

Kicking Bodies and Damning Souls: The Danger of Harming “Innocent” Individuals While Punishing “Delinquent” States

Toni Erskine

The problem with trying to punish an institution that is judged to be “delinquent” – whether a “rogue state,” the United Nations (UN), Shell Oil, or the U.S. Army – might be understood as one of responding to an entity that (to invoke Edward, First Baron Thurlow’s eighteenth-century account of the corporation) “has no soul to be damned and no body to be kicked.”¹ Perhaps this seems a fairly obvious point. After all, even if one can draw some carefully qualified analogies between individual human actors and institutions (as I attempt to do in the first part of this chapter), the two types of entity are different in important ways. One might thereby conclude that the corporeal – and, depending on one’s beliefs, even the spiritual – nature of individual human actors renders them vulnerable to forms of punitive harm to which institutions, in the sense of formal organizations, are simply impervious. Alternatively, one might maintain that such an observation has little relevance when we are talking about “delinquent” institutions in international relations. We do not, one might argue, need to be able to anthropomorphize formal organizations to

This argument was first presented at a panel on “Responding to ‘Delinquent’ Institutions in International Relations” at the International Studies Association Annual Convention in San Diego, California, March 22–25, 2006, and at “No Soul to be Damned, No Body to be Kicked: Responding to ‘Delinquent’ Institutions in International Relations,” the 4th Workshop of the British Academy Network on Ethics, Institutions and International Relations, Aberystwyth University, July 2007. I am grateful to Richard Vernon and Tracy Isaacs for providing me with the opportunity to return to it, and for organizing such a stimulating workshop in London, Ontario, in 2009. I am also grateful to the participants of both workshops for their valuable comments. A version of this chapter was previously published in *Ethics & International Affairs* 24, no. 3 (2010), 261–85.

¹ Quoted in John C. Coffee, Jr., “No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment,” *Michigan Law Review*, 79 (1981): 386–460 (p. 386).

be able to punish them. Indeed, we frequently justify actions toward states, multinational corporations, and intergovernmental organizations in terms of punishment, and these actions often serve successful deterrent, retributive, and even rehabilitative functions.

In this chapter, I want to take a path somewhere between these two responses to the idea of punishing institutions. The distinction between individual human actors and corporations stressed in Baron Thurlow's statement is, indeed, a fairly straightforward one. Nevertheless, it is also a distinction with implications that are largely ignored when we make calls to punish institutions. This distinction does not preclude the possibility of punishment at the level of the institution, but it does point to significant conceptual and practical complexities in how we can coherently respond to formal organizations that are seen to fall foul of their moral responsibilities in international relations.

I have argued elsewhere that institutions – such as states, the UN, and multinational corporations – can be moral agents, and therefore bearers of duties.² In negotiating the often controversial step from individual to institutional moral agency, I have asked when (if ever) such a move is appropriate. I have also asked what the practical implications of this step are for confronting ethical issues in international relations. In exploring these questions, I have suggested that identifying both the internal features that allow an institution to qualify as a moral agent and the external conditions that are conducive to its discharging particular duties are critical endeavors. Only then can we consider to which bodies it makes sense to distribute duties in world politics and how blame might be fairly apportioned if these moral responsibilities are unmet.³ This chapter begins by surveying the terrain of this argument – an argument with which I feel fairly confident, despite its arguably radical bent – and then turns to a proposition that, for me, elicits both hesitation and worry: that we can punish institutions for abrogating their moral responsibilities.

² Erskine, "Assigning Responsibilities to Institutional Moral Agents: The Case of States and 'Quasi-States,'" *Ethics & International Affairs* 15, no. 2 (2001), reprinted in *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations*, ed. T. Erskine (New York and Basingstoke: Palgrave Macmillan, 2003), 19–40; Erskine, "'Blood on the UN's Hands'? Assigning Duties and Apportioning Blame to an Intergovernmental Organisation," *Global Society* 18, no. 1 (2004), 21–42; and Erskine, "Locating Responsibility: The Problem of Moral Agency in International Relations," *The Oxford Handbook of International Relations*, ed. Christian Reus-Smit and Duncan Snidal (Oxford: Oxford University Press, 2008), 699–707.

³ I use the terms "moral responsibilities," "duties," and "obligations" interchangeably for the purposes of this chapter.

Even more daunting than determining which institutions in international relations can be assigned responsibilities and burdened with blame (and in what circumstances) is the task of responding to the “delinquent” institution once it has been blamed for a particular act or omission. Especially problematic is judging how (and if) an institution can be “punished” in a way that does not punish its constituents as individuals. The central aims of this chapter are, first, to explain why it makes sense, in the context of certain acts and omissions, to blame an organization at the corporate level for harm or wrongdoing, and, second, to highlight the grave difficulties in turning to punishment as an appropriate response to such institutional delinquency. These difficulties are highlighted by exploring the repercussions for arguably “innocent” individual human constituents when the “delinquent” state is the intended object of punishment.⁴

This chapter is divided into four sections. In the first section, I outline what I will call a “model of institutional moral agency,” which not only attempts to define criteria that a collectivity, or group, must meet to qualify as a moral agent but also aims to define those circumstances in which an institutional moral agent can be expected to discharge specific duties. The purpose of this section is to establish why it makes sense, conceptually, to talk about blame and punishment vis-à-vis certain collectivities, even if the attempt to introduce punishment in practice is accompanied by a plethora of difficulties. In the subsequent section, I draw on this model of institutional moral agency to clarify what I mean by a “delinquent” institution. The third section contains a preliminary discussion of problems involved in attempting to punish delinquent institutions. Specifically, I address three types of concern: “guilt by association,” “misdirected harm,” and “overspill.” In the fourth section, I illustrate these problems by turning to the danger of harming “innocent” individuals while ostensibly punishing “delinquent” states through organized violence. To conclude, I offer some points for future development on the following themes: the relative culpability of individual members of delinquent states that have democratic versus nondemocratic decision-making

⁴ This chapter represents an initial step in extending my examination of institutional moral responsibility and blame to questions of punishment. As such, it seeks to provide an account of some of the problems involved in taking this further step and to preface what will be a more detailed examination of attempts to punish the state (and other institutional agents) by means of extracting reparations, imposing sanctions, and resorting to military intervention. This broader study forms the final section of a monograph titled *Who Is Responsible? Institutional Moral Agency and International Relations* (in progress).

structures; and the logic of nondistributive, as opposed to distributive, forms of punishment in response to delinquent institutions.

A MODEL OF INSTITUTIONAL MORAL AGENCY

In international politics, assertions of moral responsibility are commonplace.⁵ These assertions take two forms: claims of prospective moral responsibility, in which *ex ante* judgments are made regarding tasks that an agent ought to perform given certain conditions and (necessarily related) statements of retrospective responsibility, involving *ex post facto* assessments of a particular event or set of circumstances for which an agent's acts or omissions are such that the agent is deemed deserving of moral praise or blame. When confronted with the possibility of crises, whether in the form of famine, genocide, terrorist attacks, or environmental harm, politicians, policy makers, and people on the street speak of duties to avert or mitigate disaster. In the wake of such crises, we demand to know who should have acted but did not or who should have responded more quickly, more efficiently, or more robustly. We point fingers and apportion blame. We frequently also demand that someone – or something – be punished.

The important detail that is often neglected, however, is that any meaningful assertion of moral responsibility (whether prospective or retrospective) requires that those who are called on to uphold duties, and those who are held to account for evading them, must be moral agents – entities that, by definition, possess capacities to contemplate, recognize the significance of, and ultimately execute different courses of action in the first place. Divorcing difficult questions of moral agency from those assertions of moral responsibility regularly voiced in international relations variously results in incoherent policy making, the effective evasion of duties despite nominal calls to action, the creation of “scapegoats,” and, perhaps most relevant to the current discussion, the tendency for punishment to be tenuously justified and carelessly directed.

We understand specifically *moral* agency first and foremost in the context of individual human beings. Extending this designation to groups is both complex and contested. Indeed, some critics would maintain that any allusion to groups bearing duties or being apportioned blame can only

⁵ In this section, I summarize arguments that I have made in the following places: “Assigning Responsibilities to Institutional Moral Agents,” in *Can Institutions Have Responsibilities?*, pp. 21–26, and “Blood on the UN’s Hands?” 23–27.

be shorthand for referring to the actions of individual human beings. For these “individualists,” collectivities can be considered neither agents nor moral agents.⁶ According to this position, (misguided) accounts of group action are always reducible to descriptions of the actions of their individual human constituents. Prescriptions and evaluations of action must therefore refer to these fundamental moral units. This rejection of the idea that groups might be moral agents leaves certain concerns unaddressed, however. Just as formal organizations arguably possess the capacity to address injustices and respond to crises in ways that individuals on their own cannot and might thereby be assigned responsibilities that could not be borne by individual human actors, formal organizations might also be blamed for wrongdoing, misjudgment, neglect, or harm that is not attributable on the same scale to particular individuals within the organization. Of course, this proposed move from individual to institutional accounts of obligation and blame must be carefully and critically examined.

Can institutions qualify as moral agents? Because the concept of moral agency tends to be invoked with respect to individual human beings, this seems a logical place to start in asking what it would mean to speak of an institution as a moral agent.⁷ Although philosophers rely on quite different standards to identify those specific features of individual human beings that define them as moral agents, they agree, in general terms, that to qualify as such, the individual must possess capacities both for understanding and reflecting on moral requirements and for acting in such a way as to conform to these requirements. Importantly, for the individual then to *exercise* moral agency and to be able to discharge specific duties, an additional condition must be satisfied. He or she must possess not only the capacity to act in response to moral requirements but also the freedom to do so. In other words, the exercise of moral agency

⁶ “Individualism” is a label that is used for a number of theoretical positions. Here, I am referring to both “methodological individualism,” according to which all social facts must be explained exhaustively in terms of the actions, beliefs, and desires of individual human beings, and “ontological individualism,” according to which only human beings are “real” and, therefore, possible agents.

⁷ The approach of drawing on parallels between individual human capacities and those of institutions is taken by Onora O’Neill, in “Who Can Endeavour Peace?,” *Canadian Journal of Philosophy*, suppl. 12, *Nuclear Weapons, Deterrence, and Disarmament*, ed. David Copp (1986): pp. 41–73, to establish an account of “institutional agents” able to respond to ethical reasoning and nuclear dangers. This article, and discussions with its author, have greatly influenced my position here.

requires that one enjoy some degree of independence from other agents and forces.⁸

The question of when – if ever – a group is a moral agent has been largely neglected by theorists of International Relations. It is necessary, therefore, to look outside that discipline to find an example of how one might extend moral agency beyond the individual. Writing in the area of business ethics, Peter French challenges what he identifies as an “anthropocentric bias” in our moral reasoning and aims to illustrate that the corporation can be a moral person.⁹ In this pursuit, he identifies features of what he labels “conglomerate collectivities,” or those groups that he suggests are “full-fledged members of the moral community.” A brief overview of some of these features provides the starting point for identifying criteria that can be usefully invoked in explaining whether certain institutions in world politics – such as states – qualify as moral agents.

“A conglomerate collectivity,” French maintains, “is not exhausted by the conjunction of the identities of the persons in the organization.” Put simply, it is more than the sum of its constituents; it has what might be called a “corporate” identity. Another characteristic of French’s conglomerate collectivities is that they have “internal organizations and/or decision procedures.”¹⁰ The idea that his corporate moral person must have a central decision-making function is important for two reasons. First, it stipulates that the group be able to deliberate, a requisite feature of moral agency outlined earlier. Second, it entails a degree of decision-making unity that would allow the group in question to arrive at a predetermined goal, rather than simply displaying the spontaneous convergence of individual interests that one might experience in a crowd or a mob, for example.

A feature that French does not mention but that seems fundamental to any group that would qualify as a moral agent is an executive function linked to this decision-making capacity. It is not enough for a group to be able to consider moral guidelines and weigh the consequences of different courses of action; the group must be able effectively to translate decisions into action. Structures must be in place to allow decisions to be realized. Decision-making procedures and structures for carrying out the

⁸ O’Neill sets out this position in “Who Can Endeavour Peace,?” p. 51.

⁹ Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984), p. 46.

¹⁰ *Ibid.*, p. 13.

resulting resolutions come together to ensure that a group has a capacity for purposive action.

Outside his discussion of conglomerate collectivities, French observes that “persons” are generally understood to have an identity over time. They are considered to be “project-making things that can ‘conceive of themselves as having a past accessible to experience-memory and a future accessible to intention.’”¹¹ Those that qualify as members of the moral community must have continuity. This is a feature that would seem to apply equally to groups. Another related criterion, implicit in the way that French describes persons as being able to “conceive of themselves” as having an identity over time, might be added to this list: to be a candidate for moral agency, groups must be self-asserting. This is not meant to demand that they be self-aware or “conscious.” Rather, this criterion requires that they not be merely externally defined, thereby disqualifying groups that do not see themselves as units.

Adding to and elaborating on French’s account of conglomerate collectivities, I propose that a group qualifies as a moral agent if it possesses the following: an identity that is more than the sum of identities of its constitutive parts, a decision-making structure, an executive function linked to this decision-making structure that allows policies to be implemented, an identity over time, and a conception of itself as a unit. I refer to groups that have these characteristics as “institutional moral agents.” On the basis of these criteria, the following collectivities might reasonably be understood to qualify as institutional moral agents: Hamas, Amnesty International, Microsoft, the Catholic Church, Harvard University, and the World Bank. Moreover, the state, which is central to the subsequent analysis of punishment, would also qualify as an institutional moral agent.¹²

The terminology here is significant. The label “institution” can, of course, mean different things, and I use it here in a particular way: in the sense of a formal organization, or what might be called a “structured institution.”¹³ Yet even while I am focusing on formal organizations,

¹¹ *Ibid.*, p. 85. French is quoting from David Wiggins, “Locke, Butler and the Stream of Consciousness: And Men as a Natural Kind,” in *The Identities of Persons*, ed. Amelie Oksenberg Rorty (Berkeley: University of California Press, 1976), p. 161.

¹² I go through each of the stated criteria with specific reference to the state in Erskine, “The Case of States and Quasi-states,” in *Can Institutions Have Responsibilities?*, 27–28.

¹³ The label “structured institution” is used by inter alia K. A. Shepsle in “Rational Choice Institutionalism,” in the *Oxford Handbook of Political Institutions*, ed. R. A. W. Rhodes, S. A. Binder, and B. A. Rockman (Oxford: Oxford University Press, 2006), 23–38 (p. 27).

another connotation of the term – which highlights the norms, rules, procedures, practices, and cultures that frame and channel the decisions and actions of individual human actors within these organizations – is also useful. The label *institutional* moral agent thereby provides important clues as to why certain types of collectivity reach decisions and act in ways that I argue cannot be described in terms of the aggregate decisions and actions of their individual members.

Three points of clarification should be offered here to avoid misunderstanding about the proposal that institutions can be moral agents. The first responds to the criticism that I am ascribing to institutions features of the individual human actor that one could not realistically expect an institution to possess. I am *not* suggesting that institutions are the same as individuals. Indeed, one of the starting points of this chapter is that they differ in significant ways that have a direct bearing on discussions of punishment. I am simply suggesting that institutions share with individual human actors certain capacities that allow both to be considered moral agents. I do not assume that institutions can be the perfectly unitary, rational, and independent entities that individuals are sometimes, problematically, portrayed to be. Rather, by acknowledging that institutions cannot be accurately portrayed as such but can nonetheless be moral agents, I am, in effect, challenging an idealized conception of the moral agent that is often tied to the individual human being.

The second point is simply that the moral agency of institutions in no way precludes or undermines the moral agency of those individual human actors, and subgroups, that comprise them. Moral agency is understood here to exist simultaneously at different levels. This means that the assignment of duty or the apportioning of blame at the level of the state, for example, does not allow those multifarious agents within it (such as individual citizens, a particular government or administration, the state leader, or its military organizations) to evade either moral expectations or censure for those discrete actions that are ascribable separately to them. Rather, moral agents at all levels can be responsible for concurrent, complementary, or even coordinated acts and omissions.

Finally, the model of institutional moral agency offered earlier says nothing about the substance of the moral demands to which formal organizations might be expected to conform. There is no attempt being made to adjudicate between different sources of obligation, codes of conduct, and, indeed, accounts of morality in international relations. This must, I think, be a separate project, and one on which the current endeavor need

not rest. Claims are frequently made that institutions in international relations are morally responsible for certain failures. Institutions are variously held to account, blamed, and, indeed, made targets of attempts at punishment. The value of a model of institutional moral agency is to address the coherence of such charges – and of particular responses to alleged institutional delinquency – given the proposed objects of condemnation and sanction. Without making assertions about the source, nature, or force of perceived duties in international relations, one can nevertheless ask who – or what – can respond to certain calls to action and who – or what – can be held to account for breaches of what we understand to be moral imperatives.

Having made this final point, it is not the case that we are left without any moorings in discussions of duty. On questions of obligation in international relations, it is possible to point to principles that represent areas of near-universal agreement. Following Mervyn Frost, one might refer to these principles as “settled norms,” defined not by their universal observance, but, more soberly, by the perceived need to provide special justification for any attempt to either deny or override them.¹⁴ The principle of noncombatant immunity, according to which noncombatants are illegitimate intended targets of organized violence, is a good example of such a norm.¹⁵ Furthermore, in cases in which states, for example, sign on to codes of conduct, such as the 1948 Genocide Convention or the 1984 Convention against Torture, certain acts (such as the abuse of prisoners at Abu Ghraib) and omissions (such as the failure to intervene in the Rwandan genocide) would seem to provide uncontroversial examples of derelictions of duty.¹⁶ Of course, identifying the appropriate objects of blame in cases in which there is widespread agreement that a particular moral responsibility has been abrogated, and deciding how best to respond to this culpable body, remain complex issues. It is to these issues that this chapter now turns.

¹⁴ Mervyn Frost, *Ethics in International Relations: A Constitutive Theory* (Cambridge: Cambridge University Press, 1996), 105.

¹⁵ I discuss the strength of this norm, despite prominent derogations from it, in Erskine, *Embedded Cosmopolitanism: Duties to Strangers and Enemies in a World of “Dislocated Communities”* (Oxford: Oxford University Press, 2008), 188–90.

¹⁶ Kirsten Ainley highlights the important point that responsibilities are not only assigned to institutions in international relations but are also incurred and assumed by them. See her “The Social Practice of Institutional Responsibility,” in *How Can We Respond to Delinquent Institutions? Blaming, Punishing, and Rehabilitating Collective Moral Agents in International Relations*, ed. T. Erskine (forthcoming).

DEFINING DELINQUENCY AMONG INSTITUTIONAL
MORAL AGENTS

When can an institutional moral agent be blamed for a particular act or omission? In other words, when can an institutional moral agent reasonably be labeled “delinquent”? Perhaps the best place to begin in answering this question is to identify cases in which institutional moral agents do not respond to what are understood to be moral imperatives, and, yet, *cannot* coherently be blamed for their apparent transgressions. From there it will be possible to move on to cases in which institutional moral agents that do not discharge particular duties can reasonably be held to account.

*When Duties Cannot be Discharged: “Weak”
and “Constrained” Institutions*

Importantly, fulfilling the criteria for institutional moral agency is not enough to determine that a particular body can be blamed for failing to respond to a moral imperative in a specific set of circumstances. Even those entities that we can call moral agents cannot be expected to discharge duties for which they are unable to perform requisite actions. As with individual moral agents, institutional moral agents might be prevented from responding to particular ethical demands for two sets of reasons, both of which are extremely important to how I go on to define institutional delinquency.

First, the group in question might possess capacities for deliberation and action that are limited in some respects. The suggestion that these capacities can be apparent but limited leads one to ask whether the attribution of moral agency to institutions is necessarily an “all-or-nothing” exercise. I suggest that it is not. Rather, each of the criteria posed earlier for determining which groups qualify as moral agents can be met in degrees. This qualification can be illustrated if one applies the criteria for institutional moral agency to states. Although “quasi-states,” or states that lack positive sovereignty, tend to have, for example, weak decision-making structures, they can nevertheless satisfy the criteria for moral agency and be held accountable for *some* actions at the corporate level of the state. (A “failed state,” conversely, cannot meet the criteria for institutional moral agency; any evaluation of accountability must be redirected toward the myriad individuals and groups that can be

said to be acting.)¹⁷ In other words, a group may possess capacities for deliberation and action that allow it to qualify as a moral agent, even when it faces internal impediments that render these capacities limited or unreliable in a way that prevents the group from discharging some duties that it would otherwise be understood to bear. I label such an entity a “weak institution.”

Second, an actor might face external limits to discharging particular duties. *Perfect* freedom from other actors and influences is neither achievable nor necessary for exercising moral agency.¹⁸ However, to be considered vulnerable to the apportioning of blame if particular duties are abrogated, institutional moral agents must be able to pursue their own objectives relatively free from external impediments. Some obstacles faced by institutions in international relations are disabling: states are constrained by the financial demands (and imposed policies) of foreign creditors; certain intergovernmental organizations are designed to perform functions and are delegated responsibilities accordingly, but are not provided with the resources necessary to fulfill them. That such external factors can undermine an institution’s ability to exercise moral agency in particular cases, and thereby render unreasonable expectations that certain duties be discharged, follows from the understanding of individual moral agency offered earlier. I label a formal organization thus restricted a “constrained institution.”

Both categories of institutional moral agent are crucial to the discussion of holding collectivities to account for moral transgressions in international relations. Although collectivities that meet the criteria for institutional moral agency are able to discharge specific responsibilities and can be blamed for their acts and omissions in certain circumstances, an actor – whether individual or institution – cannot coherently be blamed, held to account, or punished for abrogating a duty that he, she, or it was unable to discharge in the first place.

“Delinquent” Institutions

The considerations of, first, whether an institution possesses the sophisticated, integrated capacities for deliberation and action that would allow

¹⁷ Erskine, “The Case of States and Quasi-States,” in *Can Institutions Have Responsibilities?*, 28–31.

¹⁸ Here, again, I am following O’Neill. See her “Who Can Endeavour Peace?,” 65.

it to qualify as a moral agent and, second, whether, as an institutional moral agent, it is either weak (due to internal limitations) or constrained (as a result of external circumstance) in ways that would prevent it from discharging duties in the context of specific actions are fundamental to discussions of moral responsibility in world politics. These steps do not lead to an account of whether certain groups are somehow inherently moral or immoral and on their own cannot determine whether these groups deserve praise or condemnation. Asking whether a group is a moral agent – and then examining the degree to which it is able to act in specific circumstances – are necessarily prior questions to determining whether it is vulnerable to assignments of duty and ascriptions of blame in the context of specific actions. In other words, an analysis of an organization’s internal capacities and external conditions must come before any attempt to evaluate the degree to which it can be said to have breached its obligations and thereby be vulnerable to condemnation – and possibly sanction.

In cases in which an institutional moral agent enjoys both the capacities and enabling conditions to discharge specific duties but fails to do so, blaming that institution for the consequences of its failure is a coherent response. I refer to institutions in these circumstances as “delinquent institutions.” Delinquent institutions in this sense might be understood to include Union Carbide in Bhopal, India; the UN in the context of Rwanda, Srebrenica, and Darfur; France in Rwanda; the U.S. military with respect to both civilian deaths and prisoner abuse in Iraq; and, possibly, BP in relation to the 2010 oil spill in the Gulf of Mexico.¹⁹

¹⁹ For the example of Union Carbide as a delinquent institution warranting a response, see Lynn Dobson, “Plural Views, Common Purpose: On How to Address Moral Failure by International Political Organisations,” *Journal of International Political Theory* 4, no. 1 (April 2008), 34–54. For examples of the UN’s alleged derogations from duty in Rwanda, Srebrenica, and Darfur, see, respectively, Erskine, “Blood on the UN’s Hands?”; Anthony Lang, Jr., “The United Nations and the Fall of Srebrenica: Meaningful Responsibility and International Society,” in *Can Institutions Have Responsibilities?*, pp. 183–203; and Howard Adelman, “Blaming the United Nations,” *Journal of International Political Theory* 4, no. 1 (April 2008), 9–33. For the delinquency of France in Rwanda, see Daniela Krosiak, “The Responsibility of Collective External Bystanders in Cases of Genocide: The French in Rwanda,” in *Can Institutions Have Responsibilities?*, 159–82. For a discussion of the delinquent institutional agents that might be held to account for civilian deaths and the abuse of prisoners in Iraq, see Neta Crawford, “Individual and Collective Responsibility for Systemic Military Atrocity,” *The Journal of Political Philosophy* (2007) and the respective contributions by Crawford and Kateri Carmola in *How Can We Respond to Delinquent Institutions?* Finally, I ask whether BP’s catastrophe in the Gulf of Mexico represents another case of institutional delinquency in *Who Is Responsible?*

THE PROBLEMS WITH PUNISHING
DELINQUENT INSTITUTIONS

I have suggested that institutional moral agents – such as states, intergovernmental organizations, and multinational corporations – are capable of addressing injustices and responding to crises in ways that individuals on their own cannot. Concomitantly, they might be deemed to have similar scope for causing harm and perpetuating injustices. Given these capacities, it makes intuitive sense to argue that such bodies can be blamed and held to account for their acts and omissions *as institutions*. Yet does it make sense to talk about punishing them as institutions, or is this a step too far?

It is important to note here that punishment is not the only possible response to institutional delinquency. Other types of response include forgiveness, reconciliation, rehabilitation, and compensation. Each of these also deserves attention. My central purpose in trying to construct a model of institutional moral agency as part of a broader project on institutional responsibility is not to defend or most appropriately apportion punishment in specific cases. This might be one possible application of this model, but it is not a necessary end product. Making assertions and raising questions of responsibility in international relations need not be understood to lead either logically or inevitably to assertions and questions of punishment.²⁰ Punishment is, however, a significant concern – and justification for action – in international relations. For this reason it makes sense to address it in the context of the model of institutional moral agency that I have offered.

Even if a compelling case can be made for addressing the issue of punishment in response to institutional delinquency, how to conceptualize an institution being punished is a challenge. Although an institutional moral agent is characterized, in part, by an identity that is greater than the sum of identities of its constituent parts, it is, nevertheless, made up of individual human actors. Punishing the entity that these individuals together help to form without punishing them each *as individuals* is incredibly difficult. A colorful depiction of this conundrum can be found in an unlikely place. In *A Christmas Carol*, Charles Dickens offers an

²⁰ For a similar point, see O'Neill, "Who Can Endeavour Peace?," 58, fn. 13. Anthony F. Lang, Jr., has taken a radically different position on the centrality of punishment to questions of moral responsibility. See, for example, his *Punishment, Justice and International Relations: Ethics and Order after the Cold War* (London and New York: Routledge, 2008).

imperfect image of what it would look like to punish an institution (and, in doing so, rises to the challenge set by Baron Thurlow of responding to a delinquent corporation when it lacks a “soul to be damned”). Beginning a journey of self-reflection, Dickens’s protagonist, Scrooge, is forced to witness an unsettling scene of suffering spirits and damned souls who are being punished for failing to lead ethical lives. Upon hearing “incoherent sounds of lamentation and regret; wailings inexpressibly sorrowful and self-accusatory,” Scrooge, to his horror, observed that

[t]he air was filled with phantoms, wandering hither and thither in restless haste, and moaning as they went. Every one of them wore chains . . . some few [they might be guilty governments] were linked together.²¹

In this portrayal, the purported punishment of guilty governments entails no more than the suffering of individual human actors. In other words, punishment might be described as distributive. Whether we consider a fictional purgatory (and the ghosts of governments) or real-life sanctions imposed on concrete regimes, Dickens’s image points to a crucial problem. Can we effectively punish an institution while remaining faithful to the understanding of responsibility as nondistributive that the model of institutional moral agency supports?

In what follows, I want to touch on three concerns that I have with the attempt to punish institutions. I do not mean to suggest that these pose necessarily insurmountable obstacles to the viability of institutional punishment. They do, however, represent problems that must be raised and addressed in any preliminary exploration of the subject. The first, which I address under the heading of guilt by association, deals with the danger of punishing all of the members of a group for the misdeeds, or failures to act, of certain constituents of that group. The second concern is over the possibility of misdirected harm, which would include the punishment of individuals *as individuals* in response to institutional delinquency. The third and final apprehension is about the harmful side effects of institutional punishment for, among others, “innocent” individual human actors (as well as individual human actors who are less culpable than the institution, the wrongdoing of which provides the basis for punishment). Drawing on an article by John C. Coffee, the title of which invokes the

²¹ Charles Dickens, *A Christmas Carol and Other Stories* (London: Odhams Press), p. 28.

statement by Baron Thurlow that I cite at the beginning of this chapter, I refer to this final concern as the “overspill problem.”²²

Guilt by Association

One serious concern with the proposal to punish institutions is that such a move might rely on guilt by association.²³ According to this objection, we unfairly blame, and punish, the many for the misdeeds of the few. This is a very real problem, but one that I want to suggest flows from a conception of moral responsibility that departs radically from the notion of institutional moral agency that I have proposed.

The alternative understanding of group responsibility that generates this apprehension is referred to by the frequently invoked and much maligned phrase “collective responsibility,” and is no stranger to discussions of justice and reparation, guilt and apology, and retribution and reprisal in international politics. According to this conception, a degree of solidarity within a group, or a shared aspect of identity, allows those who are not party to a specific action to be morally praised or blamed for the action of an agent or agents within the same group.²⁴ Responsibility in this sense has been addressed in the specific sense of exploring the degree to which individual citizens must bear and retain guilt for the past deeds of their governments. It has garnered particular attention with regard to the issue of whether the German people are “collectively responsible” for the Holocaust.²⁵ By this account, membership within the group in question, and therefore the distribution of responsibility among

²² Coffee, “No Soul to Damn,” 387, fn. 4. It is important to note that Coffee is specifically addressing fines imposed on corporations.

²³ Elsewhere, and in a previous draft of this chapter, I used the label “vicarious responsibility” synonymously with “guilt by association.” I am grateful to Larry May for pointing out another way in which the notion of “vicarious responsibility” is often employed in the literature on collective responsibility and, to avoid confusion, use only “guilt by association” here.

²⁴ Daniel Warner provides a valuable analysis of the bearing that this notion has on theorizing about international relations in *An Ethic of Responsibility in International Relations* (Boulder and London: Lynne Rienner, 1991).

²⁵ See, among others, K. Jaspers, *The Question of German Guilt*, trans. E. B. Ashton (New York: Fordham University Press, 1947/2000). Jaspers, it should be noted, is careful to distinguish between different types of responsibility. He adamantly rejects any suggestion that all Germans took part in criminal activity and, therefore, were criminally guilty. Nevertheless, his notion of “political guilt” comes close to the notion of “guilt by association” to which I am referring. For Jaspers, all Germans were to some extent politically guilty, or answerable for the acts of the regime to which they belonged,

its members, may even be understood to extend transgenerationally – and, in another variation on this position, to extend universally so that the relevant group is conceived of as humanity as a whole.²⁶ Aversion to this notion of responsibility – and any call to punishment that might arise from it – is not difficult to explain. It runs counter to the understanding that one cannot be blamed for the wrongdoing of another. This conception of group responsibility diverges significantly from what I introduced earlier in the chapter. An implication of the model of institutional moral agency that I outlined cannot be that all members of a group are responsible for the actions of discrete members within that group. Institutional responsibility is simply not distributive in this way. The group itself is the moral agent. If the group is also the proposed object of punishment (in response to acts that cannot be described in a way reducible to its constituents), then the fear that punitive action is being directed against individuals who are being unfairly held to account is unwarranted.

This particular concern is based on the conceptual difficulties of talking about blaming and punishing a formal organization. These difficulties can be overcome by rejecting the equation of institutional blame with guilt by association and reserving the apportioning of responsibility to institutions for instances in which the relevant action is one that can genuinely be described at the corporate level. The subsequent two concerns, however, relate to the *practical* difficulties of actually punishing an institution, even after we have established that it is the institution itself that deserves blame. The following concern appears to be particularly intractable.

Misdirected Harm

In cases in which we are responding to acts or omissions that cannot be reduced to the agents that constitute the group – and we can, therefore, coherently talk about *institutional* responsibility – punishing the institution, as an institution, makes sense, at least in theory. One problem

even if they could be accused of neither supporting nor cooperating with this regime (pp. 43–44).

²⁶ In *The Guilt of Nations* (New York and London: W. W. Norton, 2000), Elazar Barkan explores cases of restitution for historical injustices that often find the descendants of both victims and perpetrators embroiled in questions of guilt, responsibility, and compensation. For the proposal that collective responsibility extend to all of humanity, see Hannah Arendt, “Organized Guilt and Universal Responsibility,” in *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics*, ed. L. May and S. Hoffman (Savage, MD: Rowman and Littlefield, 1991), pp. 273–83.

that remains, however, is that it is not apparent how one goes about “punishing an institution as an institution.” Here we are back to Baron Thurlow’s observation that an institution “has no soul to be damned and no body to be kicked.” So how do you punish it? Perhaps more to the point of my immediate concern here is the question of how to punish the institution at the corporate level (at which blame has been apportioned) rather than inflicting punishment on the aggregate of its individual human constituents (who *do* have bodies to be kicked and souls to be damned). In other words, if my previous concern might be referred to as the danger of misdirected responsibility, then this concern is one of misdirected harm.

Overspill

The final concern also relates to the danger of harming individuals in the attempt to punish the institutions. However, in this case, such harm is the indirect consequence of effectively punishing the institution. If we can assume that it is possible to get past the previous sources of concern by first appropriately identifying the relevant institutional agent as an object of blame in the context of a specific action, and second arriving at a means of punishment that targets this agent at the corporate level, this third problem remains. Even punishment that is directed at the corporate level of the institution risks *indirectly* harming individuals – both those who are constituents of the institution and those who benefit from the services provided by the institution. As Coffee quips, “when the corporation catches a cold, someone else sneezes.”²⁷ He goes on to observe that overspill from a penalty levied against a corporation occurs at various levels.²⁸ Individuals benefit from the functions performed, and, indeed, the duties discharged, by an institution. Although one might argue that the long-term deterrent or rehabilitative effect of punishing an institution could result in the institution in question better fulfilling its functions and discharging its duties – to the ultimate benefit of the individuals

²⁷ Coffee, “Corporate Punishment,” 401.

²⁸ Note, again, that Coffee is referring to financial penalties. Those that he maintains are adversely affected by the overspill resulting from such penalties are the following: stockholders, who suffer from the diminished value of their securities; bondholders and other creditors, who also find that the value of their securities has been reduced (due to “the increased riskiness of the enterprise”); the workforce (“lower echelon employees”) who face layoffs if the corporation is hit hard enough by the fine; and the consumer, if the corporation responds to the fine by setting higher prices. See Coffee, “Corporate Punishment,” 401–2.

that it serves – in the short term, these individuals might nonetheless suffer.²⁹

In the subsequent section I aim to illustrate each concern in the context of attempts to apportion punishment through military means. Specifically, I touch on examples taken from the recent wars in Afghanistan and Iraq. I am not accepting either state as a delinquent institution, but, rather, using these cases of *alleged delinquency* to interrogate the logic of justifying military action in response. Particularly useful in the current context are the discrepancies that these cases entail between the purported objects and the actual victims of punitive harm.

KICKING BODIES AND DAMNING SOULS: “INNOCENTS” AND THE PROBLEM OF PUNISHING THE STATE

Talk of punishment is nothing new to discussions of the ethics of war. Indeed, a just cause for engaging in organized violence was traditionally seen to include punishment of wrongdoing. Although accepted justifications for war have narrowed to self-defense in most contemporary articulations of the Just War tradition, punishment as a reason for war has not disappeared – and, arguably, has experienced a reemergence.³⁰ This is apparent in both academic and political commentary on the so-called War on Terror. For example, in response to the 2001 attacks on the World Trade Center and the Pentagon, Jean Elshtain maintained that “a carefully worked out and unprovoked act of terror against non-combatants of one’s own country is an injury – an act of war – that demands a response. That response is just *punishment*.”³¹ President Bush, defending wars against both Afghanistan and Iraq, also spoke passionately of “bringing justice to the enemies.”³² Punishment has been unmistakably present as an underlying justification for military action in the War on

²⁹ Dobson makes the point that individuals who depend on institutions suffer if these institutions are prevented from performing their functions in “Plural Views, Common Purpose.”

³⁰ Cian O’Driscoll addresses this theme in *Negotiating the Just War Tradition: The Right to War in the Twenty-First Century* (New York: Palgrave Macmillan, 2008).

³¹ Jean Bethke Elshtain, “How to Fight a Just War,” in *Worlds in Collision: Terror and the Future of Global Order*, ed. Ken Booth and Tim Dunne (Basingstoke: Palgrave, 2002), 263–69 (p. 264), emphasis mine. See also Jean Bethke Elshtain, *Just War against Terror: The Burden of American Power in a Violent World* (New York: Basic Books, 2003).

³² “Remarks by the President at Michigan Rally,” Jerome-Duncan Theatre at Freedom Hall, Sterling Heights, Michigan, May 3, 2004. Available at: <http://www.whitehouse.gov/news/releases/2004/05/20040504.html>.

Terror – even though it has not been the only, or, indeed, in the case of Iraq, the predominant (explicit) justification for engaging in war. Analyzing the idea of war as punishment by appealing to the idea of institutional moral agency, then, serves as more than a mere conceptual puzzle. It is an endeavor that reveals far-reaching and important implications pertaining to how we understand, and respond to, purported cases of institutional delinquency in international politics. These implications are addressed by revisiting the three categories of concern generated by the idea of punishing institutions.

Narrowing the Enemy: The Specter of Guilt by Association

The perceived danger of relying on guilt by association in ostensibly punishing a delinquent state is apparent in the context of the War on Terror. This perceived danger is revealed in dedicated attempts to avoid it – through explicit endeavors to narrow the purported objects of punishment. Breaking with the conventional understanding of “the enemy” in war as the collective body against which one is fighting, there have been recent moves, particularly with respect to the war in Iraq, to limit significantly who is described as falling within this category. “Enemy,” it seems, has taken on the connotation of those who are “guilty” – and who are, therefore, deemed to be legitimate targets. President Bush, for example, declared at the start of the war that “our *enemy* in this war is the Iraqi regime, not the people who have suffered under it.”³³ Expressing a similar sentiment, Prime Minister Tony Blair assured the Iraqi people that “our enemy is not you but your barbarous rulers.”³⁴ Drawing this nominal distinction might be perceived as particularly important because of the underlying justification of war as punishment. Punishment implies a guilty party, yet, in many cases, there is a dissonance between treating the state (as a corporate entity) as the object of organized violence (and therefore, implicitly, as the object of punishment) and accurately portraying the party whose delinquency has provoked a military response. In the case of Iraq, eliding punishment with other just-cause arguments required an overt denial that all members of the Iraqi state were being held collectively responsible for the wrongdoing of a corrupt few. Falling into the

³³ President Bush, “President Rallies Troops at MacDill USAF Base,” March 26, 2003, emphasis mine.

³⁴ Prime Minister Blair, “Blair Calls for Unity,” BBC News, March 21, 2003. Cited by Alex J. Bellamy, “Is the War on Terror Just?,” *International Relations* 19, no. 3 (September 2005), 275–96 (p. 277).

trap of assuming guilt by association was seen to be a real danger. Of course, narrowing the category of those labeled “guilty” and thus justifiably vulnerable to punitive action is more straightforward than effectively limiting those who ultimately become targets of attack. Indeed, the apparent attempt to avoid the charge of apportioning guilt by association in this case raises the question of whether war *can* be an appropriate means of punishment when culpability is thought to lie only with certain individuals – or a subgroup – within a state. This question brings us back to the separate problem of misdirected harm.

Individual and Innocent Deaths: The Reality of Misdirected Harm

Misdirected harm, as described earlier, occurs when the objects of a punitive response are distinct from the entity whose delinquency is invoked to justify the punishment in the first place. Even if one avoids the charge of bringing notions of guilt by association into justifications for punishing the state – by, for example, making the sorts of statements offered by Bush and Blair in the context of the war in Iraq – the danger of misdirecting punishment remains a concern. I want to suggest that there are two ways in which this problem is manifest when punishment is directed against the state through military means. The first brings us back to the difficulty of punishing the state as a corporate entity (in a way that does not effectively target its individual constituents) when it is the corporate entity that is being held to account for some wrong. The second introduces the problem of whether one can coherently use war as an instrument of punishment against a state if it is not the state as a whole that is deemed to be delinquent, but, rather, a subgroup within the state. I address each in turn.

The Just War tradition has a long-established and complex means of limiting legitimate human targets in war: the principle of noncombatant immunity. Accounts of this principle describe noncombatants as deriving their immunity from their “innocence” – a term variously used to connote their lack of moral guilt or, more commonly in contemporary arguments, the fact that they are “not harming.”³⁵ Of course, killing in war is never completely delimited and discriminate. Noncombatants are

³⁵ Attention to its etymology uncovers “innocent” as the negative form of *nocentes*, meaning “harming.” See the following: Norman, *Ethics, Killing and War*, p. 168; McMahan, “Innocence, Self-Defense and Killing in War,” *The Journal of Political Philosophy* 2 (1994), 193–221 (p. 193); and Anthony Kenny, *The Logic of Deterrence* (London: Firethorn Press, 1985), p. 10. Drawing on this notion of “material” rather than “moral”

regularly killed. When this is “unintended,” they are designated “collateral damage.”³⁶ When this distinction between permissible and prohibited human targets is drawn, why it is morally significant, and which individual and institutional actors are to be blamed when noncombatants become victims of attack (intentionally, disproportionately, or due to insufficient efforts to safeguard them) are difficult and important questions. They are not, however, addressed here. Arguably, these dilemmas fade into the background if war is portrayed as a means of punishing a particular state. This is because killing noncombatants and soldiers alike becomes problematic if we are talking about responding to institutional wrongdoing. Indeed, even accounts of combatant vulnerability that rest either implicitly or explicitly on notions of the “guilty” soldier sit uneasily with justifications for war that rely on the notion of institutional (rather than individual) culpability.³⁷ Punitive harm is *misdirected* toward individual human beings when it is the state that is being blamed for an alleged delinquency.

There is at least one conceivable retort to the claim that harm is misdirected in this case. As I argued earlier in this chapter, institutional responsibility does not preclude concomitant individual responsibility. One might invoke this point to argue that war can legitimately achieve the aim of punishing both the state at the corporate level *and* those individual citizens who are understood to be either directly or indirectly responsible for the policies of the state. This is an argument that warrants serious consideration. Yet even if one were to defend this extreme position, it must be conceded that, in some cases, it is particularly difficult to point the finger of blame at individual citizens for contributing – to whatever

innocence, the vulnerability of combatants is explained by analogy to the domestic notion of self-defense: we can target those who pose a direct threat to us.

³⁶ The appeal to civilian deaths as “unintended consequences” of military actions (otherwise known as “collateral damage”) is rooted in the doctrine of double effect. According to this doctrine, it is possible to distinguish between two types of foreseeable consequences of an act: those that are either military goals or means to achieving military goals (intended consequences) and those that are merely the side effect of the act (or unintended consequences). According to the Just War tradition, deaths of noncombatants can never, morally, be the intended consequences of a military attack.

³⁷ I have argued in the following two papers that the moral relevance of the principle of noncombatant immunity within Just War arguments is (problematically) based on either explicit or implicit assumptions of the combatant’s culpability: “Justifying Prohibited and Permissible Human Targets: Concepts of Blame, Punishment and Collective Moral Agency in the Ethics of War,” paper presented at the 42nd Annual Convention, Chicago, Illinois, February 20–24, 2001 and “‘Soldiers Are Made to be Killed?’ The Principle of Combatant Vulnerability,” paper presented at the 44th Annual International Studies Association Convention, Portland, Oregon, February 25–March 1, 2003.

degree – to the delinquency of the state to which they belong. Indeed, such an argument is stretched to breaking point when membership within a nondemocratic state means that individual citizens play no part in its decision-making process (and, perhaps, risk having any opposition to the ruling government or attempt to introduce democratic reform brutally oppressed). It is exactly this scenario that leads to the second possible manifestation of misdirected harm.

Misdirected harm also occurs when the state is the proposed object of punishment, yet delinquency is so narrowly associated with a specific group within the state that it becomes impossible to talk about delinquency at the corporate level of the state at all. To defend punishing the state in such a case would involve either embracing the idea of guilt by association and treating many as collectively responsible for the misdeeds of a few or eschewing this idea of transferred guilt and succumbing to the equally serious misdemeanor of misdirected harm. This second variation on misdirected harm is exemplified in the recent wars against Afghanistan and Iraq to the extent that attempts were made to justify them in terms of punishment even while explicitly asserting that the delinquent parties did not include those citizens who were inevitably placed under attack.

Earlier in the chapter, I described attempts by President Bush and Prime Minister Blair to make explicit that they were not holding the Iraqi people collectively responsible for what they presented as the grievous misdeeds of their “barbarous rulers.” Perhaps the sharp distinction between the overwhelming majority of members of this “rogue state” who bore no responsibility for its alleged delinquency and the culpable minority in power served to intensify the perceived need to make clear that civilians would be protected. Prime Minister Blair announced in the context of the attack on Afghanistan that “[t]his military plan has been put together mindful of our determination to do all we can to avoid civilian casualties”; President Bush stated at the start of the Iraq war that, “[p]rotecting innocent civilians is a central commitment of our war plan.”³⁸ Of course, noncombatants were killed. The way in which this represents a case of misdirected harm resulting from the state being punished is subtly different from that just addressed. Whereas in the previous manifestation of misdirected harm, the problem was identified as one of effectively punishing individuals *as individuals* in the attempt to punish the institutions

³⁸ Prime Minister Blair, “Statement on Military Action in Afghanistan,” October 7, 2001; President Bush, “President Rallies Troops at MacDill USAF Base,” March 26, 2003.

to which they belong, in this case harm is directed outside the corporate entity (whether this be the Taliban or Saddam Hussein's regime), the delinquency of which is invoked as a justification for engaging in punitive action. Even somehow successfully punishing the state at the corporate level would, in this case, nevertheless entail misdirected harm because the state as a whole is not being assigned responsibility for the alleged delinquency. Alternatively, apportioning punishment that affects individuals as individuals in such a case (which I have argued is the necessary, if unintended, outcome of trying to punish the state through war) would result in *compounded* misdirected harm. One of the reasons that the people of Afghanistan and Iraq provide such deeply problematic recipients of punitive harm is that they are not the perpetrators (nor, one might add, are they in any way the beneficiaries) of the delinquent deeds with reference to which punishment is being justified.

Indirect Harm: The Problem of Overspill

The problem of overspill brings us back to the indirect harm with which both individuals and groups might be afflicted when an institution is punished and is no longer able to perform certain functions toward either its members or those outside the institution who depend on it. In the case of punitive military action against the state, overspill might take the form of suffering caused by destruction of the state's infrastructure, disruption to health services, and population displacement (each leading, for example, to the spread of infectious diseases and malnutrition), as well as the erosion of the rule of law. Moreover, environmental damage might affect those within and without the state. Finally, military action might place burdens on neighboring states in terms of refugee flows and on external institutions with respect to rebuilding the affected region. Examples of overspill can be identified in the ongoing problems associated with the occupation of Iraq.

Overspill is significantly different from misdirected harm. Misdirected harm represents a disjuncture between the objects of blame and the direct objects of punishment. Overspill does not involve such a disjuncture. Rather, overspill involves the indirect, and unintended, harm of those who are neither held morally responsible for an alleged delinquency nor targeted in the ensuing punishment. To be defined as overspill as I have presented it here, the harm generated must be no more than a side effect of the punitive act. Overspill is likely to be unavoidable to some degree in all

cases of punishment (whether individual or institutional).³⁹ It is a problem that should be carefully considered in the context of determining what constitutes legitimate and effective institutional punishment. Yet, unlike the problem of misdirected harm, I do not think that overspill undermines the logic of a particular form of punishment for institutional delinquency. For overspill to be acceptable, there must be concerted efforts to avoid it, and this indirect harm must be proportionate to the overall good achieved by the resort to institutional punishment.

CONCLUSION

This chapter has addressed some of the conceptual and practical difficulties that threaten to render morally incoherent those attempts to punish formal organizations that are deemed to be institutionally delinquent. Although some acts and omissions are best described at the corporate level of an institution, and moral responsibility for these cases of harm and neglect should be correspondingly located, attempts to punish institutions are fraught with difficulties. There is reason for grave concern that trying to punish an institution will, in fact, unfairly harm its individual human constituents. This concern can be tied to three specific potential problems, which I have labeled guilt by association, misdirected harm, and overspill. These problems have been explored through endeavors to punish the state as a delinquent institution by means of organized violence, with particular attention to the disjuncture between the punitive justifications for engaging in violence and the ultimate objects of harm in the recent wars in Afghanistan and Iraq.

I have argued that punishment cannot represent a morally coherent response to culpability that is located at the corporate level of an institution if the individual human members of the institution are, in fact, targeted. This can happen either because they are assumed to be guilty by association (so that attributions of moral responsibility are effectively

³⁹ The comparison between individual and institutional punishment is interesting here. Incarcerating the family members of a convicted murderer either because of their relationship to the criminal (despite their innocence) or to punish the criminal through the family members would be widely understood as unacceptable. Conversely, incarcerating the criminal knowing that this would indirectly affect his or her dependent family members could reasonably be presented as a foreseen harm that is proportionate and acceptable as a side effect of the criminal's punishment. The two variations on the first example are analogous to what I have called, respectively, guilt by association and misdirected harm in the case of attempts at institutional punishment. The second example is analogous to what I have called overspill.

misdirected) or because the punishment directly affects those whose culpability is not invoked to justify the punitive response in the first place (and harm is thereby misdirected). In other words, where present, the problems of guilt by association and misdirected harm undermine any attempt to justify punishment at the institutional level. Overspill, however, or indirect harm to actors that is a consequence of punishing an institution, is contingently acceptable – if the harm caused is proportionate and attempts are made to minimize it. In coming to these conclusions, two themes have arisen that deserve attention in future attempts to explore different forms of punishment levied against institutional actors. I touch on these briefly in the specific context of the state, which has been the focus of this chapter, before reiterating the broader points that we can – and cannot – take from the discussion to this point.

The first theme that warrants further attention is that of democratic versus nondemocratic decision making and the extent to which this should affect our considerations of how to respond to a delinquent state. Barry Buzan’s provocative analysis of whom we may bomb – an analysis tied to the degree to which a people *deserves* their government – might be instructive here.⁴⁰ To what degree are citizens of a democracy responsible for the foreign policy of their state (in a way that citizens in repressive regimes with no say in such decision making are not)? A classically ambiguous statement by President Bush is interesting in this context: “I want each and every American to know for certain that I am responsible for the decisions that I make and each of you are as well.”⁴¹ To what extent can we take this literally? To what extent does taking this literally render unnecessary any distinction between holding a government to account for its policies, practices, and delinquencies and holding the citizens of a state to account for their individual actions? To what extent – and this is a separate question – does taking literally the statement that each and every citizen is responsible for the policies of the state make the idea of punishing the state as an institutional moral agent, through organized violence, more coherent – and more palatable? Each of these questions requires careful consideration of how culpability (both of the individual and of the state as a corporate entity) is affected by the degree to which citizens contribute to the state’s decision-making process.

⁴⁰ Barry Buzan, “Who May We Bomb,?” in *World in Collision: Terror and the Future of Global Order*, ed. Ken Booth and Tim Dunne (New York: Palgrave Macmillan, 2002).

⁴¹ George W. Bush, “Live with Regis,” September 20, 2000.

A second theme that follows on from this is that of distributive versus nondistributive blame and punishment. If culpability is established at the corporate level of the state, then one might argue that an appropriate response must be one that is nondistributive (in other words, one that is directed at the institution). Only if one is responding to an aggregate of individuals who are individually deemed responsible for a harmful act or omission should blame and punishment be distributive (or directed at the individuals themselves).

In identifying some problems that I think need to be addressed in broaching the possibility of institutional punishment, it is, perhaps, important to end by clarifying the things that I am *not* arguing. First, *I am not suggesting that institutional punishment is necessarily unviable*. There are a variety of possible means of punishing formal organizations – including dismantlement, boycott, and “naming and shaming” – and a variety of types of organization against which some form of punishment might be deemed appropriate. Organized violence against a state is only one – admittedly extreme – example of punishment that one might attempt to justify on the basis of institutional culpability. Other forms of punishment might be more effective in punishing an institution *as an institution* in a way that avoids, or minimizes, punishing its constituents as individuals. Second, *I am not proposing that punishment is necessarily an incoherent basis on which to engage in military action*. There are a plethora of issues regarding the legality, and indeed prudence, of justifying war in terms of punishment that deserve attention and have not been addressed here. In the context of this discussion of institutional moral agency and responsibility, the focus of concern has been on whether it makes sense to justify military actions toward a state in terms of culpability *at the corporate level*. My point here is that war waged against the state represents a form of punishment that is necessarily distributive (in that it directly harms those within the group *as individuals*) and can only represent a coherent response when responsibility for the acts or omissions that have motivated the punitive action is also judged to be distributive (in that blame is clearly reducible to the constituents of the state). To return to Baron Thurlow, one might observe that the state has many bodies to kick and many souls to damn, but engaging in either practice fails to respond coherently, and proportionately, to institutional delinquency.