

The Distributive Effect of Collective Punishment

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Collective punishment has a notorious reputation among moral philosophers. If we take it to mean the imposition of punitive measures on groups (I elaborate on this meaning later in the chapter), collective punishment raises two normative issues that many philosophers find particularly troubling. The first concerns the extent to which *groups* are the appropriate subjects of punishment. Here the question is, are groups moral agents that are responsible for their actions and should be held to account when they act wrongly? The second difficulty concerns the impact of collective punishment on group *members*. Here the question is, is it justified to impose burdens on individuals by virtue of the fact that their group caused a collective harm?

To see these problems more clearly, consider the proposed academic boycott against Israeli universities (the subject of heated debates in recent years in British academia). Briefly, the proponents of the boycott recommend the elimination of professional ties with Israeli academic institutions, in light of the latter's alleged support of the Israeli government policies.¹ However, does it make sense to argue that academic *institutions*

I am grateful for comments and suggestions by the participants of the workshop on collective punishment at The University of Western Ontario, April 2009; the participants of the Center on Ethics workshop at Stanford University; and one anonymous reviewer from Cambridge University Press.

¹ Proposals to impose a boycott on Israeli universities have been considered in recent years by the University and College Union (UCU), the largest academic trade union in the United Kingdom. Delegates to the UCU annual meeting voted on several occasions for motions in support of a boycott. All motions were met with much criticism and objections from within the union and were subsequently revoked on legal grounds. At the UCU 2007 annual meeting, delegates voted for a circulation of the boycott call to all its branches and local organizations. This vote raised a heated debate within the union.

act in a condemnable manner? Are *institutions* themselves the proper subject of moral reactions such as anger, resentment, or condemnation? Moreover, even if it can be shown that Israeli academic institutions acted in a way that merits condemnation, boycotting them will harm the individual academics who work in those institutions. Can this distributive effect be justified?

In recent years, much attention has been given to the first of these challenges: which groups should be classified as moral agents that are collectively responsible for their actions?² At the same time, the problem of the impact of collective punishment on such groups' members has not gained much attention. Here, to assess the legitimacy of such impact, two separate issues must be addressed. The first concerns the *character* of the impact of collective punishment on group members: is it a form of punishment, or perhaps another type of burden? The second concerns the *pattern* of the impact of the collective punishment on group members: how are the different group members affected by the punishment relative to each other, and what is the justification for that pattern of distribution? The answers to these questions would help us to understand under what circumstances the distributive effect of collective punishment is morally permissible and how this effect should be managed.

In this chapter, I begin to address these issues. The starting point of the discussion here is the (admittedly controversial) assumption that some groups have a collective moral agency that is independent of their members' agency and that, as such, they are collectively responsible for their actions. The first section distinguishes between two types of burdens that groups can be made to bear in the aftermath of an injustice or harm for which they are responsible. The first is collective (or, more precisely, corporate) punishment, a burden with the purpose of condemning the group for the harm it caused. The second is collective (or corporate) liability, a burden with the purpose of assigning the costs of the harm to the group

It was subsequently revoked after it had been pointed out that an academic boycott is likely to infringe on UK antidiscrimination legislation. At the 2008 annual meeting, delegates decided to call on the UCU members to "consider the moral and political implications of educational links with Israeli Institutions." This decision was also met with much internal criticism and threats for legal action and was not implemented. In 2009, delegates voted for a "boycott, disinvestment and sanctions campaign" against Israeli universities. The vote was immediately declared void by the union's leadership.

² See, for example, the collection of works in Peter A. French and Howard K. Wettstein, eds., *Shared Intentions and Collective Responsibility*, vol. XXX, *Midwest Studies in Philosophy* (Oxford: Blackwell Publishing, 2006).

but in a way that does not carry with it a condemning quality. When groups are being punished or held liable for their actions, their individual members are bound to be affected as a result. However, using the case of the academic boycott as a case study, I suggest that this effect does not necessarily amount to the personal condemnation and *punishment* of individual group members. Rather, group members may end up being merely *liable* for harms that their group has caused, without that burden implying that they personally have acted wrongly. Nevertheless, as I discuss later in the first section, even if collective sanctions do not punish group members, they affect them adversely, and sometimes heavily. This fact raises important questions about the proper model for the distribution of the collective burden that is created by the sanction, between the group's individual members.

The second section deals with this problem. I suggest that, once a group is being collectively sanctioned, there are three ways in which the impact of the sanctions can be further distributed between its members: on a proportional basis, on an equal basis, and on a random basis. A proportional distribution of the impact takes into account the group members' personal association with the collective harm; an equal distribution distributes its costs on an equal basis; and a random distribution lets the collective burden fall randomly. A group that is subjected to corporate sanctions must choose between these three models. The third section analyzes both the normative and practical considerations that should guide a group's choice in this matter. As the discussion shows, the three models of distribution fare differently from each of these perspectives: a proportional distribution is potentially the least practical distribution, but it has a solid normative justification that revolves around the principle of fairness. A random distribution is hard to justify on normative grounds, but is the easiest to implement. Finally, an equal distribution is located somewhere between the two other distributions on both scales: it is more practical than a proportional distribution and harder to implement than random distribution. On the normative scale, although it is not as clearly supported by a normative premise as proportional distribution, there are cases in which it can be justified on normative grounds. For example, as I suggest here, in cases in which the group in question is the state, it can be argued that citizens ought to accept an equal distribution of their governments' collective burden because doing so is constitutive of a certain ethical understanding of the meaning of citizenship. Finally, the fourth section draws on the discussion to provide some recommendations for the proper scope and limits of collective sanctions.

IMPOSING SANCTIONS ON COLLECTIVES

In this section, I examine the nature of the impact of collective punishment on group members. As a prelude to the discussion, it is important to draw two conceptual distinctions. The first distinction is between “punishment” and what I would refer to here as “liability.” Following Joel Feinberg, I define punishment as a “device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.”³ According to this definition the key function of punishment is the expression of condemnation through some form of hard treatment. Liability, in contrast, is a notion that refers to the burdens that are imposed on an agent in the aftermath of an undesired situation but that do not necessarily carry with them the implication that she acted wrongly. Examples are fines and penalties – costs that are imposed when agents have broken the law but that lack symbolic significance,⁴ and compensatory duties to the victims of harm, which are sometimes assigned to agents who acted without fault or who have not even contributed to the harm in question (e.g., companies’ liability for the quality of their products or for the conduct of their employees).⁵

³ Joel Feinberg, “The Expressive Function of Punishment,” *Monist* 49, no. 3 (1965): 400.

⁴ See discussion in *ibid.* As Feinberg points out, fines, penalties, or the withdrawal of state benefits can become a form of punishment if they carry with them a symbolic significance.

⁵ See discussion in Joel Feinberg, “Collective Responsibility (Another Defence),” in *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics*, ed. Larry May and Stacey Hoffman (Savage, MD: Rowman & Littlefield Publishers, 1991). Notice that the notion of liability as it is used here is different from the notion of “outcome responsibility” as developed by Tony Honoré and more recently by David Miller (Tony Honoré, “Responsibility and Luck: The Moral Basis of Strict Liability” in *Responsibility and Fault* (Oxford: Hart, 1999); and David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 86–90). According to Honoré, outcome responsibility means “being responsible for the good and harm we bring about by what we do,” and it justifies the assignment of costs (or benefits) to agents for outcomes they have brought about even when their conduct was without fault (Honoré, “Responsibility and Luck,” 14). Although my notion of liability is also concerned with the distribution of the costs (and benefits) of certain outcomes, I wish to also include in it cases where the liable agent is not related to the outcome through her own conduct. My reason for preferring this notion of liability is that, as the discussion later on would reveal, it covers cases in which the responsibility of a group is distributed between group members, sometimes regardless of their own conduct. The notion of outcome responsibility seems inapplicable to those cases.

The second distinction is the familiar distinction between corporate and shared responsibility. Briefly, corporate responsibility refers to the responsibility of a group, as an agent independent of its individual members. Shared responsibility, in contrast, refers to the responsibility of group members, with relation to actions performed by the group or by other group members.⁶ The idea that groups are corporately responsible for their actions, and as result can be held liable or punished when their actions lead to bad outcomes, is often grounded in the metaphysical claim that groups can have a collective moral agency independent of their members. Several familiar accounts in the literature support this claim, and what they all share in common is the assumption that at least highly institutional groups can form collective intentions and can act collectively.⁷ The collective intentions and actions of groups have a derivative nature in the sense that they are exercised through the intentions and actions of individual group members. However, at least in highly institutional groups with formal decision-making mechanisms, the collective intention of the group would not necessarily be the intention of all group members, and even if all group members share the collective intention, they may be doing so to varying degrees. In the rest of the discussion, I assume that a group agent that acts in a condemnable manner is corporately responsible for its behavior, but it does not follow that all its members acted in a condemnable manner; even if they did, then not necessarily to an equal degree.

Do Corporate Sanctions Punish Group Members?

We can now turn to examine the distributive effects of collective punishment and of collective liability. On the basis of the aforementioned

⁶ This distinction appears in many discussions of collective responsibility. See, for example, Virginia Held, "Can a Random Collection of Individuals Be Morally Responsible?," in *Collective Responsibility*, ed. Larry May and Stacey Hoffman. Larry May, *Sharing Responsibility* (Chicago: University of Chicago Press, 1992), 37–38. Gregory Mellema, *Collective Responsibility*, Value Inquiry Book Series, Vol. 50 (Amsterdam: Rodopi, 1997).

⁷ See, for example, Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984). Larry May, *The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights* (Notre Dame, IN: University of Notre Dame Press, 1987); Philip Pettit, "Groups with Minds of Their Own," in *Socializing Metaphysics: The Nature of Social Reality*, ed. Frederick F. Schmitt (Oxford: Rowman & Littlefield Publishers, 2003); Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: New York: Cambridge University Press, 2000), 191–97. According to some of these accounts, noninstitutional groups can also be corporately morally responsible.

distinctions, I take “collective punishment” to mean the imposition of *corporate* punishment, or the punishment of a group. Accordingly, collective punishment amounts to a hard treatment of a *group* with the purpose of expressing resentment, indignation, disapproval, or reprobation of the group’s behavior.⁸ But is it possible to punish a group without also punishing its members? After all, groups are made of flesh and blood individuals, and it seems that, at least usually, whatever treatment the group itself is subjected to would pass on to them.⁹ To see this problem more clearly, consider the aforementioned example of the proposed academic boycott against Israeli universities.¹⁰ Supporters of the boycott call for the elimination of professional contacts with Israeli academic *institutions*. By eliminating those professional contacts, the boycotting academics express their condemnation of the alleged collaboration of Israeli academia with Israel’s foreign policy.¹¹

The calls for an academic boycott on Israeli universities have been met with much critique. Some opponents question the alleged collaboration of Israeli universities with the Israeli government’s policies. Others doubt whether a boycott is the most appropriate means to express condemnation

⁸ Notice that in common speech, the term “collective punishment” is often used to describe not just the punishment of a group but also the imposition of burdens on group members by virtue of their membership. According to my proposed terminology, the latter type of burden should be called “shared punishment” or “shared liability.”

⁹ For the various ways in which group members are affected by the punishment of their group, see the chapter by Toni Erskine in this volume. Notice that the punishment of the group would not always pass on to its members. For example, it is possible to characterize the revocation of a corporation’s charter as a form of “capital punishment” of the corporation, but not of its members. These are more rare examples, however, and they raise a host of separate questions such as, for example, should we classify a revocation of a charter as punishment at all, if it does not inflict suffering on real flesh-and-blood agents? These problems are briefly discussed in French, *Collective and Corporate Responsibility*, chap. 14.

¹⁰ Boycotting is, of course, different from punishment, inter alia because a boycott does not have a retributive function. Nevertheless, both boycotts and punishments have the function of expressing the condemnation of their subject’s behavior, and for that reason, I think the example of the boycott is relevant for the discussion here.

¹¹ Such public expression of condemnation is meant to serve several goals, according to the supporters of the boycott: it would put pressure on the Israeli public and government; it would express solidarity with Palestinian academics and with Israelis who oppose their government’s policies, and it would raise international consciousness to the Israeli–Palestinian conflict. Whether these goals justify the use of boycott as a means and whether these goals would realistically be achieved by a boycott are important questions, but they are not the subject of this chapter. For a related discussion on these issues with regard to international economic sanctions, see Avia Pasternak, “Sanctioning Liberal Democracies,” *Political Studies* 57, no. 1 (2009), 54–74.

of academic institutions and to achieve the boycott's proclaimed goals. Finally, there is the worry that an academic boycott would seriously compromise academic freedom. These are heavy charges against the academic boycott, and its supporters do not necessarily have adequate replies to them. However, in what follows I wish to leave these debates behind and instead focus on the problem of the impact of the boycott on individual academics. This problem was raised, for example, by Martha Nussbaum, in her recent critique of academic boycotts. According to Nussbaum, the primary target of an academic boycott is the academic *institution*, but it inevitably bans *individual* academics from participation in the international academic community. By doing so, it signals that "all *members* of the institution deserve condemnation."¹² Using the distinctions I drew earlier, we can say that Nussbaum is concerned that the type of treatment that individual academics face when their institution is boycotted is a form of shared punishment, because it shames and condemns *them*, not just their institution. This is a heavy accusation, because it implies that the boycott violates the basic moral premise according to which expressive condemnations such as punishment or boycotting must condemn the specific agent that behaved wrongly.¹³ When the group itself is the agent that behaves wrongly but its members are the ones who end up being condemned, then the necessary connection between responsibility and punishment (or boycotting) is broken.

If collective sanctions such as punishment or boycott do inevitably turn into a form of *shared* punishment, as Nussbaum seems to suggest, then we have an additional good reason to reject such practices. However, in what follows, I argue that this is not obviously the case. I take the lead here from Peter French's defense of the practice of punishing

¹² Martha Nussbaum, "Against Academic Boycotts," *Dissent* 54, no. 3 (2007): 33. Emphasis added. Nussbaum lists several other objections to academic boycotts in general and to the boycott against Israeli institutions in particular.

¹³ Anthony Flew, "The Justification of Punishment," *Philosophy* 29, no. 111 (1954): 293. Mark Reiff explores an alternative view that does not share this basic moral premise about the necessary connection between responsibility and punishment. This view, as he suggests, is the most plausible basis for terrorist acts against civilian populations. It postulates that people can be *punished* for things which their group has done but for which they share no responsibility (e.g., wrongs committed in the distant past). Reiff demonstrates how this view suffers from internal inconsistencies and leads to conclusions which are unacceptable by its own lights. See Mark Reiff, "Terrorism, Retribution, and Collective Responsibility," *Social Theory and Practice* 34, no. 2 (2008), 209–42.

criminal corporations.¹⁴ In reply to the objection that corporate punishment harms the individual members of corporations (such as shareholders), French makes the following observation: “when a natural person commits a felony and is convicted and punished, his or her associates, often family members and dependents, are frequently cast into dire financial circumstances.” Yet, as he continues, “in many jurisdictions little or no official interest is paid to these innocent sufferers.”¹⁵ One way to interpret this statement is as a suggestion that the costs that are imposed on those who are related to the punished agent, whether an individual or a corporation, are mere side effects.¹⁶ They have no expressive and condemning function and are therefore not a reason, in and of themselves, to reject the practice of punishment (although, as French himself later on notes, considerations of proportionality could play a role here).¹⁷ A similar line of argument could be employed with regard to the academic boycott. According to this line, the costs that pass on to individual Israeli academics as result of the boycott are not intended to condemn *them*. Rather, although the social meaning of the boycott is a form of corporate condemnation of Israeli academic institutions, the social meaning of its distributive effect on individual academics is a form of shared *liability*. It is a burden that they end up carrying as a result of the fact that the institution they work in acted wrongly. This burden is part of the costs that come with being a member of an academic institution. In this respect, it is equivalent to a fine or to the attribution of strict liability – namely, costs that, although unpleasant, do not necessarily express indignation, resentment, or disapproval. As I mentioned earlier, there are other objections to the boycott (and to other forms of corporate punishment) that should be taken into account when we evaluate it. However, the specific objection that a boycott of an institution necessarily condemns all the members of the institution can be rejected, at least when a boycott is designed and

¹⁴ In French’s terminology, corporations are ‘conglomerates,’ or groups with a moral personality. On the definition of conglomerates see French, *Collective and Corporate Responsibility*, 13–18.

¹⁵ *Ibid.*, 189–90.

¹⁶ The analogy between the corporation and the criminal is made also by Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart, 2002), 146). See also David Runciman, “The Concept of the State: The Sovereignty of Fiction,” in *States and Citizens: History, Theory, Prospects*, ed. Quentin Skinner and Bo Stråth (Cambridge: Cambridge University Press, 2003).

¹⁷ I refer to the issue of proportionality in the conclusions to the chapter.

advertised in a way that separates the condemnation of the institution from the condemnation of its members.¹⁸

The Problem of Distributing Shared Liability

I suggested thus far that the distributive effects of corporate sanctions like punishment or boycott should not necessarily be rejected on the grounds that they amount to a form of shared punishment. If the sanction is designed in a way that does not condemn the group members, then the burdens they suffer as a result are a form of shared liability. However, in what follows, I point to a different normative difficulty that the effects of corporate sanctions raise. This difficulty concerns the way in which the effect of the corporate sanction is distributed between group members. To see this problem more clearly, consider again French's example of the family who is cast into financial difficulties as a result of the arrest of a family member. Imagine a criminal whose family consists of a sister and a mother. Both women were financially dependent on the criminal before he was sent to prison. The mother, who is old and ailing, was unaware of the fact that her son perpetrated a crime. The sister, however, was in a position to prevent the crime, but failed to do so and in that specific sense shares some moral responsibility for it. Under these circumstances, we are likely to think that *within* the family, there are better and worse ways to distribute the new financial burden that resulted from the arrest. For example, we may think that the sister should carry a greater portion of the burden, for after all, she shares greater responsibility for the crime than her mother. As this example demonstrates, even if the burdens that are imposed on those that surround the punished are not punitive in and of themselves, they raise an important normative question about the proper distribution of the burden among those who are affected by the punishment.

The question of the proper distribution of the effects of sanctions is especially pertinent when the sanctioned agent is a group. For after all, it is usually the case that when a group is sanctioned, these sanctions cannot

¹⁸ Notice that many supporters of the academic boycott on Israeli institutions have failed in that respect. See, for example, Mona Baker and Lawrence David, "In Defence of the Boycott," *Counterpunch*, September 18, 2003. Available at <http://www.counterpunch.org/bakero9182003.html>. The authors of this piece argue that the target of the boycott is Israeli institutions but also suggest that the boycott is justified because all Israeli academics share the blame for the wrongs of the Israeli occupation (thus pointing the finger at individuals rather than at the institution).

be contained to the level of the group and almost always are bound to have a distributive effect. We saw this effect in the case of condemning sanctions such as the academic boycott: its adoption cannot avoid imposing burdens on the institution members. This scenario repeats itself in the case of corporate *liability*. Consider, for example, the common practice of holding states liable for injustices they caused (e.g., war crimes).¹⁹ When a state pays compensation to its victims, the material losses it suffers pass on to its citizens, either directly or indirectly. By direct transfers I mean that the government taxes citizens more, to cover for the assets it lost. By indirect transfers, I mean that the government covers for its losses using resources that would otherwise have been used for other public goods and services, thus lowering the overall welfare level of the population. Because the population will end up bearing the liability of the state, it is important to stipulate the rules for the distribution of this effect.²⁰

To sum up, I distinguished between the notions of punishment and liability and between shared and corporate responsibility. I suggested that if we take collective punishment to mean corporate punishment, it can have two types of effect on group members: first, the punishment imposed on the group (e.g., boycotting) may carry a condemning quality

¹⁹ On states' agency, see Toni Erskine, "Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi States," *Ethics and International Affairs* 15, no. 1 (2001), 67–86.

²⁰ This example points to the relevance of the problem of the distributive effects of corporate sanctions to individualist as well as to corporatist theorists. Corporatists take collectives such as states to be independent moral agents that can be held responsible and liable for their actions. This position is not shared by individualists, who reject the metaphysical assertion that groups have a moral agency; see discussion in H. D. Lewis, "Collective Responsibility (a Critique)," in *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics*, ed. Larry May and Stacey Hoffman (Savage, MD: Rowman & Littlefield, 1991; Mellema, *Collective Responsibility*, chap. 4.) For that reason, individualists are likely to argue against the practice of punishing collective entities such as states. Nevertheless, even individualists can agree that, as a matter of practicality, states are the institutional units that should be held *liable* for the bad outcomes brought about by their governments and sometimes its citizens. Indeed, many authors assign liability to states but remain silent about their separate moral agency. See, for example, Christian Barry, "Applying the Contribution Principle," in *Global Institutions and Responsibilities: Achieving Global Justice*, ed. Christian Barry and Thomas Pogge (Malden, MA and Oxford: Blackwell, 2005); John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 105–6; Henry Shue, "Global Environment and International Inequality," *International Affairs* 75 (1999), 531–45. As I suggest, if the state is regarded as the liable agent, even if for practical reasons alone, there is room for thinking about the way in which this collective burden will be distributed among citizens.

for the group members as well. As we saw, the transfer of such punitive measures to group members is morally objectionable because it violates the necessary connection between punishment and responsibility. Next, the punishment imposed on a group may create further nonexpressive burdens for its members (e.g., damage to one's academic career in the case of the academic boycott); similarly, corporate liability is likely to be translated into shared liability (e.g., higher taxes for citizens). I suggested that even when the burden that group members bear is mere liability and not punishment, important questions arise about the way this burden should be distributed among them. In the next sections, I turn to address this issue by examining several rules for the distribution of the impact of corporate sanctions.

THREE WAYS TO DISTRIBUTE CORPORATE SANCTIONS

In the previous section, we saw that it is common practice to hold collective entities responsible for their actions and to impose corporate sanctions on them when they act wrongly. Furthermore, we saw that whenever a group is corporately sanctioned, its members will be liable for those costs, and this fact calls for thinking about the proper rules for the distribution of the burden. In this section, I stipulate what I take to be the three possible ways to distribute the impact of corporate sanctions within a group.²¹

The first rule for the distribution of the impact of corporate sanctions is what I call "proportional distribution." According to this rule, the group allocates the collective burden that was assigned to it in proportion to members' differing levels of personal association with the collective harm. There are different ways in which group members may be associated with a collective harm that their group caused: their contributions to the harm, their failure to prevent it, and even the personal benefit they derived from the harm. Putting aside the differences between these various considerations, for the purposes of the discussion here, I'll define proportional distribution (PD) as any form of distribution that identifies some way in which individual group members are personally associated with the collective harm and apportions their share of personal liability in proportion to their association. It is not difficult to find supporters for some version of

²¹ For the time being, I am treating the question of the distribution of corporate sanctions as an internal question that is directed to the sanctioned group itself. Later on, I reflect on the implications of this question also for the external agents who impose the sanctions on the group (I thank David Luban for pointing out this distinction).

a PD in the literature. For example, Larry May expresses support for a PD when he suggests that the punishment of criminal organizations should be distributed “among those key members of the corporation who can be linked to the harm by their positions of authority and then also by the specific guilty state of mind they each had.”²²

The second rule for the distribution of the impact of corporate sanctions is what I call “equal distribution” (ED). In contrast with a PD, an ED ignores members’ personal association with the harm, and instead apportions to each liable member an equal share of the burden. The precise definition of an equal share of the burden will be informed by further distinctions about the nature of equality. For example, an ED may take into account members’ relative capacity to pay, so that the burden has an equal impact on each. However, these further distinctions are not important for the discussion here, so long as the distribution is not guided by considerations which relate to members’ association with the harm. An ED of one specific type of collective burden is advocated by Iris Young, in her work on responsibility for global labor injustice. According to Young, citizens of developed and underdeveloped countries have a duty to work toward a more just global supply chain system, regardless of their personal involvement with this injustice.²³

²² May, *The Morality of Groups*, 100. The crude-careful approach to collective responsibility that Mark Drumbl stipulates in his contribution to this collection is another example of proportional distribution. Other supporters are Cass Sunstein and Eric Posner in their work on the costs of climate change injustice. They note with regard to the distribution of these costs that “many Americans today do not support the current American energy policy, appear not to benefit from it, and already make some sacrifices to reduce the greenhouse gas emissions that result from their behaviour. . . . [A]n approach that emphasized corrective justice would attempt to be more finely tuned, focusing on particular actors, rather than on Americans as a class.” Cass Sunstein and Eric Posner, “Climate Change Justice,” (John M. Olin Program in Law and Economics Working Paper Series, University of Chicago Law School, 2007), 22. Thomas Pogge expresses a similar position in *World Poverty and Human Rights*, where he argues that the scope of individuals’ duty to reform unjust institutions is determined in light of their level of participation in these institutions and contribution to the injustices they commit. See Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2002), 50.

²³ Iris Marion Young, “Responsibility and Global Labor Justice,” *The Journal of Political Philosophy* 12, no. 4 (2004): 385. For a similar line of argument that is grounded in consequentialist premises, see Robert Goodin, “Apportioning Responsibility,” *Law and Philosophy* 6, no. 2 (1987). Young develops a further principle (which includes the capacity to engage in political activity) that specifies what an equal share of the task of opposing global labor injustice precisely entails for each individual. Notice that the burdens associated with the task of opposing global labor injustice do not clearly fall into the category of “liability costs.” Like liability costs, however, they are burdens that

Finally, the third possible way to distribute the costs of corporate sanctions is what I call random distribution (RD). RD is distinct from PD and ED by the fact that it allows the distribution to be guided by pure luck or chance, rather than by a systematic principle. Consider, for example, the case of the academic boycott. If Israeli universities will be boycotted, their individual members are likely to suffer as a result, and we can imagine the distribution of this burden to be neither proportional nor equal: it will impose different burdens on different academics, and this burden will not necessarily fall in proportion to members' association with the collective harm (e.g., academics with a higher international profile will suffer more than academics who publish only in Israeli journals). Furthermore, the burden in question (damage to one's international career, etc.) can hardly be transferred between members within the group, and for that reason, the group cannot shift to a proportional or equal distribution. In this case, the distribution then remains random: some members simply have the bad luck of being more vulnerable to the collective harm than others.

EVALUATING THE THREE FORMS OF DISTRIBUTION

We saw that there are three ways in which a group that is liable or punished for its actions can pass the burden on to its members. The question I now turn to address is under what circumstances would each of the models be recommended?²⁴ When answering this question, we should distinguish between practical and normative considerations. As we will see, at least as a general rule, the three models fare differently from each of these perspectives. Let us first look at practical considerations such as the feasibility and the financial cost of the chosen distribution. On this scale, a PD is likely to fare worse than the other two models. After all, according to the PD model the group has to engage in calculations of members' personal association with the collective harm (their personal contributions, omissions, benefit, and so on) to determine their share of liability. Such calculations are potentially costly and time-consuming (if not impossible), at least in very large groups such as states or big

are imposed on agents as a result of harm or injustice, and they do not have a symbolic significance. For these reasons, I think the example is relevant for the current discussion.

²⁴ I am assuming here that the group can make a viable choice between the three models. This implies, for example, that the costs are at least partly transferrable and that the group is not forced to remain with a random distribution.

corporations.²⁵ An ED and an RD, in contrast, do not require similarly complex calculations, because they are not based on information about individual members' personal behavior with relation to the collective harm. Furthermore, at least as a general rule we can assume that an ED, although potentially less costly than a PD, would be more costly than a RD. After all, an ED requires some transfer of resources between the members of the group – from those who were encumbered with a greater share of the burden to those who paid less or from everyone an equal share to the general pool. A RD would avoid the procedural costs that such transfers would entail, simply because it does not call for any redistribution within the group.²⁶

Turning next to the normative set of considerations, it is hardly surprising that an RD fares badly in this respect, for as we saw, an RD provides little in terms of normative justification for why some group members rather than the others end up with the costs. That is not to say that an RD can never be justified on normative grounds. An RD may arguably be deemed normatively acceptable under some circumstances, usually if it is assumed to lead to an overall significant benefit. Consider for example the legal practice of “solidarity liability.” This practice gives a claimant who was harmed by several parties the right to seek full compensation from any of those parties. As Peter Cane explains, “the sharing of the liability is a matter between the various responsible parties . . . it is no answer to a claim for full compensation that the party sued was only one of several responsible parties.”²⁷ At least in its initial stage, solidarity liability is a form of RD, because it does not provide a systematic principle according to which we are able to foretell on which of the guilty parties the collective expense will fall.²⁸ This legal practice, as Cane notes, is highly controversial, but its supporters justify it by pointing to the fact that, as a general rule, it serves to protect the interests of victims, who

²⁵ In his contribution to this collection, Mark Drumbl deals with some of the practical critiques of PD.

²⁶ An RD may incur additional negative costs for the group in the long run. For example, it may have negative side effects that will harm the group as a whole (e.g., it will create resentment among those individuals who end up paying more than others). Notice, however, that PD and ED may also have long-term side effects in terms of their influence on the behavior of group members. Because it is hard to determine what such side effects would be without a more detailed sociological account, I do not consider them here.

²⁷ Cane, *Responsibility*, 178.

²⁸ Notice, however, that in this example, RD is imposed on the members of the group from the outside, and only at an initial stage. After that initial stage, the group can decide to leave the distribution in its random form or to continue and redistribute the burden (where possible) on a proportional or an equal basis.

do not have to go through the cumbersome process of proceeding against several parties. Another example of cases in which RD may be justified is when the sanctions that are imposed on a group simply cannot, by their nature, be transferred between group members (whether on an equal or proportional basis). Here, if there are good reasons to think that sanctioning the group would stop it from perpetrating greater wrongs, then the fact that this measure would have an impact on group members on a random basis should perhaps be ignored.²⁹ Note, however, that in both these examples, RD is a moral compromise, permissible not because it is supported by some underlying normative principle but by virtue of the fact that it produces an overall desired outcome.

In contrast to RD, a PD has a solid normative basis to support it. After all, as we saw in the example of the family of the criminal, PD is compatible with our basic intuitions about fairness. Fairness requires that a distribution of gains and burdens will allocate them to the parties in question according to some relevant factors. A PD of a group's collective burden does precisely that, by identifying those individuals who are personally associated with the collective harm through their own actions and omissions. This conclusion is not unfamiliar in the literature. For example, it is the driving force behind May's aforementioned argument that the punishment of corporations should be directed at decision makers in the corporation rather than at powerless shareholders.³⁰

The picture becomes more complex, however, when we examine the normative status of ED. As we saw, an ED gives each group member an equal share of the group's collective burden. In this respect, it can be argued, an ED fails to comply with basic standards of fairness: it treats alike those who are more and those who are less associated with the collective harm. Can an ED ever be justified on normative grounds? The

²⁹ Although as some authors argue, an RD is justified in such cases only if all the group members share some responsibility for the collective harm. Erin Kelly's work on the justification of collective sanctions against unjust states arguably takes this line: she argues for collective sanctions against unjust states, which include even bombing from the air. These measures are likely to impose nontransferrable burdens on the citizens of the sanctioned state. As such, they cannot be redistributed on an equal or proportional basis. Nevertheless, Kelly suggests that such impositions can be justified in cases in which all the citizens of the target state share some responsibility for their government's unjust policies. See Erin Kelly, "The Burdens of Collective Liability," in *Ethics and Foreign Intervention*, ed. Deen Chatterjee and Don Scheid (Cambridge: Cambridge University Press, 2003).

³⁰ May, *The Morality of Groups*, 104; Sunstein and Posner, "Climate Change Justice," 32.

answer to this question partly depends on the type of group in question. In the case of voluntary groups, such as corporations or partnerships, an ED would be legitimate if the rules of distribution of the group's collective burdens are publicly known, and members are generally aware of the fact that, were the group to be punished or held liable, they would be expected to share the costs on an equal basis.³¹ An ED is much harder to defend in nonvoluntary groups, whose members do not choose to join nor can they easily exit them. The paradigmatic example of such groups is, of course, the state: in most states, the majority of citizens do not choose their country of nationality, nor can they leave it without incurring serious costs. Moreover, it is usually the case that policy makers prefer an ED over a PD of the costs of the state's collective liabilities. Consider, for example, a state that is demanded to pay compensation for a harmful or aggressive behavior toward another country. State officials are unlikely to attempt to design a tax scheme that would identify those citizens who have supported the harmful policies, failed to prevent them, or benefited from them. Instead, they will raise a general tax that would distribute the burden among *all* citizens, regardless of their personal association with the harm.

Of course, it could be argued that political decisions of this nature are guided primarily by considerations of practicality (such as the costs of a PD to the state as a whole). However, can such practices be defended on normative grounds as well? I would argue that they can, at least under certain circumstances. The starting point of my defense is the intuition that a PD of the collective burden that results from governments' policies seems somehow inappropriate. This intuition is voiced, for example, by Michael Walzer, in his discussion of reparations for unjust wars.³² There Walzer briefly notes that

Reparations are surely due to the victims of aggressive war, and they can hardly be collected only from those members of the defeated state who were active supporters of the aggression. Instead the costs are distributed through the tax system, and through the economic system generally, among

³¹ As I noted earlier, members may have good reasons to prefer an ED to PD, in light of the latter's potentially considerable costs.

³² See similar comments in Hannah Arendt, "Collective Responsibility," in *Amor Mundi: Explorations in the Faith and Thought of Hannah Arendt*, ed. James William Bernauer (Boston: Nijhoff, 1987); Karl Jaspers, *The Question of German Guilt* (New York: Fordham University Press, 2000), 55–57; Debra Satz, "What Do We Owe the Global Poor?," *Ethics and International Affairs* 19, no. 1 (2005): 50.

all the citizens . . . in this sense, citizenship is a common destiny, and no one, not even its opponents . . . can escape the effects of a bad regime.³³

I would suggest that this quote points to a normative defense of the practice of ED in states. According to this defense, an ED is part and parcel of a certain ethical view of the meaning of citizenship. More specifically, on this view, citizens should see themselves as having equal shares in their joint political activities and as equal bearers of responsibility for them.³⁴ This view, I would venture, is not uncommon in the real world. It is reflected, for example, in the powerful sense that citizens often have that “this is *their* government,” even when they did not personally authorize it and even if they protest against its policies; in the familiar sense of shame, or at least discomfort, we tend to feel when our governments act badly, even if we personally “off-set” our contributions to the objectionable policy. These common sentiments reflect a certain understanding of the bond of citizenship, according to which each citizen is tied to outcomes of the political community’s shared political goals and institutions in a way that does not depend on his or her own personal contributions to it.

The perception that citizenship is a common destiny is not the only available interpretation of the meaning of citizenship. One could point to alternative accounts of citizenship that are more individualistic. However, the idea of citizenship as a common destiny has an intrinsic value that other perceptions arguably do not share. Its value is generated, first by the fact that it connects citizens to each other in a deep and important sense,³⁵ and second, by the fact that it enhances citizens’ willingness to participate in and contribute to their political lives together. Consider, for example, the case of soldiers who are asked to fight a war for their

³³ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd ed. (New York: Basic Books, 1992), 297. In the sentence omitted from the quote, Walzer refers to the fact that current generations are often made to pay for injustices perpetrated in the past. The problem of transfer of collective burdens between generations raises a host of other questions, which I cannot refer to in the scope of this chapter.

³⁴ For a detailed account of this particular understanding in general and in political communities in particular, see Avia Pasternak, “Sharing the Costs of Political Injustice,” *Politics, Philosophy, Economics* (forthcoming). An argument in similar spirit appears in Amy Sepinwall’s contribution to this collection (Chapter 9).

³⁵ On the importance of this specific deeper connection see, for example, Alasdair MacIntyre, “Is Patriotism a Virtue?,” in *Theorizing Citizenship*, ed. Ronald Beiner (Albany: State University of New York, 1995), 224; Robert Nozick, *The Examined Life: Philosophical Meditations* (New York: Simon & Schuster, 2006), 289.

country. The sacrifice these soldiers may have to make can be high, and they are more likely to be willing to make it if they are certain that the rest of the citizenry will share the burden of the actions that they are performing for the collective.

I suggested that according to one common and valuable understanding of citizenship, citizens who act together to execute their common political will through their representative institutions should see themselves as having equal shares in their joint political activities. Although an ED of the costs of government policies expresses precisely this idea, a PD or an RD undermines it: a PD highlights the individualized actions of citizens with regard to government's policies, thus treating some as participants and others as not. An RD lets the burden fall only on some citizens and thus undermines any sense of collective solidarity. Because an ED is constitutive of a valuable ethical understanding of the meaning of citizenship, citizens have ethical reasons to preserve and protect it.³⁶

To sum up, a group that is held liable or punished for its actions must choose between the three models of distribution, and – at least as a general rule – normative and practical considerations are likely to pull in opposite directions. An RD may cost less to the group as a whole, but it can rarely be justified on normative grounds. A PD may be costly for the group, but from a normative point of view, it is compatible with the principle of fairness.³⁷ Finally, an ED is potentially less costly than a PD, but harder to justify on normative grounds. Still, as we saw, there are instances in which an ED is morally acceptable. For example, I suggested that an ED can be justified in voluntary groups, if it is a matter of public knowledge. I also suggested that even in nonvoluntary groups such as states, an ED could be justified because it is constitutive of a certain

³⁶ Notice that rejecting PD would be more difficult than rejecting RD, because PD, as we saw earlier, is compatible with the principle of fairness. Groups like the political community thus face a choice between two visions: the idea of citizenship as a common destiny, and an alternative view of citizenship that emphasizes fairness and personal responsibility. Both are legitimate views of citizenship, and my goal here is not to judge between them but rather merely to point out to a possible defense of ED that could outweigh fairness considerations.

³⁷ An important caveat to be mentioned here is that if the costs of PD are high, attempting to implement it might have residual normative costs; for example, it would take a long time until the victims of the injustice received their due compensation; or the group's ability to provide other goods would be diminished. Such problems do not necessarily call for a complete break with PD but perhaps, where possible, for a partial PD, which will be easier to implement.

understanding of the civic bond, according to which citizenship is a common destiny.³⁸

CONCLUSIONS

I noted in the introduction that collective punishment has a notorious reputation among moral philosophers. My goal here was not to redeem the reputation of the practice of collective punishment but rather to distinguish between the various ways in which the punishment of groups can be managed and to show which of these are more morally acceptable than others. As I argued in the first section, even if we accept the claim that groups are independent agents that merit condemnation when they behave badly and should be held liable for their actions, we must acknowledge that corporate sanctions will usually affect group members adversely. This does not necessarily imply that corporate punishment translates into the unjustifiable shared punishment of group members. Rather, the costs that group members suffer as a result of the sanctioning of their groups may be merely a form of shared liability. Even so, there are good reasons to stipulate the rules for the further distribution of that type of burden between group members because the various possible patterns of distribution have different strengths and weaknesses.

The second and third sections pointed to what I take to be the three possible ways in which the costs of corporate sanctions may fall on group members: on a proportional basis, which takes into account their personal responsibility for the collective harm; on an equal basis, which allocates each an equal share; and on a random basis, which lets the burdens lie where they fall. An RD may be the most feasible and least costly to the group as a whole because it does not require transfer of resources between group members. However, it is bound to raise deep moral objections precisely because it does not provide any normative explanation for why some group members and not others end up carrying the burden. A PD may be hard to implement in large groups, but it sits well with our intuitions about fairness and personal responsibility: those group members who have a greater share of personal association with the collective harm end up bearing a greater share of the burden. Finally, I suggested that an ED can be defended from a normative point of view when it is

³⁸ This defense is developed more fully in Pasternak, "Sharing the Costs of Political Injustice." For an alternative defense see Anna Stilz, "Collective Responsibility and the State," *Journal of Political Philosophy* (forthcoming).

constitutive of a certain valuable perception of group membership as common destiny. This argument can perhaps serve to explain why, in many states, an ED of the costs of the states' corporate burden is a common practice that, I would venture, is largely supported by common sentiments.

The discussion thus far analyzed the impact of collective punishment on group members. As a final point, I turn to assess how this distributive nature of collective punishment should shape our general assessment of the practice of corporate sanctions. First, as was mentioned in the first section, corporate punishment should be designed in a way that does not translate into punitive measures on group members. This implies that to whatever condemning treatment the group is made subject, that treatment should not condemn its members simply because they belong to the group. This restriction will put limits on the type of treatment to which groups can be subject when they are punished for their actions. For example, going back to the case of the academic boycott, if it turns out that the sanctioning of individual academics (which results from the general boycott) is generally interpreted as a mark of their condemnation, this would be a good reason to avoid this practice.

The distributive effects of corporate sanctions should also be taken into account when they do not have a condemning implication for group members. Here I would agree with French that, as a general rule, the fact that the sanctioning of a group would have derivative effects on its members should not forbid the sanctioning of that group (in the same way, to recall French's example, that the fact that the punishment of a criminal affects his family members should not lead to his pardoning). In that spirit, I presented the question of the distribution of the effects of corporate sanctions as an internal question that the group itself needs to deal with in the aftermath of the bad outcome it had brought about. However, although as a general rule the problem of distribution is an internal question, it can nevertheless affect the choice of measures that are imposed on the group in question by external agents. First, if a result of the punishment of the group, group members will inevitably suffer extreme costs that are highly disproportional to either the harm caused or to their involvement in the collective harm, then this poses a good reason to reconsider the chosen mode of corporate sanction itself (as it may do in the case of sanctions imposed on individual actors). Second, we are led to the conclusion that at least where possible, corporate sanctions should be designed so that they give the sanctioned group the opportunity to redistribute their costs between group members on some normatively justified basis (namely, a

PD or in some circumstances an ED). This would imply, for example, that corporate sanctions that impose material and transferrable costs on group members are preferable to sanctions that impose nontransferrable costs. Moreover, it implies that sanctions should be imposed with much greater care and with more attention to their distributive effects, when the target group does not have the organizational capacity to redistribute the costs between its members. Consider again the academic boycott: even if we agree that Israeli universities should be boycotted for their allegedly condemnable behavior, the costs that an academic boycott would impose on Israeli academics are likely to be nontransferrable. Moreover, academic institutions are not the type of institutions that have the authority to redistribute the impact of the boycott among their members. These facts suggest, as we saw throughout the discussion, that boycotting or punishing academic institutions is by far more problematic from a normative point of view, because the distributive effects of these measures cannot be mitigated. As I noted earlier, this fact does not imply that an academic boycott is never permissible. There may be cases in which such a boycott could be justified on the grounds that it prevents greater evils. Nevertheless, if my arguments in this chapter are correct, then corporate sanctions in this particular type of case would likely to be a serious normative compromise. However, when the effect of the sanction can be transferred, and the group has the tools to do so, then the fact that group members suffer as a result of the corporate sanction is not, in and of itself, a detrimental objection to the practice of corporate punishment.