitudes toward other items—for instance, in the relation of premises (subject to majoritarian voting, say) to conclusions (derived from the accepted premises, rather than from the views of individual members). This would be to adopt a type of “sequential priority procedure,” which, roughly speaking, aggregates individual attitudes on some items on the group’s agenda, but uses those attitudes—rather than the individual attitudes themselves—as decisive for other, subsequent, items on the agenda. An aggregation function that had the form of a sequential priority procedure could satisfy universal domain, collective rationality and anonymity, and to that degree preserve the possibility of genuine group agency.

Surprisingly, while List and Pettit are at pains to emphasize the importance of rational coherence to status as an agent, they have comparatively little to say about the salience of universal domain, anonymity and systematicity to agent status. Each of these criteria holds some appeal as a desideratum for an aggregation function—an aggregation function that can operate over any possible consistent set of inputs is obviously more robust than one that must exclude divergent opinions, for instance—and so are plausible as components of the impossibility theorem. But it is at least not obvious that demonstrating the impossibility of an aggregation function satisfying each of these constraints is the same as demonstrating the impossibility of an aggregation function sufficient for attributing group agency. Indeed, given that List and Pettit suggest that we should relax systematicity, these constraints—desirable as they may be for aggregation function generally—cannot all be conditions of group agency in the way that collective rationality is.

6 Id. at 50.
8 Group Agency at 56. It would also allow us to describe the group agent as sensitive to “the normative requirements of practical rationality”—that is, as sensitive to the logical force of prior commitments. See Bruce Chapman, Rational Association and Corporate Responsibility, in Lorenzo Sacconi, et al, eds., Corporate Social Responsibility and Corporate Governance (2011).
9 In subsequent chapters, they seem to suggest that some of these desiderata—universal domain and collective rationality—are required for “robust group rationality,” but even this leaves it unclear why the
Consider the case of universal domain: why shouldn’t we find a group agent that only has attitudes when the views of its constituent members are aligned in a certain way to be a genuine, albeit limited, agent? Similarly, surely it is sensible to describe the UN Security Council or the EU Council of Ministers—two groups that List and Pettit describe as frequently being forced to “suspend attitude,” thereby violating the completeness prong of collective rationality—as group agents, even if not optimally so.

Finally, consider anonymity. A “dictatorial” aggregation function that privileges the attitudes of one member over those of any of the others could satisfy the other criteria List and Pettit place on aggregation functions, at least insofar as that one individual’s attitudes are consistent and complete. A group organized along these lines would, to be sure, fail to be particularly democratic, and it would not be in a position to avail itself of one of the primary benefits of group organization, namely the ability to rely on the information and expertise of the individual members. But wouldn’t it for all that still be recognizable as a group agent? Indeed, they seem to concede just this point in acknowledging that a dictatorial aggregation function could have its place in certain types of hierarchically arranged groups, such as “the director of a company or the head of an organization.” But surely they do not mean to suggest that autocratically run institutions are for that reason not agents.

Perhaps ignoring anonymity as a constraint on agency would spoil the contrast between group and individual agents, insofar as dictatorially arranged groups are simply individual agents who have other individuals at their disposal. So perhaps if you want to draw a distinction between group agents and individuals, anonymity is a sensible constraint to have. It is not clear that this response is available to List and Pettit. After all, the argument is supposed to show that groups at least sometimes have what it takes to be agents, which suggests that the constraints on acceptable aggregation functions should reflect what we believe to be central to the concept of agency. How any particular agent is constituted is, from this point of view, secondary. Our question is what it takes for a group to be an agent, not what it takes for an agent to be a group. From this point of view, it is at least not clear why a group with a non-anonymous aggregation function—which other desiderata are relevant to the possibility of group agency, and if they are not, why they are relevant to admissible aggregation functions.

In a later chapter, List and Pettit defend universal domain by insisting that for the group’s attitudes to supervene on those of the individual members, it must be the case that the aggregation function satisfy universal domain, for “[u]nless this condition is met, the relation is not one of supervenience—that is, of necessary determination—but only one of contingent determination.” Group Agency at 67. This claim is questionable. To say that B facts supervene on A facts is to say that specifying all the A facts (e.g., facts about neurons, or individual attitudes, or the location of dots on a grid) necessarily specifies all the B facts (e.g., facts about mental states, or group attitudes, or the shapes formed by dots on a grid), but not vice versa. But this would appear to be consistent with allowing that some specifications of A facts are undefined with respect to B facts—some collections of dots define no shape at all, some neuronal states result in no recognizable mental state, and perhaps some collections of individual attitude profiles result in no definite group attitude.

Id. at 53.

Id. at 53.
would allow the group’s attitudes to be systematically rational—should nonetheless not be considered an agent. It might not be a genuine group agent, but it’s not exactly an individual agent, either. More importantly, that it is (some kind of) agent is enough to ground genuine responsibility for what the group does, the conclusion List and Pettit seek to establish for group agents in the latter chapters of Group Agency.

A related worry is that rational coherence comes in degrees, and it obviously cannot be the case that absolute coherence in attitudes is required for an entity to qualify as an agent. (There would be very few agents of any kind, were that the case.) How often would, say, a majoritarian aggregation function result in rational incoherence in a group’s attitudes? There would seem to be no general answer to this question, as it would presumably depend on the kind of group in question, the character of the agenda it sets itself, variation in member dispositions, and so on. Could a group with a majoritarian aggregation function, in the specific context in which it operates, avoid incoherence often enough to make it reasonable to treat it as an agent, processing environmental cues and responding appropriately (even if not perfectly)? If that is conceivable, then the significance of the impossibility result for group agency as such might be less, even if indisputably significant for group agency of a certain level of robustness.

In short, without taking issue with List and Pettit’s impossibility result, or with their proposal to avoid it by relaxing systematicity, it seems that one might nonetheless question the degree to which the constraints on aggregation that they identify bear on the possibility of group agency as such. The consistency prong of collective rationality might not be too controversial. But the centrality of the other constraints on aggregation functions to agency is much less clear. If there is no connection, then this calls into question the salience of the impossibility result to the possibility of group agency. The impossibility result would just show how hard it is for groups to be very good agents—which is, of course, quite different from showing how hard it is for them to be agents at all. There may well be an account, grounded in a conception of agency, that would justify the choice of constraints on aggregation functions that List and Pettit identify, but such an account appears to largely be missing from Group Agency.

Supervenience. List and Pettit draw a further set of conclusions from their discussion of aggregation functions. If group agency depends on “robust group rationality,” and if it turns out that such rationality can only be met by an aggregation function that follows some form of sequential priority procedure, then, List and Pettit argue, it follows that group attitudes can only depend on the attitudes of individual group members in a holistic, rather than proposition-wise manner. List and Pettit thus characterize the relation between individual and group attitudes as one of “holistic supervenience,” viz. that “[t]he set of group attitudes across propositions is determined by the individual sets of attitudes across these propositions,” rather than by individual attitudes on each particular proposition.13 As holistically supervenient, group attitudes have some level of independence from the individual attitudes that determine them. Consider again the three judge panel: operating under a premise-based procedure, the panel will (by majority vote) accept both that there was a duty and a violation of it, and it will conclude on the bases of these two judgments that the defendant is liable. The panel comes to this conclusion despite the fact that the proposition that the defendant is liable is in fact rejected by a majority of

13 Id. at 69.
the panel members. The group thus has a “mind of its own,” in that the attitudes of the individual member on liability are both insufficient and unnecessary in determining the group’s attitude on that item. But there is nothing mysterious about the group mind: the group’s conclusion is determined in a straightforward way by the attitudes of the individual judges, not some further entity over and above the individuals.

After defending, as they put it, the “logical possibility” of group agents, List and Pettit go on to consider three further desiderata that we might reasonably want group agents to meet. Without going into any detail on these topics, List and Pettit consider how groups can organize themselves to take advantage of three epistemic gains from democratizing, decomposing and decentralizing decision making; difficulties in properly incentivizing individual group members to be truthful about their own attitudes and preferences, and to cooperate with group decisions with which they individually may not accept; and strategies for ensuring that groups—particularly the state—preserve spheres of control (understood in a fairly demanding sense) for their individual constituents. Although these chapters are worthy of further exploration, I shall move directly to the connections List and Pettit draw between group agency and group responsibility.

2. **Group agency and group responsibility.**

In this section, I briefly sketch List and Pettit’s conception of group responsibility, before turning to consider three concerns one might have about a view of this sort. First, conceiving of groups as responsible agents may be under-inclusive insofar as some groups may be agents capable of doing things that it would be desirable to subject to legal regulation, yet fail to be the more sophisticated kind of agent that appropriately be the object of responsibility. Second, the thought that legal regulation requires moral responsibility—rather than some thinner notion of accountability—may be a more substantive, and controversial, premise than List and Pettit acknowledge. Finally, I consider their provocative suggestion that some group agents, at least, should be considered persons, albeit only persons of a second-class stature.

**Are group agents fit to be held responsible?** Why should someone interested in group responsibility be at all interested in group agency? There is, after all, a sense of responsibility according to which A is responsible for what B does insofar as A is made to clean up after B’s messes. Parents may, in this sense, be responsible (or “accountable,” to use List and Pettit’s terminology) for what their children do, and principals for their agent’s torts. Presumably, groups, such as corporations, can be made accountable for various kinds of harms regardless of whether they are or are not agents. The impetus to look at agency comes, rather, when we shift our attention to a more overtly moralistic conception of responsibility, a conception according to which holding someone responsible involves treating them as appropriately subject to praise or blame. Whether groups can be agents matters to this conception of responsibility insofar as we only treat entities as subject to praise or blame insofar as it makes sense to think of them as agents. If, for instance, we determine that the cause of some harm is an infant or insane, or if the conduct in question was a muscular reflex or a seizure, this can be expected to affect our judgments of responsibility, legal or otherwise.
The thought that groups, as such, ought not be held responsible in this latter sense frequently stems from the observation that groups act only through their individual members. So when all the relevant individual members have been praised or blamed for their contributions, there is no other source of merit or demerit left unacknowledged. This line of thought seems consistent with, and perhaps even required by, methodological individualism: social phenomena are brought about by individuals, and so praise or blame for those phenomena travel down to the individual contributors. By way of illustration, consider the facts of two landmark American cases: first, New York Central & Hudson River Railroad Co. v. United States, in which the U.S. Supreme Court found the defendant railroad in violation of the Elkins Act, which mandated set rates for shipping goods, when one of its employees—acting without authorization from the railroad’s board of directors or stockholders—provided illegal rebates to some of the railroad’s clients.14 Second, in United States v. Park, the Supreme Court upheld the conviction of a corporation’s CEO for food safety violations in the corporation’s warehouses, despite the CEO’s lack of personal involvement in the unsanitary conditions, and his delegation of responsibility for responding to the government’s warnings to a subordinate.15 In both of these cases, one might well ask: what is left of the offenses once we subtract the contributions made by the conduct of the corporations’ employees? A plausible answer would be: nothing. Why, then, should the corporation (or the corporation’s chief executive) be responsible for them?

The court arrived at a contrary conclusion in both cases, and it was correct to do so, or so List and Pettit would argue. They claim that group agents are fit to be held responsible in their own right, and that there may also be good reason to in fact do so. Responsibility—not simply accountability—is appropriate because group agents, like individual agents, face normatively significant choices that they are capable of understanding and evaluating, and over which they exercise some degree of control. While a group can only act through its individual members, who directly cause the relevant harm, the group itself bears responsibility for the control it has over the acts of its agents—for, as List and Pettit put it, “ensuring that one or more of its members perform in the relevant manner.”16 Holding the group agent responsible not only prevents individuals from (opportunistically or otherwise) evading responsibility by acting in a group format, but also recognizes the group’s status as an independent agent—one with attitudes and preferences that do not map onto those of any of its constituent members.

Non-responsible group agents. List and Pettit are careful to point out that responsibility does not simply follow from agency. Simple robots, small children and animals are agents but are not for that reason responsible for the things they do. Among the other conditions that are required, by List and Pettit’s lights, is a kind of cognitive robustness: the agent must “be able to form judgments on propositions bearing on the relative value of the options it faces … and it must be able to access the evidence on related matters.”17 In short, not all groups are agents, and of those that are, only some are responsible agents. From a policy-maker’s point of view, then, an initial

14 212 U.S. 481 (1909)
15 421 U.S. 658 (1975)
16 Group Agency at 163.
17 Id. 158.
concern is whether there are groups, or even group agents, which fail to have these capacities yet which are nevertheless capable of acts that merit praise or blame.

It is certainly true that most of the group agents with which we are most concerned in the criminal law—corporations and conspiracies, notably—would seem to have the wherewithal to evaluate what they ought to do in any given situation. But what is perhaps less clear is that group agents couldn’t be formed that might lack this kind of robustness by being precluded from forming judgments on the relevant normative judgments. Such an agent would thus be in the same boat as simple robots and small children—capable of wreaking havoc, but not capable of being held responsible. Indeed, it is arguable that the three-judge panel we considered earlier might fit this mold. Suppose the panel finds liability in one case on the basis of a duty plus violation, but in a subsequent case finds no violation despite indistinguishable facts. Could we blame the panel for not treating like cases alike? Certainly we could—if the principle that like cases should be treated alike is itself a doctrinal rule, akin to duty plus violation equals liability, that the panel is expected to apply. But this principle need not be an enforceable legal rule, even if it characterizes the pattern of outputs the panel is set up to produce. After all, the panel’s thinking, unlike that of the judges who make it up, may be limited to taking votes on the doctrinally relevant premises, and mechanically deriving a legal conclusion. Yet, one might think, a panel that flouts settled precedent in this way should not be exempt from blame simply because the application of precedent to the present case is not itself an explicit item on the panel’s agenda.¹⁸

Are there group agents who fit this description and—unlike the judicial panel—might nonetheless be desirable objects of responsibility? Corporations, with which List and Pettit seem principally concerned, plausibly must have the cognitive wherewithal to understand and evaluate normative propositions, i.e., to answer the “what should we do?” question. In any case, as they point out, corporations could in principle be legally required to have the capacity to engage a normatively robust agenda. Corporations, though, are not the only group agents with which we might be concerned. Moreover, even in the case of corporations, it would surely be perverse to block liability on the grounds that, by illegally restricting the scope of its agenda to exclude consideration of potentially inconvenient propositions, a group failed to meet the criteria of responsible agency, and so, while it could be sanctioned violating the corporate structuring regulation, it could not be held responsible for the harm it creates as a consequence.

What would be examples of group agents that are, for one reason or another, unable to evaluate the value or rightness, of its proposed actions, and which we might nonetheless want to subject to praise or blame? Perhaps extremely regimented, hierarchically arranged groups (e.g., military units) might fit this mold. A military unit might be set up such that when certain conditions are fulfilled—a directive is issued, and a triggering condition arises—it springs into action forthwith. Or suppose that a number of individuals discuss the possibility of trafficking in drugs, and agree

¹⁸ List and Pettit suggest in a footnote that “[w]hen we treat a group agent as fit to be held responsible … we automatically assume that its attitudes range over a relatively rich agenda,” and in particular, an agenda that is suitably rich to encompass principles like that of treating like cases alike. See id. at 225, n. 109. The concern I am raising is that the connection between fitness to be held responsible and robustness of agenda is perhaps not quite so direct.
that once the conspiracy is up and running, they will—as a group—no longer entertain discussion about whether to continue in the endeavor. The individuals involved may surely be held responsible for agreeing to such a course of action in the first place, as well as for any crimes they commit in furtherance of it. But, one might think, the cartel itself may also be held responsible for those crimes, despite the fact that, once constituted, it cannot form judgments on what is, for it, the most salient of normative propositions. Perhaps these are group agents where occupying the role of a member has such an overwhelming exclusionary impact on the individuals’ normally functioning evaluative capacities that the resulting group becomes a simple, rather than a responsible, agent. The only option in these sorts of cases would seem to be to hold the individual enactors responsible, whenever possible. Yet as List and Pettit point out, this may not be an available avenue in any given case, insofar as group attitudes supervene on individual attitudes in only a holistic, rather than retail, manner.

**Accountability and responsibility.** As I have noted, List and Pettit’s discussion of group responsibility is concerned with whether group agents may be appropriate targets of praise or blame, and they contrast this sense of responsibility with what they call accountability, the identification of the “agent as the one who carries the can, the one who occupies the desk where the buck stops.” And they acknowledge that it is easier to justify holding someone accountable than it is to justify holding someone responsible. Agency, as we have seen, is necessary, although not sufficient, for responsibility. Is there a similar relation between agency and accountability?

List and Pettit do not consider this question. This oversight is surprising, given their clear concern about the potential of group agents—and corporations, in particular—to dominate the lives of their constituent members and to set back the interests of non-members. List and Pettit claim that failure “to recognize the reality of group agents” can lead analysts to “look right through the organizational structures that scaffold group agency,” and allow us “to live in an illusory world in which the comforting mantras of individualist thought make corporate power invisible.” Groups, and particularly large business corporations, plausibly do wield significant social and political power, and it is probably not unreasonable to believe, with List and Pettit, that we should be concerned that this power be subject to effective oversight to ensure that the rights and well-being of third parties are properly taken into account. One way to do this is by realizing that at least some groups are not just agents but responsible agents, and so can be made responsible for the consequences of their actions, for instance through criminal liability. Another way might be to give up on responsibility as such, and be satisfied with simply holding corporations and other group agents accountable. Taking this tack might make it harder to conceive of criminal liability for corporation as a form of blame, but it might also make it easier to defend, insofar as whether or not a group is an agent at all—much less a responsible one—might simply be beside the point for purposes of accountability.

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19 As *Pinkerton* doctrine, which allows individuals to be held liable for the foreseeable crimes of their co-conspirators that are performed in furtherance of the conspiracy, even when the individual defendant had no involvement in the planning or commission of those acts, might be taken to suggest. See *Pinkerton v. United States*, 328 U.S. 640 (1946).

20 *Group Agency* at 154.

21 *Id.* at 185.
Let us return for a moment to List and Pettit’s impossibility theorem. In their discussion of ways around the impossibility result, List and Pettit acknowledge that a “dictatorship”—in which the group’s attitudes are determined by the attitude of a single privileged group member—could satisfy universal domain, collective rationality and systematicity, if we are prepared to relax anonymity. They reject this way around the impossibility theorem on the grounds that this kind of aggregation function presents merely a “degenerate” form of group agency, as “just an extension of that individual’s agency rather than as a group agent proper.”22 This may be plausible as a characterization of the nature of a dictatorially run group agency, but it is much less clear what lessons we should draw from it about a dictatorially run group’s status as the subject of regulation, including the possibility of serious sanctions. Suppose corporation C is run in a dictatorial manner. This would presumably mean that C is not genuinely a group agent, and so a fortiori not a responsible group agent. Of course, we might still hold the privileged individual—C’s founder, let us say—personally responsible for any shenanigans C engages in. But, by List and Pettit’s lights, we cannot reasonably hold C itself responsible. (Why would we want to hold C accountable, given that we can hold C’s founder responsible? Perhaps C’s assets are greater, or perhaps it is in virtue of incorporating as C that the founder is able to act as he does, and so we might have reason to incapacitate even degenerate group agents like C.)

Should the law care about this result? Or, somewhat less obliquely, should we care about this result when figuring out what formal mechanisms to use in keeping tabs on C? Perhaps not. Even if we cannot hold C responsible, we may still be able to hold C accountable. Is there a reason in principle why the law cannot go after C’s assets in response to malfeasance on the part of C’s dictatorial director? Perhaps, functionally speaking, that’s the really important conclusion: perhaps that is what it takes to ensure that we do not “look right through” corporate power. For purposes of regulating corporate power, what does a finding of fitness to be held responsible do that a finding of fitness to be held accountable does not? If the answer is “nothing,” then this would appear to call into question whether List and Pettit’s conception of group agency and group responsibility, sophisticated as it is, does much work for people who are interested—as they evidently are—in keeping tabs on corporate malfeasance.

One way of resisting this conclusion would be to draw a distinction between criminal liability and other forms of legal regulation of corporations. Perhaps criminal punishment, unlike other forms of legal sanction, requires more than just accountability, and in fact requires just the kind of blameworthiness that accompanies responsibility. Perhaps it requires that the object of punishment be a responsible agent, and that the punishment be predicated on a prior wrong committed by that agent. If so, then while group agency and group responsibility might not figure in other forms of legal regulation, a group’s status as a responsible agent would still be decisive for attempts to impose criminal punishment. To be fair, List and Pettit at least hint at a line of thought along these lines, when they discuss retributivist theories of punishment in connection with their claim that groups are fit to be held responsible.23 But more work would have to be done to show that a distinction between retributively motivated punishment and

22 Id. at 59.
23 Id. at 156.
instrumentally motivated sanction is a distinction that matters to the legal regulation of corporate action.24

I note that whatever the appeal of such a view of the criminal law more generally, as a doctrinal matter it would appear to face something of an uphill battle in the corporate context. Suppose that E is an employee of C, and that while acting within the scope of her employment, she negligently fails to take a required safety precaution, resulting in an environmental catastrophe. The fact that C is dictatorially run—implying that E has no input on policy—would not block criminal liability for C under existing law.25 Within some broad margins, how C is run has little bearing on C’s availability as a legitimate target of punishment under the criminal law. Bluntly put, the question of whether C is arranged so as to enable genuine group agency is not a question that corporate criminal law appears to be terrifically interested in. So even if the law generally reserves criminal punishment for responsible agents, it is arguably less inclined to cavil about the point in the corporate context.26

**Group personality.** As we have seen, List and Pettit move from relatively minimal characterizations of groups to progressively more robust characterizations: as mere collections, as jointly intended endeavors, as agents proper, and as responsible agents capable of making normative judgments. It doesn’t stop there, however. In a provocative penultimate chapter, List and Pettit go further and suggest that it makes sense to personify responsible group agents. Unsurprisingly, they reject the Cartesian view of personhood as resting on the consciousness of the thinking subject in favor of the more contemporary view of personhood as consisting in an entity’s ability to function in specified ways—notably, in being able to enter into, and respect, the norms of an interpersonal system of obligations in which the parties are recognized as having the capacity to make claims on each other.27 Additionally, while fitness to be held responsible requires the capacity to form judgments about what to do, rather than simply carrying out some pre-programmed script, personhood requires something still more demanding. Personhood, according to List and Pettit, requires sufficient reflexive awareness to engage in meaningful self-regulation by detaching from the first-person perspective and evaluating impersonally the consistency of one’s beliefs or preferences, or assessing the likely strength of one’s resolve. (pp.176–77) Insofar as group agents have this capacity—which they in principle may—then, by List and Pettit’s lights, they would qualify as persons. Yet, despite potentially being persons, group agents should not, List and Pettit insist, receive equal concern as individual persons. Individual well-being is, they claim, the sole metric of value—something is good only insofar as

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24 I discuss this issue in “Punishment and Permissibility in the Criminal Law,” forthcoming in *Law and Philosophy.*

25 See section 22.1 of the Criminal Code of Canada, establishing organization liability based on the negligence of its employees. Other jurisdictions take a broader view of organizational liability; see *Commonwealth v. Beneficial Finance Co.*, 275 N.E. 2d 33 (Mass. 1971) (rejecting the view that an employee needs to be a “high managerial agent” to ground corporate criminal liability, and holding that the employee only needs to have had “enough authority and responsibility to act for and in behalf of the corporation in handling the particular corporate business, operation or project in which he was engaged at the time he committed the criminal act.”)

26 And perhaps even less so in other forms of group criminality, most notably the law of conspiracy.

27 *Id.* at 173.
it is good for an individual sentient being, a view that they dub normative individualism. Indeed, although groups may be persons, not only are such persons not entitled to equal standing, but group persons should in fact be subject to particular scrutiny and regulation, on account of the significant power groups wield in contemporary society.\textsuperscript{28}

I must confess to some perplexity at this conclusion. Are there principled reasons why an entity that can act, can make meaningful choices and be held answerable for them, has the capacity to respect the claims of others as well as advance claims of its own, and has sufficient higher-order functioning—what we might well, in the individual case, refer to as self-consciousness—not be entitled to equal respect and concern as all other entities satisfying those criteria, and indeed count as a fount of value in its own right? Some individuals might predictably be stronger than others; yet this would seem a strange basis to deny them equal standing. It might, instead, be a basis to structure law and institutions in ways that ensure their greater physical strength could not be abusively inflicted on others, even while acknowledging their moral equality. The thought that group agents should have equal standing with individual agents may seem, I admit, to be a strange and radical conclusion, but it seems to be the direction that List and Pettit’s argument seems to draw us toward. What explains List and Pettit’s (widely shared, I would assume) reluctance to go so far, and to insist on second-class status for group persons?

One possibility is that group agents, unlike individuals, are frequently, perhaps even typically, created to achieve specific ends.\textsuperscript{29} They are, in that respect, instrumental for individual agents, in a way that individual agents are not instrumental for any others. In Kantian language, individuals are ends-in-themselves and not to be treated solely as a means. In contrast, group agents, such as corporations, are generally not ends-in-themselves, and are frequently created precisely because they are a useful way of attaining some desired end. Perhaps, then, even if group agents are able to reflexively self-regulate, and to form and respect legal and other obligations with others, they may still have no claim to equal standing because they are not fully persons; and they are not fully persons because, despite their many other impressive achievements, we are not prepared to recognize them as independent sources of value.\textsuperscript{30} This line of thought—which seeks to explain

\textsuperscript{28} Id. at 182ff..

\textsuperscript{29} To be fair, List and Pettit point out that individuals “create and organize group agents.” Id. at 181. They go on to claim that “[o]n standard accounts,” it is only individuals who have a say in how to set up society’s basic structure, and that individuals “can certainly be expected to agree to less than equal status for the corporate bodies they construct.” Id. Yet standard accounts presumably exclude groups because the view that groups are persons in their own right is a novel and controversial claim, not that mainstream political theory has considered and rejected the inclusion of group agents in setting the basic terms of social cooperation. So it can hardly count against their inclusion in deliberation about the basic structure that standard theory does not contemplate including them.

\textsuperscript{30} Can a view along these lines explain the impermissibility of creating a human being purely as a resource for others—say, as an organ farm, or a slave—even if the relevant community disavows any interest in recognizing the human as a person? Treating Kantian non-instrumentality as criterial for personhood makes this difficult, insofar as this makes non-instrumentality into a description of how we are prepared to treat some class of entities rather than as a commandment applying to that class of entities. On the other hand, treating non-instrumentality as a commandment requires an independent specification of the class of entities to which it applies, and it then becomes difficult to explain why it is permissible to create group agents, such as corporations, that plausibly satisfy all the applicable criteria while also
normative individualism by appeal to an underlying conception of personhood, rather than
treating them as independent commitments—would of course need much more unpacking to go
beyond being merely suggestive. Whether List and Pettit would accept the direction in which it
points, I cannot say.

denying them equal standing in the kingdom of ends. On this view, if we are unprepared to grant such
entities equal standing, then it would not be permissible to create them. One way out of this dilemma is to
bite the speciest bullet, and refuse to provide criteria for personhood other than membership in the
species of *homo sapiens*. This approach, however, makes the concept of personhood explanatorily inert,
in that to say that you are a person/member of *homo sapiens* just is to say that it is impermissible to treat
you in certain ways and/or are an independent source of value, rather than to provide an explanation for
why that might be so. My thanks to Meir Dan-Cohen for discussion of this point.