

# Corporate Criminal Liability: End It, Don't Mend It

By Stephen F. Smith\*

*In this Article, I make the case in favor of abolishing corporate criminal liability. Criminal liability for corporations is peculiar, given that “entity liability” does not otherwise exist in criminal law. The legal system appropriately deals with law-breaking within other entities (such as police departments and labor unions) solely through criminal prosecutions of the individual offenders and civil suits against the entities within which criminality occurred. Corporate criminal liability is another example of overcriminalization, in which criminal law is unjustifiably used to address problems better dealt with through other means. Finally, corporate criminal liability is fundamentally incompatible with established legal principles governing criminal liability. Rather than squander limited resources on efforts to prosecute corporations and other business entities, we should invest in more robust civil regulation of businesses and increased prosecution of corporate officers and employees who abuse their positions by committing crimes.*

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## INTRODUCTION

In the federal system, corporate criminal liability owes its existence to a remarkably unreasoned decision of the Supreme Court. In *New York Central & Hudson River Railroad Co. v. United States*, the Court held that, just as in tort law, corporations are vicariously liable for crimes committed by corporate officers and employees within the scope of their employment.<sup>1</sup> Essentially, if vicarious corporate liability based on respondeat superior was good enough for tort law, it was good enough for criminal law. The Court made no attempt to square that sharp break from prior law<sup>2</sup> with established doctrines positing that criminal

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1. 212 U.S. 481, 493 (1909).

2. The traditional common law rule was that corporations lacked the “free will” necessary for criminal liability. 1 WILLIAM BLACKSTONE, COMMENTARIES \*476. This rule was under attack in the late nineteenth century but held except for public nuisance and certain other minor offenses. *See generally* AMANDA PINTO & MARTIN EVANS, CORPORATE CRIMINAL LIABILITY 3–17 (2003) (reviewing the history of corporate criminal law). It was not rejected outright until *New York Central. N.Y. Cent.*, 212 U.S. at 492–93.

liability requires what would later be described as an “evil-doing hand and evil-meaning mind.”<sup>3</sup>

Over the years, scholarly proponents of corporate criminal liability have strived mightily to supply a justification for the *New York Central* rule that corporations are vicariously liable for all job-related crimes committed by their employees. These arguments basically take one of two forms. One line of argument is consequentialist in nature, positing that modern corporations are simply too powerful, in terms of their wealth and impact on modern society, to be left solely to regulation by administrative agencies and tort law.<sup>4</sup> The second line of argument contends that, despite their fictional status, corporations can and often do merit moral blame (and thus punishment) separate and apart from their officers and employees.<sup>5</sup>

These arguments, of course, have not gone unchallenged. Criminal law and jurisprudence scholars have argued that, because corporations cannot act except through their officers and employees, it is both incoherent and unjust to blame corporations (and, ultimately, their innocent shareholders) for crimes committed by their agents.<sup>6</sup> The guilt for corporate crime rests solely with the offending officers and employees although the corporations remain answerable under civil law. For their part, law-and-economics scholars add that criminal punishment of corporations is unnecessary at best, if not inefficient, because civil regulation can fully and more readily achieve all of the law-compliance goals of criminal prosecutions.<sup>7</sup>

My purpose in this brief Article is to offer an additional response to the arguments in favor of corporate criminal liability. Part I shows that, apart from corporate criminal liability,<sup>8</sup> entity liability does not exist in criminal law (and for good reason). Part II seeks to reframe the debate over corporate criminal liability as a reprise of the longstanding phenomenon of overcriminalization, in which criminal law is used symbolically or to address problems adequately dealt with through other means. Part III contends that corporate criminal liability, as it exists in the federal system,<sup>9</sup> is fundamentally incompatible with established principles governing criminal liability. Corporate criminal

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3. *Morrisette v. United States*, 342 U.S. 246, 251 (1952).

4. See, e.g., Sara Sun Beale, *A Response to Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481 (2009).

5. See, e.g., Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 473 (2006).

6. See, e.g., Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1359–60 (2009); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1331 (2009). As one commentator famously put it, corporations, unlike human beings, have “no soul to damn” and “no body to kick.” See 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 (1981).

7. See, e.g., Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320–21 (1996); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996).

8. In referring to “corporate criminal liability,” I mean to include not just for-profit corporations, but also nonprofits, as well as partnerships and other means of doing business outside the corporate form.

9. The Model Penal Code and a number of states have endorsed a far narrower form of corporate criminal liability under which corporations can only be punished for the actions of certain high-ranking corporate officials. MODEL PENAL CODE § 2.07 (AM. L. INST. 2020). This limited form of criminal liability avoids many of the problems inherent in the federal system’s much broader approach. Nonetheless, it retains the flaw of treating corporations as fitting candidates for punishment.

liability should be abolished and replaced with more robust civil regulation of businesses and increased prosecution of lawbreaking employees.

#### I. THE NORMATIVE BANKRUPTCY OF “ENTITY LIABILITY” IN CRIMINAL LAW

Perhaps because corporate criminal liability remains so controversial in academic circles, some commentators have sought to repackage the doctrine as a more generalizable principle. In this view, corporate punishment is nothing special but merely an example of what is referred to as “entity liability” in criminal law.<sup>10</sup> How can it be controversial to hold corporations criminally liable when other entities are also subject to punishment? This argument is appealing except for one inconvenient fact: “entity liability” simply does not exist in criminal law; it is a rule only for corporations and other means of doing business.

Although my primary claim here is a descriptive one—that, today, corporations and other forms of doing business are the only entities that face federal criminal liability—a word is in order at the outset about the historical development of corporate criminal liability in U.S. law. Throughout the early development of corporate criminal liability, the law had in mind municipalities (also known as “municipal corporations”) and certain public transportation facilities, as opposed to the private commercial enterprises we now think of as “corporations.”<sup>11</sup> Corporate criminal liability thus originally arose as a means of regulating “public and quasi-public corporations.”<sup>12</sup>

Today, however, corporate criminal liability deals specifically with lawbreaking within private enterprises. For other entities, criminal punishment would now be unthinkable, which gives rise to the following conundrum: “We would never dream of criminally punishing a city . . . for its criminogenic qualities, much less its ‘character’ flaws. Why, then, are we so bent on doing the same to corporations?”<sup>13</sup> Why indeed!

Federal racketeering laws provide an example of an important area of law in which “entity liability” does not exist. Organized crime syndicates obviously differ from corporations because they lack legally-recognized existence and exist for unlawful purposes. Otherwise, however, they bear much in common, structurally speaking, with corporations. Like corporations, they are ongoing entities that can only act through their individual members. More to the point, organized-crime syndicates, no less than corporations, are powerful institutions that have a major impact on the national and global economies.<sup>14</sup> Indeed, they are often hierarchically organized and diversified in the manner of major corporations.<sup>15</sup> It is for these reasons that Congress took aim at organized crime

10. See generally Buell, *supra* note 5.

11. See generally Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 404 (1982). The original conception of corporations as public or quasi-public entities chartered to serve public purposes, as opposed to private commercial enterprises, had deep roots in early English law. See *id.* at 397–98.

12. *Id.* at 405.

13. Miriam H. Baer, *Propping up Corporate Crime with Corporate Character*, 103 IOWA L. REV. ONLINE 88, 98 (2018).

14. As Congress found in enacting the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), “organized crime . . . annually drains billions of dollars from America’s economy by unlawful conduct and . . . seriously burden[s] interstate and foreign commerce . . .” Congressional Statement of Findings and Purpose, Organized Crime Control Act of 1970, Pub. L. No. 91–452, 84 Stat. 922, 922–23 (1970).

15. Organized crime involves “groups of people, through division of labor, specialization, diversification,

in 1970 with the landmark RICO law, which sought nothing less than the eradication of organized crime.<sup>16</sup>

As much as Congress wanted to wipe out organized crime, RICO did *not* impose criminal liability on organized crime syndicates themselves. Instead, RICO took aim only at those who commit racketeering crimes under the auspices of organized crime.<sup>17</sup> The organization itself is relevant under RICO only in so far as it elevates other federal and state crimes into RICO violations.

Subsection 1962(c), the most commonly used basis for substantive RICO charges, is instructive. It imposes civil and criminal liability on the persons “employed by or associated with” organized-crime syndicates or other RICO “enterprises” who “conduct, or participate in the conduct of, the [enterprise’s] affairs” through a “pattern of racketeering activity.”<sup>18</sup> Although, as used in federal law, the term “persons” can be construed to encompass corporations and certain other legal entities depending on context,<sup>19</sup> RICO defines “person” narrowly so as to exclude organized crime syndicates.<sup>20</sup> Congress thus recognized that the vital objective of eradicating organized crime could be fully accomplished by taking aim at those who commit the racketeering activities that render organized crime so dangerous.

To be sure, the analogy to organized crime cannot be pressed too far. After all, there would be considerable practical difficulties with authorizing direct prosecution of organized-crime syndicates. For example, even if Congress could satisfactorily define “organized crime” (an effort that confounded lawmakers in the years preceding RICO’s passage),<sup>21</sup> organized crime syndicates differ from corporations in that they have no assets in their names that might be used to pay criminal fines. These obstacles are not insuperable, however, at least when it comes to Mafia organizations and other highly structured syndicates. In such organizations, the members of the ruling body (such as the Commission of La Cosa Nostra) could be required to pay the fines imposed on their organizations. Moreover, RICO’s asset-forfeiture provisions demonstrate faith that investigation can allow enforcers to reach concealed interests that were illegally acquired, held, or used by

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complexity of organization, and the accumulation of capital, [who] turn crime into an ongoing business.” *United States v. Elliot*, 571 F.2d 880, 884 (5th Cir. 1978).

16. 18 U.S.C. § 1961. My discussion focuses on organized crime because all agree it was the central concern motivating the passage of the RICO law. This is not to suggest, however, that the reach of RICO is limited to organized crime. For good or ill, Congress “chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.” *H.J. Inc. v. Nw. Bell Tele. Co.*, 492 U.S. 229, 248 (1989).

17. See 18 U.S.C. § 1962(a)–(d) (imposing liability on “persons” who commit specified crimes in order to acquire or maintain interests in, or control in some way the affairs of, an “enterprise”).

18. 18 U.S.C. § 1962(c); see also *id.* §§ 1963 (criminal penalties), 1964 (civil penalties). Although it was originally quite doubtful that purely criminal organizations could constitute RICO enterprises, the Supreme Court has long endorsed that expansive interpretation, which breathed new life into RICO by allowing prosecutors to go directly after organized criminals without awaiting efforts to infiltrate legitimate businesses. See *United States v. Turkette*, 452 U.S. 576, 587 (1981) (holding that purely illegitimate groups can constitute RICO enterprises).

19. See Dictionary Act, 1 U.S.C. § 1 (stating that the words “person” and “whoever” “include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals”).

20. See 18 U.S.C. § 1961(3) (defining “persons” as including individuals and “any . . . entity capable of holding a legal or beneficial interest in property”).

21. See generally Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 685–88 (1987) (recounting the difficulties Congress encountered in trying to define organized crime).

organized-crime syndicates.<sup>22</sup>

In any event, police departments constitute an even closer (and timely) analogy to corporations for present purposes. The practical problems that would attend punishing organized-crime syndicates are completely absent in the case of police departments. Police departments, like corporations, have a legally recognized existence, a chain of command, and assets that might be used to pay criminal fines. The buzzwords supporters of corporate criminal liability often use—institutional “cultures,” “reputations,” “character,” and the like—also apply to police departments.<sup>23</sup>

Although all police departments presumably employ officers who occasionally use their authority in ways that violate federal law, many police departments have systemic problems that regularly produce unconstitutional policing. These troubled departments might have rogue leadership (such as former Los Angeles Police Chief Daryl Gates and former Maricopa County, Arizona Sheriff Joseph Arpaio) or training modules or policies that facilitate constitutional violations, or they might have deficient disciplinary processes that allow bad officers to remain on the force.<sup>24</sup> These departments are said to have a “pattern or practice” of constitutional violations and, as such, are subject to federal structural reform to ensure that they will operate lawfully.<sup>25</sup>

Importantly, Congress recognized that the proper role of federal criminal law in combating unconstitutional policing is to punish the individual officers who violate federal law but not the departments under whose authority they act. Officers who deprive people of federally guaranteed rights and privileges are subject to prosecution and conviction in federal court.<sup>26</sup> Even if the departments that employed and trained the officers maintained a pattern or practice of constitutional violations—and thus might easily be said to be blameworthy for the unlawful actions of their officers—those departments face no criminal liability.<sup>27</sup>

The need to reform troubled police departments, though very real, is not viewed as sufficient to justify subjecting those powerful entities to criminal liability. Instead of the blunderbuss of criminal law, civil law provides a variety of tools that can be used to rectify the structural problems that facilitate unconstitutional policing. These tools include the

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22. See 18 U.S.C. § 1963(a)–(b) (RICO asset-forfeiture provisions).

23. For a thoughtful exploration of departmental culture as a major factor contributing to widespread police misconduct, see generally Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004).

24. See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 2 (2009) (discussing how department inadequacies facilitate or even encourage misconduct).

25. 34 U.S.C. § 12601 (formerly codified at 42 U.S.C. § 14141). As of a few years ago, the Civil Division of the Department of Justice had required at least forty police departments to adopt a variety of structural reforms, with another two dozen or so involved at various stages of federal “pattern-or-practice” investigations. U.S. DEPT. OF JUST., *THE CIVIL DIVISION’S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT* 3 (2017), <https://www.justice.gov/crt/file/922421/download> [<https://perma.cc/7DTS-H7CG>].

26. 18 U.S.C. § 242.

27. State sovereign immunity would impose no obstacle to federal liability for constitutional violations by police departments. Sovereign immunity only attaches to *state* institutions and has no application to local or municipal governments or agencies. *Alden v. Maine*, 527 U.S. 706, 756 (1999). Furthermore, even where state sovereign immunity does apply, it is settled law that Congress’s enforcement power under the Fourteenth Amendment can be used to abrogate sovereign immunity as an appropriate means of protecting federal constitutional rights against infringement by state actors. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000).

Justice Department's "pattern-or-practice" investigative authority<sup>28</sup> and Reconstruction-era federal statutes authorizing lawsuits against police departments or municipalities that, by policy or custom, sanction unconstitutional policing.<sup>29</sup> The "consensus" view among scholars is that police misconduct might be less widespread today if federal enforcers were less restrained (and resource-constrained) in the use of their pattern-or-practice authority.<sup>30</sup>

A final example of civil, rather than criminal, law being used to reform entities plagued by lawbreaking involves labor unions. Despite their vital role in the federal scheme of collective bargaining, labor unions have had a long history of corruption and racketeering dating back to the 1800s.<sup>31</sup> Some, such as the International Brotherhood of Teamsters, were actually controlled by organized-crime syndicates for decades and came to be viewed as "synonymous" with organized crime.<sup>32</sup> The internal affairs of "mobbed up" unions were conducted through intimidation, violence, and other unlawful means, and such unions provided organized crime the ability to stifle competition in markets served by mob-controlled businesses and to control outright a number of industries, such as construction and waste hauling in New York City.<sup>33</sup> By the 1970s and 1980s, reforming labor unions was seen as an essential component of the fight against organized crime.

As federal enforcers devoted themselves to the difficult task of restoring the integrity of labor unions, the tool of choice was not criminal prosecution of labor unions. Indeed, that tool was not even in the proverbial toolkit. Instead of trying to convict unions for the crimes of their leaders and members, prosecutors went directly after corrupt union officials (most famously, Teamsters president Jimmy Hoffa) and their confederates in organized crime.<sup>34</sup> Otherwise, however, the task of purging unions of Mafia influence and ensuring that unions would be operated lawfully, in the best interest of their membership, was left to civil law. A series of landmark civil RICO lawsuits brought by the federal government

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28. See 34 U.S.C. § 12601 (authorizing the Attorney General to sue police departments with patterns of violations of federal law).

29. See, e.g., 42 U.S.C. § 1983 (creating an individual cause of action for violations of federal law committed under color of state or local law). Interestingly, although police departments are subject to civil liability under Section 1983, they are not vicariously liable for the wrongs committed by individual officers (as corporations are, both civilly and criminally, for job-related crimes committed by their employees). Rather, they are liable *only* if the unlawful conduct was so entrenched as to constitute official policy or custom. *Monell v. Dep't. of Soc. Servs. of N.Y.*, 436 U.S. 658, 698 (1978). Corporations, by contrast, are subject to vicarious criminal liability even if their employees' actions *violated* corporate policy and even if the corporations had robust compliance programs designed to prevent such criminal conduct. See, e.g., *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 310 (2d Cir. 2009); *United States v. Automated Med. Lab'ys., Inc.*, 770 F.2d 399, 406 (4th Cir. 1985).

30. Harmon, *supra* note 24, at 3.

31. See James B. Jacobs & Ellen Peters, *Labor Racketeering: The Mafia and the Unions*, 30 CRIME & JUST. 229, 233–39 (2003) (discussing the long history of corruption in American labor unions).

32. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, THE EDGE: ORGANIZED CRIME, BUSINESS, AND LABOR UNIONS § 5, at 1–2 (1986) (finding that "[t]he leaders of the nation's largest union, the International Brotherhood of Teamsters (IBT), have been firmly under the influence of organized crime since the 1950's"). Of course, the Teamsters were hardly the only labor union with close ties to organized crime. See, e.g., James B. Jacobs, *The Rise and Fall of Organized Crime in the United States*, 49 CRIME & JUST. 25 (2019) (noting that the same Mafia family that controlled the Teamsters also controlled the International Longshoremen's Association, the Laborers Union, and the Hotel Employees and Restaurant Employees Union).

33. See, e.g., Jacobs & Peters, *supra* note 31, at 229–37.

34. Hoffa was convicted in 1964 of union pension fund fraud and jury tampering, only to receive a presidential pardon in 1971 and be assassinated four years later reportedly by a Mafia hitman. *Id.* at 236.

against mob-dominated labor unions ushered in a new era for the American labor movement through sweeping structural reforms, including court-appointed trustees and independent review boards to supervise union affairs.<sup>35</sup>

Anyone who doubts the power of civil lawsuits to achieve major structural reform of corrupted organizations without the threat of criminal “entity liability” need only consider the stunning success federal enforcers had using civil RICO to clean up mob-dominated labor unions.<sup>36</sup> The consent decree against the Teamsters permanently enjoined certain named individuals from any future involvement with the union and ordered “various changes to the [Teamsters] constitution, democratic elections for international officers, and, most important, the selection of three court-appointed officers—-independent administrator, investigations officer, and elections officer—to oversee the union’s reform.”<sup>37</sup> As a direct result, civil RICO actions achieved “impressive institutional reform in thoroughly racketeer-dominated unions.”<sup>38</sup> The carefully coordinated use of criminal law to punish individual wrongdoers and civil reform litigation against corrupted unions thus constituted a powerful “one-two punch” in the fight to restore the integrity of the American labor movement.

These three examples—involving organized crime, local police departments, and labor unions—illustrate the predominant approach in the federal system to dealing with organizations within which lawbreaking occurs. Apart from the peculiar case of corporations and similar business entities, criminal law is not used to punish the organizations themselves but rather the individual wrongdoers who actually broke the law under their aegis. The fact that an entity was involved potentially serves as a basis for enhancing the punishment individual offenders receive but not for punishing the entity itself.<sup>39</sup> To the extent legitimate organizations (such as police departments or labor unions) have a deficient internal culture that tends to result in legal violations, civil remedies can be used to require them to adopt the structural reforms necessary to promote legal compliance within their ranks.

In sum, there is no generalizable rule of “entity liability” that renders organizations criminally responsible whenever one or more of their members happen to commit crimes

35. See, e.g., *United States v. Int’l Brotherhood of Teamsters*, 808 F. Supp. 279 (S.D.N.Y. 1988) (discussing the consent decree); see generally JAMES B. JACOBS, *MOBSTERS, UNIONS, AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT* 143–45, tbl. 8-1 (2007) (tracking federal government’s civil RICO cases against unions).

36. JACOBS, *supra* note 35, at 138–60.

37. Jacobs & Peters, *supra* note 31, at 244–45. The court-appointed monitors were charged with conducting fair union elections via secret ballot, investigating corruption at all levels of the union, disciplining union officials guilty of corruption or other misconduct, and reviewing union decisions to ensure that they would not benefit the interests of organized crime. *Id.* at 245.

38. *Id.* at 231 (reporting that across the labor movement “[h]undreds of criminals have been purged from union positions, fair election procedures have been instituted, and fundamental changes in union governance and operations have been adopted”).

39. RICO, Continuing Criminal Enterprises, and conspiracy doctrine are examples. The fact that a person committed racketeering crimes in relation to an entity that qualifies as a “RICO enterprise” exposes the offender to the heightened punishments RICO affords. See 18 U.S.C. § 1962. A similar offense-enhancement applies to members of “continuing criminal enterprises.” See 21 U.S.C. § 848. Finally, offenders who band together in order to commit federal crimes, thus forming an entity known as a “conspiracy,” can be punished for conspiring to break the law in addition to the object crimes they committed in pursuit of their shared criminal goals. See 18 U.S.C. § 371. In none of these cases, however, is the entity itself subject to punishment.

beneficial to the organizations in some manner. Corporate criminal liability, understood broadly for this purpose as including businesses and non-profits which utilize alternatives to the corporate form, is the exception that proves the rule. It must be defended on its own terms, yet the voluminous literature defending corporate criminal liability is completely bereft of any effort to justify singling out corporations for criminal liability when other entities are answerable only civilly for lawbreaking by their members.

## II. CORPORATE CRIMINAL LIABILITY AS OVERCRIMINALIZATION

Although supported by a century of domestic practice and insightful scholarship by leading legal academics, the case in favor of corporate criminal liability is surprisingly weak. Corporations, after all, cannot act except through their officers and employees. If those individuals do not break the law, corporate crimes, by definition, cannot occur—which suggests that it is a misnomer to speak of “corporate crime” in the first place. As far as criminal law is concerned, then, an entirely adequate response to lawbreaking within corporations would be to ensure that the *individuals* who choose to conduct their employer’s affairs through illegal means face an appropriate level of punishment.<sup>40</sup> Such punishment would achieve retributive goals by stigmatizing the individuals’ blameworthy choice to break the law, as well as utilitarian goals by incapacitating past wrongdoers and deterring similar wrongdoing in the future. From the standpoint of ensuring that businesses operate lawfully, nothing appreciable is gained by punishing corporations vicariously for the crimes of their employees.<sup>41</sup>

Supporters of corporate criminal liability argue that such liability is necessary to give corporations adequate incentives to maintain compliance programs and other internal structures necessary to prevent employees from committing crimes.<sup>42</sup> This argument, though instrumentally sound, is deeply problematic. As a moral matter, the argument does not sit well with the prevailing modern view, informed by painful experience throughout world history, that collective or group punishment—using the wrongdoing of others as a basis for punishing innocent third parties—is fundamentally unjust.<sup>43</sup> Questions of

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40. Needless to say, individual criminal liability would not obviate the need for administrative regulation of businesses or for tort liability to require corporations to internalize the costs their operations impose on others.

41. See generally V.S. Khanna, *supra* note 7. Perhaps this explains why few other countries have followed the American lead in this area: “Most countries in Europe and the world lack corporate criminal liability generally and only recently have enacted a handful of specific corporate crime statutes. Foreign countries impose civil regulatory fines and individuals may be prosecuted, but firms rarely face prosecution.” Brandon Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1778 (2011) (footnote omitted).

42. See Jennifer Arlen & Reiner Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 689 (1997) (noting that “commentators broadly agree that corporate liability usefully enlists the firm in interdicting or deterring its wayward agents”).

43. As one commentator has explained:

From the point of view of justice and fairness, the principle of collective punishment is not one that commands much respect in either moral philosophy circles or the legal community. It is held in general disrepute for a very obvious reason: it violates the principle that knowingly punishing an innocent party is morally reprehensible. . . . Indeed, it might not be overstating the matter to claim that the principle of collective punishment has met with universal rejection and condemnation in all liberal democratic states.

Irwin Lipnowski, *A Partial Rehabilitation of the Principle of Collective Punishment*, 8 CAN. J.L. & SOC’Y 121, 121 (1993). This is not to deny, of course, that a functional case can be made in certain contexts for collective

morality aside, the argument proves too much. It would not only justify the punishment of corporations but of *any* entity within which lawbreaking occurs. As previously shown, however, entities other than corporations and related business enterprises are not subject to punishment even though such punishment might equally be defended as necessary to induce such entities to monitor and prevent wrongdoing by their employees and members.<sup>44</sup>

Moreover, the idea that criminal liability serves to give corporations needed additional incentives to control the behavior of their employees is incorrect. In the case of individuals, a potential sentence of imprisonment (or even death) affords an additional deterrent for judgment-proof offenders.<sup>45</sup> Corporations, however, cannot be jailed—contrary to the catchy, oft-repeated mantra that some are “too big to jail”—and the main penalty visited upon corporations is monetary fines. This is significant because tort law and civil penalty statutes already give corporations strong monetary incentives to do what they can to police misbehavior by their officers and employees. Indeed, as Professor John Coffee rightly notes, “the inconvenient truth is that the civil law (through both public and private enforcement) seems today to be imposing *significantly higher* penalties than the criminal law.”<sup>46</sup> The threat of criminal punishment simply is not the strong added deterrent for corporations that it is for individuals.<sup>47</sup>

Indeed, corporate criminal liability might actually be counterproductive. The sheer size and scope of many modern corporations make it all but impossible to detect and prevent many instances of employee wrongdoing. Expansive criminal liability for corporations cannot change that fact—but it *can* change the incentive structure of employees. If, as almost certainly is the case, corporations represent far more attractive targets for prosecutors than individual employees, then employees may have reduced incentives to behave lawfully. Employees, particularly those in mid- or lower-level positions, can rationally discount their potential criminal liability, banking on the fact that

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sanctions (including even criminal punishment) if one is unconcerned with “backward-looking moral issues of responsibility and blame.” Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 351 (2003). Those moral issues, of course, are of paramount concern to the criminal law. See *infra* Part III.

44. See *supra* Part I.

45. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1204–05 (1985) (explaining that “the criminal law is primarily designed for the non-affluent”).

46. John C. Coffee, Jr., *Crime and the Corporation: Making the Punishment Fit the Crime*, 47 J. CORP. L. 963, 970 (2022) (emphasis added). Coffee’s further (and equally inconvenient) point is that many corporate prosecutions end in *no fines* being imposed. *Id.* at 971. Corporations can also be punished with debarment and suspension orders excluding them from government contracting programs or even be ordered dissolved, sanctions which can be seen as a kind of corporate death penalty. *Id.* Given the enormous costs that putting a company out of business would impose on innocent employees, shareholders, and creditors, not to mention consumers and government procurement, it comes as no surprise that such penalties are “highly unusual.” BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 150, 156–57 (2014).

47. To the extent the real value of corporate prosecutions is to achieve structural reforms designed to reduce lawbreaking by corporate insiders, there is no reason why civil enforcement actions brought by the government could not provide similar leverage. After all, as Professor Brandon Garrett has demonstrated, the origins of what he describes as “structural reform prosecution” were in *civil* litigation from the 1960s and 1970s. Brandon Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 869–74 (2007). The Justice Department’s pattern-or-practice investigative authority over local police departments and its use of civil RICO suits to purge labor unions of racketeers are more recent examples of the potency of civil litigation to achieve the structural reforms necessary to promote legal compliance within entities. See *supra* notes 29–39 and accompanying text.

prosecutors will prefer to pursue the corporation for huge fines instead of seeking to imprison them.<sup>48</sup> This expectation would tend to lead to more corporate crime, not less.

Now consider the impact that prioritizing corporate over individual prosecution may have on the incentives facing corporations. All things being equal, a higher likelihood of criminal liability should increase incentives to obey the law.<sup>49</sup> Given the unusual features of corporate criminal liability, however, increased focus on corporate prosecution may have the opposite effect.

The key here is that federal criminal liability today is commonplace and widespread. Between 2004 and 2014 alone, for example, hundreds of major corporations (including ten Fortune 100 corporations) reached deferred or non-prosecution agreements with the federal government.<sup>50</sup> This is no coincidence. In the federal system, by virtue of expansive lower-court decisions, corporate criminal liability is so broad that it “makes every Fortune 500 company subject to prosecution, conviction, and punishment.”<sup>51</sup> As a consequence, corporations are powerless “to do anything but beg for mercy when the government comes calling.”<sup>52</sup>

In this climate, the fact that a corporation incurred criminal liability does not signal that it was a “bad” or “reprehensible” corporation. All it means is that the corporation joined the long roster of businesses that became ensnared, at some point, in the exceedingly broad federal criminal net by virtue of employee misconduct.<sup>53</sup> After all, “[t]here exists no mechanism guaranteed to compel compliance with the thousands of commands that make up the federal criminal code. The only guaranteed law-abiding corporation is the defunct one.”<sup>54</sup>

This reality of limitless corporate criminal liability spells doom for efforts to use criminal law’s vaunted “blaming function” as a mechanism for enlisting corporations to

48. According to a review of the deferred prosecution agreements (“DPAs”) and non-prosecution agreements (“NPAs”) entered between 2001 and 2014, individual offenders escaped charges almost two-thirds of the time; in the minority of cases in which individuals were charged, most (58%) of the individual defendants received no jail time. GARRETT, *supra* note 4646, at 96–100. This state of affairs reflects a “paradigm shift” in which federal prosecutors “increasingly attempt to reform institutions themselves rather than impose punitive fines and imprisonment upon individual offenders.” Garrett, *supra* note 47, at 861.

49. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

50. ISAAC GORODETSKI & JAMES R. COPLAND, THE SHADOW LENGTHENS: THE CONTINUING THREAT OF REGULATION BY PROSECUTION i (2014), <https://www.manhattan-institute.org/html/shadow-lengthens-continuing-threat-regulation-prosecution-5898.html> [<https://perma.cc/2Y4P-WNMJ>].

51. Alschuler, *supra* note 6, at 1382; see also *id.* (noting that “[e]very Fortune 500 company presumably has had at least one employee who violated a federal criminal law while carrying out his duties”). For an overview of the ways the lower courts have expanded corporate criminal liability to its logical extremes, see W. Robert Thomas, *Corporate Criminal Law is Too Broad—Worse, It’s Too Narrow*, 51 ARIZ. ST. L. REV. 505, 515–16 (2020).

52. Julie R. O’Sullivan, *How Prosecutors Apply the “Federal Prosecutions of Corporations” Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29, 29 (2014).

53. Professor Miriam Baer puts the point quite well: “corporate criminal liability, as currently constituted in federal jurisdictions, fails to perform the sorting and rehabilitation mechanism that [its supporters] envision. That is, as a legal matter, corporate criminal liability is so broad that it cannot possibly identify those corporations whose cultures are particularly corrupt.” Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL’Y 1, 2 (2010).

54. Miriam H. Baer, *Too Vast to Succeed*, 114 MICH. L. REV. 1109, 1134 (2016).

police wrongdoing by employees. Once it is understood that any corporation could be criminally charged on any given day, the reputational harms from revelations of potential criminal activity within a corporation will quite naturally decline. In fact, studies have found that “the market does not respond negatively to even record penalties [against publicly traded corporations]”—exactly the opposite of what one would expect if criminal liability truly served to stigmatize corporations in the eyes of investors, consumers, and other relevant stakeholders.<sup>55</sup> In the end, then, the result of corporate criminal liability may ultimately be to give corporations in general (and the wealthiest corporations in particular) the perverse incentive to treat the fines resulting from vicarious criminal liability as a mere cost of doing business—and, in the ultimate scheme of things, not a terribly significant one, at that.<sup>56</sup>

The relative insignificance of even major criminal fines may help explain why dozens of corporations (including giants such as Bristol Meyers-Squibb and JPMorgan Chase) have gone on to commit further crimes *after* having previously been targeted (and supposedly rehabilitated) for prior criminal violations.<sup>57</sup> In these cases of corporate recidivism, the Justice Department rarely responds punitively (as prosecutors routinely do, for example, when individual offenders breach plea agreements or violate their conditions of supervised release); instead, it grants repeat offenders further leniency in the form of additional DPAs or NPAs.<sup>58</sup> These actions suggest that *even prosecutors* recognize that repeated offenses by corporations do not suggest institutional fault or incorrigibility but rather the sheer impossibility of preventing all job-related lawbreaking by employees.

The difficulty of preventing employees from committing crimes, even with industry-standard compliance programs, means that corporations cannot rule out the possibility of criminal liability. It does not follow, however, that they are completely powerless to minimize their exposure to corporate penalties. Many crimes that occur within corporations may be hard for enforcers (or plaintiffs’ attorneys) to detect on their own, which is a major reason for the emphasis enforcers place on corporate self-policing and cooperation. Absent immunity or other strong incentives for self-reporting, corporations will have incentives to keep regulators and enforcers from learning that such crimes occurred, in which case the

55. Coffee, *supra* note 46, at 974 n.47. The inescapable conclusion seems to be that “corporate criminal liability just isn’t conventionally stigmatizing in the way that the general criminal law is [for individuals]. We don’t call corporations ‘killers’ when they kill; ‘thieves’ when they steal; ‘arsonists,’ ‘sex traffickers,’ or any of the other vibrantly stigmatic epithets that surround the criminal law.” Mihailis E. Diamantis & W. Robert Thomas, *But We Haven’t Got Corporate Criminal Law!*, 47 J. CORP. L. 991, 1005 (2022).

56. According to a recent empirical analysis, on average, the criminal fines imposed on publicly traded corporations between 2001 and 2012 amounted to a paltry 0.04% of their market capitalization. GARRETT, *supra* note 46, at 63. As Professor John Coffee wryly notes, “[t]hat kind of potential loss is not likely to keep the CEO awake at night.” Coffee, *supra* note 46, at 974. Contrary to claims that indictment alone can drive companies out of business, businesses invariably survive criminal convictions. As a recent empirical study has found: “If it were true that ‘prosecution alone [can] destroy even the most established of companies,’ then at least some of the public companies convicted in the years 2001–2010 should have gone out of business following their convictions. Yet none of them did.” Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 827 (2013) (footnote omitted).

57. See generally PUB. CITIZEN, *SOFT ON CORPORATE CRIME: DOJ REFUSES TO PROSECUTE CORPORATE LAWBREAKERS, FAILS TO DETER REPEAT OFFENDERS* (2019), <https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/soft-on-corporate-crime-dpa-npa-repeat-offenders-report.pdf> [<https://perma.cc/K62K-8UYW>] [hereinafter SOFT ON CRIME].

58. See *id.* at 28–50.

corporation (and the offending employees) may never be called to account for the wrongdoing.<sup>59</sup>

Nonetheless, many supporters of corporate criminal liability insist that corporations deserve blame (and hence the stigma of punishment) if they fail to prevent crimes by their employees. This line of argument takes one of two different forms. In one version, the emphasis is on the moral agency of corporations;<sup>60</sup> the other attempts to elide the issue by instead justifying corporate punishment on “expressive” grounds as a necessary means of communicating societal disapproval of lawbreaking within corporations.<sup>61</sup> Whether these are truly distinctive arguments or merely different ways of making the same retributive point, they are no more convincing than their utilitarian counterparts.

The same blameworthiness arguments might be made of any entity in which criminal activity takes place. Nevertheless, apart from business entities, entities are not subject to criminal liability; only the individuals who used their positions to break the law are.<sup>62</sup> There would seem to be no reason to single out corporations and other business enterprises for criminal liability when police departments, labor unions, and other entities within which lawbreaking occurs face only civil liability for crimes committed by their constituent members. In these other contexts, society evidently is all too content to pass on entity liability as a further opportunity to “express” its disapproval of such lawbreaking.

Furthermore, fault-based efforts to justify punishing corporations miss the point that corporate criminal liability is not based on notions of corporate blameworthiness. As the Supreme Court has made clear from the beginning, the criminal liability of corporations is *not* fault-based but rather vicarious. The fault for which corporations face punishment is that of their officers and employees, based on the familiar tort doctrine of respondeat superior.<sup>63</sup> Accordingly, it is no defense that the corporation either could not have prevented, or forbade or otherwise made reasonable efforts to prevent, the crimes committed by employees. Given that substantive criminal law quite explicitly makes corporate fault legally irrelevant, it is unconvincing to invoke fault as a justification for the current doctrine of corporate criminal liability. To do so is to defend a doctrine that never existed—and, if history is any guide, will never exist—in the federal system.<sup>64</sup>

The foregoing analysis suggests that the debate over corporate criminal liability has been improperly framed. Rather than being a serious effort to balance the scales of justice or reduce the costs of crime in the corporate context, the current doctrine of corporate

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59. See generally Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994).

60. Buell, *supra* note 5, at 495.

61. See, e.g., David H. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Liability*, 49 U.C. DAVIS L. REV. 1235 (2016).

62. See *supra* Part I.

63. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493–95 (1909).

64. Even though federal charging policies instruct prosecutors to consider blameworthiness concerns (such as the extent of wrongdoing within the organization) before charging corporations, it would appear that prosecutors give such concerns little weight in exercising their charging discretion. See generally O’Sullivan, *supra* note 52, at 63–76. Even if prosecutors were more attentive to issues of corporate fault at the charging stage, it would still be the case that the law allows corporate criminal liability, not just in cases of rampant or egregious criminality, but rather in any case where an employee happened to commit a job-related crime benefitting the corporation. If corporate fault is to be the true basis of corporate criminal liability, it should be written directly into substantive law, not left to prosecutorial whim.

criminal liability may be symbolic only—an effort by the legal system to give the appearance of being “tough” on crime within corporations while, in fact, accomplishing little (if anything) toward its stated crime-prevention goal.<sup>65</sup> This is the hallmark of the widely condemned phenomenon of “overcriminalization”—using criminal codes, not to address areas of genuine societal or law-enforcement need, but rather to capitalize on high-profile controversies (such as the collapse of Enron or the BP oil spill in the Gulf of Mexico) and signal the “toughness” of legislators and enforcers.<sup>66</sup>

Viewing corporate criminal liability through the lens of overcriminalization helps explain why supporters so doggedly defend criminal liability despite any indication that punishing corporations serves any purpose that could not just as readily be accomplished through noncriminal means. The sentiment seems to be that the need for society to “express” its disapproval of fraud, environmental crimes, and other unlawful business practices *itself* justifies vicarious corporate punishment, regardless of whether such punishment is a necessary adjunct to individual criminal liability and corporate civil liability.<sup>67</sup> The felt need to use the megaphone of criminal law to make endless symbolic statements condemning “corporate crimes” trumps all other concerns—including concerns that punishing corporations might be pointless or even counterproductive. This is not just overcriminalization; it is overcriminalization on steroids.

### III. CORPORATE CRIMINAL LIABILITY OFFENDS BEDROCK DOCTRINES OF CRIMINAL LAW

In the first year of law school, students are taught that criminal law is qualitatively different from other areas of law. Unlike contract law and tort law, for example, where liability typically is imposed without regard to moral blameworthiness, criminal law demands moral fault—both as a basic prerequisite to conviction and as a limitation on the amount of punishment that may be imposed at sentencing. This intense focus on moral fault is readily evident, students learn, at every stage of the criminal process, from crime definition and the grading of offenses to defenses and sentencing. At each step, the goal is to ensure that only blameworthy persons are branded criminals and that the punishment “fits the crime.” Fortunately, most students do not study corporate criminal liability unless they take advanced courses in criminal law. I say “fortunately” because corporate criminal liability proves the lie to the story students learn in criminal law.

Without a doubt, the current doctrine governing corporate punishment flouts bedrock principles of criminal law. Corporations, unlike individuals, are subject to punishment

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65. Indeed, the Justice Department has been criticized for being “soft” on corporate crime in recent years. See, e.g., SOFT ON CRIME, *supra* note 57. While not using the same terminology, Mihailis Diamantis and Will Thomas suggest as much in their provocative argument that corporate criminal liability is a “myth.” See generally Diamantis & Thomas, *supra* note 55.

66. See generally Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005). For a thorough exploration of the factors that have made overcriminalization so pervasive throughout the nation, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529-33 (2001).

67. See, e.g., Uhlmann, *supra* note 61, at 1242 (stating that “the focus on retributive and utilitarian justifications” for corporate criminal liability “obscures the expressive function of the criminal law and the societal need for condemnation”). To his credit, although Samuel Buell has endorsed what he describes as the “blaming function” of corporate criminal liability, he disclaims the notion that “expressive” concerns alone can justify punishing corporations. Buell, *supra* note 5, at 518–19.

entirely without regard to blameworthiness.<sup>68</sup> It matters not whether a corporation or its leadership knew or should have known of the crimes committed by employees or exercised due diligence to prevent employee lawbreaking; the corporation is guilty anytime lawbreaking beneficial to the corporation occurs anywhere within its ranks. This result, though routine in tort law under the rule of respondeat superior, has no parallel in traditional criminal law doctrines governing responsibility for the conduct of others. The type of liability imposed on corporations, in fact, is nothing short of absolute liability, which has been anathema in criminal law since the emergence of mens rea requirements centuries ago.<sup>69</sup>

It is hornbook criminal law that, in order to be guilty of a crime, offenders must have performed a prohibited act (the actus reus) with a morally blameworthy state of mind (mens rea). As Justice Jackson famously put it in *Morissette v. United States*, crime is a “compound concept” generally requiring a “concurrence of an evil-meaning mind with an evil-doing hand.”<sup>70</sup> As between these two concepts, the mental element is of outsized importance. After all, the prohibited act is often entirely innocuous, such as using the mails<sup>71</sup> or crossing state lines.<sup>72</sup> Especially in such cases, requiring proof that the offender acted with some appropriate level of mens rea is the principal means by which blameless conduct is exempted from punishment.<sup>73</sup>

Corporations have the dubious distinction of being the only type of offender subject to conviction and punishment without any form of mens rea. To convict corporations, prosecutors need not show any mental culpability on the entity’s part; it is enough that persons on its payroll committed a crime in the course of their employment that benefitted the corporation in some manner. Even if the corporation neither knew nor should have known of the lawbreaking by employees—and even if the corporation maintained and strictly enforced policies proscribing the precise actions committed by employees—the corporation is guilty. Indeed, under the controversial “collective knowledge” doctrine followed by some lower courts, corporations can be convicted even if no one individual employee had the requisite mens rea, as long as the collective “bits” of information known to the employees as a whole add up to the requisite mens rea.<sup>74</sup> Needless to say,

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68. I leave to philosophers thorny questions such as whether corporations are entities capable of being blamed or forming mens rea. For helpful recent overviews of these questions, see, e.g., Hasnas, *supra* note 6; W. Robert Thomas, *How and Why Corporation Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. L. REV. 479, 491–505 (2018).

69. See generally Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 982–1004 (1932) (tracing the evolution of mens rea requirements after the separation of criminal law from torts). “Absolute liability” must be distinguished from strict liability. Strict-liability crimes dispense with mens rea requirements for one or more elements of the offense but require mens rea (and, often, high levels of mens rea) for others. Absolute liability, by contrast, dispenses with mens rea requirements for *all* elements of the crime, rendering offenders guilty simply upon proof that they (or, in the case of vicarious liability, someone else) committed the prohibited acts. The Model Penal Code is clear that absolute liability has no place in criminal law. MODEL PENAL CODE § 2.05(2)(a) (AM. L. INST. 1962).

70. *Morissette v. United States*, 342 U.S. 246, 251 (1952).

71. See 18 U.S.C. § 1341 (mail fraud statute).

72. See, e.g., 18 U.S.C. § 1952 (Travel Act).

73. Despite the large, confusing universe of mens rea terms used in common law jurisdictions over the centuries, the Model Penal Code identifies four different levels of mens rea. From most to least culpable, these are “purpose,” “knowledge,” “recklessness,” and “negligence.” MODEL PENAL CODE § 2.02 (AM. L. INST. 1962).

74. See generally Thomas, *supra* note 51, at 213 (discussing conflicting precedents concerning “collective

supporters of corporate criminal liability would object to the notion that corporations are being punished without mens rea. In their view, the corporation is merely being held vicariously liable for the crimes of its employees. In effect, the guilt of the employees—their criminal acts *and* their culpable states of mind—are attributed to the corporation. Thus, corporations did have mens rea, in keeping with *Morissette*.

This line of argument is not only incorrect but misconceives the very nature of the mens rea requirement in criminal law. *Conduct* is often attributed from one offender to another in criminal law. Unlike conduct, however, mens rea cannot be imputed from one actor to another. By its very nature, it must exist within the mind of the particular offender facing punishment.<sup>75</sup>

*Pinkerton* doctrine nicely illustrates that criminal intent is not transferred among offenders. Under *Pinkerton v. United States*,<sup>76</sup> each member of a conspiracy is criminally responsible for ancillary crimes committed by other conspirators if those crimes were both reasonably foreseeable and committed in furtherance of their shared criminal objective. Critically, however, only the “acts in furtherance of the conspiracy” are “attributable to the others for the purpose of holding them responsible for the substantive offense.”<sup>77</sup>

The mens rea with which ancillary crimes were committed by others, however, is *not* attributed to co-conspirators under *Pinkerton*.<sup>78</sup> Rather, each co-conspirator is punished based solely on his or her own state of mind. As the *Pinkerton* Court explained, “when the substantive offense is committed by one of the conspirators . . . [t]he criminal intent to do the act is established by the formation of the conspiracy.”<sup>79</sup> *Pinkerton* thus makes clear that, although a conspirator can be convicted for the conduct of other conspirators, criminal intent must exist in the mind of the offender and is not transferred among conspirators.

The need for personal culpability is a fundamental distinction between criminal law and torts. Purely vicarious liability “violates the most deep-rooted traditions of criminal law” by “departing . . . from the fundamental, intensely personal, basis of criminal liability.”<sup>80</sup> As a leading treatise explains, “it is one thing to hold that the faultless employer ought to pay for the damage which his employee (often impecunious) inflicts upon third persons in the course of furthering his employer’s business; it is much more drastic to visit criminal punishment and moral condemnation upon the employer who is innocent of any personal fault.”<sup>81</sup> It was, therefore, a grievous mistake for the Supreme Court in *New York Central & Hudson River Railroad Co. v. United States*<sup>82</sup> to import tort law’s conduct-attribution rule of respondeat superior into criminal law as the touchstone of corporate liability.

Moreover, corporate criminal liability does not fit easily with criminal law’s other doctrines governing responsibility for the conduct of others. There are two discrete

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knowledge” doctrine).

75. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 13.4 (Oct. 2020) (explaining that “with vicarious liability it is the need for a personal actus reus that is dispensed with”).

76. 328 U.S. 640 (1946).

77. *Id.* at 647 (emphasis added).

78. *Id.*

79. *Id.*

80. Francis Bowen Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 702 (1930).

81. LAFAVE, *supra* note 75, § 13.4.

82. 212 U.S. 481 (1909).

problems here. First, apart from the peculiar case of corporations, offenders who are not blameworthy in their own right cannot be subjected to felony convictions or nontrivial penalties based on the conduct of others. Second, where they are legally responsible for the conduct of others, offenders can be convicted only for the *crimes* of others; criminal law does not operate, as corporate criminal liability does, to allow punishment for the *noncriminal* actions of others.

*Pinkerton* doctrine and the felony-murder rule—which are sometimes cited in support of corporate criminal liability<sup>83</sup>—afford ready examples. As previously explained, *Pinkerton* liability does not attach unless the offender specifically intended to commit the crime that is the object of the conspiracy. Even that high level of *mens rea* is not enough, however. *Pinkerton* liability additionally demands that the conspirators were at least negligent as to the possibility (that is, reasonably should have known) that their confederates might commit the ancillary crimes in pursuit of their shared criminal goals.<sup>84</sup> Just as it does not transfer criminal intent among offenders, *Pinkerton* doctrine does not allow punishment in the absence of personal blameworthiness.

Felony murder operates in the same manner. The felony-murder rule holds all participants in a felony responsible for a death that occurs in connection with the underlying felony, even if another felon did the killing and, more controversially, even if the killing was an effort by an uninvolved third party to thwart the felony. In cases where a felon did the killing, the homicidal act is easily attributed to the felons on the theory (similar to *Pinkerton* doctrine) that the killing was committed in furtherance of the felony all the participants were intentionally committing. Cases where someone outside the felony committed the killing, however, have proved more controversial.<sup>85</sup>

Regardless of who actually did the killing, it is clear that persons can be convicted of felony murder only if they were seriously blameworthy in their own right. The *mens rea* for felony murder is not imputed from the actual killer to the other felons but rather comes from each felon's specific intent to commit the felony during which the killing occurred. Indeed, courts have demanded even greater moral culpability by limiting the felony-murder rule to felonies that are “inherently dangerous” to human life, a limitation implying that persons guilty of felony murder were at least negligent as to the risk that their conduct could result in fatalities.<sup>86</sup> As a result, the felony-murder rule does not dispense with the requirement of personal blameworthiness. On the contrary, to be guilty of felony murder, all offenders must have had a seriously blameworthy state of mind in their own right, even if that state of mind differs from the precise *mens rea* ordinary homicide principles would require.<sup>87</sup>

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83. See, e.g., Beale, *supra* note 4, at 1489.

84. *Pinkerton*, 328 U.S. at 648.

85. Some courts, adhering to what is known as the “agency rule,” refuse to apply the felony-murder rule in this situation. These courts have ruled that felons cannot be punished for a killing committed by third parties in opposition to the felony. Other courts take the broader “proximate cause” view that even killings by uninvolved third parties are within the rule because the felons set in motion a chain of events that foreseeably led to the loss of life. See generally WAYNE R. LAFAVE, CRIMINAL LAW § 14.5(d), at 790–96 (4th ed. 2003).

86. See *id.* § 14.5(b), at 787–89.

87. All that said, the felony-murder rule remains controversial, and rightly so. The problem is not that the rule allows morally blameless persons to be punished for murder. It does not. Rather, the rule is controversial because it produces disproportionately severe punishment for blameworthy offenders: intent to commit the felony during which a killing happens to occur is blameworthy but not *sufficiently* blameworthy to justify the severe

Broader accomplice liability principles accord with *Pinkerton* and felony murder in their demand for personal blameworthiness. For example, under the “aiding and abetting” statute,<sup>88</sup> an accomplice—someone who encourages or assists in the commission of a crime by another—is guilty of the resulting crime. Aiders-and-abettors, in other words, are punished for the unlawful actions of the person whose crimes they encouraged or assisted. Nevertheless, the mens rea of the perpetrator is not attributed to the aider-and-abettor. Instead, the accomplice is punished based on his or her own blameworthy state of mind.<sup>89</sup> Thus, as a leading criminal-law treatise explains, “[u]nder the general principles applicable to accomplice liability, there is no such thing as liability without fault.”<sup>90</sup>

The differences between corporate criminal liability and the traditional doctrines allowing punishment for the conduct of others could hardly be starker. In contrast to the Model Penal Code’s much narrower rule,<sup>91</sup> prevailing doctrine requires no culpability on the corporation’s part whatsoever. Based on the fiction that corporations act, not just through their boards of directors and C-suite officers, but rather through each and every employee on their payrolls, current doctrine imputes to corporations both the criminal acts *and the criminal states of mind* of their employees. This is in sharp contrast to the traditional bases for punishment based on the conduct of others (such as *Pinkerton* doctrine, the felony-murder rule, and accomplice liability more generally), which permit persons attributed the criminal acts of others to be convicted only if they personally had a seriously blameworthy state of mind in their own right.

The one exception, outside of corporate criminal law, allowing punishment to be imposed on entirely blameless offenders involves the controversial category of crimes known as “public welfare offenses.” Public welfare offenses impose strict liability on persons or firms engaged in hazardous activities in the event they fail to prevent dangers to the public health and safety from materializing.<sup>92</sup> In the corporate context, liability extends beyond the persons who actually created the public danger to high-ranking corporate officials who, by virtue of their positions, could have prevented the violations from occurring.<sup>93</sup> In such cases, it is no defense that the firm or its responsible corporate officers did not know, or could not have known, that the dangerous conditions existed.<sup>94</sup> They are vicariously and strictly liable for failing to prevent the commission of public

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penalties for murder. In prior work, I have argued that mens rea doctrine should seek to prevent disproportionately severe punishment, separate and apart from the related problem of punishment without blameworthiness. *See generally* Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127 (2009).

88. 18 U.S.C. § 2.

89. As the Supreme Court has ruled, an aider-and-abettor must have acted “with the intent of facilitating the offense’s commission” in order to be guilty. *Rosemund v. United States*, 572 U.S. 65, 71 (2014).

90. LAFAVE, *supra* note 75, § 13.4, at 683.

91. *See* MODEL PENAL CODE § 2.07 (AM. L. INST. 1962).

92. *See generally* *Morissette v. United States*, 342 U.S. 246 (1952) (recognizing the category of public welfare offenses). Prosecutions for public welfare offenses were much more common in the past than today. A recent example is *United States v. DeCoster*, 828 F.3d 626 (8th Cir. 2016), in which the owners of an egg production firm were convicted of misdemeanor violations of the Federal Food, Drug, and Cosmetics Act based on the firm’s shipment of salmonella-tainted eggs in interstate commerce.

93. *See* *United States v. Park*, 421 U.S. 658, 673–75 (1975) (applying “responsible corporate officer” doctrine).

94. *See* *United States v. Dotterweich*, 320 U.S. 277, 280–81 (1943) (stating that public welfare offenses “[i]n the interest of the larger good . . . put[] the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger”).

welfare offenses by employees—which, admittedly, sounds analogous to corporate criminal liability.

Even so, corporate criminal liability sweeps well beyond the bounds of the permissible for public welfare offenses. By definition, public welfare offenses are not traditional crimes; they essentially constitute civil regulation through nominally criminal means. As the Supreme Court held in *Morissette v. United States*, public welfare offenses involve low penalties (typically “small” fines or short terms of imprisonment) and low stigma.<sup>95</sup> Because public welfare offenses more closely resemble civil penalties than traditional crimes, they have significantly reduced standards of mental culpability. By contrast, felonies and other crimes that carry “severe” penalties are not public welfare offenses and thus are fully subject to “the usual presumption that a defendant must know the facts that make his [or her] conduct illegal” in order to be subject to punishment.<sup>96</sup>

The existence of public welfare offenses provides no support for corporate criminal liability. Corporations do not merely face “small” penalties in the event of conviction. They routinely are subjected to felony punishments and made to pay millions (and sometimes billions) of dollars in fines, not to mention other potentially severe sanctions such as suspension and debarment from federal government contracts and programs. Corporate criminal liability is far from civil regulation through nominally criminal means; it encompasses very serious crimes—crimes for which individual employees would face years (or even decades) in prison.<sup>97</sup> These are not the kind of punishments that may be imposed without a guilty mind.

The “collective knowledge” doctrine of corporate criminal liability represents another divergence from traditional doctrines governing punishment for the actions of others. That doctrine exposes corporations to punishment even if no one employee has the state of mind necessary to be guilty of a crime.<sup>98</sup> In all other related contexts in criminal law, however, the offender’s guilt is derivative in nature, meaning that the offender can be punished for the actions of others only if those actions committed a crime.<sup>99</sup> The purpose and effect of the collective knowledge doctrine is to subvert this sound limitation on derivative criminal liability by allowing corporations to be convicted when no individual employee committed an offense, producing, ironically, a broader scope of liability than even tort law would allow.<sup>100</sup>

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95. 342 U.S. at 256 (noting that, with public welfare offenses, “penalties commonly are relatively small, and conviction does no grave damage to an offender’s reputation”).

96. *Staples v. United States*, 511 U.S. 600, 618–19 (1994).

97. As Professor Sara Sun Beale has noted: “In recent years, some white-collar defendants have received very long sentences, including twenty-five years for Bernard Ebbers (former CEO of Worldcom) and twenty-four years for Jeffrey Skilling (former CEO of Enron). Critics charge that some of these sentences exceed the maximum sentences available under state law for violent crimes as well as the sentences imposed in the federal system for particular cases involving organized crime or terrorism.” Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1518–19 (2007).

98. See Thomas, *supra* note 51 (discussing the collective knowledge doctrine).

99. To give an obvious example, encouraging or assisting in the performance of an act that is lawful does not result in criminal liability for aiding and abetting. Similarly, *Pinkerton* doctrine only allows conspirators to be punished for co-conspirators actions that constitute crimes.

100. In torts, an employer is not vicariously liable unless one or more employees committed a tort. See RESTATEMENT (SECOND) OF AGENCY § 219 (AM. L. INST. 1958) (describing the legal doctrine of *respondeat superior*). The collective action doctrine, by contrast, allows corporations to be punished when no one employee committed a crime.

In short, traditional criminal law doctrines provide no support for punishing corporations without proof of fault on their part (as distinct from their offending employees) or for punishing corporations when there is no single employee guilty of a crime. Punishing corporations in these ways is to impose absolute liability antithetical to long-established principles of criminal law. Indeed, in its present form, corporate criminal law constitutes nothing less than guilt by association, with the corporation being punished simply for having hired employees who, unbeknownst to it, would at some future time perform their duties in an unlawful manner.<sup>101</sup> As the former Director of the federal Enron Task Force has written, that “extreme view” of corporate blameworthiness “has never been a part of our shared values regarding criminal corporate law and has been rejected by law enforcement and regulatory agencies.”<sup>102</sup>

#### CONCLUSION

For more than a century, the blunderbuss of criminal law has been used in the federal system, more or less indiscriminately, against corporations. Corporations are punished, not just for high-level or widespread criminality, but for any criminal activity by any employees within the scope of their employment. The roster of corporations that have come within the sights of federal prosecutors reads like a veritable “Who’s Who” of big business, with corporations routinely being required to pay billions of dollars in criminal fines and adopt compliance structures dictated by prosecutors who have no expertise either in business or corporate governance. Nevertheless, we are still said to be awash with crimes within corporations.<sup>103</sup> Why?

This Article suggests an answer: perhaps we have been approaching the problem of criminality within corporations in the wrong way. Instead of focusing on the root of the problem—which is *employees* choosing to perform their functions in an unlawful manner—we have demonized and pursued corporations whenever unlawful activity happens to occur anywhere within their ranks. Corporations are thus cast in the unenviable role of the “fall guy”—or, as Professor Brandon Garrett put it, the “scapegoat”<sup>104</sup>—which all too often take the heat in the place of their guilty employees.

Shifting the enforcement focus, as current doctrine and enforcement policies do, away from lawbreaking individuals to the corporations that employ them has greatly undermined the deterrent effect of the criminal law on corporate employees. In an enforcement climate that so strongly favors prosecuting corporations, most corporate employees are not prosecuted when they break the law—and, in the comparatively rare cases when they are, the sentences are usually remarkably light.<sup>105</sup> Reduced incentives for employees to obey the law naturally lead to continued lawbreaking within corporations because, for the individuals, the short-term benefits of committing business crimes exceed the expected

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101. This is why corporate criminal liability has been likened to ancient forms of punishment long since abandoned as barbaric. See Alschuler, *supra* note 6 (discussing deodand and frankpledge as the discredited antecedents of corporate criminal liability).

102. Andrew Weissmann & David Newman, *Rethinking Corporate Criminal Liability*, 82 IND. L.J. 411, 412 (2007).

103. See, e.g., Uhlmann, *supra* note 61, at 1282 (stating that “corporate crime occurs with alarming regularity”).

104. Brandon Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1790 (2015).

105. See Garrett, *supra* note 47.

value of punishment.

Furthermore, broad corporate criminal liability has stripped this area of criminal law of its most precious commodity: its ability to stigmatize offenders for violating societal norms.<sup>106</sup> Ignoring the mantra that “if everyone is a criminal, no one is,” we have cast such a broad criminal net for corporations, and vested prosecutors with such sweeping power over corporate America, that there simply is no way for corporations to avoid criminal liability. With so many leading corporations having been punished criminally, punishment no longer stigmatizes corporations as “bad” or “reprehensible,” and corporate criminal fines have become just another cost of doing business in over-criminalized America.

In theory, it might be possible to reform corporate criminal liability to focus narrowly on areas where high-ranking corporate officials encouraged or sanctioned criminal behavior by employees. In practice, however, that middle ground is nonexistent. Overcriminalization is simply too entrenched in American law, which essentially operates as a “one-way ratchet” in favor of expanded criminal liability and harsher punishments.<sup>107</sup> Certainly, the Justice Department can be counted on to oppose any efforts to limit its authority to extract billions of dollars in fines and other concessions from corporate America and to force it to do the hard (but vital) work of pursuing the many individuals on corporate payrolls who break the law yet usually escape punishment.<sup>108</sup>

The only satisfactory solution, I believe, is to abolish corporate criminal liability outright. Stripped of the ability to use high-profile proceedings against corporations to give the appearance of being “tough” on business crimes, prosecutors will have to roll up their sleeves and vigorously pursue the individuals who abuse their corporate positions to break the law. More importantly, without the smoke and mirrors of headline-grabbing corporate prosecutions to distract public attention from the regulatory failures that allowed the Gulf oil spill, the Enron scandal, and similar disasters to occur, it is more likely that lawmakers will invest in more robust civil regulation of businesses to prevent environmental catastrophes, frauds, and other public harms from occurring.<sup>109</sup> The only question is whether we truly want to safeguard the public or if we will remain content simply to continue “expressing” our disapproval of business crimes and scapegoating corporations while allowing guilty employees all too often to escape the punishment they so richly deserve.

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106. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468–78 (1997).

107. Stuntz, *supra* note 66, at 509.

108. Tellingly, though, a number of prominent former prosecutors who earned reputations for being quite tough on business crimes have joined the chorus that corporate criminal liability is too harsh and should be drastically reformed. See, e.g., Preet Bharara, *Corporations Cry Uncle and the Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 73–74 (2007); Larry D. Thompson, *The Blameless Corporation*, 47 AM. CRIM. L. REV. 1251, 1255 (2010); Weissmann & Newman, *supra* note 102.

109. For an insightful discussion of how overemphasis on criminal law has reduced the focus on proactive administrative regulation of businesses, see Darryl K. Brown, *Criminal Law's Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 677–82 (2011).