Michigan Law Review

Volume 90 | Issue 8

1992

Moral Responsibility in the Age of Bureaucracy

David Luban
University of Maryland

Alan Strudler
Institute for Philosophy and Public Policy

David Wasserman
Institute for Philosophy and Public Policy

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Natural Law Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

David Luban, Alan Strudler & David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348 (1992).

Available at: <https://repository.law.umich.edu/mlr/vol90/iss8/4>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

MORAL RESPONSIBILITY IN THE AGE OF BUREAUCRACY

David Luban,*
Alan Strudler,**
and David Wasserman***

The ranks of officials in this judiciary system mounted endlessly, so that not even the initiated could survey the hierarchy as a whole. And the proceedings of the Courts were generally kept secret from subordinate officials, consequently they could hardly ever quite follow in their further progress the cases on which they had worked; any particular case thus appeared in their circle of jurisdiction often without their knowing whence it came, and passed from it they knew not whither. Thus the knowledge derived from a study of the various single stages of the case, the final verdict and the reasons for that verdict lay beyond the reach of these officials.

— Franz Kafka, *The Trial*¹

I. INTRODUCTION: BUREAUCRACY AND NATURAL LAW

No twentieth-century writer has thought so deeply, or so yearningly, about natural law as Franz Kafka. Kafka's is a world in which we seek desperately to know the natural law that is sovereign in human affairs but find that knowledge of the law is withheld from us. For this reason, we lead our lives in a state of, if not original sin, then original guilt — guilt for violating the law, or perhaps guilt for not knowing the law, despite the fact that we wish to know it.

The Trial is Kafka's greatest elaboration of this theme. Joseph K. is arrested for a crime, but he cannot discover what his crime is. He is convinced that the arrest is a gigantic misunderstanding, but he is unable to bring the inquest to a halt. In the end, he is executed, and

* Professor of Law, University of Maryland; Research Scholar, Institute for Philosophy and Public Policy. B.A. 1970, University of Chicago; M.A. 1973, M.Phil. 1973, Ph.D. 1974, Yale. — Ed.

** Research Scholar, Institute for Philosophy and Public Policy. B.A. 1975, Johnston College; Ph.D. (Philosophy) 1982, J.D. 1985, University of Arizona. — Ed.

*** Research Scholar, Institute for Philosophy and Public Policy. B.A. 1975, Yale; J.D. 1978, University of Michigan; M.A. (Psychology) 1984, University of North Carolina. — Ed. We have presented versions of this paper at the University of Baltimore and The Australian National University, and have benefited greatly from the helpful comments we received. We are particularly grateful to John Braithwaite, Teresa Chandler, and Jorge Garcia.

1. FRANZ KAFKA, *THE TRIAL* 133-34 (E.M. Butler rev. definitive ed., Willa Muir & Edwin Muir trans., Secker and Warburg 1956) (1925).

Kafka leaves us with the distinct impression that Joseph K.'s crime is precisely his inability to discover what crime he has been accused of. K. never has a formal trial, yet the novel is called *The Trial*: evidently, K.'s fruitless effort to learn what he is accused of is his trial. His execution is therefore just, because Joseph K. lives in a state of culpable ignorance. In the remarkable parable that his confessor relates to Joseph K. in the ninth chapter, a man comes to the court of justice but is denied admittance. He waits patiently by the gate for years, and at the moment of his death learns from the doorkeeper that the gate will now be closed forever, for it was never intended for anyone other than the dying petitioner.² The law is real, and sovereign in human affairs, but forever withheld from us. That is the extremity of our condition.³

Kafka found the perfect literary image for his legal and theological theme in *The Trial*, and that is the image of bureaucracy. In *The Trial*, the emblem of the protagonist's inability to learn the law is his confrontation with a bureaucracy that frustrates and evades his every effort to get to the bottom of things, to obtain clarification. Assume a hierarchical world, a great chain of being; then take away the pinnacle of the hierarchy, leaving only the lower orders who cannot take ultimate responsibility for anything they do. That is the theological situation that Kafka ponders, but it is also the secular situation of the bureaucracy. The everyday experience of the bureaucratic runaround — tedious, preposterous, yet with potentially fatal consequences — gives the word *Kafkaesque* its common meaning. The epigraph at the beginning of this paper encapsulates the Kafkaesque world of bureau-

2. *Id.* at 238-47.

3. In the grisly story "In the Penal Colony," condemned prisoners are executed on a torture device that slowly inscribes the law they have violated on their bodies with needles. As the message takes shape over many hours of suffering, recognition and understanding gradually grow in the prisoners, until finally they attain a kind of spiritual redemption that comes of knowing why they are suffering and dying. The officer in charge of the apparatus fervently believes that this form of punishment alone satisfies the requirements of justice. Faced with the imminent abolition of this form of execution on humanitarian grounds, the despairing officer climbs into the apparatus himself, programming it to carve "Be Just" on his body. But the machine disintegrates; instead of writing "Be Just," the needles merely punch the officer to pieces, and the dead officer's face "was as it had been in life; no sign was visible of the promised redemption; what the others had found in the machine the officer had not found." FRANZ KAFKA, *In the Penal Colony*, in *SELECTED SHORT STORIES OF FRANZ KAFKA* 126 (Willa Muir & Edwin Muir trans., 1952).

Like *The Trial*, the story may be read as a comment on natural law — law that is so much a part of the human condition that it must be harrowed into our bodies when we transgress it. This is, evidently, an outward emblem of the fact that the law already dwells in our nature — and, perhaps, that it dwells in our nature cruelly. In Kafka's parable, it is the officer, the one remaining believer in this law, who alone is denied the redemption it promises — redemption that is meant to come through ultimate knowledge of natural law engraved in one's own body. The officer represents the predicament of the natural lawyer who understands that natural law binds us but, for whatever reason, cannot discover what it asks of him.

cracy. It exaggerates, but only slightly, a phenomenon that all of us recognize at once.

Within our collective imagination, evidently, bureaucracy and natural law are antithetical to each other; otherwise, Kafka's imagery would not seem so perfectly appropriate. We begin our own argument by attempting to vindicate this perception. We believe that the pervasiveness of the bureaucratic phenomenon in contemporary life threatens to make natural law irrelevant to our political and economic institutions.

In its classical form, the key idea of natural law is that legal systems are legitimately instituted in order to promote the common good. Propositions of natural law impose constraints on precepts of positive law: if a precept of positive law is not instituted to promote the common good, it lacks legitimacy — it is not law.

Natural law principles are thus, in the first instance, criteria for assessing systems of positive law. However, natural law theory also offers important insights into the dimensions of individual moral and legal responsibility. The natural law understanding of legal systems as cooperative efforts to promote the common good implies a moral relation between those who govern and those who are governed. The governed bear a moral obligation to obey the law, provided that the law aims at the common good, whereas those who govern possess authority only to the extent that they undertake to promote the common good. The two sides of this relation fit together: the citizens' obligation to obey the law depends on the rulers' undertaking to legislate for the common good.⁴

This doctrine of individual responsibility on the part of rulers and ruled alike has played a prominent role in the development of twentieth-century international law. Positivism, including legal realism, was the ascendant view among legal theorists outside the Catholic Church for the century between the 1830s and the 1930s. World War II changed that. If there is a single historical event that accounts for the revival of serious secular interest in natural law, it is surely the Nuremberg trials. The Nuremberg Tribunal held individual Nazi officials

4. At this point, however, natural law theorists diverge. Philip Soper, for example, contends that a good faith belief on the part of the rulers that they are legislating for the common good suffices to establish a moral obligation on the part of the ruled to obey the law. PHILIP SOPER, *A THEORY OF LAW* 79 (1984). John Finnis, by contrast, believes that positive law's inconsistency with the common good undermines the moral obligation to obey, regardless of what the legislator may believe. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 351-60 (1980). Thus, the notion of "the rulers' undertaking to legislate for the common good" may be understood subjectively (Soper) or objectively (Finnis). Elsewhere, one of us has criticized Soper's argument. David Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 806-09 (1991).

responsible for acts that positive law did not forbid at the time they were committed — so-called “crimes against peace” and “crimes against humanity.”⁵ Anticipating the defendants’ protest that they were merely following official orders that carried the force of positive law, Article 8 of the Nuremberg Charter specifically provided that “[t]he fact that the defendant acted pursuant to an order of his government or of a superior shall not free him from responsibility.”⁶

That Article 8 represents a flat-out rejection of what might be called the *positivist excuse* for atrocious official acts — the excuse that the acts were licensed by positive law — is intuitively clear. As Stanley Paulson has shown, the defense at Nuremberg relied extensively upon the positivist excuse, which the Tribunal had little difficulty rejecting.⁷ The natural law argument that unjust laws lose their obligatory character provides a straightforward philosophical justification for Article 8. Similarly, appeals to natural law clearly form the most obvious justification for criminalizing “murder, extermination, enslavement, deportation, and other inhumane acts . . . whether or not in violation of domestic law of the country where perpetrated.”⁸ Such crimes against humanity are radically inconsistent with the common good, and any domestic legal system that permits them must violate natural law. In addition, Article 7 of the Charter eliminated the act-of-state defense on the part of those in command positions,⁹ thereby recognizing that those who legislate bear moral responsibilities just as surely as do those who follow orders.

Indeed, the view that the Nazi era exposes the moral deficiency of positivism compared with natural law is a commonplace. As early as the mid-1940s, Gustav Radbruch, an eminent pre-War German positivist, repudiated positivism and embraced natural law, arguing in several influential essays that positivism had disarmed German jurists in the face of Nazism.¹⁰ Thus, international revulsion at the official crim-

5. For an argument that the criminalization of crimes against peace and crimes against humanity represented a legal novelty, see David Luban, *The Legacies of Nuremberg*, 54 SOC. RES. 779, 797-801 (1987).

6. 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 12 (1947).

7. Stanley L. Paulson, *Classical Legal Positivism at Nuremberg*, 4 PHIL. & PUB. AFF. 132 (1975).

8. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL art. 6(c) (defining *crimes against humanity*).

9. See CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL art. 7.

10. See GUSTAV RADBRUCH, *Five Minutes of Legal Philosophy*, in PHILOSOPHY OF LAW 109, 109-10 (Joel Feinberg & Hyman Gross eds., Stanley L. Paulson trans., 3d ed. 1980) (1950) (translating GUSTAV RADBRUCH, *Fünf Minuten Rechtsphilosophie*, in RECHTSPHILOSOPHIE 335, 335-37); GUSTAV RADBRUCH, *Gesetzliches Unrecht und Übergesetzliches Recht* [Legal Injustice and Supralegal Justice], in RECHTSPHILOSOPHIE, *supra*, at 347. Radbruch's arguments proved

inality of Hitler's regime, as manifested legally in the Nuremberg trials, represents a triumph for natural law thinking.¹¹ At the very least, this worldwide condemnation provisionally lays to rest the positivist excuse in international law.¹²

But the excuse that "I was only following orders," or "I was only doing my job," was not the only one offered by those implicated in Nazi crimes. In the aftermath of World War II, the world heard with equal frequency the cry, "I didn't know!" This is the *epistemological excuse*, whose elements present the problem that will occupy our attention in this article. Though it is often insincere, and seldom entirely persuasive, the epistemological excuse seems to come naturally to those who commit wrongs in a bureaucratic setting. We shall argue (1) that bureaucracies function (often by design) to permit their functionaries to truthfully plead the excuse "I didn't know!"; (2) that traditional accounts of moral responsibility typically recognize this epistemological excuse; and (3) that it is therefore very difficult to find a workable account of moral responsibility within bureaucratic institutions. The strength and prevalence of the epistemological excuse may render the historic rejection of the positivist excuse an empty or very partial victory.

We cannot overemphasize the importance of this point, for perhaps the single most salient characteristic of the Nazi crimes was their bureaucratic nature. They were committed, not by a lawless gang of criminals, but by a regularly functioning state bureaucracy executing official policies.¹³ Not only Nazi crimes have this bureaucratic character — it exists as well in the misdeeds of the recently departed regimes of the Soviet empire. The emerging democracies of Eastern Europe — if democracies are what they prove to be — are beginning to come to grips with the bureaucratic crimes committed for generations by offi-

influential in English-language jurisprudence, largely through the prominent place they occupied in the well-known Hart-Fuller debate. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615-21 (1958); Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 646-47 (1958). More recently, however, Ingo Müller has criticized Radbruch's view, arguing that the worst perversions of justice in the Third Reich occurred because the Nazi judges were not good enough positivists — they were too willing to pervert the law for political reasons. See INGO MÜLLER, *HITLER'S JUSTICE* (Deborah L. Schneider trans., 1991). This critique, of course, does not affect the argument that Nuremberg law represents a repudiation of positivism, nor does it render the positivist excuse acceptable.

11. For an argument that the Nuremberg Charter did not go far enough in this direction because it safeguarded the principle of national sovereignty, the linchpin of positivism, see Luban, *supra* note 5, at 780-90.

12. Regrettably, the acquittal of Oliver North suggests that the excuse lives on in American criminal law.

13. Rhetorical references to the Nazis as gangsters, criminals, or the like often obscure this important point. See Luban, *supra* note 5, at 817-20.

cials of their former regimes, many of whom will surely enter the epistemological excuse. Czech novelist Milan Kundera poses the problem directly in *The Unbearable Lightness of Being*:

Let us concede that a Czech public prosecutor in the early fifties who called for the death of an innocent man was deceived by the Russian secret police and the government of his own country. But now that we all know the accusations to have been absurd and the executed to have been innocent, how can that selfsame public prosecutor defend his purity of heart by beating himself on the chest and proclaiming, My conscience is clear! I didn't know!¹⁴

One might respond with an equally rhetorical question: how can the prosecutor be blamed if he truly did not know? Kundera's rage clearly stems from the ready availability of the epistemological excuse within the secretive Communist bureaucracies, but the fact that an excuse is a bit too handy does not in itself undercut its viability. Thus, the problem of bureaucratic irresponsibility faces post-Communist societies much as it faced post-Nazi Germany.

Bureaucratic evasion of responsibility, however, is not a pathology confined to police states. A recent article in *The Washington Post* describes the loss of six million dollars of the savings of Washington area Hispanics when the unregulated Latin Investment Corporation failed. When depositors blamed lax regulation, a D.C. politician responded that no one in government was to blame. "Frankly, I think the responsibility belonged to several agencies, including federal agencies Thus, effectively, the responsibility belonged to no one."¹⁵ The bureaucratic evasion of responsibility is as American as your failing neighborhood bank.

Nor is bureaucratic irresponsibility a pathology limited to governments. All of us live our lives in the sway of many nongovernmental bureaucracies — HMOs, business corporations, large employers, and the like — that function as "private governments" (and often as remarkably autocratic ones).¹⁶ Particularly now, when the erstwhile socialist nations of central and eastern Europe have committed themselves to programs of privatization and capitalism, and their massive bureaucracies prepare to shift allegiance from the state to private owners, the danger of bureaucratic evasion inherent in private governments as well as public should be clear. The problem of individual

14. MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* 177 (Michael H. Heim trans., 1984).

15. Charlene Drew Jarvis, D.C. Council Member, *quoted in* Carlos Sanchez, *A Year Later, Depositors Still Waiting, Hoping*, WASH. POST, Dec. 1, 1991, at B3.

16. See Stuart Macaulay, *Private Government*, in *LAW AND THE SOCIAL SCIENCES* 445 (Leon Lipson & Stanton Wheeler eds., 1986).

responsibility within bureaucratic institutions straddles the divide between private and public.

Natural law theories have functioned in the twentieth century to strip away the positivist excuse for official wrongdoing. This will be a hollow triumph, however, if in the end official malefactors may fall back on the epistemological excuse. As bureaucratic institutions increasingly come to pervade modern life, the contrast between natural law and positivism threatens to become moot unless a meaningful conception of individual responsibility within organizational settings can be formulated.

A more direct reason exists to explain the tension between natural law and the bureaucratic phenomenon, which drastically expands the availability of the epistemological excuse. Natural law, remember, insists that institutions are legitimate only when they aim to promote the common good. The common good includes, of course, the prosperity, stability, solidarity, and liberty of the community. But that cannot be the end of the story. Surely one central aspect of the common good lies in what we might call the *moral intelligibility* of our lives. A community is worse off to the extent that its members are unable to make moral sense of the lives that they and their fellow citizens lead. Moral intelligibility enhances the sense of meaningfulness and mutual assurance in a community, whereas moral opacity undermines it.

The Kafkaesque world of bureaucracy is morally opaque. That Kafka's world often seems to have the character of a bad dream in its combination of tedium, oppressiveness, and withheld meaning is no accident. As the passage we have taken as our epigram suggests, the horror of the bureaucratic process lies not in officials' mechanical adherence to duty, but rather in the individual's ignorance of what the fulfillment of his or her duty may entail. Everyone operates in an epistemological and therefore moral vacuum. Interestingly, it was the epistemological excuse, not the positivist excuse, that captured Kafka's imagination in *The Trial*. Though one might interpret the epistemological theme of *The Trial* as our inability to know the natural law, another interpretation is equally plausible: We all know what the natural law commands, but because of the way we lead our lives, and the institutions within which we live them, we never know whether we have transgressed it. The individual actions that make up our lives have become ciphers, action shards whose moral character we — like Joseph K. — are unable to determine.

In its stringency, Kafka's moral vision is an optimistic one. Though we may wish to plead the epistemological excuse, in Kafka's world we do so to no avail. This may be wishful thinking. As

Kundera recognizes, the problem in the world we live in is not that the epistemological excuse fails, but that it may succeed all too well. Thus, the moral relationship between those who rule and those who are ruled dissolves, and natural law threatens to recede into the realm of useless abstraction. If bureaucracy indeed installs the epistemological excuse as a standing option in our moral lives, then bureaucratic institutions make a mockery of natural law ideals.

In this article, we shall examine the sources of the epistemological excuse and the moral resources available for restricting its application. Our topic, then, is the often-noticed but poorly understood fragmentation of knowledge and responsibility in large organizations, including government, business corporations, and professional groups. We wish to investigate the compartmentalization, mutual buckpassing, and deniability that too often leads organizations to commit wrongs for which no individual in the organization seems genuinely responsible.

Bureaucratic organizations parcel out morally significant knowledge among various individuals along the same lines as organizational tasks. The division of labor is equally a division of knowledge. Supervisors may not know of wrongful actions by subordinates implementing management decisions, while subordinates may believe they have been left no discretion and no alternatives. Put these conditions together and you have a recipe for organizational wrongdoing that will never trouble the conscience of anyone within the organization. Individuals within the organization do not know, or perhaps do not want to know, what their actions add up to.

Recent psychological and sociological research on wrongdoing in organizations has examined the pressures individuals feel from their superiors, their peers, and the norms of corporate culture to engage in wrongful conduct. This research has yielded profound insight into the subtle but powerful coercive forces at work in organizations. It has not paid sufficient attention, however, to the cognitive aspects of obedience and conformity, the structural features of large organizations that prevent individuals from obtaining the knowledge they need to make informed moral decisions and resist pressure to obey and conform. Individuals in organizations frequently lack awareness of the role their acts play in the larger corporate undertaking; their ignorance complicates both the moral assessment of and the practical response to the wrongs they help commit. Analyzing the *problem of fragmented knowledge* (as we shall call it) is critical for an adequate philosophical analysis of organizational wrongdoing and for an effective practical response to it.

We contend that traditional accounts of morality have failed to

deal adequately with the problem of fragmented knowledge, in part because they treat the problem as peripheral rather than central, in part because they take too narrow and episodic a view of moral decisionmaking. We contend that fragmented knowledge in bureaucratic organizations is one of the central moral problems of our time and that an adequate response to this problem requires us to broaden the scope of moral prescription and appraisal.

II. BACKGROUND OF THE PROBLEM

The bureaucratic fragmentation of knowledge and dilution of responsibility are pervasive phenomena in modern society. To set the stage for our analysis, we first describe the scope of the problem and briefly review some of the research, commentary, and debate it has provoked. We conclude this background section by discussing the research most relevant to our own concerns, the Milgram studies of destructive obedience to authority.

A. *The Collectivization of the Workplace*

Most work in modern society is done by organizations: corporations, governments, hospitals, foundations, universities, accounting firms, armies. Even such supposedly independent professionals as physicians and lawyers practice in large organizations to an ever-increasing extent. The HMO has replaced the family physician, and the new graduates of today's law schools join firms, of which the largest now employ over a thousand lawyers, rather than hanging out a shingle. The problems of professional and business ethics have thus become the problems of supervisors and subordinates in organizational settings. Indeed, in a culture such as ours, where our first question to each other is often not "How do you do?" but "What do you do?", the ethics of the workplace has enormous impact on how we think of morality in general. To a great extent, ethics in the organizational setting has come to define ethics as a whole. We speak of team players and loose cannons, leaders and followers, as categories of moral judgment and not simply of social description.

B. *The Organization Man and the Other-Directed Society*

The transformation of the workplace appears to have wrought a transformation in values, replacing individual responsibility and internal norms with group identification and external norms. As the post-war American economy assumed its contemporary form, several leading social scientists and commentators explored the psychology of

"The Organization Man," in the famous title of William H. Whyte's book. Whyte used this term to describe "the ones of our middle class who have left home, spiritually as well as physically, to take the vows of organization life."¹⁷ He ascribed to them the "Social Ethic," which includes "a belief in the group as the source of creativity" as well as "a belief in 'belongingness' as the ultimate need of the individual."¹⁸

David Riesman described middle-class Americans as a "Lonely Crowd," and elaborated a famous typology of characters. In Riesman's scheme, people of premodern societies were *tradition-directed*, and the sanction for deviation was *shame*; in early modern societies people were *inner-directed*, guided by an internal moral compass, acquired in childhood, which induces *guilt* when one deviates. In contemporary society, however, we have become *other-directed*: our "contemporaries are the source of direction for the individual [T]he process of paying close attention to the signals from others . . . remain[s] unaltered throughout life."¹⁹ For other-directed individuals, the sanction for deviance has changed: "As against guilt-and-shame controls, though of course these survive, one prime psychological lever of the other-directed person is a diffuse *anxiety*."²⁰ Sociologist Robert Jackall conducted interviews with 143 managers in several contemporary American corporations. In the anxiety-ridden world of middle management, "[m]anagers have a myriad of aphorisms that refer to how the power of CEOs, magnified through the zealous efforts of subordinates, affects them [One such maxim is] 'When he sneezes, we all catch colds'"²¹ Jackall comments:

As a result, independent morally evaluative judgments get subordinated to the social intricacies of the bureaucratic workplace. Notions of morality that one might hold and indeed practice outside the workplace . . . become irrelevant Under certain conditions, such notions may even become dangerous. For the most part, then, they remain unarticulated lest one risk damaging crucial relationships with significant individuals or groups.²²

C. Historical Perspective

The collectivization of the workplace and the threat it poses to traditional moral values are hardly new phenomena; they have been

17. WILLIAM H. WHYTE, JR., *THE ORGANIZATION MAN* 3 (1956).

18. *Id.* at 7.

19. DAVID RIESMAN, *THE LONELY CROWD* 22 (1950) (emphasis omitted).

20. *Id.* at 26.

21. ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* 22 (1988).

22. *Id.* at 105.

recognized, and lamented, for the past 150 years. The erosion of individual responsibility and the evils of bureaucracy have engaged conservative writers since the advent of the industrial revolution. Over a century ago, Karl Marx likewise criticized what he called "the real mindlessness of the state." "The bureaucracy is a circle from which no one can escape," Marx contended. "The highest point entrusts the understanding of particulars to the lower echelons, whereas these, on the other hand, credit the highest with an understanding in regard to the universal; and thus they deceive one another."²³ In 1932, Reinhold Niebuhr wrote his classic treatise *Moral Man and Immoral Society*, in which he argued that

[i]ndividual men may be moral They are endowed by nature with a measure of sympathy and consideration for their kind, the breadth of which may be extended by an astute social pedagogy But all these achievements are more difficult, if not impossible, for human societies and social groups. In every human group there is less reason to guide and to check impulse, less capacity for self-transcendence, less ability to comprehend the needs of others and therefore more unrestrained egoism than the individuals, who compose the group, reveal in their personal relationships.²⁴

Niebuhr's argument recognizes that the increasing organization of society will be accompanied by a dilution of morality.

As we have already observed, the problems Marx and Niebuhr discussed in a theoretical vein came to life in the most horrible way possible during World War II, where ostensibly civilized human beings tortured and slaughtered twelve million men, women, and children in extermination camps. The names of the camps — Auschwitz, Treblinka, Majdanek — have become synonymous with the incomprehensible willingness of ordinary human beings to do anything, no matter how atrocious, when ordered to do so by those in authority. Here, again, an explanation may be offered in terms of the division of responsibility within groups. Consider a historian's description of the euthanasia program Hitler ordered to eliminate mentally retarded, handicapped, or genetically ill Germans (individuals Hitler called "useless eaters"):

The euthanasia program . . . demonstrated how, through fragmentation of authority and tasks, it was possible to fashion a murder machine. Hitler had enunciated an offhand, extralegal decree, and had not wanted to be bothered about it again. Brandt had ordered the "scientific" implementation of the program and, like Hitler, wished to hear no complaints. The directors and personnel of institutions rationalized that matters

23. KARL MARX, CRITIQUE OF HEGEL'S "PHILOSOPHY OF RIGHT" 46-47 (Joseph O'Malley ed., Annette Jolin & Joseph O'Malley trans., 1970).

24. REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY xi-xii (rev. ed. 1960).

were out of their hands and that they were just filling out questionnaires . . . , though in reality each form was the equivalent of a death warrant The personnel at the end of the line excused themselves on the basis that they were under compulsion, had no power of decision, and were merely performing a function. Thousands of people were involved, but each considered himself nothing but a cog in the machine and reasoned that it was the machine, not he, that was responsible.²⁵

The horrors of Nazism are without parallel, but the bureaucratic pattern of organization that fragments the knowledge required for moral decisionmaking is common to large institutions throughout contemporary society. Jackall describes the typical corporate structure in terms not unlike those Marx used to characterize "the real mindlessness of the state":

Power is concentrated at the top in the person of the chief executive officer (CEO) and is simultaneously decentralized; that is, responsibility for decisions and profits is pushed as far down the organizational line as possible.

. . . .
 . . . [P]ushing details down protects the privilege of authority to declare that a mistake has been made. . . . Moreover, pushing down details relieves superiors of the burden of too much knowledge, particularly guilty knowledge.

. . . .
 . . . [Middle managers] become the "point men" of a given strategy and the potential "fall guys" when things go wrong.²⁶

Hannah Arendt described the bureaucratic phenomenon as a novel form of governance appearing alongside the classical distinction among rule by one (monarchy), rule by "the best" (aristocracy), rule by the few (oligarchy), and rule by the many (democracy). She wrote of

the latest and perhaps most formidable form of . . . dominion: bureaucracy or the rule of an intricate system of bureaus in which no men, neither one nor the best, neither the few nor the many, can be held responsible, and which could be properly called rule by Nobody. (If, in accord with traditional political thought, we identify tyranny as government that is not held to give account of itself, rule by Nobody is clearly the most tyrannical of all, since there is no one left who could even be asked to answer for what is being done. It is . . . impossible to localize responsibility and to identify the enemy)²⁷

Such rumors of the demise of responsibility may be exaggerated; yet Arendt's description has the ring of familiarity. A graphic contempo-

25. ROBERT E. CONOT, *JUSTICE AT NUREMBERG* 210-11 (1983).

26. JACKALL, *supra* note 21, at 17, 20-21.

27. HANNAH ARENDT, *ON VIOLENCE* 38-39 (1970).

rary analogue appeared in litigation surrounding the Dalkon Shield. In his opinion, Federal Judge Frank Theis angrily noted:

The project manager for Dalkon Shield explains that a particular question should have gone to the medical department, the medical department representative explains that the question was really the bailiwick of the quality control department, and the quality control department representative explains that the project manager was the one with the authority to make a decision on that question. . . . [I]t is not at all unusual for the hard questions posed in Dalkon Shield cases to be unanswerable by anyone from Robins [the manufacturer].²⁸

One must not be naive, of course: often the defense of fragmented knowledge will be entered falsely and cynically, as a form of liability screening. Executives in the hot seat should be treated with the same skepticism that greeted German officials who "didn't know."²⁹ Despite this healthy skepticism, however, we remain convinced that fragmented knowledge is a genuine phenomenon that we cannot simply dismiss as a lame excuse.

D. *The Psychology of Destructive Obedience*

Social scientists have labored to understand the Holocaust and to answer the all-important question whether it could occur in other settings. Stanley Milgram conducted perhaps the most significant — and certainly the most famous — experimental studies to address this issue. Milgram's experiments underscore our thesis because they illustrate the ways in which social and institutional pressures to obey reinforce, and are reinforced by, the fragmentation of knowledge in modern bureaucracies and other large organizations.

In Milgram's experiments, volunteers in a Yale University experiment were ordered by the experimenter to administer gradually increasing electric shocks to another "subject" (actually a confederate of the experimenter), ostensibly to study the effect of punishment on learning. As the "shocks" increased in intensity, the confederate displayed increasing discomfort, demanded that the experiment stop, screamed with pain, complained of a heart condition, and finally fell silent as if he were unconscious.³⁰ In this original experiment, sixty-five percent of the subjects went all the way, administering the highest possible, potentially lethal, level of shock. Those subjects who admin-

28. *In re A.H. Robins Co. "Dalkon Shield" IUD Prods. Liab. Litig.*, 575 F. Supp. 718, 724 (D. Kan. 1983).

29. John Braithwaite, *Passing the Buck for Corporate Crime*, AUSTL. SOC'Y., Apr. 1991, at 3, 3.

30. See STANLEY MILGRAM, *OBEEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 3-4 (1974).

istered the maximum shock expressed great discomfort at the cruel task they were assigned; many of them berated the experimenter, protested, or insisted that they would not proceed with the experiment — all the while continuing to flip the switches.

Milgram conducted a number of important variations on the original experiment, several of which suggest the role that incomplete and fragmented knowledge may play in facilitating destructive obedience and the abdication of individual responsibility.³¹ In one version, the experiment was removed from the anxiety-relieving auspices of Yale to a seedy-looking storefront operation in nearby Bridgeport. Less able to reassure themselves that the experimenters knew what they were doing, fifty-three percent of the subjects refused to go all the way.³² This suggests that compliant subordinates often believe that their qualms are merely the result of incomplete understanding, and assume that those in charge have good reasons for what they are doing.

The rate of compliance also declined when the subject could see the victim, and declined even further when the subject was actually required to hold the victim's hand on the contact-plate. In this latter version of the experiment, seventy percent of the subjects stopped before administering the maximum level of shock.³³

While these levels of resistance are hardly comforting, they do suggest that individuals will be less willing to follow immoral orders when the consequences of obedience are less ambiguous. One striking variation on Milgram "simulated a bureaucratic hierarchy by dividing the teacher's role among two people: a 'transmitter' and an 'executant.'"³⁴ Executants, who administered the shock, resisted significantly more often than transmitters, who merely informed the executor when to deliver a shock, although the executants were under at least as much pressure to obey.

As Kelman and Hamilton note in discussing this variation, subjects' resistance to obedience is often weakened

by the . . . ability to avoid seeing the connection between their own actions and the destructive consequences of those actions. The Nazi extermination program was carried out by a vast bureaucracy in which many functionaries — from Adolph Eichmann down to junior clerks — sat at desks, shuffled papers, arranged train schedules, and carried out a vari-

31. More recently, Herbert Kelman and Lee Hamilton have offered a detailed psychological analysis of the dynamics of obedience and the social structures that contribute to it. See HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* (1989).

32. MILGRAM, *supra* note 30, at 61.

33. *Id.* at 35.

34. KELMAN & HAMILTON, *supra* note 31, at 165.

ety of other tasks without having to consider the final product of their efforts.³⁵

Seeing the connection between one's action and its destructive consequences clearly has a strong emotional component, but it also has critical cognitive significance; it removes any doubts about the effect of the individual's obedience.

Another form of ignorance that appears to have played a significant role in Milgram's experiments was the absence of a clear-cut moment of decision. Few subjects would have hesitated to give a mild, tingling shock; most probably would have refused to give an initial shock of maximum voltage. The gradual escalation of voltage was insidious because it deprived subjects of an obvious stopping point, encouraging them to defer resistance until they saw themselves as committed, or as compromised. This kind of slippery slope may characterize many of the decisions made in contemporary organizations.

Another variant of the Milgram experiments, however, provides some encouragement that resistance and reform may be possible in organizational settings. In this study, the subject was assigned to a team administering the shocks, while the other team members were really confederates of the experimenter. Milgram discovered that compliance was extraordinarily sensitive to peer pressure. When the other team members refused to proceed with the experiment, only ten percent of the subjects remained obedient to the experimenter and "went all the way." Conversely, when a teammate rather than the subject took charge of physically administering the shock, 92.5% of the subjects went along with the experiment up to the maximum shock.³⁶ In Niebuhr's terms, we may think of moral man made *less* moral by an immoral society, but *more* moral by a society of his betters.

While there are obviously other factors at work, we believe that in this experiment the compliance or resistance of others served an important cognitive function. As Kelman and Hamilton argue, "[t]he most important effect of the confederates' disobedience . . . was probably in providing the cognitive and motivational conditions that allowed the participant to redefine the situation in which he found himself."³⁷

The Milgram studies, then, suggest the role of imperfect and fragmented knowledge in organizational misconduct. The less individuals appreciate the consequences of their acts, the need to decide, and the

35. *Id.*

36. MILGRAM, *supra* note 30, at 119.

37. KELMAN & HAMILTON, *supra* note 31, at 160.

available alternatives, the easier it will be for them to engage in destructive obedience. Milgram's experiments suggest that the fragmentation of knowledge promotes organizational wrongdoing by blunting the edge of moral conflict.

Although Milgram's research focused on subordinates, parallel problems arise for supervisors. As we have seen, bureaucratic structures serve to deny supervisors knowledge of operational details, blunt their awareness of harsh consequences, and help them rationalize what they cannot ignore. The result is the deep paradox of the "rule by Nobody": when neither superiors nor subordinates may be held responsible, we face an uncanny situation in which responsibility has seemingly been conjured out of existence.

E. *The Inadequacy of Ethical Tradition and Philosophical Theory*

Most moral theories take as their central cases the moral choices confronting individuals deliberating alone and in full knowledge of the morally relevant circumstances — including, indeed, that the choice they face is morally charged. Standard moral theories may be viewed, in effect, as structures of three concentric circles. At the center lie the core precepts, which presuppose full knowledge on the part of agents. Limiting these precepts are principles of mitigation, including mitigation when full knowledge is absent. Qualifying these, in turn, is an account of culpable ignorance. The phenomenon of culpable ignorance lies at the periphery of concern in such a moral theory, and is typically restricted to a small range of exceptional cases.

Reflection on organizational settings suggests that knowledge and ignorance must play a more central role in moral theory. We believe that the specter of fragmented knowledge, divided responsibility, ambiguous orders, and unknown consequences is inadequately addressed in the moral discourse of Western societies. Virtually every approach to normative ethics, from the Ten Commandments to the latest wrinkles in philosophy journals, focuses primary attention on moral problems in which four *knowledge conditions* are satisfied — knowledge conditions that are frequently absent in individual decisionmaking and almost never found in organizational settings.

First, the decisionmaker recognizes that he or she has come to a fork in the road: The decisionmaker knows *that* a decision must be made. Do I or don't I cheat on the examination? Do I or don't I protest when I hear an acquaintance tell an anti-Semitic joke? Situations such as these are readily identifiable as moral decisions. Typically, when we face one of these questions, we know that we face it.

Second, the decisionmaker recognizes that he or she must make the

choice in a fairly short, distinct period of time: The decisionmaker knows *when* a decision must be made, or at least *by* when it must be made. The examination is tomorrow; I must confront the acquaintance about his anti-Semitic joke now or never.

Third, the decisionmaker confronts a small number of well-defined options: The decisionmaker knows *what* choices are available. For example, a lawyer, learning that her client is using her services to perpetrate a fraud, can quickly catalogue her options: do what the client asks, try to talk the client out of the plan, blow the whistle on the client, or resign.

Fourth, the decisionmaker has the information needed to make the decision: The decisionmaker knows *what is needed* to make the choice. Even in situations of radically incomplete information, theories of rational decisionmaking under uncertainty allow us to assign probability-estimates to these various outcomes in order to generate a recommendation, though that recommendation may be merely to flip a coin.

These, then, are the four knowledge conditions of moral decision-making: we know *that* a decision must be made, *when* a decision must be made, *what choices* are available, and *what is needed* to make the choice. From the Biblical "Thou shalt not steal" and the Golden Rule, to Kant's categorical imperative and the utilitarian injunction to achieve the greatest good for the greatest number, the core precepts of the major systems of ethical thought are directed to agents who satisfy the knowledge conditions. If the conditions are not satisfied, ethical systems generally respond with mitigation or even immunity: forgiving those who "know not what they do" is basic to Western understandings of moral responsibility.

Ignorance can, of course, be culpable; but most philosophers and legal theorists who acknowledge the phenomenon of culpable ignorance have implicitly confined it to a small range of exceptional cases: conspirators who attempt to preserve their deniability, or drunks who have wilfully stupefied themselves. The possibility that the modern workplace may place millions of ordinary individuals in a state of culpable ignorance throughout their careers has never, to our knowledge, been explicitly addressed in moral theory.

In an organizational setting, one or more of the four knowledge conditions typically fails at a critical juncture. As the Milgram experiments illustrated, individuals in bureaucratic settings may not fully appreciate that a decision must be made, understand when it should be made, realize what choices are open to them, and comprehend what the consequences of different choices will be. A law firm associate

asked to research a small point of law or a junior architect asked to design a detail may have no idea that the project as a whole raises deep questions of professional ethics. Even if they have their suspicions, it is often impossible to pinpoint a moment of truth when the decision must be made. No clear list of options, or even clear understanding of who to speak with, may exist, and the subordinate may never believe she has sufficient information to fashion a solution.

The failure of these knowledge conditions is created or maintained by organizational structure. Typically, supervisors parcel out subtasks to a number of subordinate employees. None of the subordinates may have more than the most general idea of what the entire project is about, while the supervisor may know nothing about the details of each subordinate's subtasks. No member of the organization might recognize a moral problem, because the problem arises not from what any *one* member of the team is doing, but rather from all their actions put together. The fact that each is merely a member of a team lulls them into a sense of security, so that they feel no pressing need to find out more about what is going on. Though they may resolve not to be "good Germans" at the moment of truth, the moment of truth never arrives.

This, then, is the central philosophical question that the problem of fragmented knowledge raises: *Is it possible to formulate satisfactory principles of individual responsibility when any or all of the four knowledge conditions presupposed by standard moral theories fail?*

III. RESPONSIBILITY WITHOUT KNOWLEDGE: FOUR APPROACHES TO THE PROBLEM

In this Part, we compare and assess principles of responsibility for individuals in organizational settings that may complement existing moral systems that presuppose the four knowledge conditions. At bottom, four approaches exist to the problem of "deeds without doers." First, we can simply accept as a tragic fact of modern existence that organizational wrongs may be committed for which no one — neither individuals nor the organization — can rightly be held responsible. More optimistically, we can either hold the organization itself morally responsible for the wrongdoing or hold all the individuals affiliated with the organization strictly liable. Finally, we can extend standard principles of culpable ignorance to explain why individuals in organizations may be held responsible for their actions even though the knowledge conditions fail. This is the approach we will defend.

A. *The Skeptical Approach*

Some might argue that “deeds without doers” are a tragic fact of modern life. We really do live under the “rule by Nobody” discussed by Hannah Arendt, so assigning responsibility to some individual — whether a natural or organizational person — is simply an anachronism. This we call the skeptical approach: “skeptical,” because it denies that the problem of fragmented knowledge has a solution. Various postmodern philosophers and psychologists have suggested that the very idea of individual responsibility rests on a discredited picture of autonomous subjects or selves making rational choices. Thus, Kenneth Gergen asserts in *The Saturated Self*: “To be sure, individuals break the law, but from the postmodern perspective, such actions should be attributed not to the individual alone but to the array of relationships in which he or she is a part.”³⁸ Unlike a corporation or government, an “array of relationships” does not look even superficially like an entity we could meaningfully praise or blame. We are left where we began, with deeds that lack doers.

Under this skeptical view, we can no more condemn organizational wrongdoing on moral grounds than we can cancer or AIDS. Suppose that an epidemic of an unknown disease rendered the entire human race psychotic and homicidal. A great deal of death would result, but no one could truly be held accountable. The skeptical, postmodern view analogizes bureaucratic organization to this imaginary epidemic.

The analogy suggests two problems with the skeptical view. First, the argument overstates the difficulty of imputing responsibility to individuals or the organizations to which they belong or help to create. Individuals in an organization may be ignorant, confused, anxious, or intimidated, but they are not in the grip of an irresistible malady. Bureaucratic organization is not a renegade virus: it results from conscious human decisions, and it possesses some of the features of a conscious entity that make it susceptible to praise and blame.

Second, even if the analogy were descriptively correct, the skeptic’s prescription of passivity or acquiescence would hardly follow. The theoretical difficulty of ascribing responsibility for egregious misconduct to individuals or organizations might instead provide a compelling reason for overhauling the basic structure of organizations in order to restore accountability. Our working hypothesis amounts to what might be dubbed a *law of conservation of responsibility*: moral responsibility for organizational actions cannot and should not be con-

38. KENNETH J. GERGEN, *THE SATURATED SELF: DILEMMAS OF IDENTITY IN CONTEMPORARY LIFE* 244 (1991).

jured out of existence. It must lie with the organization itself, with the individuals in the organization, or with the institutions that permit responsibility to be endlessly circulated.

B. *Replacing Individual with Organizational Responsibility*

As one alternative, the organization itself could be held responsible to precisely the degree that an organizational structure of fragmented knowledge absolved individuals within the bureaucracy from responsibility. This approach raises deep philosophical questions about the reality of metaphysical fictions such as organizations and the cogency of assigning them moral agency and responsibility. An organization may not possess all the characteristics necessary to ascribe agency and responsibility to it. As Baron Thurlow, Lord Chancellor of England, asked in an often quoted question, "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?"³⁹

Several philosophers address Baron Thurlow's question, proposing different methods for understanding organizations as the kind of entity to which responsibility can be ascribed.⁴⁰ Peter French, for example, argues that, because corporations possess personality and decision-making ability, we must regard them as "members of the moral community, of equal standing with the traditionally acknowledged residents: human beings."⁴¹ As French sees it, corporations that cause harm are not ordinarily mere causes of harm: they are instead persons that may be morally responsible in the same way as human beings. Indeed, French holds open the possibility that a corporation may be responsible for a harm even though neither its employees nor directors have any responsibility for that occurrence.⁴² Although French's view does not imply that organizations must be held responsible to precisely the degree that individuals are absolved from responsibility by an organizational structure of fragmented knowledge, his approach at least makes this possibility intelligible.

Should we agree with French that organizations are morally re-

39. THE OXFORD DICTIONARY OF QUOTATIONS 550 (3d. ed. 1979).

40. For an excellent survey of these discussions, see LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS* (1987). See also ELIZABETH WOLGAST, *ETHICS OF AN ARTIFICIAL PERSON: LOST RESPONSIBILITY IN PROFESSIONS AND ORGANIZATIONS* (1992). Wolgast's book is one of the best-sustained philosophical efforts to deal with the issues of individual and organizational responsibility we are concerned with. She addresses the issue through the concept of role-differentiation rather than fragmented knowledge, but her approach and conclusions are in many respects congenial to ours.

41. PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 32 (1984).

42. *Id.* at 152, 162.

sponsible persons? This question really has two components: first, whether organizations are moral persons; second, even if they are not moral persons, whether they are still the kind of entity that can be morally responsible. If an organization is a moral person, then by definition it is the kind of entity to which responsibility can be ascribed. If, on the other hand, it is an entity other than a person, then the issue of whether we can ascribe responsibility to it — and what making that ascription would mean — becomes more complex.

As French initially presented his position, all that is required to be a moral person is that one be able to engage in a complex kind of decisionmaking that involves making a deliberate choice. A corporation, he maintained, engages in such decisionmaking when its board of directors or managers renders decisions on the corporation's behalf.⁴³ French's critics responded that many entities that are not moral persons apparently have the ability to engage in intentional decisionmaking.⁴⁴ A cat may choose after deliberation to kill a mouse, yet it is not a moral person. To avoid this problem, French now refines his definition of moral personhood to require the ability not only to engage in intentional decisionmaking but also to change one's conduct in response to moral criticism.⁴⁵

We do not believe, however, that even French's revised criterion suffices to show that organizations are moral persons. There is more than one sense in which one might respond to moral criticism, and not all these senses are relevant to the issue of whether one is a person morally speaking. Suppose that, observing a cat toying with a mouse, you yell, "Fiend!" and the cat runs. In this case the cat would in some sense be responding to moral criticism: it responds to your yell, which voices a moral criticism.

Yet plainly the cat would not be responding to the criticism in a way that lent credence to the idea that it appreciated the moral significance of the criticism. Indeed, one might say that rather than responding to moral criticism, the cat responded to the simpler

43. Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 213-14 (1979).

44. THOMAS DONALDSON, CORPORATIONS AND MORALITY 20-23 (1982); see also Thomas Donaldson, *Personalizing Corporate Ontology: The French Way*, in SHAME, RESPONSIBILITY, AND THE CORPORATION 101, 101-12 (Hugh Curtler ed., 1986). For a cogently argued interpretation of choice and deliberation that would place animals and corporations outside the realm of entities that can choose, see ALAN DONAGAN, CHOICE: THE ESSENTIAL ELEMENT IN HUMAN ACTION (1987). For a view interestingly similar to Donagan's, see Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, 2 BUS. & PROF. ETHICS J., Spring 1983, at 7. Velasquez argues that, in order to be a person, one must have the unity of consciousness that would allow one to initiate an action, and that corporations lack this characteristic. *Id.* at 8-9; see also WOLGAST, *supra* note 40, at 79-95.

45. See FRENCH, *supra* note 41, at 166.

phenomenon of angry yelling. In order to respond to moral criticism in the relevant sense, one must respond in a way that confirms one's understanding of the criticism. At the very least, one's response must be animated or informed by an appropriate moral emotion like guilt or shame.

This returns us to Baron Thurlow's objection. If the corporation, or any other organization, cannot feel guilt or shame or other suitable moral emotions, how can it appreciate the significance of moral criticism? Because the organization lacks heart and soul, it literally feels nothing. Lacking the capacity for moral feeling, the organization's response to moral criticism may do nothing more to distinguish the organization as a person than does the reaction of the cat.

One might respond that the controlling members of the organization, perhaps acting in their official capacity, might feel guilt or shame on the organization's behalf, and that the possibility of this vicariously felt shame should allow us to attribute moral responsibility to the organization, to blame it, and to certify its credentials as a person. Indeed, it is not hard to imagine the individual sense of shame being deepened by a mutual understanding among members of the organization of the shame each person feels.

Under this view, the fact that the organization feels shame would consist in the fact that relevant members of the organization experience appropriate sentiments of shame for what the organization has done. One might thus defend French against Baron Thurlow by holding that the organization need not have moral sentiments apart from those experienced by humans associated with it in order to be a morally responsible person, any more than it need have conscious experiences of decisionmaking in order to be the kind of entity that makes decisions.

This defense, however, overlooks the difference between the claim that the organization feels shame and the claim that the organization is *a person* that feels shame. One can plausibly say that an entity other than a person can feel shame. A family, for example, may feel shame for what one of its members has done. For it to do so, its members must feel shame in a way that shows mutual understanding of the importance of family ties. Is an organization's feeling shame more like the family's feeling shame (or some other collective entity's feeling shame) than it is like an individual person's feeling shame? We think that the answer is yes, and thus that the organization is best understood as a collective entity, not a person.

To earn the moral status of a person, one must do certain things for oneself that an organization must have done for it by others. Con-

sider what having a thought means. Unless a person herself has a thought, she does not think. One person does not have a thought simply because some other person has a thought. Similarly, outside the legal fictions of agency law, one person does not render a decision simply because another person makes a decision for her, and one person does not feel shame simply because another person feels shame for her.

Because an organization can think, decide, or feel shame only by having someone else do these things for it, the organization cannot think, decide, or feel shame the way that a person can. At most, the organization engages in these mental acts not as a person but as a collective entity like a family. Indeed, if the organization were a person, all collective entities that had decisionmaking abilities, like families, bridge clubs, and law school faculties, would be persons. But it would be absurd to suppose that a family that made collective decisions consisted of five persons: the mother, father, two children, and the family itself.⁴⁶

Perhaps the organization is a morally responsible entity other than a person. Several writers suggest the possibility that many nonpersons, including mobs, crowds, and nations, are morally responsible.⁴⁷ An organization, conceived of as an entity other than a person, might be regarded as morally responsible in at least two ways. Each method involves a metaphysical interpretation of the organization.

First, one might think of the organization as a collective entity constituted by its employees and officials,⁴⁸ who stand in a distinctive relation to one another, somewhat analogous to the way a brick wall is made of bricks or a family is constituted by its members. This first view holds that the organization is not an entity that can exist apart from the individual human beings associated with it, and regards blaming the organization as just an indirect way of blaming those individuals.

This view naturally raises the question, why bother? Why not simply blame the individuals? One obvious answer is that often, when organizational activity results in harm, identifying the responsible organization is much easier than identifying the responsible individuals within. Holding the organization responsible may be a way of holding responsible individuals within the organization whose identities we cannot determine. This tactic makes sense, however, only when we

46. While we call this implication absurd, there is no reason to think that French would agree.

47. For an illuminating analysis of these issues, see Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674 (1968).

48. A sophisticated version of this view is developed in MAY, *supra* note 40.

are reasonably confident that some individuals or other in the organization really are at fault. It makes sense, that is, only when we are not confronted with a case where no individuals are at fault because all of them may truthfully plead the epistemological excuse. Thus, blaming the organization simply because it is a convenient surrogate for the responsible employees makes practical sense only when the problem of fragmented knowledge is not the primary issue. This pragmatic approach consequently ignores the problem of fragmented knowledge rather than solving it.

Second, one might think of the organization as an entity whose existence is distinct from that of the human beings associated with it. For example, rather than following French in thinking of the corporation as some weird variety of person, one might, following John Ladd and Meir Dan-Cohen,⁴⁹ think of the corporation as an entity like a machine. Alternatively, one might follow Virginia Held and regard the corporation to be something intermediate between a person and a machine.⁵⁰ If one accepts the view that an organization is a metaphysically distinct entity, then one might also follow Held in supposing that the organization can act even after the humans associated with it perish.

This second view seems odd on the surface for reasons raised by Baron Thurlow. To attribute moral responsibility to something is to blame it, which involves subjecting it to moral criticism. Yet morally criticizing an entity that has no capacity for moral feeling seems pointless. Some authors nonetheless suggest that certain situations force us to recognize the moral responsibility of organizations apart from the individuals who comprise them.⁵¹ These are cases in which organizational activity causes harm, no individual associated with the organization can properly be blamed for the harm, and there is therefore nobody but the organization to blame — that is, precisely those cases that form our central topic.

One situation in which the facts supposedly require us to acknowledge the necessity of blaming the organization without blaming individuals associated with it involves the 1979 crash of an Air New

49. MEIR DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* 46-51 (1986); John Ladd, *Morality and the Ideal of Rationality in Formal Organizations*, 54 *THE MONIST* 488 (1970). Ladd, however, denies that corporations can be morally responsible. *Id.* at 498-500.

50. See Virginia Held, *Corporations, Persons, and Responsibility*, in SHAME, RESPONSIBILITY, AND THE CORPORATION, *supra* note 44, at 161-81.

51. See FRENCH, *supra* note 41, at 145-63; Paul B. Thompson, *Why Do We Need a Theory of Corporate Responsibility?*, in SHAME, RESPONSIBILITY, AND THE CORPORATION, *supra* note 44, at 115-35.

Zealand jet. French⁵² and Paul Thompson⁵³ argue that while perhaps no single individual was responsible for this crash, the airline corporation *was* responsible; indeed, these commentators suggest that the corporation's responsibility may arise from facts that, in our terms, involve fragmented knowledge.

The facts are as follows.⁵⁴ Air New Zealand flew large jets over Antarctica as part of a sightseeing package. The jets would fly at low altitude so that the passengers could see the terrain. Apparently, Air New Zealand used strange procedures to disseminate information about the flight. These procedures fragmented knowledge about the details of the flight plan and the obstacles to flight. Air New Zealand's flight plans were programmed into on-board computers from a central ground computer. There was no practice of including flight crews in discussions of changes in the flight plan; hence, pilots were not informed of a flight plan change before the flight occurred. Yet these changes put the flight on a collision course with a mountain. The collision killed everyone on the jet.

Since they believe that Air New Zealand employees acted conscientiously, French and Thompson maintain that the responsibility for the crash should not be attributed to any individual employee or manager. Instead, they argue, the corporate policy itself was at fault for the crash. These authors thus approve of a government report which concluded that the cause of the air disaster had an "organizational nexus," and that it was wrong to attribute moral responsibility to any individual associated with Air New Zealand.⁵⁵

It is difficult to believe that no individual associated with Air New Zealand did anything wrong. If the accident occurred because of bad corporate policy, then we must wonder whether the person or persons responsible for the policy should also be blamed for the accident. One wonders whether those in charge of designing the communication procedures properly discharged their duties, and if they did not, whether doing so would have prevented the accident. In many ways, to suppose that the accident might have occurred despite the fact that all involved properly discharged their duties seems a piece of science fiction.

These doubts about the French-Thompson description of the case

52. See FRENCH, *supra* note 41, at 145-63.

53. See Thompson, *supra* note 51, at 119-20.

54. We rely on the accounts provided in FRENCH, *supra* note 41, at 145-54, and Thompson, *supra* note 51, at 119-20.

55. See FRENCH, *supra* note 41, at 152; Thompson, *supra* note 51, at 119-20 (implicitly concurring with government report).

highlight an important point about the epistemological excuse for organizational wrongdoing: though we have argued that the excuse may be genuine, it is also clear that embattled employees will frequently seize on it whether it is genuine or not. This suggests a practical reason to be concerned about shifting blame to the organization. To the extent that we assign responsibility to the organization itself rather than to its managers, employees, or directors, we protect those individuals from blame. This may encourage managers, employees, and directors to resort too readily to the epistemological excuse "I didn't know" and may even lead them to resurrect the positivist excuse "I was only doing my job." The effect may be to diminish the responsibility individuals take for what they do in the firm and to encourage individuals to acquiesce in bad and even harmful policy. On the other hand, to the extent we hold responsible the individual employee or official but not the organization itself, we run a complementary risk: we may encourage organizations to treat individual employees as scapegoats. When harm is caused by corporate structure that has careened out of control, something must be done to change that structure. Picking out individual managers to hold responsible may distract us from the more important task of institutional reform.

Let us, then, accept for the sake of argument that even though individuals in Air New Zealand bear no responsibility for the crash, Air New Zealand itself was responsible. How might this happen? Suppose as a bottom-line fact that even though all individuals involved worked very hard at getting the relevant information, the structural complications were so overwhelming that they were doomed to fail. Nobody could have anticipated these complications, so nobody was to blame for them. We might say that the accident was somebody's fault but not, even to some small degree, the fault of any individual. Therefore, the corporate structure must have been at fault: the corporate structure, and hence the corporation itself, caused the crash. Had that corporate structure not been present, a pilot would have been aware of the risk of crash, and could have acted to avoid colliding with the mountain. But if we concede that the corporation, not an individual, caused the crash, are we also forced to admit that the corporation was morally responsible for the crash?

Here again Baron Thurlow enters the picture. That causation is not enough for moral responsibility is elementary. Lightning may cause a fire in the forest, but it is only *causally* responsible, not *morally* responsible, for the fire. In the case of lightning, our inability to attribute moral responsibility is of no concern. We are able to understand and control the connected phenomena — to protect ourselves from

being struck, for example — so long as we understand the relevant causal facts. When humans cause harm, the situation is different. To get people to avoid harm, we must appeal to their sense of decency and duty, to their desire to do nothing for which they should feel guilt or shame. Even when we cannot hope to affect the behavior of a responsible person — because, for example, he caused the harm in the past and is now dead — we may still benefit from developing explanations of what he did in terms of the moral concept of responsibility. Such explanations help us hone our understanding of the distinctively human causal web.

While it is plainly important to observe how organizations and organizational structure cause harm, even to attribute causal responsibility for a particular harm to organizational structure, we gain nothing by going further and talking about the moral responsibility of the metaphysically distinct organization. We do not alter an organization by appealing to its sense of decency or duty; we do so by appealing to the sensibilities of its employees and officials, or, in extreme cases, by placing it in receivership. Because the language of moral responsibility is lost on the metaphysically distinct organization, to use that language on the organization cheapens it.

Hence, even if we resist the temptation to blame the organization morally instead of its employees or officials, we need to find another variety of responsibility for the organization, a nonmoral variety. In finding that the organization or its structure is causally responsible for the accident, we need not morally blame it as a metaphysically distinct entity, because we need not assert that the organization should have acted with a sense of decency or duty or felt guilt or shame for what it did. Instead, we cite the organizational structure as a causal factor that contributed to the accident and that merits our attention for change. Thus, by blaming the organization, we can make at least one valid point: that, in solving the problem that led to this crash, we must do more than admonish or even fire Air New Zealand employees who were involved in this crash. We must also change the organizational structure that led these employees to behave in a manner that allowed the crash to occur. This blame, however, is not moral blame. It is causal blame, or, more simply, causal citation.

Beyond organizational structure, another aspect of the organization may be a morally important cause of harm: organizational culture. The difference between structure and culture is straightforward. Two organizations with the same structure — that is, the same organizational flow chart and the same written policies — may behave differently because they have different cultures, different patterns of

informal institutional practice and social relations. One organization might stress upright behavior, honoring the spirit of laws as well as abiding by their letter, putting safety before profits, and frowning on backbiting and internal politicking among middle management. Another might stress the bottom line, encourage employees to get away with all they can, and applaud personal advancement through dirty tricks. We can cogently ascribe moral terms to these cultures. We can find one decent and the other reprehensible.

Does this distinction imply that the culture is a moral person or some other kind of entity that we may suitably hold responsible for wrongdoing? From the moral point of view, is organizational culture less like organizational structure and more like a person? Referring back to French's criterion for moral personhood, the answer would seem to be no. A culture can experience moral emotions like guilt and shame, if at all, only vicariously. Still, one may be drawn to impute moral responsibility to organizational cultures more than to organizational structures because cultures are more suffused with human character than are structures: we may blame a culture that encourages Smith to lie and cheat because that culture expresses the character of — perhaps even seems part of — many individuals within the culture who lie and cheat. We can more easily anthropomorphize an organizational culture than an organizational structure.

Yet the fact that we may correctly use some terms of moral appraisal when talking about an organization does not imply that the whole range of moral terms applies to it. Some things are subject to moral appraisal only in very limited ways. If Smith starts a fight by making a nasty remark, I may assess the remark as morally reprehensible while also judging Smith to be reprehensible for making the remark. On the other hand, it makes better sense to blame Smith, not the remark, for causing the fight. How the remark itself *could* be at fault or blameworthy is not plain. Hence we must hold open the possibility that organizational culture, while subject to moral appraisal, cannot be held responsible for wrongdoing.

Moreover, even if organizational cultures may be partly responsible for individual wrongdoing, that would not exculpate the individual. We do not exonerate mobsters merely because they live their lives in a culture of violence. Nor can an organizational culture act except through individuals, who ultimately bear the praise or blame for the lives they craft out of the raw material the culture provides.

We have now seen that facts such as those of the Air New Zealand case do not force us to attribute moral responsibility to the organization as a metaphysically distinct entity. But another factor, not em-

phasized by French or Thompson, might discourage us from insisting that the responsibility of an organization ultimately collapses into the responsibility of individuals. If we say that humans acting as individuals are the ultimate bearers of moral responsibility, we seem to deny the moral significance of an individual's organizational involvement. Yet when organizational activity causes harm, not merely individuals acting in their capacities as participants in the organization are to blame for the outcome. The relationship between individuals and the organization matters morally. In the case of organizational crime, for example, we want to do more than blame each executive involved in the relevant decision or perhaps restructure the organization. Our blaming practices must somehow reflect the fact that these executives engaged in criminal activity as part of a larger enterprise. To acknowledge the moral relevance of the organization, we might blame it while also blaming the individuals who form its membership.

Consider conspiracy law by way of analogy. According to traditional criminal jurisprudence, stealing something is bad, but agreeing with someone else to steal that same thing may be worse, even if neither you nor your coconspirator actually steals it.⁵⁶ Involvement with a group for illicit purposes has distinctive moral significance. It does not follow, however, that the group as an entity is responsible in some way that transcends the responsibility of the individuals. Rather, the idea is that those who act in groups may impose greater risks on society, and thus deserve greater blame when they act wrongly.

Joining a legal organization is not an evil like joining a conspiracy, but both legitimate organizations and criminal conspiracies pose more of a threat to social welfare than do their individual members, a threat which has implications for the responsibility of those members. One of the principal rationales for punishing conspiracy as a separate offense is "the special danger incident to group activity."⁵⁷ As one oft-quoted commentary argues, "[I]t is more difficult to guard against the antisocial designs of a group of persons than those of an individual The advantages of division of labor and complex organization characteristic of modern economic society have their counterparts in many forms of criminal activity."⁵⁸

56. See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 6.4, at 530 (2d ed. 1986).

57. MODEL PENAL CODE § 5.03 comment on criminal conspiracy (Tent. Draft No. 10, 1960).

58. Note, *The Conspiracy Dilemma: Prosecution of Group Crime*, 62 HARV. L. REV. 276, 283-84 (1948) (footnotes omitted).

Obviously, we do not wish to condemn "modern economic society" because dangers arise from its "division of labor and complex organization." But we may wish to impose on individuals who participate in that society obligations commensurate with the dangers. After all, the converse of the passage we have just quoted is equally true: many forms of criminal activity have their counterparts "in the division of labor and the complex organization characteristic of modern economic society."

While this comparison highlights the special risks of organizational activity, it also reminds us that the explicit agreement to do wrong found in conspiracies is rarely the source of individual responsibility for organizational wrongdoing. Individual blameworthiness lies rather in the failure to respond adequately to the heightened risks of unintended and inadvertent wrongdoing.

In sum, we have identified three distinct reasons that the organization must be taken seriously in our practices of fixing blame and attributing responsibility. First, the corporate structure may be a locus of events causally relevant to morally significant harm. Second, organizational culture may serve as both a causal locus for harm and an object of moral condemnation. Third, an individual's participation in organizational activity involves special risks and imposes special obligations, factors that may deepen responsibility for unintended and inadvertent wrongs.

None of these reasons, however, suggests that organizations are moral agents of some metaphysically unique type, nor that we can blame organizations for their wrongdoing in such a way as to replace individual responsibility. Organizational structure may mitigate or even excuse individual conduct, but organizational structures cannot be the subject of moral blame. Organizational culture may be subject to blame in a certain sense, but blaming the culture does not excuse or mitigate the conduct of the individuals who are part of it. Finally, recognition of the special risks that organizations share with conspiracies serves to heighten, not reduce, individual responsibility for organizational wrongdoing.

Our approach splits the difference between antireductionist and reductionist views of organizations. With the antireductionists, we acknowledge that praising and blaming organizations is not merely a shorthand way of praising and blaming individuals. Organizations are real and irreducible to their component individuals. With the reductionists, however, we insist that organizations are not metaphysically distinct seats of moral responsibility — persons or otherwise — that can absorb the blame from individuals who "know not what they do."

Individuals alone have souls to damn, and if the epistemological excuse relieves them of moral responsibility, then nothing in the world is morally responsible.

C. *Strict Moral Liability*

Let us return to Kundera's reflections on the guilt of Czech Communists for the crimes that they committed because they were deceived by the Russians. Kundera's protagonist Tomas observes that "In the end, the dispute narrowed down to a single question: Did they really not know or were they merely making believe?"⁵⁹ To Tomas, however, this seemed a shallow and wrongheaded question:

It was in this connection that Tomas recalled the tale of Oedipus: Oedipus did not know he was sleeping with his own mother, yet when he realized what had happened, he did not feel innocent. Unable to stand the sight of the misfortunes he had wrought by "not knowing," he put out his eyes and wandered blind away from Thebes.

When Tomas heard Communists shouting in defense of their inner purity, he said to himself, As a result of your "not knowing," this country has lost its freedom, lost it for centuries, perhaps, and you shout that you feel no guilt? How can you stand the sight of what you've done? How is it you aren't horrified? Have you no eyes to see? If you had eyes, you would have to put them out and wander away from Thebes!⁶⁰

In Sophocles's drama, a plague visits Thebes because it is harboring someone polluted by the twin crimes of parricide and incest. The gods do not care if Oedipus did not know that the man he killed at the crossroads was his father or that Jocasta was his mother; the gods did not care that he had no guilty intentions. *Oedipus Rex* portrays a world of strict moral liability. Kundera wishes us to understand moral responsibility among the *apparatchiks* through the categories of this world.

By analogy, one may approach the problem of fragmented knowledge through a conception of strict moral liability by holding organizational functionaries morally responsible for the wrongs they participated in despite the fact that they "didn't know" and thus had no wrongful intentions.

The notion of strict moral liability seems at first blush unpromising, simply because we typically bridle at blaming someone morally for ignorant or unintended wrongs. In this, no doubt, we differ from Sophocles and his culture, which placed less emphasis on intentions, and indeed on any interior mental states, than we do. Yet even the

59. KUNDERA, *supra* note 14, at 176.

60. *Id.* at 177.

Greeks recognized the excuse, "I didn't realize what I was doing!" When Agamemnon apologizes to Achilles in book 9 of the *Iliad*, he attempts to mollify Achilles by explaining that a blindness had come over him when he seized Briseis.⁶¹ It is hard to imagine any culture for which the agent's intention is simply irrelevant to the moral classification of acts; as Holmes observed, even a dog knows the difference between being tripped over and being kicked.

A.W.H. Adkins has argued that it was principally in the context of wrongful acts involving the religious notion of *pollution* that the Greeks regarded the agent's intentions as irrelevant.⁶² The notion of pollution, however, seems to have no place in a world that does not believe in demons, Furies, or vengeful ghosts howling for blood; the Greek conception of strict moral liability, so closely tied to cultic and chthonic religions, appears to hold little promise for us. Reinforcing this conclusion is the fact that the analogous notion of strict liability for criminal offenses is widely regarded as a jurisprudential aberration with no place in a civilized legal system.

Yet the argument cannot be quite so quick or straightforward. For one thing, the concept of pollution has by no means vanished from contemporary, secular moral discourse, as the postwar debate over the dimensions of German "metaphysical guilt" makes clear.⁶³ Anthony Appiah has noted that many of those advocating Western divestment of South African holdings until the end of *apartheid* base their arguments explicitly on the idea that, regardless of the practical efficacy of divestment, possessing South African holdings amounts to a form of pollution.⁶⁴ Moreover, in recent years moral philosophers have paid increasing attention to the phenomenon of *moral luck*,⁶⁵ the possibility that matters beyond our control may affect our moral blameworthiness. Philosophers who believe in moral luck must be prepared to weaken the requirement of evil intent in attributions of moral blame. Finally, as George Fletcher points out, the concept of pollution has

61. HOMER, THE ILIAD bk. IX, lines 136-45 (Robert Fugles trans., 1990).

62. ARTHUR W.H. ADKINS, MERIT AND RESPONSIBILITY: A STUDY IN GREEK VALUES 92-104 (1960). Some acts, such as murder, rendered the perpetrator loathsome in the eyes of the gods. One thus polluted could not perform prayers and sacrifices without first undergoing expiation and ritual purification.

63. See KARL JASPERS, THE QUESTION OF GERMAN GUILT (E.B. Ashton trans., 1947).

64. Anthony Appiah, *Racism and Moral Pollution*, 18 PHIL. F. 185 (1987), reprinted in COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS 219 (Larry May & Stacey Hoffman eds., 1991).

65. See, e.g., THOMAS NAGEL, *Moral Luck*, in MORTAL QUESTIONS 24 (1979); MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY (1986); BERNARD WILLIAMS, MORAL LUCK (1981).

survived in our criminal law in forfeiture provisions.⁶⁶ Forfeiture of goods involved in criminal activity is a residue of the law of deodands, which grew out of a tradition of regarding the physical instruments of wrongdoing as polluted objects.⁶⁷ Deodands, it is true, are a thing of the past; but forfeiture remains. All this suggests that the notion of strict moral liability may not be as anachronistic, and as bound to superstition, as it seems.

We nevertheless continue to find it an unpromising approach to the problem of fragmented knowledge. To begin with, the notion of moral pollution simply cannot substitute for the concept of moral blameworthiness. Proponents of the concept of pollution face a dilemma. If they base their argument, as they seem to, on the fact that the concept of pollution persists in our actual practices of moral criticism, they must acknowledge that those practices do not restrict it to cases where the agent plays a causal role in wrongdoing. In the paradigmatic instances of moral pollution — metaphysical guilt, or the sense of taint felt by the close relatives of notorious murders — the agent's causal role in the wrongdoing is as irrelevant as his intentions. German metaphysical guilt, for example, is *metaphysical* precisely because it applies even to Germans who played no causal role in the Holocaust.

But decisive reasons exist to reject the concept of noncausal moral pollution. Recently, enraged citizens of Auckland, New Zealand burned the garage of a murderer's parents. In their anger they evidently regarded the parents as polluted by their son's crime; surely, however, such thinking is a terrible moral error. The U.S. Constitution thus justifiably proscribes punishment by corruption of blood, a holdover from the ancient jurisprudence of pollution. The promiscuous use of the noncausal concept of moral pollution is suspect; and it is a concept that invites promiscuous use because it simply seems impossible to cabin within precise, or even imprecise, boundaries. If, on the other hand, we restrict the concept of pollution to cases where the agent played a causal role in wrongdoing, we can no longer base the argument on "the normative force of the actual" — the fact that the concept of pollution persists in actual practice. In that case, proponents of the concept must justify it.

Moreover, an analogous objection arises even in many cases where the agent did play a causal role in wrongdoing. The secretary who printed the address labels for shipments of Dalkon Shields, the clerk

66. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 5.1, at 347-49 (1978).

67. *Id.*

who affixed these labels to the boxes, the trucker who delivered them, the stevedore who loaded them onto a ship, the UPS driver who delivered them to physicians' offices, and the physician's receptionist all played a causal role in the wrongful distribution of the product. Yet it seems outrageous to insist that their causal role in wrongdoing morally polluted all these individuals.

This suggests that if the concept of pollution is to be used at all, it demands fine-grained distinctions of degree. One might distinguish, for example, between investors (and employees' relatives) who are polluted because they unknowingly benefited from organizational wrongdoing, employees who are polluted merely by virtue of working for an organization involved in wrongdoing, employees who are polluted because they played an unintentional causal role in the wrongdoing, employees who are polluted because they knew of the wrongful act and did nothing (though they did not participate in it), and employees who are polluted because they knowingly or intentionally participated in the wrongful act. Ordinarily, we would regard the last category as a worse form of pollution than its predecessors; the list proceeds in roughly ascending order of pollution.

If that is the strategy, however, the concept of pollution does not solve the problem of fragmented knowledge — it merely restates that problem. True, the concept of pollution provides a resource by which we can in some sense condemn nonintentional involvements in wrongdoing. But under conditions of bureaucratic fragmentation of knowledge, the worst form of moral pollution — pollution by intentional wrongdoing — seems to disappear, so that bureaucracy seems able to conjure it out of existence. Thus, even when the concept of pollution fortifies our moral repertoire, bureaucratic fragmentation of knowledge blocks the severest and most characteristic form of moral criticism. That is the problem of fragmented knowledge.

To summarize, we may either resolve the problem of fragmented knowledge by employing an undifferentiated notion of moral pollution that is hopelessly overbroad or distinguish gradations of pollutions, in which case the problem of fragmented knowledge has merely been restated rather than resolved.

Let us return to Kundera's example. The most striking fact about the Czech Communists he discusses is that they were not *simply* ignorant of what they were doing in the way Oedipus was ignorant when he married Jocasta. They were "enthusiasts convinced they had discovered the only road to paradise. They defended that road so val-

iantly that they were forced to execute many people."⁶⁸ They had embarked on a course of political action that involved recognizable moral risks. They knowingly collaborated with a powerful foreign power in order to bring their own country under its dominion, banking on the Soviets' claim to represent the party of humanity. If they did not know what they were doing, they should have found out.

Thus, to analyze Kundera's problem correctly, we should not hold the Communists strictly morally liable, like Oedipus. Rather, we must understand that they took voluntary part in an organizational enterprise engaged in risky business, giving them special and stringent obligations to comprehend the import of their actions. Tomas is right to find *Did they know or did they not?* a "second-rate" question⁶⁹ — not because, as with Oedipus, knowledge is irrelevant, but because the right question is *Should they have known?* Accordingly, we propose to give the concept of culpable ignorance a more central role in assigning responsibility for organizational wrongdoing.

D. *Extending Individual Responsibility*

The simplest way of extending the concept of culpable ignorance to situations in which the knowledge conditions fail is to invoke an analogy to drunk driving. By the time a driver has had six drinks, he may no longer have the reflexes or judgment to avoid an accident, and thus in one sense he is not responsible for what he does behind the wheel. Obviously, though, we *do* hold him responsible. Why? The answer seems simple enough: although we agree that once he became drunk he lost effective control of his actions, we blame him for becoming drunk in the first place. Though he was not fully responsible at the time of the accident, it was his own fault that he was not responsible. In Aristotle's words, "when one has once let go of a stone, it is too late to get it back — but the agent was responsible for throwing it, because the origin of the action was in himself."⁷⁰

Analogously, we may agree that individuals in organizational settings often do not know enough to be held responsible for organizational wrongdoings and yet we insist that they should have known. They were wilfully blind. Thus, for example, if an SS officer claimed

68. KUNDERA, *supra* note 14, at 176.

69. *Id.* at 178.

70. ARISTOTLE, *NICOMACHEAN ETHICS* bk. III, ch. V, 1114a, at 124 (J.A.K. Thomson trans., rev. ed. 1976). For discussion, see T.H. Irwin, *Reason and Responsibility in Aristotle*, in *ESSAYS ON ARISTOTLE'S ETHICS* 117 (Amélie O. Rorty ed., 1980). For a proposal similar to ours, see DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* 60 (1987). Thompson's discussion of what he calls "the moral responsibility of many hands," *id.* at 40-65, is one of the best recent efforts to address the problem of fragmented knowledge.

that he did not know about the SS's murderous activities, we may wish to insist that his ignorance is blameworthy. He should have known what he was joining.

The drunk driving analogy suggests that we can hold people responsible for getting into the very predicament that at first glance seems to relieve them of responsibility. If we focus on the act of drinking, this suggests that an employee is responsible for the predicament he gets into by joining an organization that fragments relevant knowledge. Except in the case of outlaw groups like the SS, however, we do not want to treat the act of joining an organization, like the act of heavy drinking, as suspect or presumptively wrong.

We would do better to focus on the driving aspect of the drunk driving analogy. Driving is a valuable activity, and our licensing procedures are designed to make it widely available. Because of the lethal potential of the automobile, however, the privilege of driving hinges on an exercise of alertness, caution, and self-restraint that we do not require of pedestrians or passengers. We allow pedestrians and passengers to impair their reflexes and judgment with alcohol, but we treat it as a legal and moral offense for a driver or prospective driver to do so.

Analogously, because of the great potential for harm arising from the division of labor and fragmentation of knowledge in a corporate or bureaucratic organization, employees may acquire duties far more demanding than doing no evil. They must look and listen for evil and attempt to thwart it if they discover it. These duties, however, are not as limited and well-defined as those imposed on the driver. We expect prospective drivers to "just say no," but we cannot expect organizational employees to know everything about the operation in which they are involved. While drinking is a gratuitous impediment to driving, fragmented knowledge inheres in the structure of the organization itself. We are left with a question that does not arise in the context of drunk driving: What and how much precaution do we require of the individual employee?

We cannot answer this question definitively, but we can begin by suggesting several obligations that arise from the specific risk of organizational enterprise: the risk that an individual will do or contribute to great harm without knowing it.

1. *Obligations of investigation.* The first, most obvious, possibility is to hold individuals in organizational settings morally responsible for discerning the nature of their own projects and for discovering what other employees are doing with their work products. The idea is obvious because it remedies the absence of knowledge in the most straight-

forward way: by demanding that individuals do their best to acquire the knowledge they lack.

2. *Obligations of communication.* A second possibility is to hold individuals who possess troublesome knowledge morally responsible for communicating it to others in the organization. Obviously, communication may be a risky course of action: supervisors treasure their "deniability," and shooting the messenger is often their knee-jerk response. Yet riskiness does not distinguish this from other moral responsibilities: we often believe that people have moral obligations to act against their self-interest.

3. *Obligations of protection.* The previous suggestions imply that supervisors may have moral obligations to protect their subordinates from adverse consequences of investigation and communication. For example, they may be morally responsible for protecting whistleblowers from retaliation.

4. *Obligations of prevention.* Those in management positions may have moral obligations to forestall wrongdoing by setting up structures that avoid the problems we have been examining. Such preventive mechanisms might include ombudsmen, incentive structures that reward moral action, channels for anonymous information about problems, and so on. Interestingly, the American Bar Association's 1983 ethics code requires supervisors in law firms to take measures that ensure that their subordinates behave ethically.⁷¹

5. *Obligations of precaution.* In some cases, we may be able to analogize the act of joining an organization to the act of heavy drinking: the individual knows or should know that once she becomes involved, her discretion and knowledge will be so constricted that she cannot be held responsible for wrongdoing that, in broad outline, she can reasonably anticipate. The fatal misstep is involving herself in the first place. More often than not, would-be employees of organizations have some prior sense of the organization's values and culture. We may therefore hold individuals responsible for joining the organization in the first place, as we might hold an individual German responsible for joining the SS.

That individuals in an organization have obligations like these, and that their breach provides a basis for assigning the individuals responsibility for wrongs done in ignorance, seems plausible. But this approach to extending individual responsibility for organizational wrongdoing raises two critical questions. First, how demanding are

71. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1983); see also John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466 (1982).

these obligations? There are some things we could not have learned, communicated, or prevented even by the most vigilant inquiry, and if *should have* does not imply *could have*, we are back to strict liability. Second, how much vigilance is enough? The standard for liability can be onerous even if it is not strict.

As we have described them, the moral obligations of the individual employee seem to fall somewhere between *perfect* duties like not killing, with fairly precise boundaries, and *imperfect* duties like charity or self-improvement, that require only some indeterminate effort. If we attempt to make these duties perfect, through more precise formulation, we risk defining them too narrowly; if we attempt to make them imperfect, by demanding a "reasonable" effort, we risk making them too vague.

Similar questions arise in settings where the law recognizes an affirmative duty to prevent harm: where the agent has a special duty to care for the victim, has contributed to the victim's peril, has initiated rescue, or has a responsibility to control the threatened harm. In these settings, we hold the agent culpable for not trying to prevent harm, but not strictly liable for its occurrence. This leaves the question of how much of an attempt to prevent harm the agent must make. Legal norms are hard to discover, because few courts actually recognize a duty to aid, and in the cases where they do, the defendant has usually failed to make even a token effort to render assistance.⁷²

This may be more problematic when assigning criminal than moral responsibility, since the notice requirement of criminal law compels us to draw a clear line between required and merely permitted assistance.⁷³ One might think that moral appraisal could tolerate more vagueness. Why should a conscientious agent need a sharp line between required and supererogatory precautions rather than an indefinite duty to be as cautious and vigilant as possible? If we treat the fulfillment of these duties as a matter of degree, however, we raise the problem of deciding how the degree of fulfillment affects the individual's responsibility for organizational wrongs that greater effort might have averted.

This raises the second question: What is an individual responsible for in failing to fulfill these *preemptive duties*, as we shall call the obligations of investigation, communication, protection, and precaution?

72. See FLETCHER, *supra* note 66, § 8.3.7.

73. When the criminal law imposes liability for unintended harm, it usually requires *gross* negligence or recklessness — conscious disregard of a risk. See, e.g., MODEL PENAL CODE § 2.02(d) (1985) (culpability requires negligence constituting "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation").

Should we blame her only for the breach of the preemptive duty, or should we blame her for the resulting offense as if she had known all the relevant facts (and thus hold her immune from censure if no harm results)? Is the employee responsible just for failing to investigate (at the time she fails to do so), or does she lose her excuse of ignorance with respect to any facts the investigation would have yielded?

Neither approach seems fully satisfactory. In limiting responsibility to the breach of preemptive duties, we impose the same blame or punishment regardless of what wrongs result; in withholding the excuse of ignorance for the offense, we treat a negligent employee as if she were responsible for intentional wrongdoing. And if we assign responsibility *only* when a wrong is actually done, we fail to censure those lucky enough to ignore their special obligations without adverse effect.

This dilemma is hardly peculiar to the problem of organizational settings, however. We display much the same ambivalence about assigning blame for the variable consequences of individual agency. Legally and morally, we are torn between a desire to make agents with the same mental state equally culpable and an urge to consider the consequences in assigning blame. Moreover, while we condemn those who fail in their deliberate efforts to bring about wrongs almost as severely as those who succeed, we condemn those who risk doing wrong without intending it far more severely when the wrong is actually done.

But denying the excuse of ignorance to those who do not fulfill their preemptive duties in organizations raises special problems. By denying employees the epistemological excuse, we rest their fault on events beyond their control; we effectively treat them as if they intentionally engaged in serious wrongdoing of which they were in fact ignorant. If this is harsh legally, it is unacceptable morally. One can hardly imagine how any level of negligence in failing to investigate the possibility of wrongdoing could be the moral equivalent of intentionally doing the wrong.

Moreover, other agents will often do the wrong the employee fails to avert. If we held an employee responsible for others' wrongdoing he could have prevented, just as if he had intentionally approved or encouraged that wrongdoing, we would greatly increase the scope of his responsibility and the sway of moral luck. We would impose on him a moral responsibility as great as the legal responsibility we now reserve for co-conspirators, based on their explicit agreement to pursue a criminal venture.

Finally, as we noted earlier, the fact that the obligations we have

described are indeterminate in their extent and stringency exacerbates the tension. To say to a manager that she should have done more to prevent her employees' wrongdoing, or to an employee that she should have blown the whistle on her boss despite the risk, is one thing. It is quite another thing to say that as a result of having failed to do enough, or of having caved in to an insufficiently grave threat, the individual is now responsible for serious wrongdoing as if she had intentionally engaged in it.

Several writers on criminal jurisprudence have suggested that in order to assign responsibility appropriately, we need to view the individual's actions in a consistently broad "time-frame" — to look not only at the *actus reus* defined by statute but also at the actions and decisions leading up to it, particularly those that promote, mitigate, excuse, or justify the act's commission. In the most fully developed proposal of this kind, Paul Robinson has argued that the law can recognize a person's responsibility for getting into a predicament without denying her the excuse created by that predicament.⁷⁴ The critical inquiry is whether, in acting in a way that creates an excuse, the individual is at fault for the offense excused.

To return to the drunk driving analogy, a driver who drank until he was no longer able to appreciate the hazards of the road would not lose the excuse of ignorance if an accident occurred, as if he had knowingly caused the accident. Rather, he would be guilty of reckless homicide for disregarding the risk of a fatal accident; if he should have known of the risk but remained ignorant (e.g., because he did not bother to find out that the punch he was drinking was highly alcoholic), he would be guilty of negligent homicide.⁷⁵

Applied to organizational wrongdoing, an approach like Robinson's would ground the employee's responsibility for the harm in her preemptive duties to investigate, prevent, and so forth. By breaching these duties, the employee has played a role in causing or contributing to the commission of the offense. The key question would not be whether the employee deliberately, recklessly, or negligently breached

74. Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).

75. Similarly, if a person negligently provoked another to use deadly force, he would not lose his right to kill in self-defense. If he exercised that right, however, he would be guilty of negligent homicide for creating the need for self-defense. If he provoked another in order to give himself a legal justification for killing that person, he would be guilty of intentional homicide.

To bear any responsibility for the ultimate offense, the agent must be at fault for creating the specific excusing or justifying condition he relies on. If he negligently provoked someone without reason to expect that she would resort to deadly force, he would not be guilty of homicide in creating the need for self-defense. He would be responsible at most for negligent provocation and the use of nondeadly defensive force.

her duty but whether, by failing to perform it, she intentionally, recklessly, or negligently facilitated the wrongdoing.

Thus, if an employee should have known that by investigating a new project before it commenced, she could ascertain whether it involved exporting toxic substances, and there was some reason to suspect that it might, she would be responsible for negligently exporting those substances, even if, by the time she exported them, the most diligent inquiry would not have revealed their toxic character. Had she actually known that an investigation could have revealed that information, but failed to investigate, she would be responsible for recklessly exporting toxic substances, even if, by the time she exported them, she was no longer able to ascertain their toxic character.

In some cases, this approach may lead us to hold employees who act in ignorance responsible for intentional wrongdoing. If the employee deliberately insulated herself from knowledge about the exports, intending to export toxic substances without being told that specific exports were toxic, she would be responsible for their intentional export despite her ignorance at the time she exported them. But if she deliberately insulated herself from such knowledge only because she hated confrontations, she would be responsible for no more than reckless export, since she did not know the character of the substances or intend or hope that they might be toxic. This approach, then, avoids the harshness of denying an employee an excuse for organizational wrongdoing if she has any fault for creating the excuse. It treats her as responsible for wrongdoing only to the extent that she is at fault for excusing or justifying its commission.

Applying this approach to organizational wrongdoing, however, involves complexities. In the examples Robinson discusses, a person gives himself an excuse of ignorance by an action that impairs his ability to obtain information critical to the safe performance of his task: a driver drinks himself insensible, a police officer leaves his glasses home when he goes on duty. In such cases, the risks of acting in the impaired condition seem obvious; to regard the driver or police officer as reckless in disregarding those risks makes sense. But the risks of proceeding in ignorance may not be so obvious in an organizational setting. Those risks depend on what the organization does, what it can or might do wrong, and how the employee's own action can or might contribute to those wrongs. Acquiring this background knowledge may itself require extensive inquiry, and the question then becomes what should trigger such an inquiry. The strength of the employee's preemptive duties will depend on the risks they serve to preempt, but

the employee may not be able to appreciate those risks without having already fulfilled those duties.

When we consider this problem less abstractly, we do not face a regress or a bootstrap. We merely face the need to condition the duties we impose on what the (prospective) employee knows or should know at the outset about the organization, its work, and her role in it. For example, an employee's duty of investigation and precaution will be much greater if she has heard rumors that the import-export business to which she has applied is a CIA front, or if she knows that similar businesses in that part of the world have often been used as CIA fronts. Because so much depends on what the employee knew or should have known, suspected or should have suspected, at various times, we must be very cautious in assigning individual responsibility for organizational wrongdoing. Frankly, we will often lack the information necessary to do so. But such epistemic limits to faultfinding are hardly unique to the organizational setting.

The devices we have suggested for extending individual responsibility may be too demanding because they require a debilitating level of caution, wariness, and investigation in routine organization work. Alternatively, they may fail to justify the ascription of responsibility to individuals in many common organizational settings. But until the attempt has been made to broaden and adapt the notion of individual responsibility, news of its death will be premature.

CONCLUSION

The preemptive obligations we are proposing have in recent years become widely accepted in both public and private bureaucracies. Governmental agencies typically have ombudsmen, and state and federal governments have enacted protections for whistleblowers. In the wake of several incidents, the Exxon Corporation has enacted regulations requiring employees who notice possible misconduct or dangerous situations to notify their superiors in writing; the superiors, in turn, are required to respond in writing, and if no written response is forthcoming, the employee must jump the chain of command and inform higher-level executives.⁷⁶

Regarded as public policy proposals, our preemptive obligations are already found in corporate manuals and memoranda. We are not offering a proposal for regulations whose time has come, however, but an account of individual moral responsibility. That is, we argue not only that bureaucratic organizations should institute policies along the

76. We owe our information about Exxon's regulations to John Braithwaite.

lines we have suggested, but also that individual executives within the organizations are morally blameworthy for failing to implement such policies and that individual employees and executives are morally blameworthy for violating preemptive obligations *even in the absence of policies implementing them*.

The latter point is particularly significant, because it implicates the moral culture of organizations as well as their formal policies. One could imagine an organization enacting Exxon-style regulations while preserving a moral culture that discouraged the whistleblowing that the regulations require; in that case, employees would fear to go over their supervisors' heads, and the regulations would function primarily to insure that lower- or middle-level employees took the fall when things went wrong.⁷⁷ To insist as we do that the preemptive obligations form part of our moral responsibilities is to insist on the spirit as well as the letter of preemptive regulations.

Thus, our proposal amounts to a reconfiguration of the dimensions of individual moral responsibility as well as a reconfiguration of the structure and culture of bureaucratic organizations. Earlier, we argued that familiar moral theories cannot handle the problem of fragmented knowledge. Not only do their first-order precepts presuppose the four knowledge conditions, but they typically marginalize the phenomenon of culpable ignorance. We conclude with some brief reflections on how our proposal differs from these familiar moral theories.

The account we propose retains the concentric-circles structure of familiar moral theories: a core of first-order precepts; a surrounding layer of mitigations and excuses; and an outer layer of conditions defeating those mitigations and excuses. In effect, the modification we propose relocates the notion of culpable ignorance from the category of conditions defeating mitigations and excuses to the first-order precepts. That is, we place preemptive obligations among the basic moral duties of the individual in bureaucratic settings. In one sense, then, our proposal may be regarded as a minor modification, or friendly amendment, to familiar accounts of morality.

In another sense, however, the change is fundamental, for it involves a different model of the moral life. Traditional moral theories presuppose an episodic or picaresque model: the moral life consists of

77. John Braithwaite has reported that American pharmaceutical company executives repeatedly told him in interviews that someone's job was "vice-president responsible for going to jail": his duty was to take the fall for his superiors, and after several years in this position he would be rewarded by moving to a well-compensated "safe" job. See Braithwaite, *supra* note 29, at 3. In such an institutional culture it is hardly farfetched to assume that Exxon-style regulations might be instituted for purposes of liability screening rather than avoiding fragmented knowledge.

a progression of discrete trials or encounters, in which the individual confronts a temptation or a difficult choice and marshals her virtue and willpower to meet the challenge. Between these episodes of heightened moral tension and challenge, life proceeds more tranquilly, in a state of comparative moral neutrality. From the labors of Hercules to the voyage of Odysseus to the progress of Bunyan's Pilgrim, the basic stories of the West have pictured the moral life as a kind of errantry. Roberto Unger has described this view of moral encounter as the "Christian-romantic view of the self,"⁷⁸ by which he means to suggest not only that Christianity adapted the pagan literary form of the romance but that this form is the deepest expression of how we morally conceive of our lives. Plainly, the episodic form of the moral life requires the four knowledge conditions, whose satisfaction permits us to recognize that the next moral test has come upon us. Our argument, however, has been that discrete and bounded episodes of moral challenge arise in a moral world far different from that of the bureaucratic organizations in which modern men and women lead their lives.

Moving the preemptive obligations to the core precepts of morality does more than reblend the wine in old bottles; it changes how we understand the moral life. We now see ourselves not as individual souls, progressing from one moral episode to the next, but as members of organizations in a continuous but changing network of involvements. We now see moral encounters not simply as tests of will and virtue in the face of known and defined obstacles, but as a part of the continual effort to position ourselves in a state of clarity where knowledge and definition at last become possible. The comprehension that we stand at a moral crossroads is not given, but acquired through considerable effort, courage, and even luck. Obtaining that knowledge is a moral challenge coequal to, or perhaps greater than, the challenge of responding to it.

Indeed, the organizational setting changes the contours of moral challenge and thus of moral virtue. Because of the division of responsibility in organizations, responding to a clearly presented choice may be less demanding than the episodic view suggests, for others are there to share our burden. Recall that in the Milgram experiments it proved easier to resist the wrongful demand when others resisted with the subject. However, because of the fragmentation of knowledge in organizations, coming to understand that one faces a clearly presented moral choice may be *more* demanding than the episodic view suggests; it may require considerable personal courage and persistence. Our

78. ROBERTO M. UNGER, *PASSION: AN ESSAY ON PERSONALITY* 24 (1984).

moral trials may be less intense but more protracted; if we are heroes, we will be heroes by virtue of the quantity rather than the quality of our efforts. The institutionalization of everyday life may demand fewer of the virtues of a soldier or saint and more of the virtues of a detective, a scientist, or a trial lawyer aiming to reconstruct shards of evidence into a coherent theory.

That takes us back to Kafka. In its form, *The Trial* seems like a picaresque novel in which Joseph K. progresses from one episodic encounter to the next. At each stage, however, the moral test in the encounter is the same: can Joseph K. fend off distraction and obfuscation to learn what he is accused of and what he can do about it? His trial, on our account, consists precisely of this repeated test, and his crime consists of his failure to meet the challenge. His obligation is to find his way through a nightmare of fragmented knowledge: to reassemble the misshapen pieces of his experience into a picture that tells him at last where he stands in the order of guilt and innocence. Under our view of morality, Joseph K.'s predicament is ours. His failure is our failure as well.