It is time to abandon the notion of corporate criminal liability.

The Discordance of *New York Central* Jazz

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In 1909, the Supreme Court decided the case of *New York Central & Hudson River R.R. Co. v. United States*, which held corporations vicariously liable for the crimes their employees commit within the scope of their employment. Because vicarious criminal liability is utterly inconsistent with the ethical values that lie at the heart of Anglo-American criminal law, this was a serious mistake. Nevertheless, for the past 101 years, federal courts have consistently upheld this form of vicarious criminal liability.

I once heard jazz defined as the musical form in which one legitimizes a mistake by repeating it. If this is accurate, then the federal judiciary has been playing *New York Central* jazz for more than a century. It is high time that it changed its tune.

MORAL AND CRIMINAL RESPONSIBILITY

Criminal law is penal law. Its purpose is punishment. It is not designed to compose disputes, provide compensation to wronged parties, or impose administrative sanctions. It is designed to punish. This implies that the criminal sanction may be applied only to those persons and entities that can be deserving of punishment; that is, to those that are capable of acting in a morally blameworthy way.

Are corporations, separate and apart from the individual human beings who comprise them, capable of bearing moral responsibility? Does it make sense to ascribe moral blame to an abstract entity with no mind in which to form intentions and no body with which to carry them out? If not, then we need go no further; criminal punishment is unjustified, and for the last 101 years the American criminal justice system has been making a fundamental category mistake in visiting criminal punishment on corporations.

But let us assume that corporations can be morally responsible agents. That does not close the matter; although moral responsibility is a necessary condition for criminal punishment, it is not a sufficient one. We apply the criminal sanction only to morally blameworthy conduct, but we do not apply it to *all* morally blameworthy conduct because there is a principled difference between moral and criminal responsibility. Moral responsibility indicates that one is deserving of punishment. Criminal responsibility authorizes some human beings to punish others. Criminal responsibility inherently involves an element of human agency that moral responsibility does not.

In making a determination of moral responsibility, we are concerned only with the actions of one party, the agent whose conduct is being evaluated. The only relevant issue is whether the agent has acted in a morally unacceptable way. Determining that the agent has acted in a morally blameworthy manner does not in itself authorize anyone else to take action against him or her. The inquiry is an abstract one involving no practical enforcement issues.

The case is different when we make a determination of criminal responsibility. Such a determination requires not only a finding that an agent has acted in a manner deserving of punishment, but also that it is proper for government officials to impose punishment upon the agent. Here, we are necessarily concerned with the actions of two parties, the wrongdoer and the government enforcement agents. Unless the enforcement agents are both omniscient and incorruptible, the class of cases in which the wrongdoer has behaved culpably cannot be coextensive with the class of cases in which the imposition of the criminal sanction is justified. There will always be some cases in which the effort to impose punishment on a class of wrongdoers who morally deserve it would subject the public to an unacceptable risk of harm from the errors or venality of the human beings charged with enforcing the law. If the criminal justice system were guaranteed to be administered with godlike perfection, then the realms of criminal responsibility and moral responsibility would coalesce. But this is not the world we live in. Thus, determinations of criminal responsibility must always consider practical matters of administration that determinations of moral responsibility ignore.

The need for protection against the human beings who administer the criminal justice system explains why criminal responsibility is inherently different from moral responsibility. Moral responsibility is an all-or-nothing affair; either one

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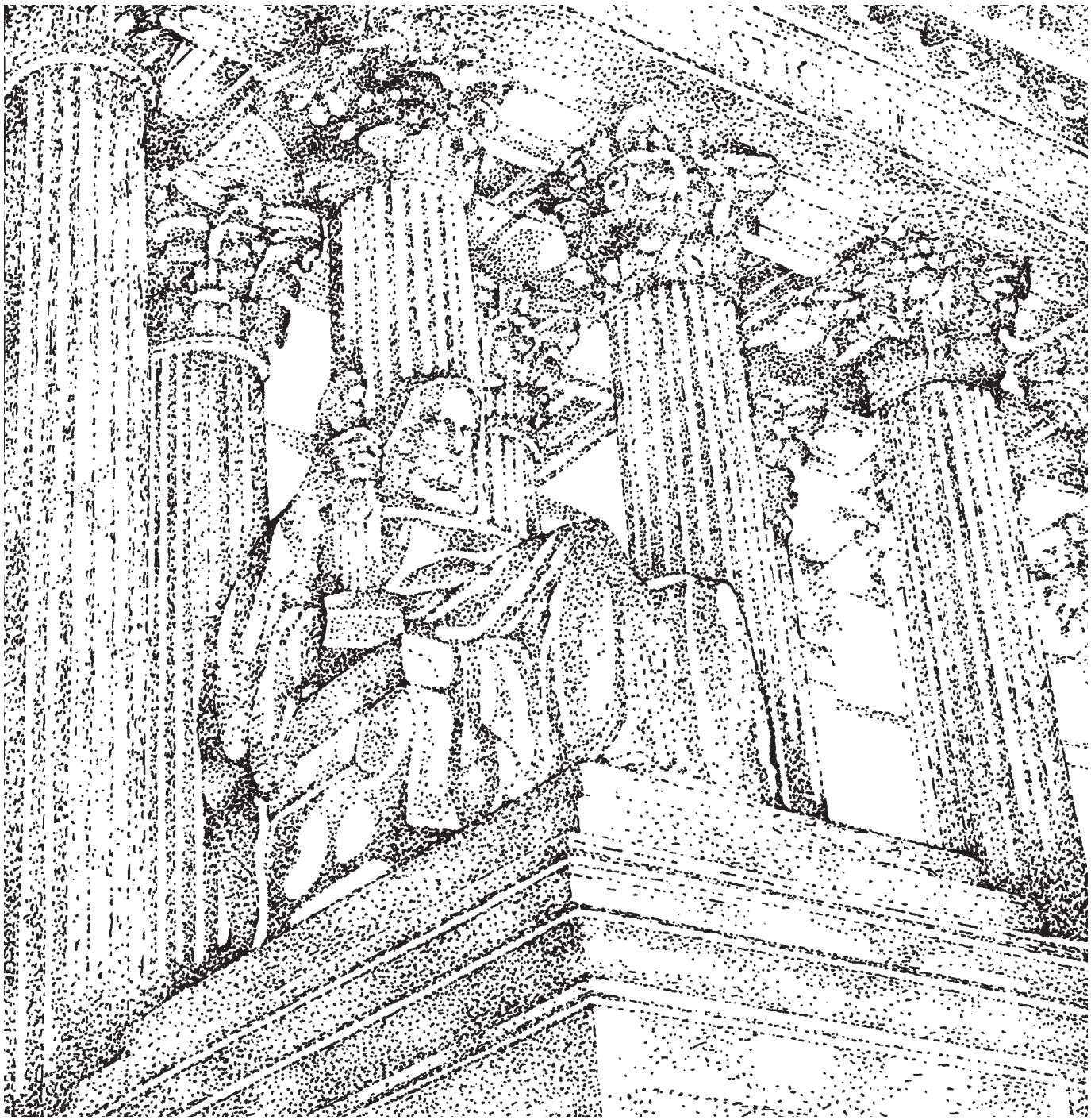

MORGAN BALLARD

has or has not acted in a morally blameworthy manner. If one has, he or she is liable to moral censure. Criminal responsibility, on the other hand, always involves a balancing of competing interests. Because the criminal law is administered by human beings who are as error-prone and susceptible to temptation as anyone else, every gain in protection against criminal activity that comes from more effective enforcement measures produces a loss in protection against ill-considered or improper official action. Conversely, every enhancement in protection against the state reduces governmental agents' ability to provide protection against individual criminals. Theorists can and do argue about where the line should be drawn to realize the optimal level of protection, but the line must be drawn somewhere. Thus, judgments of criminal responsibility necessarily involve a weighing of competing interests that judgments of moral responsibility do not.

STANDARD OF CRIMINAL RESPONSIBILITY

Any attribution of criminal responsibility carries with it an inherent danger: the danger that enforcement error or abuse will wrongfully deprive an innocent person of his or her life, liberty, or property. Consequently, the standards by which we assign criminal responsibility necessarily depend on the extent to which we are willing to incur that danger. How much risk of punishing the innocent are we willing to run in return for more effective law enforcement?

In the United States, the answer has traditionally been, "Not very much." The Anglo-American system of criminal law

is specifically designed to minimize the risk of wrongful punishment. The presumption of innocence, the prosecutorial burden to prove every element of a crime beyond a reasonable doubt, and the requirement of a unanimous jury verdict for conviction are all structural features of the criminal law that make it more difficult to punish the guilty in order to reduce the risk of improperly punishing the innocent. Indeed, constitutional protections such as the right to trial by jury, to be represented by counsel, to confront one's accuser and be informed of the charges brought against one, and to be free from compulsion to testify against oneself and from double jeopardy were all originally derived from the common law of crime. Taken together, these features create an inherent liberal bias within the fabric of Anglo-American criminal law. This bias, embodied in William Blackstone's oft-quoted aphorism that "it is better that ten guilty persons escape than that one innocent suffer," reflects the underlying judgment that an abusive state constitutes a greater danger to citizens' well being than do individual criminals.

The inherent liberal bias of the criminal law is "operationalized" in the form of three necessary conditions for the application of the criminal sanction. These are:

- Criminal sanctions may be applied only when doing so advances a legitimate purpose of punishment.
- Criminal sanctions may be applied only when doing so does not create an unacceptable risk of prosecutorial error or abuse.
- Criminal sanctions may be applied only when necessary to address a public harm.

The first of these necessary conditions follows directly from the nature of criminal law. Criminal law is penal law. It is designed to punish wrongdoing. Hence, its sanction should be applied only where doing so advances at least one of the purposes of punishment: retribution, deterrence, or rehabilitation.

The second necessary condition indicates that there are cases in which criminal punishment is inappropriate even though one of the purposes of punishment would be advanced. These are the cases in which permitting punishment produces an unacceptably high risk of wrongful conviction because of the fallibility or venality of the human beings who act as law enforcement and prosecutorial agents. This condition requires that criminal provisions be crafted to place objective limitations on prosecutorial discretion and provide adequate opportunity for parties to conform their behavior to the law. More generally, it bars law enforcement and prosecutorial techniques that pose a significant likelihood that the innocent will be swept up with the guilty.

Finally, the third necessary condition is designed to ensure that the criminal sanction is regarded as a last resort rather than a favored method of social control. It requires that the criminal sanction be used to address only harms to societal — as opposed to purely private — interests, and then only when necessary to protect such interests.

Taken together, these three conditions describe the Anglo-American standard of criminal responsibility.

THE *NEW YORK CENTRAL* STANDARD

A crime requires the combination of an *actus reus* — the performance of a legally prohibited act — with a *mens rea* — a particular state of mind with respect to that act. But corporations have no bodies with which to perform actions and no brains in which mental states can reside. How then can corporations commit crimes?

The Supreme Court answered that question in *New York Central* by importing the tort doctrine of *respondeat superior* into the criminal sphere. Recognizing that corporations were civilly liable for the acts of their employees taken within the scope of their employment, the Court proceeded to "go only a step farther" and permit corporations to be held criminally liable for the conduct of their employees as well. The Court held that for purposes of criminal punishment, both the actions and the mental states of individual employees who were acting within the scope of their authority could be attributed to the corporation, even though the employee was acting "against the express orders of the principal."

Thus, since 1909, the law has been that a corporation commits a crime whenever an employee acting within the scope of his or her employment for the benefit of the corporation commits a crime. The only problem with this definition of corporate criminal liability is that it violates all three of the necessary conditions for criminal responsibility.

Purposes of Punishment With no bodies that can be incarcerated, corporations are subject only to financial sanctions. But who pays when a financial loss is imposed on a corporation? To the extent that such a loss cannot be passed along to consumers, it is the owners of the corporation — the shareholders — who incur the penalty. The defining characteristic of the modern corporation is the separation of ownership and control. The shareholders, who own the corporation, have no direct control over or knowledge of the behavior of the corporate employees who commit criminal offenses. Hence, inflicting punishment on a corporation's shareholders is punishing those who are personally innocent of wrongdoing for the offenses of others. How can punishing the innocent advance any of the legitimate purposes of punishment?

It cannot. Consider retribution first. Retribution justifies imposing sanctions only on those who have acted in a blameworthy way. Retribution clearly justifies punishing corporate employees who commit a criminal offense. It cannot justify punishing corporate shareholders who are innocent of personal wrongdoing. A criminal justice system based exclusively on a retributivist theory of punishment would expressly exclude such vicarious criminal liability.

What about deterrence? All but the staunchest retributivists would argue that a major purpose of criminal punishment is to deter wrongdoing. But not by any means. Specifically, not by punishing the innocent. In the Anglo-American criminal justice system, deterrence refers to inflicting punishment on a wrongdoer to discourage others from committing similar offenses. It does not refer to punishing the innocent to pressure them into suppressing the criminal activity of their fellow citizens.

There is a sense in which threatening to inflict punishment on a corporation's innocent owners for the crimes of the corporation's employees can be said to deter crime. Fear of the financial penalty to be visited on the corporation can motivate management to attempt to suppress criminal activity by corporate employees. But this form of deterrence is no different in principle from more venial and obviously unacceptable forms of punishment. Much of the crime attributable to teenagers could undoubtedly be deterred by punishing parents for their children's offenses. The Nazis sought to deter acts of resistance by punishing innocent members of the communities in which such acts occurred. Although such measures may be effective, they generally are not and should not be permitted in a liberal criminal justice system. Threatening innocent shareholders with punishment for the offenses of culpable corporate employees may be an effective means of reducing criminal activity within business organizations, but it does not constitute the type of deterrence that can justify criminal punishment in a liberal legal regime.

Punishment is sometimes justified on the basis of its rehabilitative effect. But rehabilitation refers to imposing treatment on a wrongdoer designed to reform his or her character to ensure better behavior in the future. One cannot rehabilitate the innocent. Threatening those who have not engaged in wrongful conduct with punishment in order to make them "behave better" is not rehabilitation. It is coercing them to act in the way that the coercive agent believes that they should. "Rehabilitating" the innocent is simply depriving them of their liberty.

The problem is that corporate criminal punishment is a form of collective punishment in which the innocent are intentionally targeted for punishment along with, and sometimes in place of, the guilty in order to discourage wrongdoing by individuals. But a liberal legal system cannot countenance collective criminal punishment. Retribution, deterrence, and rehabilitation are all potential justifications for imposing punishment on those who violate the law. They do not and cannot justify imposing punishment on those who do not themselves violate the law in order to attain some greater societal purpose.

Enron is the poster child for corporate corruption. If any corporation is deserving of criminal punishment, it would have to be Enron. How better to send a signal that corporate misbehavior will not be tolerated than by nailing the one-time energy giant? Yet no indictment was brought against Enron, and the company was never prosecuted. Why? The obvious answer is that it would be patently unjust to impose a further penalty on Enron's shareholders who constituted the bulk of the innocent victims of the crimes that were committed by Enron's employees.

Because the *New York Central* standard of corporate criminal liability inherently involves punishing the innocent, it does not advance any of the legitimate purposes of punishment.

Prosecutorial Error and Abuse The *New York Central* standard of corporate criminal liability is rife with opportunities for prosecutorial error and abuse. To begin with, it places no limitation on prosecutorial discretion. Under it, the corporation is guilty of an offense whenever a corporate employee acting within the scope of his or her employment violates the law. This gives prosecutors carte blanche as to whether to charge a corporation in addition to the culpable individual employee.

With regard to the decision to charge the individual employee, prosecutorial discretion is limited by the elements of the offense. The need to generate the evidence sufficient to establish the required physical and mental elements of the crime restrains the prosecutor's ability to file charges. But with regard to the decision to charge the corporation, there are no additional legally required elements that the prosecution must establish. No new evidence is necessary. This means that the prosecutor may decide to charge the corporation or not at his or her whim.

This situation practically invites abuse, as is perhaps exemplified by the recently negotiated deferred prosecution agreement that requires Bristol-Myers Squibb to endow a chair in business ethics at the prosecutor's alma mater, Seton Hall. In deciding whether to indict a corporation, it is official Justice Department policy to consider, among other things, whether the corporation has an effective compliance program and has adequately cooperated with federal investigative authorities. An effective compliance program is one that "is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees," and includes the prompt disclosure of any detected wrongdoing to the government. And until late 2006, adequate cooperation required a corporation to be willing to disclose the results of its internal investigations, to waive attorney-client and work product privilege, to refuse to advance attorney's fees to employees under investigation, and to refuse to enter into joint defense agreements with employees or otherwise aid employees in mounting a

The *New York Central* standard inherently involves punishing the innocent and thus does not advance any legitimate purpose of punishment.

defense. These provisions make it clear that whether a corporation is indicted or not depends at least in part on its willingness to serve the convenience of the prosecutor.

In addition, corporations have no opportunity to conform their behavior to the law. With regard to any crime requiring intent, an individual can avoid violating the law merely by controlling himself or herself and refraining from knowingly engaging in prohibited conduct. Even with regard to crimes requiring only recklessness or negligence, an individual may comply with the law by exercising the required degree of care. But there is literally nothing a corporation can do to ensure that it will not commit a criminal offense.

Corporate managers are acutely aware of the limits of their control over the conduct of their organization's employees. There is much that they can do to discourage unethical and criminal employee behavior. But all managers know that no matter how good their organization's internal controls may be, they cannot ensure that no rogue employee will intentionally violate the law or, in today's highly regulated business environment in which many criminal offenses do not require intentional conduct, that no employees will inadvertently commit a crime. Indeed, one of the leading cases on corporate criminal liability, *United States v. Hilton Hotels Corp*., arose out of an employee's decision to violate corporate policy and his manager's explicit instructions "because of anger and personal pique." But since the *New York Central* standard imposes strict vicarious liability — since even a corporation that exercises its best efforts to suppress employee criminal activity has no defense — a corporation will be guilty of an offense whenever an employee transgresses.

Because there is no way for a corporation to avoid committing a crime should an employee go astray and no way to ensure that employees will never go astray, all the rational manager can do is try to avoid corporate indictment by acceding to whatever conditions prosecutors wish to impose. This renders corporations extraordinarily vulnerable to prosecutorial discretion and actually encourages prosecutorial abuse.

Finally, the *New York Central* standard of corporate criminal liability maximizes, rather than minimizes, the likelihood that the innocent will be punished along with the guilty. As discussed above, corporate criminal liability is a form of collective punishment that targets the innocent to discourage wrongdoing by others. What would in other circumstances constitute prosecutorial error or abuse — the mistaken or corrupt prosecution of the innocent — is in this case the very point of the exercise. It is either a misnomer or an understatement to say that the problem with the *New York Central* standard of liability is that it is unacceptably susceptible to prosecutorial abuse. Although it does create a prosecutorial tool that is easily misused, the essence of the problem is not that the standard lends itself to misuse, but that its proper use is itself abusive.

Public Harm Fraud, embezzlement, and other financial, business-related crimes threaten serious public harm. Such offenses not only cause losses for their individual victims, but also undermine the trust that allows markets to function efficiently and commerce to flourish. However, punishing corporations for the offenses of their employees is neither a necessary nor an effective way of preventing this harm. In the absence of corporate criminal liability, there remains a wide array of legal protections for the societal interest in well-functioning markets.

There is no way for a corporation to avoid committing a crime if an employee goes astray, and no way to ensure that employees won't go astray.

To begin with, there is the threat of criminal liability to the individuals who perpetrate the offenses. Individual corporate employees who commit crimes are subject to incarceration, which is surely a more potent deterrent to employees contemplating criminal activity than the threat that if they are caught, their employer will be subject to a fine. In addition, corporations are already subject to significant financial penalties for the criminal activities of their employees. When an offense involves the breach of a regulation, the corporation is subject to a civil penalty for the violation. But more significantly, when an employee's offense results in a loss to the corporation's shareholders or any other party, the corporation is subject to civil lawsuits and the resultant payment of damages. Because corporations are strictly liable for the torts that their employees commit within the scope of their employment, any corporation that fails to exercise proper oversight to prevent deceptive or fraudulent practices by its employees can be made to pay not only compensatory damages, but potentially massive punitive damages.

It would be a mistake to underestimate the deterrent effect of such civil liability. Congress passed the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998 to address what it considered the over-deterrence of the civil liability system. Indeed, recent studies suggest that additional criminal sanctions can actually undermine the overall deterrent effect of civil liability by creating perverse compliance incentives that are not otherwise present. (See the articles by Assaf Hamdani and by Andrew Weissmann in the Readings list below.)

THE RATIONALE FOR THE *NEW YORK CENTRAL* STANDARD

If the *New York Central* standard of corporate criminal liability does not advance any of the legitimate purposes of punishment, creates the danger of prosecutorial abuse by investing prosecutors with excessive discretion, and is not necessary to address any public harm, then how did it become law? What rationale did the Court offer in support of its decision?

In *New York Central*, the Court noted the appellant railroad's argument that to

> punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without due process of law.... [Further, it deprives] the corporation of the presumption of innocence — a presumption which is part of due process in criminal prosecutions.

One searches the opinion in vain for a response to this argument. Instead, the Court launches into a discussion of *respondeat superior* liability in tort. After recognizing that "[i]t is now well established that, in actions for tort, the corporation may be held responsible for damages for the acts of its agent within the scope of his employment," the Court explains that such liability

> is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct.

Turning its attention to criminal liability, the Court then simply asserts,

> Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him, ... may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

This is not much of an argument. The Court explicitly recognizes that *respondeat superior* liability in tort is justified by a principle of corrective justice that requires compensation to a wrongfully injured party. It then turns around and applies that form of liability in the criminal realm where corrective justice is not at issue. What is needed in the context of the criminal law is a justification for punishment, not restitution. The problem is that no principle of justice condones punishing the innocent. Applying *respondeat superior* tort liability in the criminal sphere is not going "only a step farther," but leaping a broad conceptual chasm.

To the extent that the Court provides any justification for this leap, it appears to be the claim that taking it is "in the interest of public policy." But what public policy is advanced by subjecting corporations to *respondeat superior* liability? The Court's answer is that "[i]f it were not so, many offenses might go unpunished and acts be committed in violation of law." This is a fairly explicit statement that the public policy interest that is being served by *respondeat superior* criminal liability is more effective law enforcement.

The problem with this is that an appeal to the need for more effective law enforcement is not and cannot be a theoretical justification for corporate criminal liability. Allowing a "public policy" interest in more effective law enforcement to serve as a basis for extending criminal liability would, in fact, be a direct repudiation of the theoretical structure of Anglo-American criminal law.

Our criminal law is intentionally designed to make it difficult to obtain convictions. That is what the inherent liberal bias of the criminal law is all about. Criminal law authorizes the state to exercise its coercive power to deprive citizens of their lives, liberty, and property. This is a fearsome power that can be safely exercised only within carefully circumscribed constraints. Those constraints consist of the *mens rea* requirement that forces the prosecution to establish that the accused has acted in a blameworthy manner, the principle of legality that bans retroactive and overly vague criminal legislation, the presumption of innocence that places the burden of proving every element of an offense on the prosecution, the reasonable doubt standard that makes it extremely difficult for the prosecution to meet this burden, the right against self-incrimination and against unreasonable search and seizure that limits the investigative tools the prosecution may employ, the right to counsel and the attorney-client privilege that enable citizens to mount an effective defense, the right to trial by jury and the requirement of a unanimous verdict that places a body of citizens between an accused and state-imposed punishment, and, until the *New York Central* decision, the ban on vicarious criminal liability. Taken together, these constraints form the fundamental theoretical and normative structure of the criminal law.

A convenient way to think of this theoretical structure is as an analog of the U.S. Constitution. The Constitution was designed to create a national government and invest it with strong but restrained powers. The constitutional structure of enumerated powers, checks and balances, and guaranteed rights was designed to severely limit the amount of social control the national government would be able to exercise. Similarly, the criminal law invests the state with the power to curtail the harmful behavior of its citizens. Its theoretical structure is designed to restrain the exercise of that power to ensure that it is not used for purposes of oppression. The internal structure of the criminal law, like the internal structure of the Constitution, is designed to limit the amount of social control the state can effectively exercise.

Hence, the criminal law is an intentionally blunted sword. It is a powerful weapon of limited use — one that restricts the goals the government may pursue via the threat of punishment for non-compliance. The recognition that Congress or state legislatures have passed criminal statutes that are difficult to enforce within the constraints inherent in the criminal law is not a justification for departing from those constraints, but evidence that the constraints are working.

Much of federal white collar criminal law consists of inchoate offenses or offenses with minimal *actus reus* requirements. Calling the federal fraud offenses "fraud" is actually a misnomer because they are, by definition, crimes of attempt-

ed fraud, complete whether they produce any harm or not. The *actus reus* of money laundering is satisfied by doing just about anything with the proceeds of specified unlawful activity, which can include the otherwise innocent acts of paying one's bills, buying groceries, or cashing a check. Conspiracy consists of nothing more than the parties' agreement. Obstruction of justice consists of otherwise perfectly innocent acts taken with the knowledge that they may interfere with some present or future federal investigation. These are crimes with virtually no visible, physical *actus reus* that distinguishes the defendant's conduct from perfectly innocent behavior — crimes for which conviction is based almost entirely upon what was in the defendant's mind. The evidence for these crimes can consist almost exclusively of testimony about what the defendant was thinking and often comes down to nothing more than one person's word against another's. These are precisely the type of crimes for which it is most reasonable to fear prosecutorial error or abuse.

This shows that what we call white collar crime — the body of federal law designed to police the behavior of those engaged in business for compliance with regulatory requirements and general honest dealing — consists, to a large extent, of precisely the type of crimes for which it should be difficult for prosecutors to obtain a conviction. Like the checks and balances of the Constitution, the internal structure of the criminal law is designed to curtail the extent to which government can impinge upon the activities of innocent citizens in its efforts to combat wrongdoing by the guilty. In restraining the state's efforts to reduce the level of deceptive or dishonest business practices through the enforcement of broadly defined, inchoate, and *malum prohibitum* criminal offenses, the inherent bias of the criminal law is functioning exactly as designed. A "public policy interest" in more effective law enforcement can never justify overriding those aspects of the criminal justice system designed to protect citizens' civil liberties against law enforcement agents. Far from a justification, recognizing such an interest would be a repudiation of the fundamental theoretical structure and normative values inherent in the criminal law. Hence, the rationale that the Supreme Court offered in *New York Central*, that in the absence of corporate criminal liability "many offenses might go unpunished," cannot possibly justify a form of collective punishment that targets the innocent as a means to discouraging the wrongful conduct of the guilty.

Over the past decade, the government has begun to fully exploit the gift of power the Supreme Court bestowed upon it in *New York Central*. As discussed above, since 1999 the Justice Department has explicitly based its decisions on whether to indict a corporation, in part, on the corporation's willingness to adopt a government-approved compliance program and to cooperate with federal investigations. And as the Justice Department defines these considerations, satisfying them requires corporations to do all they can to aid in the prosecution of their own employees. But also as discussed above, because no corporation can guarantee that none of its employees will intentionally or inadvertently violate the law, and because the *New York Central* standard holds corporations strictly liable for the offenses of their employees, corporations know that there is nothing they can do to ensure that they will not violate the law. Thus, the *New York Central* standard brings almost irresistible pressure on corporations to do whatever they can to avoid indictment, which means signing on as deputy prosecutorial agents.

Today, the purpose of corporate criminal liability is not to punish corporations, but to force them to cooperate in the prosecution of their employees.

Today, it has become apparent that the purpose of corporate criminal liability is not to punish corporations, but to force them to cooperate in the prosecution of their employees. This is evidenced by the constantly increasing number of federal criminal investigations of business organizations that end in deferred prosecution agreements coupled with the constantly decreasing number that end with corporate indictments and convictions. It is anachronistic to think of the purpose of corporate prosecution as the imposition of punishment upon conviction. Today, it is corporate indictment that is the punishment and lack of cooperation that is the offense. The actual indictment of a corporation, which carries with it the costs of going to trial, is a mark of failure. It means that the prosecution has failed to gain the "cooperation" that allows it to export the costs of its criminal investigation onto the corporation.

Poisonous Effect A century of experience with corporate criminal liability has made the role that it plays in our system of criminal justice clear. The ability of the government to threaten corporations with criminal indictment for the offenses of their employees shifts the balance of power between prosecutor and defendant. And that is precisely the purpose of corporate criminal liability. The reason why it does not advance any of the traditional purposes of punishment is that it is not designed to punish. It is designed to circumvent the pro-defendant liberal bias inherent in our system of criminal law.

There is no doubt that the *New York Central* standard of corporate criminal liability advances the "public policy inter-

est" in more effective law enforcement. In general, prosecutors would have a much easier job if they could threaten to indict all those who might have knowledge relevant to their criminal investigations unless they aided in the prosecution of their fellow citizens. Generally, we do not permit this, and for good reason. It reminds us too much of the practices of the Nazi and Soviet regimes in which failure to inform on others was itself an offense. We do not want a society in which police agencies pursue their missions by turning citizens against each other.

Corporate criminal liability is the exception to this, and it is an unfortunate one. It turns employers into the adversaries of their own employees whenever those employees come under suspicion. This may not seem harmful in cases in which the employees have, in fact, acted purposely and malevolently. But given the amorphous nature of the federal criminal law and its myriad provisions that can be violated without awareness that one is doing anything wrong, this becomes a very harmful and destructive practice indeed. As the incentives placed on corporations by corporate criminal liability slowly become more widely understood by those involved in business, its poisonous effect on trust and loyalty spreads.

I have heard the echoes of this in my own teaching. Years ago, my MBA students used to believe that they had a duty to help maintain an ethical workplace and that if they were loyal to their employer, came forward, and did the right thing, they were entitled to and could expect loyalty and support in return. Today, enough of the effects of how corporations respond to the incentives of corporate criminal liability have filtered into the corporate culture for my students to have absorbed the lesson that if they are asked about any suspicious behavior in the corporation, rule #1 is to say nothing and get your own personal attorney. In my opinion, this is a trend to be much regretted.

CONCLUSION

I have argued that the Supreme Court's decision in *New York Central* was a mistake that the judiciary has been repeating for 101 years. By creating *respondeat superior* criminal liability, the Court authorized a form of vicarious collective punishment that is inconsistent with the fundamental principles of a liberal society. Over the course of the 20th and 21st centuries, the advent of this form of liability shifted the balance of power between prosecution and defense in a way that has had a pernicious effect on the methods employed by federal law enforcement agencies.

Our criminal law contains an inherent liberal bias that is designed to restrain both the breadth and type of criminal statutes that the government may employ in its mission to suppress harmful conduct. The purpose of this liberal bias is to preserve the civil liberties of the citizenry. The effect of this bias is to place some otherwise worthwhile ends beyond the reach of what may be achieved through the threat of state punishment. In a liberal society, some ends must be sought through a combination of moral suasion, market discipline, and civil liability. It may be that the elimination of dishonest and deceptive practices that fall short of actual fraud from the marketplace is among those ends.

Nevertheless, Congress has seen fit to attempt to achieve this end by enacting criminal statutes of extraordinary if not unlimited breadth and creating a wide variety of inchoate and *malum prohibitum* criminal offenses. Many of these statutes strain or exceed the bounds created by the law's internal liberal bias, and hence are difficult or impossible to enforce under the traditional rules of the criminal law.

This situation confronts the judiciary with a choice. It can require the prosecution to enforce these laws as best it can within the civil libertarian constraints inherent in the criminal law, or it can relax those constraints in order to render the problematic laws more enforceable. The former approach is consistent with the normative judgment at the heart of our criminal law that an unrestrained state represents a greater danger to citizens' liberty and well being than do individual criminals; the latter is not.

When first confronted with this choice in 1909, the Supreme Court opted to relax the law's constraints. I believe this was a momentous mistake. If jazz is indeed the musical form in which one legitimizes a mistake by repeating it, then the federal judiciary has been playing *New York Central* jazz ever since. I suggest that the judiciary change its tune and learn to play some more melodic classical music from the 19th century, when the rules of criminal law were consistent with its underlying theoretical structure and the oxymoron of vicarious criminal liability and the abomination of collective punishment were unknown. R

Readings

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