The Forlorn Hope: A Final Attempt to Storm the Fortress of Corporate Criminal Liability

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I. INTRODUCTION

In military parlance, the term "forlorn hope" refers to a body of picked troops assigned an exceedingly dangerous task where the chances of survival are poor. The forlorn hope was the name given to the troops selected to be the first storming party against the walls of a fortress.[1] Junior officers and enlisted men volunteered to join the ranks of a forlorn hope because those who survived were frequently rewarded with promotion or cash. The commanding officer of a forlorn hope was guaranteed a major career advancement if he

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1. *Forlorn Hope*, 1911 ENCYCLOPEDIA BRITANNICA (Hugh Chisholm ed., 1911), https://en.wikisource.org/wiki/1911_Encyclop%C3%A6dia_Britannica/Forlorn_Hope [https://perma.cc/NMY2-PAWG].

survived. Thus, despite the risk, there was often intense competition for the chance to lead a forlorn hope and display conspicuous valor.

For some reason, this came to mind as I sat down to write in favor of abolishing corporate criminal liability. In 1909, the U.S. Supreme Court authorized such punishment in the seminal case of *New York Cent. & Hudson River R.R. Co. v. United States*.[2] Since that time, the idea that corporations are subject to criminal punishment as collective entities has become ever more entrenched in our jurisprudence.

New York Central, which held corporations criminally liable for the actions of their employees on a *respondeat superior* basis, rested, at least in part, on the fact that the statute that the corporation violated, the Elkins Act, explicitly authorized the punishment of the corporate entity.[3] That limitation was abandoned as courts regularly held corporations liable for the full range of criminal offenses regardless of whether the relevant statute authorized such corporate liability.[4] Hence, it was quickly established that corporations are criminally liable for offenses of their employees, acting within the scope of their employment, for the benefit of the corporation.[5]

Once this liability was established, judicial walls were erected against attempts to undermine it. Courts held corporations liable for their employees' offenses even when the employees' actions were inconsistent with corporate policy or contravened explicit instructions to the contrary,[6] and indeed, even when the corporation had used its best efforts to prevent the offense.[7] Further, the employees' actions did not have to actually benefit the

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2. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 481 (1909). Actually, corporations could be convicted of certain crimes long before 1909 under state law. *See, e.g.*, Telegram Newspaper Co. v. Commonwealth Gazette Co., 52 N.E. 445 (Mass. 1899) (affirming the conviction of two newspaper companies for contempt). *New York Central* was merely the first time the Supreme Court recognized this to be the case under federal law as well. *See* Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 401 (1982).

3. *N.Y. Cent.*, 212 U.S. at 496 ("[T]he plaintiff in error is a corporation, and the provision as to its responsibility for acts of its agents is specifically stated in the first paragraph of the section."); *see also* Elkins Act of 1903, Ch. 708, 32 Stat. 847, 49 U.S.C.A. §§ 41–43 ("[Under this Act,] the commission by corporate officers, acting within the scope of their employment, of criminal violations of the prohibitions of that act against giving rebates, is imputed to the corporation, and the corporation is subjected to criminal prosecution therefor.").

4. *See, e.g.*, Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945) ("The generally accepted rule is thus laid down: 'A corporation may be held criminally responsible for acts committed by its agents, provided such acts were committed within the scope of the agents' authority or course of their employment.'" (quoting 19 C.J.S. *Corporations* § 1362)); United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir. 1946) ("[T]he Supreme Court has long ago determined that the corporation may be held criminally liable for the acts of an agent within the scope of his employment . . . and the state and lower federal courts have been consistent in their application of that doctrine."); Cont'l Baking Co. v. United States, 281 F.2d 137, 149 (6th Cir. 1960) ("[S]o long as the criminal act is directly related to the performance of the duties which the officer or agent has the broad authority to perform, the corporate principal is liable for the criminal act also, and must be deemed to have 'authorized' the criminal act.").

5. *See, e.g.*, United States v. Singh, 518 F.3d 236, 250 (4th Cir. 2008) ("[A] corporat[ion] accused is liable for the criminal acts of its 'employees and agents' acting 'within the scope of their employment' for 'the benefit [of] the corporation' and such liability arises if the employee or agent has acted for his own benefit as well as that of his employer" (third alteration in original) (quoting Mylan Lab'ys, Inc. v. Akzo, N.V., 2 F.3d 56, 63 (4th Cir. 1993)); United States v. Potter, 463 F.3d 9, 25 (1st Cir. 2006); United States v. Jorgensen, 144 F.3d 550, 560 (8th Cir. 1998); United States v. Sun-Diamond Growers, 138 F.3d 961, 970 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999).

6. United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972).

7. President Coolidge (Dollar S.S. Co. v. United States), 101 F.2d 638, 640 (9th Cir. 1939).

corporation. It was enough if the employees merely intended to benefit the corporation, and only in the minimal sense that they were aware that the corporation would benefit even if the employees' primary motivation was personal gain.[8]

Redoubts were thrown out to encompass more jurisprudential territory. Courts ruled that corporations could be convicted of criminal offenses even when no individual employee committed the actus reus of the offense or possessed the necessary mens rea. Thus, courts upheld corporate convictions in which different employees performed the acts that constituted the actus reus,[9] and when the prosecution could not identify any particular employee who committed the offense.[10] They also created the collective knowledge doctrine, which holds that "the corporation is considered to have acquired the collective knowledge of its employees,"[11] and which allows the conviction of the corporation even though no individual employee has the required mens rea. They have even gone so far as to suggest that juries need not agree on which employee committed the offense for the corporation to be convicted.[12]

The ramparts of the judicial bulwark protecting corporate criminal liability grew ever higher. Battlements were added in the form of the United States Sentencing Commission's (USSC) adoption of the Federal Sentencing Guidelines for Organizations in 1991[13] and the United States Department of Justice's (DOJ) development of the Principles of Federal Prosecution of Business in 1999.[14] They were reinforced by academic opinion in the form of myriad law review articles extolling the benefits of subjecting corporations to criminal sanction.[15] And, they were buttressed by the evolution of an entire industry of consultants

8. United States v. Agosto-Vega, 617 F.3d 541, 552 (1st Cir. 2010) ("[T]he test is whether the agent is 'performing acts of the kind which he is authorized to perform,' and those acts are 'motivated—at least in part—by an intent to benefit the corporation.'") (quoting *Potter*, 463 F.3d at 25); *see also* Steere Tank Lines, Inc. v. United States, 330 F.2d 719, 723 (5th Cir. 1963).

9. Riss & Co. v. United States, 262 F.2d 245, 249–51 (8th Cir. 1958).

10. *Dollar S.S.*, 101 F.2d at 640 (stating that the "resulting liability is like many others imposed upon an individual, regardless of his personal fault . . . . [A]n owner takes the risk of much which he cannot easily control").

11. United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974); *see also* United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987) ("A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability.")

12. *See* United States v. Arthur Andersen LLP, No. H-02-0121, 2002 U.S. Dist. LEXIS 29538 (S.D. Tex. May 17, 2002) (instructing jury that it need not unanimously agree on the same Andersen employee having committed obstruction of justice so long as each juror agreed that an employee obstructed justice).

13. U.S. SENT'G GUIDELINES MANUAL, ch. 8 (U.S. SENT'G COMM'N 1992) (Sentencing of Organizations).

14. Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., Dep't of Just., on Bringing Criminal Charges Against Corps. to Dep't Component Heads and U.S. Att'ys (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF [https://perma.cc/D659-BJ9B].

15. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 697 (1997) ("[C]orporate liability fills an important enforcement niche."); *see also* Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833 (2000); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006); Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481 (2009); Meir Dan-Cohen, *Sanctioning Corporations*, 19 J.L. & POL'Y 15 (2010); Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049 (2016).

teaching corporations how to avoid such liability; the compliance industry.[16]

The last 112 years have seen an imposing jurisprudential fortress built around the idea that corporations can be held criminally liable as collective entities—so much so that attempting to breach the conceptual walls and bring the citadel tumbling down must seem like enlisting in a forlorn hope. Nevertheless, I volunteer.

In Part II, I argue that there is no theoretical justification for corporate criminal liability—that imposing criminal punishment on corporations as collective entities is inconsistent with the purposes of the criminal law and the normative values of a liberal legal regime. In Part III, I argue that corporate criminal liability cannot be justified on practical grounds—that empirical studies show that it does not effectively reduce wrongdoing within corporations. And in Part IV, I consider what would happen if we take the fortress by imagining what a world without corporate criminal liability would be like.

II. THEORY

A. First Principles

1. Criminal Law

A perhaps apocryphal story about the great football coach Vince Lombardi recounts that after the Green Bay Packers had played a bad game, he began a team meeting by placing a football on the table in front of him and saying, "Let's get back to fundamentals. This is a football." In this Article, I intend to apply an analogous approach.

So, let's get back to fundamentals by noting that criminal law is penal law. Its purpose is to punish wrongdoing. It is not designed to compose interpersonal disputes. That is what mediation is for. It is not designed to provide compensation to wrongfully injured parties. That is what tort law is for. It is not designed to regulate commercial activity. That is what administrative law is for. Criminal law is designed to punish.

Criminal law's punitive purpose limits the range of the application of its sanction to those persons and entities that can be deserving of punishment—to those capable of acting in a morally blameworthy way. Consequently, moral responsibility is (or should be) a necessary condition for the application of the criminal sanction. This explains why infants, the incompetent, and the legally insane are excluded from criminal punishment.

It also suggests that the starting point for any consideration of corporate criminal liability is to ask whether corporations, separate and apart from the individual human beings who comprise them, are morally responsible agents. If the answer is no, then the matter is settled.

This Article, however, is not the place to discuss the ontology of corporations or the

16. *See, e.g.*, *Governance, Risk, and Compliance Services*, DELOITTE, https://www2.deloitte.com/us/en/pages/governance-risk-and-compliance/solutions/governance-risk-compliance-services.html [https://perma.cc/5RAN-4MSE]; *Operational Risk Compliance and Controls*, MCKINSEY & CO., https://www.mckinsey.com/business-functions/risk-and-resilience/how-we-help-clients/operational-risk-compliance-and-controls [https://perma.cc/K3F9-G43E]; *Products in Corporate Compliance and Oversight Solutions Market*, GARTNER, https://www.gartner.com/reviews/market/corporate-compliance-and-oversight-solutions [https://perma.cc/R5MD-QS4G] (rating 20 vendors including Wolters Kluwer, Thomson Reuters, RSA, SAI Global); COMPLIANCENET, https://www.compliancenet.org [https://perma.cc/RX7A-Z66R].

niceties of moral philosophy.[17] So, for present purposes, let's just assume it makes sense to ascribe moral responsibility to corporations. This assumption makes corporations candidates for criminal punishment.

2. Criminal Punishment

Punishment is the coercive imposition of a harm upon a party *in response to that party's failure to behave as required by some binding code of conduct*. Ordinarily, coercing others is a wrong. What distinguishes punishment from the ordinary application of coercion is that the harm imposed by punishment is deserved. It is the link between the coercion applied and the violation committed by the individual to whom it is applied that renders the coercion morally acceptable.

Coercively imposing a harm on those who have not committed a violation is not punishment. Punishing the innocent is not simply a moral wrong. In a sense, it is oxymoronic.[18]

Placing the adjective "criminal" before the word "punishment" identifies who is imposing the harm and what constitutes the offense. Punishment is criminal punishment when the state is imposing the harm for the violation of the state's rules of criminal law.

Hence, criminal punishment is the coercive imposition of a harm by the state on a party who has violated the criminal laws of that state.

3. The Purposes of Punishment

Because criminal law is penal law, its sanction should be applied only where doing so advances the purpose of punishment. Although theorists disagree about what that purpose is, the candidates are retribution—requiting evil with evil in which harm is imposed on wrongdoers in proportion to the harm they have done, deterrence—inflicting harm on a wrongdoer to discourage others from committing similar wrongful acts, and rehabilitation—imposing treatment designed to reform the character of a wrongdoer so that they will behave better in the future. Regardless of which one or combination of these objectives is the true purpose of punishment, criminal punishment is justified only if it serves at least one of them.

B. Application

1. Metaphysics

One reason why it is inappropriate to apply the criminal sanction to corporations is that corporations cannot be punished.[19] An oft-repeated aphorism holds that a corporation

17. If you would like to, however, see John Hasnas, *The Phantom Menace of the Responsibility Deficit*, *in* THE MORAL RESPONSIBILITY OF FIRMS 89, 89–103 (Eric W. Orts & N. Craig Smith eds., 2017).

18. Nevertheless, because the phrase "punishing the innocent" is conventionally used as a criticism of misdirected government action, and in order to avoid being a logical didact, I will continue to employ the phrase in the remainder of this Article.

19. Although for purposes of this Article, we are assuming that corporations can bear moral responsibility, this does not imply that they can or should be punished. Moral responsibility is a necessary condition for punishment, not a sufficient condition for it. For example, dead people can be morally responsible for their actions

has "no soul to be damned and no body to be kicked."[20] This is a somewhat poetic way of recognizing that corporations are not the type of thing that can bear punishment.

A corporation, like the White House, Congress, Georgetown University, and the New York Mets, is not a thing. These terms are all collective nouns that refer to complex networks of (constantly changing) human beings who are related to each other through certain formal and informal arrangements. Although in some sense, these are all real entities, none of them is a thing that has a physical existence in the world. The "White House" usually does not refer to the physical building within which the President resides. Such collective nouns aid our ability to communicate effectively. They facilitate discourse by allowing us to refer to complex human arrangements with the convenience of a single term. Hence, we are perfectly well understood when we say things like the White House is monitoring the situation in Afghanistan, Congress is unable to restrain its profligate spending, and the Mets can't hit. Similarly, we often speak as though we are ascribing responsibility to such abstract entities. Thus, we say things like the White House is morally responsible for the ill-treatment of migrants or Congress for the budget deficit or corporations for the wrongdoing of their employees.

There is nothing wrong with speaking this way as long as we keep in mind that, in doing so, we are speaking metaphorically. We are using a linguistic shorthand for the unwieldy proposition that some set of difficult-to-identify members of an indefinite group of people who are related to each other in both formal and informal ways have acted so as to produce unfortunate or morally improper results.

Problems arise, however, when we forget that we are speaking metaphorically. Once we forget that collective nouns function merely as linguistic placeholders to facilitate communication, we begin to think that the abstract collections they represent are entities that exist in their own right and that they are the type of thing that may be punished.

But they are not. It is impossible to punish a corporation because there is nothing—no thing—there to absorb the punishment. Any punishment directed toward a corporation necessarily passes through its mythical facade to fall on some set of human beings. Not only can corporations not be kicked, they cannot be incarcerated. They may be fined, but that punishes only the human beings who have to pay the fine. This could be the corporation's customers, if the cost is passed along in the form of increased prices; its employees, if the cost is passed along in the form of reduced employment or compensation; or its shareholders, if the cost is passed along in the form of reduced dividends or stock valuation. But acting as though the corporation is being punished rather than the individuals who bear the cost is a good example of what Felix Cohen called "transcendental nonsense,"[21] the ascription of properties to abstract concepts. As Cohen puts it:

> Nobody has ever seen a corporation. What right have we to believe in corporations if we don't believe in angels? To be sure, some of us have seen corporate funds, corporate transactions, etc. But this does not give us the right to

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while living but cannot be punished. *See* Hasnas, *supra* note 17, at 102–03 (noting the morality versus punishment distinction).

20. *See, e.g.*, John C. Coffee, Jr., *No Soul to Damn, No Body to Kick; An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981).

21. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

> hypostatize, to "thingify," the corporation, and to assume that it travels about from State to State as mortal men travel.[22]

Or, I would add, that it may be punished as mortal men may be punished.

As much as I believe this observation settles the matter, past experience has taught me that such metaphysical arguments are rarely convincing to a legal audience. So, let us move on to more prosaic considerations.

2. Analytics

Assuming, arguendo, that it makes sense to talk about punishing corporations, doing so is nevertheless not justified because it does not advance any legitimate purpose of punishment. As noted above, corporate punishment is necessarily financial in nature. To the extent that this financial cost is not borne by customers in the form of higher prices or employees in the form of reduced compensation or layoffs, it is the owners of the corporation—the shareholders—who incur the penalty. But the defining characteristic of the modern corporation is the separation of ownership and control. This means that shareholders, who own the corporation, have no direct control over or knowledge of the behavior of the corporate employees who commit criminal offenses. Inflicting punishment on a corporation's shareholders (or its customers or non-culpable employees) is punishing those who are personally innocent of wrongdoing for the offenses of others. Punishing the innocent cannot advance any of the legitimate purposes of punishment.[23]

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, customers, or other employees 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.

Deterrence fares no better. All but the staunchest retributivists would recognize 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 stakeholders 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 venal 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 where such acts occurred. Although

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22. *Id.* at 811.

23. For an excellent discussion of this point, see Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 521–24 (2018) (noting that the financial interests of a corporation should not be thought of as separate from the interests of the individuals who compose the corporation).

such measures may be effective, they generally are not and should not be permitted in a liberal criminal justice system. Threatening innocent stakeholders 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 *wrongdoers* designed to reform their character to ensure better behavior in the future. One cannot rehabilitate the innocent. Threatening those who have not engaged in wrongful conduct with punishment 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.

There is no doubt that the threat of corporate criminal liability can influence managers to adopt legal compliance programs and otherwise try to produce a corporate environment that discourages criminal activity by its employees. But such governmental action is not rehabilitation, and as a matter of principle, it is not distinct from the practices of the old Soviet Union and present-day China, in which those whose conduct is unacceptable to the government are sent to psychiatric hospitals and "re-education" camps. Threatening innocent stakeholders with punishment for the offenses of culpable corporate employees may be an effective means of producing a general improvement in "corporate culture," but it is not a form of rehabilitation that is consistent with the principles of a liberal society. 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. Because corporate criminal liability inherently involves punishing the innocent, it does not advance any of the *legitimate* purposes of punishment.[24]

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24. The objection is frequently raised that corporate criminal liability is not distinct from ordinary criminal liability because—even when individual wrongdoers are punished—innocent parties, such as the criminal's spouse, children, or business partners, suffer harm. But the cases are not parallel. In ordinary cases brought against individual wrongdoers, the punishment is directed toward the person who engaged in wrongdoing with *regretted* spillover effects on innocent third parties. If those spillover effects could be ameliorated, they would be. This is not the case with regard to corporate criminal liability, where the punishment is not directed against the actual wrongdoers but is intentionally aimed at those who are not personally culpable. Because prosecutors already have the power to charge the wrongdoers personally for their crimes, there would be no point in corporate criminal liability if it did not target the innocent.

There can be a justification for vicarious liability in tort law because the purpose of tort law is not punishment. Holding one who has the power to control the behavior of those in his or her employ liable for the employees' tort can incentivize the employer to discourage harmful employee behavior. (Note that vicarious civil liability does not extend to those who do not have the power to control employee behavior, e.g., the limited liability of shareholders.) But the purpose of criminal law is punishment, and there can be no justification for vicarious *punishment,* for inflicting *an additional harm* on one party for the moral wrongdoing of another. (And this is doubly true when the parties receiving the harm had no control over the behavior of the wrongdoers.)

III. PRACTICE

Experience teaches that theoretical arguments against corporate criminal liability, whether metaphysical or analytical, are unavailing.[25] We live in a utilitarian world in which principle-based constraints are easily abandoned if good results can be achieved by doing so. Hence, punishing the innocent is apparently acceptable if corporate criminal liability reduces the amount of wrongdoing by corporate employees.

But, of course, it does not. And this is not even particularly controversial. Almost everyone familiar with the subject knows that it does not. This is because the purpose of corporate criminal liability is not to reduce employee wrongdoing, but to conscript corporations into the law enforcement function, *which is not the same thing*.

A. Two Approaches to Reducing Wrongdoing

Much is known about how to reduce wrongdoing within organizations. Organizational behavior scholars and social psychologists have identified two approaches for doing so: the compliance-based approach and the integrity-based approach.[26] The compliance-based approach "focuses on creating structures and processes that 'exercise due diligence in seeking to prevent and detect criminal conduct by its employees and other agents.'"[27] In contrast, "the integrity-based approach focuses on developing an organizational culture that enables and encourages employees to act honorably and responsibly as part of meeting a broader set of social obligations, including the law."[28] The compliance-based approach consists of efforts to "monitor and detect wrongful or unethical behavior"[29] in order to hold employees accountable for their wrongdoing. This approach enlists the organization's power over its employees to deter them from engaging in wrongdoing.[30] The integrity-based approach consists of "supporting ethically-sound behavior as part of the organizational culture,"[31] and involves a corporate commitment to the fair treatment of employees as defined by the principles of organizational distributive, procedural, and interactional justice.[32] This approach utilizes employees' belief in the "legitimacy" of the organization's injunctions—"the judgment that 'the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions'"—to reduce wrongdoing.[33]

The empirical evidence strongly suggests that the integrity-based approach is much more effective at reducing employee wrongdoing than the compliance-based approach. To begin with, the compliance-based approach is both expensive and inefficient.

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25. I first made such arguments in 2005. *See generally* John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579 (2005).

26. Robert J. Bies, *Reducing Criminal Wrongdoing Within Business Organizations: The Practical and Political Skills of Integrity*, 51 AM. CRIM. L. REV. 225, 225 (2014).

27. *Id.*

28. *Id.*

29. *Id.*

30. Tom R. Tyler, *Reducing Corporate Criminality: The Role of Values*, 51 AM. CRIM. L. REV. 267, 268 (2014).

31. Bies, *supra* note 26, at 234.

32. *Id.* at 234–37.

33. Tyler, *supra* note 30, at 269 (quoting Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995)).

> Seeking to gain influence over others based solely on the possession of power requires enormous expenditures of resources to create a credible system of surveillance through which authorities monitor public behavior to punish rule violators. In addition, resources must be available to provide incentives for desired behavior such as cooperation and rewarding people for acting in ways that benefit the authorities and the community. Recent empirical research suggests that these strategies of governance and management . . . can shape crime related behavior, but that the magnitude of that deterring influence is usually small if not non-existent. The use of power, particularly coercive power, thus requires a large expenditure of resources to obtain modest and limited amounts of influence over others.[34]

In addition, the results of the compliance-based approach are less stable over time because:

> [I]f people comply with the law only in response to coercive power, they will be less likely to obey the law in the future because acting in response to external pressures diminishes internal motivations to engage in socially desirable behavior. On the other hand, if people are motivated by intrinsic reasons for behaving in a certain way, then their compliance becomes much more reliable and less context dependent.[35]

Finally, the compliance-based approach is self-defeating in that it retards the development of an organizational culture of trust by creating a "trust paradox."[36] The corporation's focus on compliance:

> create[s] a legalistic mindset in its leaders and managers. Increasingly, managerial actions are becoming dominated by a concern for what is legally defensible at the expense of broader social considerations such as trust and fairness. . . . [T]he paradox is that when corporations rely on accountability strategies to build trust (which is also their primary approach to reducing criminal wrongdoing in business organizations), they actually create distrust in the corporation and its leaders.[37]

Thus, when "a company communicates an atmosphere of surveillance and sanctioning, it is communicating mistrust, which undermines employees' identification with the company and willingness to engage in self-regulation."[38]

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34. *Id.* at 269. Myriad studies testify to the compliance-based approach's relative ineffectiveness. *See, e.g.*, John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 LAW & SOC'Y REV. 7, 35 (1991); TOM R. TYLER, WHY PEOPLE COOPERATE 51–65 (2011); Tom R. Tyler & Steven L. Blader, *Can Businesses Effectively Regulate Employee Conduct?*, 48 ACAD. MGMT. J. 1143, 1153 (2005); SALLY S. SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL 42 (2002).

35. Tyler, *supra* note 30, at 273. *See also* Richard M. Ryan & Edward L. Deci, *Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions*, 25 CONTEMP. EDUC. PSYCH. 54, 60–65 (2000) (providing an overview of the role of extrinsic motivation in human psychology and its shortcomings); BRUNO S. FREY, NOT JUST FOR THE MONEY 13–33 (1997) (arguing against the notion that humans are solely motivated by monetary gain; rather, internal motivation plays a significant role).

36. Bies, *supra* note 26, at 228.

37. *Id.*

38. Tyler, *supra* note 30, at 273.

There is nothing particularly novel or new in these observations.[39] It has long been known that the integrity-based approach is the best way to reduce employee wrongdoing.[40] The question is why it is so rarely employed. The answer is the existence of corporate criminal liability.

B. Perverse Incentives

Under the doctrine of *respondeat superior*, corporations are strictly liable for their employees' wrongdoing. When an employee's action constitutes a breach of a regulation, the corporation is subject to an administrative, civil penalty for the violation. Although such penalties are usually fines, they may also include restrictions on the corporation's ability to conduct business.[41] Additionally, 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 of their employees, 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 as well. Finally, the market itself creates an incentive for corporations to control the conduct of their employees. The general public (including the media) routinely ascribes the wrongdoing of corporate

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39. *See, e.g.*, PHILIP SELZNICK, PHILIPPE NONET & HOWARD M. VOLLMER, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 101–02 (1969) (arguing rules governing public authority can serve to govern private authority); Marius Aalders & Ton Wilthagen, *Moving Beyond Command-and-Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment*, 19 LAW & POL'Y 415 (1997) (arguing that the success of forced compliance is merely illusory); John M. Darley, Tom T. Tyler & Kenworthey Bilz, *Enacting Justice: The Interplay of Individual and Institutional Perspectives*, *in* THE SAGE HANDBOOK OF SOCIAL PSYCHOLOGY 458, 458–76 (Michael Hogg & Joel Cooper eds., 2003) (describing the negative effects that emerge from failure to generate law that comports with intuitions of justice); Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 LAW & POL'Y 363 (1997) (arguing that industry self-regulation can be effective); Andrew A. King & Michael J. Lenox, *Industry Self-Regulation Without Sanctions: The Chemical Industry's Responsible Care Program*, 43 ACAD. MGMT. J. 698 (2000) (arguing that effective self-regulation is difficult to maintain without explicit sanctions); Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998) (describing the paradigm shift in corporate enforcement practices); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361 (2001) (arguing that trust in the law is only achieved when there is a perception that the process by which it is generated is fair).

40. For an excellent overview of the empirical evidence, see Tyler, *supra* note 30, at 279–80, where he reviews the results of several studies, ending with a description of one conducted by four leading organizational behavior scholars that:

> [C]ompared the effectiveness of rules and punishment to the internal values and culture of integrity in companies in a study of 10,000 employees in six industries. Compared to compliance-based programs, values-based programs had fewer reports of unethical conduct, higher levels of ethical awareness, more employees seeking advice about ethical issues, and a higher likelihood of employees reporting violations. Here again, a relative comparison reveals the superiority of a values-based approach.

Id. at 280 (citing Linda Klebe Treviño, Gary R. Weaver, David G. Gibson & Barbara Ley Toffler, *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 132, 138 (1999)).

41. *See* U.S. Dep't of Just., Just. Manual § 9-28.1600 (2018) ("In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters or corporate monitors.").

employees to the corporation itself. The resulting damage to the corporation's reputation or "brand" often produces a major hit to its bottom line. Therefore, even without corporate criminal liability, corporations have the strongest possible incentive to reduce wrongdoing by their employees as much as possible. Left to their own devices, corporations would want to adopt the most effective means of doing so, which would be integrity-based ethics programs.

But the introduction of corporate criminal liability means that corporations are not left to their own devices. The deterrent effect of corporate criminal liability does not come from the threat of conviction. The fines that constitute the punishment for criminal conviction are often much lower than the damages corporations incur in civil judgments.[42] The deterrence comes from the threat of indictment.

Criminal indictment can cause major damage to a corporation's fortunes. For most corporations, a large part of their financial worth consists in the intangible asset of goodwill.[43] Criminal indictment has a negative effect on this value far greater than any fine that a company might receive upon conviction and can be a death sentence for companies that depend on their reputation for honest dealing. Arthur Andersen disappeared upon indictment as its clients fled, and the firm was forced to sell off its component services in response. By the time it was convicted, the firm had shrunk from a $9 billion "Big Five" accounting firm with more than 28,000 employees to a company consisting of 200 people employed to process the claims filed against it.[44] In addition, an indictment can result in the firm being suspended or debarred from government contracting.[45] This, too, can be a death sentence for companies that depend on government contracts for a significant part of their revenue.[46] And finally, there is the expense of defending the firm against criminal charges that can be devastating to small and medium-sized corporations.

This gives corporations a powerful, and usually irresistible, incentive to avoid indictment. Because prosecutors decide whether to indict a corporation, this becomes an incentive to do whatever prosecutors want. And what prosecutors want corporations to do is adopt the compliance-based approach to reducing employee wrongdoing.[47] The

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42. For example, Arthur Andersen offered to pay $750 million to settle a lawsuit brought by Enron's shareholders for its negligence in auditing Enron's accounts. *See* Julie R. O'Sullivan, *Some Thoughts on Proposed Revisions to the Organizational Guidelines*, 1 OHIO ST. J. CRIM. L. 487, 496 n.30 (2004). The fine it received for its criminal conviction was $500,000; *see also* Cheryl Corley, *Arthur Andersen Fined and Sentenced*, NPR (Oct. 17, 2002), https://www.npr.org/templates/story/story.php?storyId=1151798 [https://perma.cc/M3ED-UFJW].

43. ALFRED M. KING, EXECUTIVE'S GUIDE TO FAIR VALUE PROFITING FROM NEW VALUATION RULES 71–73 (2008).

44. *See* BALA G. DHARAN & NANCY B. RAPOPORT, ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 129 (2d ed. 2004) (reporting $9 billion in revenue in 2001); *see also* Jess Bravin, *Justices Overturn Criminal Verdict in Andersen Case*, WALL ST. J. (June 1, 2005, 12:01 a.m. ET), https://www.wsj.com/articles/SB111754871885447062 [https://perma.cc/Y6TD-ZMLB] (explaining that the losses the firm suffered, including its workforce falling from 28,000 at its peak down to just 200, are unrecoverable).

45. U.S. Dep't of Just., Just. Manual § 9-28.1600 (2018) ("In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate.").

46. Indictment also damages a corporation's credit standing, access to bank loans, and undermines its ability to raise needed operating capital.

47. For a fuller discussion of what the DOJ requires for corporations to avoid indictment and a more detailed description of what constitutes an acceptable compliance plan, see John Hasnas, *Managing the Risks of Legal*

Principles of Federal Prosecution of Business have long required corporations to adopt an accountability-oriented, power-enforced compliance program—one designed to monitor their employees' behavior, disclose any potential wrongdoing to the government, and help the government convict those suspected of criminal conduct.[48] Indeed, the DOJ recently explicitly stated that the purpose of prosecuting corporations was not to reduce employee wrongdoing, but to induce corporations to aid prosecutorial efforts to convict individual employees.[49] This necessarily places the corporation in an adversarial relationship with its employees, the antithesis of what is needed for a successful integrity-based ethics program.[50]

Integrity-based ethics programs do not meet the requirements of what the government considers an effective compliance plan by definition. My colleagues at the McDonough School of Business have entire courses on "organizational justice" devoted to teaching future business leaders how to develop a corporate culture that would support an integrity-based ethics program. These courses emphasize the building of trust within the organization by aligning the values of the workforce with those of the organization. They make it clear that constant monitoring of employees by management and an adversarial relationship between the organization and its employees are incompatible with this approach. Not being lawyers, they seem mystified that more businesses do not adopt their prescriptions. I don't think they believe me when I tell them that the reason is that they would risk criminal indictment if they did.

I could become philosophical and ignore all the teachings of public choice economics and political science and observe that the existence of corporate criminal liability does not logically entail a compliance-based approach to reducing wrongdoing. It is conceptually possible for the government to announce a policy of not indicting corporations that exercise reasonable care and adopt an integrity-based ethics program. But in this case, corporate criminal liability would be superfluous since corporations are already incentivized to exercise reasonable care by the threat of administrative penalty, civil liability, and market sanctions.

In the real world, of course, human psychology and bureaucratic incentives ensure that the government would never adopt such a policy.

Tom Tyler has studied why, despite a mass of contrary evidence, the belief that threats

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Compliance: Conflicting Demands of Law and Ethics, 39 LOY. U. CHI. L.J. 507, 512–16 (2008) (discussing the DOJ's vigorous law enforcement against white-collar crime).

48. U.S. Dep't of Just., Just. Manual §§ 9-28.700–28.800 (2018).

49. Memorandum from Sally Q. Yates, Deputy Att'y Gen., U.S. Dept. of Just., on Individual Accountability for Corporate Wrongdoing to All U.S. Att'ys (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download [https://perma.cc/ZW7D-54PZ]; *see* Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1321 (2007) ("It is now a commonplace position among the white-collar bar post-Enron—amongst both defense and prosecution—that corporate defense consists largely of being an arm of the prosecutor.").

50. Indeed, as I write these words, the Wall Street Journal has a front-page account of the extent to which DOJ policy drives a wedge between corporate management and employees and requires corporations to act as deputy law enforcement agents. Aruna Viswanatha & Dave Michaels, *Flaws Emerge in Justice Department Strategy for Prosecuting Wall Street*, WALL ST. J. (July 6, 2021), https://www.wsj.com/articles/flaws-emerge-in-justice-department-strategy-for-prosecuting-wall-street-11625506658 [https://perma.cc/JG6Y-79MB]. For a detailed analysis of how adherence to government-approved compliance programs is antithetical to developing a corporate culture of organizational justice and trust that more effectively reduces employee wrongdoing, see John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 633–37, 646–51 (2005).

and sanctions are the best response to wrongdoing continues to be the conventional wisdom among law enforcement agencies.[51] He notes that "whether or not a theory appears self-evident is more strongly related to whether it is consistent with cultural myths than whether it is supported by empirical evidence"[52]—that "[o]nce people have such a conception of their own and other's motivational nature, it is difficult to let go of those beliefs even when the evidence for them is discredited."[53] Thus, rather than make a proper comparative assessment between compliance-based and integrity-based approaches, "[t]here is a general tendency . . . to frame deterrence studies as questions of whether deterrence works, in the sense that its effects can be shown to be significantly different from zero. Against this relatively low standard, deterrence effects are often found and researchers can conclude that deterrence is effective."[54]

In addition, requiring the utilitarian, compliance-based approach is "psychologically attractive to the people in authority. Such models support illusions of competence, good character, and security, all of which provide important psychological benefits to authorities."[55] The first illusion gives people in authority exaggerated confidence in their competence that leads them to "take on tasks that are more complex or risky than they can actually manage . . . . The management literature shows that once people embark upon a course of action they cannot handle, they tend not to question their competence when their strategy begins to unravel but rather to throw more and more resources into that course of action."[56] The second illusion causes them to see themselves as morally superior and to "view others as less motivated to act upon values, or to behave in a just and moral way, than they are in fact."[57] And the third illusion stems from the authorities' "control over resources and power [that causes them to] feel secure and protected."[58] In sum:

> Because of these illusions of competence and character, authorities have lower levels of stress. They are also motivated to govern instrumentally, acting proactively to control others and treating other people as objects whose value is defined by their utility in achieving instrumental goals. First, since they are the most competent, authorities believe that they should control resources. Because they are the most moral, they believe that it is appropriate for them to make decisions for others. Finally, since they are in possession of power, they believe they are secure. There are, therefore, a variety of reasons that authorities fall easily into a utilitarian approach, managing social order by the threat or use of force and deploying community resources to address the problems and concerns that they feel are of importance.[59]

But we do not have to delve into social psychology to understand why law enforcement agents prefer the compliance model. A simple observation of their incentives

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51. Tyler, *supra* note 30, at 278.
52. *Id.* at 278–79.
53. *Id.* at 279.
54. *Id.*
55. *Id.* at 280–81.
56. Tyler, *supra* note 30, at 282. This is certainly the case with regard to corporate compliance efforts. *See infra* notes 63–64 and accompanying text.
57. *Id.* at 283.
58. *Id.*
59. *Id.* at 284–85.

would suffice. Prosecutors are not rewarded for preventing wrongdoing. They are rewarded for convictions. Preventing wrongdoing via integrity-based ethics programs does not produce convictions. Threatening corporations with indictment unless they adopt compliance programs designed to generate evidence against corporate employees does.

Prosecutors are evaluated on the basis of the number of successful enforcement actions they bring. Prosecutors who actually reduced employee wrongdoing so that such actions were unnecessary would be undermining their career prospects. As things now stand, prosecutors who employ deferred and non-prosecution agreements to avoid corporate convictions that would impose high costs on innocent stakeholders are routinely excoriated for doing so.[60] Imagine what it would be like for a prosecutor who refrained from charging corporations that had adopted integrity-based ethics programs.

DOJ policy is the exemplar of the classic managerial blunder of "hoping for A, but paying for B."[61] DOJ's announced goal is to reduce corporate wrongdoing, yet it pays its employees to obtain convictions, guilty pleas, or criminal settlements. Rather than reducing wrongdoing, this requires them to identify ever-increasing amounts of such wrongdoing. The last thing they are interested in is integrity-based ethics programs that reduce wrongdoing without criminal prosecution.

The effect of corporate criminal liability is to convert all corporate ethics officers into compliance officers. This may help the government obtain convictions, but it is definitely not the most effective way to reduce corporate wrongdoing.

1. Summary

The lack of theoretical justification for corporate criminal liability cannot be overcome by claiming that it is necessary to reduce corporate wrongdoing. It is not. The threat of administrative sanctions, civil liability, and reputational damage already give corporate managers the incentive to reduce wrongdoing by the firm's employees. The advent of corporate criminal liability shifts this incentive from reducing wrongdoing to avoiding indictment; that is, to playing what has been aptly called "the compliance game."[62] I am leading this forlorn hope against the citadel of corporate criminal liability. Yet, for aid in this assault, I cannot do better than to quote at length from one of the citadel's staunchest defenders, who describes the nature of the compliance game:

> [The] commodification of compliance, coupled with the failure of regulators to develop any significant capacity to evaluate compliance programs and practices, supported a complex brew of incentives and disincentives that lends itself to a

60. *See, e.g.*, Christopher Modlish, *The Yates Memo: DOJ Public Relations Move or Meaningful Reform That Will End Impunity for Corporate Criminals?*, 58 B.C. L. REV. 743, 773 (2017); Peter R. Reilly, *Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, 2015 BYU L. REV. 307, 339–46 (2015); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1298–99 (2013); Ellis W. Martin, *Deferred Prosecution Agreements: 'Too Big to Jail' and the Potential of Judicial Oversight Combined With Congressional Legislation*, 18 N.C. BANKING INST. 457, 468 (2014).

61. *See* Steven Kerr, *On the Folly of Rewarding A, While Hoping for B*, 18 ACAD. MGMT. J. 769, 774 (1975) (identifying flawed business reward systems that fail to discourage certain behavior by inadvertently reinforcing it).

62. William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71, 110 (2017).

> multi-stakeholder compliance game. The ultimate objective of this game, however, is not economic corporate criminal justice. The incentives and disincentives are not designed to change corporate behavior, improve corporate culture, or facilitate corporate decision-making. . . . Ultimately, stakeholders in this game seek to protect and enhance their positions without disturbing the equilibrium and, remarkably, without concern for whether their efforts actually affect rates of offending behavior.
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> . . . .
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> At their core, the rules of the game assume that neither firms nor regulators have or want to have evidence of compliance effectiveness. The game further assumes that there is no interest in exploring whether the compliance machine actually affects behavior, organizational decision-making, planning, programming, or corporate culture. . . . The result: with countless billions spent on some of the most impressive accountancies, consultancies, and law firms, it is practically impossible for regulators to make meaningful distinctions between and among ethical leaders and laggers, as well as compliant and non-compliant firms. And if one looks at the history of this game, it is hard not to see interested stakeholders pushing compliance spending forward in extreme and, at times, perverse ways.[63]

It is, of course, possible to imagine an alternative reality in which the compliance game is swept away, and corporations are criminally prosecuted only when management has been at least negligent in failing to prevent criminal action by the firm's employees.[64] But, personally, I find ideal theory uninteresting. The compliance game is not an aberration but is precisely what one would expect given the incentives that corporate criminal liability introduces into the political/legal system. In the real world, corporate criminal liability and the compliance game are a package deal. You can't get one without the other.

IV. IMAGINING A WORLD WITHOUT CORPORATE CRIMINAL LIABILITY

Having battered at the walls of corporate criminal liability with metaphysical, analytical, and empirical arguments to no avail, what can now be done? Given the incentives of prosecutors, politicians, and the compliance industry, the prospects for reform through the political process are roughly equivalent to those of the current federal income tax being replaced with a flat tax. So perhaps it is time to send in the sappers to undermine the foundation of the doctrine in hopes of bringing the edifice crashing down all at once. Because corporate criminal liability is a judicially-created doctrine, the judiciary can repudiate it and, in doing so, cause the entire structure to collapse.

So, indulge me by considering the following fanciful scenario. Imagine that President Biden fills a vacancy on the Supreme Court with a liberal judge, unaware that he or she is an ardent civil libertarian who believes that vicarious criminal liability is antithetical to a liberal legal system (it could happen). A quixotic corporate counsel decides that it is time

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63. *Id.* at 112–14. I mean no disrespect in using Professor Laufer's words to argue against his position. I find that Professor Laufer and I usually agree on empirics. Our disagreement almost always concerns matters of interpretation.

64. Although, as noted above, this would make the existence of corporate criminal liability unnecessary. *See* discussion *supra* Section III.B.

to directly challenge corporate criminal liability when her company is indicted for the criminal action of a rogue employee, despite the firm's best efforts to prevent employee wrongdoing. In an effort to get the indictment dismissed, corporate counsel files a brief that argues: 1) the *New York Central* case that first recognized corporate criminal liability was interpreting the Elkins Act, which explicitly authorized corporate punishment; 2) this cannot serve as a precedent for the proposition that corporations are subject to criminal punishment in the absence of such a statutory provision; 3) because subsequent judicial decisions overlooked this distinction, the question should be treated as a case of first impression; and 4) because vicarious criminal liability is incompatible with a liberal legal system, the case against the client corporation should be dismissed.

To everyone's surprise, the judge agrees and dismisses the indictment. The prosecution appeals, the circuit court reverses and reinstates the indictment, and the corporation asks for and is granted certiorari to the Supreme Court. There, in a 5-4 decision, the new justice persuades Justices Thomas, Alito, Gorsuch, and Barrett to affirm the dismissal of the indictment and rule that corporations are not subject to criminal liability as collective entities.[65]

What would be the consequences of such an event?

A. Prosecutors

Without the ability to threaten corporations with indictment, prosecutors would lose the ability to make corporations dance to their tune. There would be no more deferred prosecution agreements or non-prosecution agreements that require corporations to pay large settlement fees and adopt the DOJ's preferred compliance measures.[66] There would

65. Positing such a scenario may seem incongruous for one who just eschewed ideal theory. But I am describing an unlikely scenario—not an idealization divorced from reality. And unlikely events sometimes occur. Those of us who grew up in the 1960s and 70s knew that the Soviet Union would always be an adversarial superpower.

66. *See, e.g.*, Deferred Prosecution Agreement of Wells Fargo & Co. ¶ 12, United States v. Wells Fargo & Co. (Feb. 20, 2020) (assessing a $3 billion criminal penalty on Wells Fargo); Deferred Prosecution Agreement of JP Morgan Chase & Co. ¶¶ 4, 7, United States v. JP Morgan Chase & Co. (Sept. 25, 2020) (crediting JP Morgan's $335 million spent on corporate compliance to date before assessing a $920 million penalty); Agreement to Not Prosecute United Cont'l Holdings, Inc. at 15, United States. v. Continental Holdings, Inc. (July 11, 2016) (requiring United to conduct annual anti-bribery and anti-corruption training for all executives, "employees in positions of leadership and trust," and business partners). Some of the more infamous examples of deferred prosecution agreements include those in which the company was required to endow a chair in business ethics at the prosecutor's alma mater, *see* Deferred Prosecution Agreement, Bristol-Myers Squibb ¶ 20, United States v. Bristol-Myers Squibb (June 15, 2005) ("BMS shall endow a chair at Seton Hall University of Law dedicated to the teaching of ethics and corporate governance . . . ."), to appoint a former Attorney General as a monitor, paying his firm between $28 and $52 million, *see* Deferred Prosecution Agreement of Zimmer, Inc. at 4–7, United States v. Zimmer, Inc. (Sept. 28, 2007); Pedro Ruz Gutierrez, *Congress Scrutinizing Selection of Outside Monitors; A Lucrative Contract for a Former Attorney General Drew Notice*, NAT'L L.J. (July 21, 2008), to raise revenue for court-mandated improvements in public education, *see* Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1877–78 (2005) (describing state officials' plan "to install at [New York Racing Association] facilities . . . slot machines whose revenues were expected to fund court-mandated improvements in public education"), and to create hundreds of jobs in Oklahoma, *see id.* at 1894 ("[U]nrelated obligations [relative to the underlying crimes] were imposed on WorldCom in a deferral initiated with the state of Oklahoma in March 2004: In exchange for deferral of charges stemming from fraud on the state's pension fund, the firm pledged that it would create hundreds of jobs in Oklahoma.").

be no need for corporations to sign up as deputy law enforcement agencies to receive the cooperation credit necessary to avoid indictment.[67] Prosecutors would no longer be able to coerce corporations to waive their attorney-client privilege or to provide incriminating information about their employees.[68] There would be no more end runs around employees' Constitutional rights by incentivizing corporations to pressure their employees into cooperating with prosecutors to retain their jobs.[69] Prosecutors will now have to find ways to earn corporations' voluntary cooperation rather than demand it with threats. Most significantly, prosecutors could no longer force corporations into the type of adversarial relationship with their employees that dooms efforts to create integrity-based ethics programs.

But the most important consequence would be the end of the compliance game.[70] Prosecutors would be required to—and free to—redirect the time, effort, and financial resources currently expended on the compliance game toward the prosecution of the individuals who actually violated the law. The resources that are freed up could cover the costs of prosecuting individual wrongdoers now that those costs can no longer be shifted onto corporations.

B. Corporations

With the threat of criminal indictment removed, corporations could shift resources from compliance-based efforts to monitor and sanction their employees to integrity-based efforts to develop a corporate culture consistent with the principles of organizational justice. In other words, they could convert their compliance programs into ethics programs.

The disappearance of corporate criminal liability does not relieve corporations of the duty to discourage employee wrongdoing. They are still subject to *respondeat superior* civil liability, complete with potentially large punitive damage awards, as well as administrative sanctions for regulatory violations. Civil liability creates the same incentive to reduce employee wrongdoing as criminal liability but leaves corporations free to determine the best way to do so.

Relieved of the need to jump through Organizational Sentencing Guidelines and DOJ hoops that place management and employees in an adversarial relationship, corporations could "follow the organizational behavior science" and adopt more effective and typically less expensive measures for reducing employee wrongdoing. Finally able to escape the trust paradox, corporate management could institute programs designed to align the values of individual employees with those of the corporate entity to create a corporate culture seen as legitimate by the employees.

The fact that integrity-based ethics programs are more effective than compliance-

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67. Currently, one of the factors the DOJ uses to decide whether to indict a corporation is the value of its cooperation with its investigations. *See* U.S. Dep't of Just., Just. Manual § 9-28.700.

68. *See, e.g.*, Deferred Prosecution Agreement, United States v. Standard Charter Bank at 41 (Apr. 9, 2019), https://www.justice.gov/opa/press-release/file/1152806/download [https://perma.cc/9NFG-LYMC] (waiving attorney-client and work product privileges regarding legal advice given for U.S. sanctions compliance).

69. *See, e.g.*, United States v. Connolly, No. 16 Cr 0370, 2019 WL 2120523, at *14 (S.D.N.Y. May 2, 2019) ("Deutsche Bank's interviews of Gavin Black, for which he was compelled to sit under threat of termination, are fairly attributable to the government."); United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008).

70. *See supra* notes 63–64 and accompanying text.

based programs creates a win-win-win-win result. The public would benefit from the reduction of harmful employee wrongdoing. Corporations would benefit from the reduced threat of lawsuit and the lower cost of the integrity-based approach. Employees would benefit from the greater emphasis on organizational justice in the workplace. And everyone would benefit from the elimination of the wasteful and destructive compliance game expenses.

C. The Compliance Industry

The compliance industry as a whole will do just fine. Its practitioners will simply change the product that they are supplying. Rather than teach corporations how to create and implement programs that conform to the Organizational Sentencing Guidelines and the Principles of Federal Prosecution of Business, they will now instruct corporate management on how to create effective integrity-based ethics programs.

As with all progress, there will be some creative destruction. Those whose expertise is entirely devoted to satisfying legal requirements may lose their jobs or have to be retrained. However, new consulting opportunities will open up for organizational behavior experts and social psychologists. The only substantive difference will be that the industry will now be teaching corporations how to actually reduce employee wrongdoing rather than how to avoid prosecutors' ire.

Oh, and the industry will have to pick a new name. The "ethics industry" might be a bit much—perhaps, the "corporate integrity industry"?

D. A Happy Place

The end of corporate criminal liability would dissipate the deadweight loss of the compliance game. It would free corporations to pursue integrity-based ethics programs that would more effectively reduce employee wrongdoing and create a more trusting and just working environment. It would force prosecutors to focus on prosecuting the individuals who broke the law rather than intangible proxies and require them to do so consistently with the individuals' presumption of innocence, attorney-client privilege, and constitutional rights. And it would remove an illiberal instance of vicarious liability from our criminal legal system.

In sum, a world without corporate criminal liability will be a happier place.

V. CONCLUSION

Over the years between the *New York Central* case in 1909 and the present, a mighty fortress has been built to protect the doctrine of corporate criminal liability. For several decades, civil libertarians have battered the walls of this fortress with principled arguments decrying vicarious criminal liability. These attacks have been repulsed by the defenders' utilitarian rejoinder that such principled objections are overridden by the need to reduce corporate wrongdoing. In this Article, I attempt to breach this defense by showing that not only is corporate criminal liability not necessary to reduce corporate wrongdoing, but it is an impediment to doing so.

But I confess that it may be too late for such an assault to succeed. The interests that benefit from corporate criminal liability—the players in the compliance game—may be too

entrenched to be routed by reasoned argument. If that is the case, then our only remaining hope, perhaps a forlorn one, is for the judiciary to bring the citadel tumbling down.