

The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability

by John Hasnas*

I. Introduction

There could be no more appropriate time for a symposium examining the theories of corporate criminality than this, the one hundredth anniversary of *New York Central & Hudson River R.R. Co. v. United States*,¹ the Supreme Court decision that created corporate criminal liability. We have now had a century of experience with the assignment of criminal responsibility to corporate entities. In this article, I will contend that the experience has not been a happy one.

Although it may be anomalous in a symposium on theories of corporate criminality, I will argue that there is *no* theoretical justification for corporate criminal liability. Indeed, I will argue that the assignment of criminal responsibility to corporate entities is a direct violation of the theoretical structure of Anglo-American criminal law that has had extraordinarily pernicious effects in practice. In short, I will argue that *New York Central* was a mistake when it was decided, remains a mistake today, and should be explicitly overruled.

I fully appreciate that such an argument is unlikely to carry the day. Advocating for the reversal of a hundred year old precedent that is the foundation for much of federal criminal

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¹212 U.S. 481 (1909).

jurisprudence and law enforcement policy is certainly a bit quixotic. Few precedents are so deeply entrenched and have been so repeatedly affirmed in subsequent decisions. Hence, the prospects of the judiciary succumbing to the force of my arguments are not good.² Nevertheless, the process by which society determines who should be subjected to criminal punishment should not be like jazz, which I once heard defined as the musical form in which one legitimizes a mistake by repeating it. Hence, to the barricades I must go.

II. Moral Responsibility

Criminal law is penal law. Its purpose is punishment. It is not designed to compose disputes, provide compensation to wronged parties, or impose administrative sanctions. It is designed to punish.

Criminal law's punitive purpose limits the range of 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.³ Consequently, moral responsibility is 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. A reasonable starting point for our analysis, then, is the question of whether corporations,⁴ separate and apart from the individual human beings who

²This has been recently confirmed by the Second Circuit Court of Appeal's summary dismissal of a challenge to the *New York Central* standard of corporate criminal liability in *United States v. Ionia Management S.A.*, 555 F.3d 303 (2009).

³For a definition of moral responsibility, see *infra* text accompanying note ?.

⁴For purposes of concision and convenience, I will employ the term 'corporation' to refer not merely to businesses that have gone through the formal process of incorporation, but to business organizations generally, regardless of their legal form. What is commonly referred to as corporate criminal liability applies to partnerships and other unincorporated business organizations as well as corporations. My critique of such liability is intended to be equally general.

comprise them, can be deserving of punishment. Are corporations morally responsible agents?

An examination of the philosophical literature reveals that this is a matter of some controversy. Some scholars argue that moral responsibility can indeed be attributed to corporate entities. For example, Peter French argues that because corporations possess internal decision structures by which corporate policy is determined, corporations can be said to act intentionally whenever they act in accordance with the output of these decision structures.⁵ This, he claims, is sufficient for corporations to constitute “full-fledged moral persons” that can be morally responsible for their actions.⁶ Others have argued somewhat more modestly that although not full moral persons, corporations can be moral agents that can bear moral responsibility for their actions. Thus, Thomas Donaldson argues that corporations qualify as morally responsible agents because they have “[t]he capacity to use moral reasons in decision-making [and are] capable of controlling the structure of [their] policies and rules;”⁷ Patricia Werhane argues that as the authors of the “secondary actions” they authorize their agents to take, corporations “are and should be held morally responsible for actions within their control when . . . they could have acted otherwise;”⁸ and Michael J. Phillips argues that because corporations are capable of taking actions that no natural person can be said to have caused, intended, or been reckless or negligent with

⁵Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 211 (1979).

⁶*Id.* at 215.

⁷THOMAS DONALDSON, CORPORATIONS AND MORALITY 30 (1982).

⁸PATRICIA H. WERHANE, PERSONS, RIGHTS, AND CORPORATIONS 59 (1985).

regard to, they are best understood as “real entities” capable of bearing moral responsibility.⁹

Many other scholars argue that it is logically incoherent to attribute moral responsibility to corporations.¹⁰ Manuel Velasquez presents a particularly compelling version of this argument.¹¹ Beginning with the observation that “[m]oral responsibility is the kind of causal responsibility that we attribute to an agent when the agent acts intentionally,”¹² Velasquez argues that it is absurd to attribute moral responsibility to corporations because 1) corporations are not agents, 2) corporations are not causally responsible for the actions of their employees, and 3) corporations do not act intentionally.

For corporations to be agents, it must be the case that “the corporate organization is a real individual entity that acts on the world and that is distinct from its members.”¹³ Velasquez points out that the various arguments designed to establish that corporations are such real individual

⁹Michael J. Phillips, *Corporate Moral Personhood and Three Conceptions of the Corporation*, 2 *Bus. Ethics Q.* 435, 453 (1992). See also, Kenneth E. Goodpaster & John B. Mathews, Jr, *Can a Corporation Have a Conscience?* 60 *HARV. BUS. REV.* 132 (1982); David T. Ozar, *The Moral Responsibility of Corporations*, in *ETHICAL ISSUES IN BUSINESS: A PHILOSOPHICAL APPROACH* 294 (Thomas Donaldson & Patricia Werhane eds., 1979); Robert J. Rafalko, *Corporate Punishment: A Proposal*, 8 *J. BUS. ETHICS* 917, 924 (1989).

¹⁰See, e.g., Michael Keely, *Organizations as Non-persons*, 15 *J. VALUE INQUIRY* 149 (1979); John R. Danley, *Corporate Moral Agency: The Case for Anthropological Bigotry*, in *BUSINESS ETHICS* 202 (W. Michael Hoffman & Jennifer Mills Moore eds., 2d ed., 1990); John Ladd, *Persons and Responsibility: Ethical Concepts and Impertinent Analyses*, in *SHAME, RESPONSIBILITY, AND THE CORPORATION* 77 (Hugh Curtler ed., 1986); Larry May, *Vicarious Agency and Corporate Responsibility*, 43 *PHIL. STUDIES* 69 (1983).

¹¹Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 *BUS. ETHICS Q.* 531 (2003).

¹²*Id.* at 532.

¹³*Id.* at 538.

entities all rest on the demonstrably false premise that “[i]f X has properties that cannot be attributed to its individual members, then X is a real individual entity distinct from its members.”¹⁴ He notes that all collections of objects have properties that are not attributable to its individual members. For example, a pile of sand can be large even though no individual grain of sand is large. In fact, one commits the logical “fallacy of division” by attributing the characteristics of a collection to its members. Thus, although “many of the properties that can be attributed to a corporate group cannot be attributed to its individual members, . . . this fact does not turn the corporate organization into a new real individual entity any more than any random collection of objects is constituted into a new individual entity by the fact that it has characteristics that cannot be attributed to its members.”¹⁵

Velasquez further contends that the arguments designed to show that corporations can be causally responsible for the actions of their employees rest on a similarly fallacious assumption—the assumption that because corporate actions are not the actions of any particular individuals, the corporations, and not their individual members, must be causally responsible for such actions.¹⁶ He neatly demonstrates the fallacy contained in this assumption with the illustration of a child’s wind up toy—the toy’s actions are not the actions of the child, but the child who winds up the toy, and not the toy itself, is nevertheless causally responsible for the toy’s movements. Velasquez points out that corporations can act only when the individuals who comprise them act. Thus, “where A is an organizational act that can be predicated truly of an

¹⁴*Id.* at 539.

¹⁵*Id.* at 540.

¹⁶*Id.* at 543.

organization, but not necessarily of any individual member, there is always some individual member or members of the organization [that] are causally responsible for A.”¹⁷

Velasquez recognizes that corporations can exert causal influences on their employees in the sense that “when individuals gather together in groups they can get each other, or lead each other, to behave in ways that none would engage in if she was acting alone.”¹⁸ But since this effect is fully explainable in terms of “the interior desires and beliefs of the individuals in the organization that are leading them to behave as they do,”¹⁹ there is no need to postulate “some kind of ghostly organizational spirit that is present in the organization and that somehow exerts external pressures and forces on its members.”²⁰

Finally, Velasquez argues that corporations can be said to act intentionally in a metaphorical sense only. He recognizes that “[i]ntentional properties, such as purposes and beliefs, can be attributed to groups on the basis of a pattern which the activities of its members exhibit.”²¹ But this does not mean that “the collection has real intentions in a literal sense.”²² We frequently speak of markets as “trying” to find a bottom, but that does not imply that the market is literally capable of intentional action. This situation is not altered by the fact that advocates of the moral responsibility of corporations frequently identify intentional corporate action with the

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.* at 544.

²⁰*Id.*

²¹*Id.*

²²*Id.* at 545.

results of the procedures and policies that constitute a corporation's internal decision structure. As Velasquez points out, "there is nothing about procedures and policies that can enable them to transform a metaphorical intention into a real one. Procedures and policies, however simple or complex, cannot create group mental states nor group minds in any literal sense."²³ Hence, "we have no reason to abandon the intuitive and plausible view that group intentions are metaphorical, in favor of the counterintuitive view that group intentions are literal."²⁴

In my judgment, Velasquez and the other critics of corporate moral responsibility have much the better of the argument. If I am right about this, then we are done. Moral responsibility is a necessary condition for punishment. If corporations are not morally responsible agents, then corporations are not a proper subject of criminal punishment. There may be good reasons for holding them civilly liable for the torts of their employees,²⁵ for imposing regulations on their behavior, and for applying administrative sanctions to their regulatory violations, but there are none for punishing them. No theory of corporate criminal liability can justify punishing an entity that is not capable of morally blameworthy behavior. If Velasquez and the other critics are correct, then for the last one hundred years the American criminal justice system has been making a fundamental category mistake in visiting criminal punishment on corporations.

As convincing as Velasquez's argument is, it would be ill-advised to let the argument against corporate criminal liability rest on it alone. In the first place, doing so would produce an inappropriately abbreviated article. In the second, it would provide those not convinced by

²³*Id.* at 546.

²⁴*Id.*

²⁵*See* DAN B. DOBBS, *THE LAW OF TORTS* 907-10 (2000).

Velasquez's argument with no reason to oppose corporate criminal liability. And there are many good reasons to oppose corporate criminal liability in addition to its fundamental incoherence. Therefore, let us pass on to an examination of these reasons.

III. The Difference Between Moral and Criminal Responsibility

Moral responsibility is a necessary condition for criminal punishment, but it is not a sufficient one. We apply the criminal sanction only to morally blameworthy conduct, but we do not apply it to all morally blameworthy conduct. Criminal responsibility is not the same thing as moral responsibility, and the range of application of the criminal sanction is not co-extensive with the range of application of the moral sanction.

There is a principled difference between moral and criminal responsibility. Moral responsibility indicates that one is deserving of punishment. Criminal responsibility authorizes some human beings to punish others. Criminal responsibility inherently involves an element of human agency that moral responsibility does not.

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

The case is different when we make a determination of criminal responsibility. Such a determination requires not only a finding that an agent has acted in a manner deserving of punishment, but also that it is proper for government officials to impose punishment upon the agent. Here, we are necessarily concerned with the actions of two parties, the wrongdoer and the

government enforcement agents. Unless the enforcement agents are both omniscient and incorruptible, the class of cases in which the wrongdoer has behaved culpably can not be coextensive with the class of cases in which the imposition of the criminal sanction is justified. There will always be some cases in which the effort to impose punishment on a class of wrongdoers who morally deserve it would subject the public to an unacceptable risk of harm from the errors or venality of the human beings charged with enforcing the law. If the criminal justice system were guaranteed to be administered with godlike perfection, then the realms of criminal responsibility and moral responsibility would coalesce. But this is not the world we live in. Thus, determinations of criminal responsibility must always consider practical matters of administration that determinations of moral responsibility ignore.

The distinction between criminal and moral responsibility does not derive from any provision of the United States Constitution or philosophical argument about the value of a free society. It derives from the internal logic of the criminal law itself. The purpose of the criminal law is to provide an orderly society in which citizens are secure in their the persons and property; to protect citizens against harm from the other members of society. Obviously, to accomplish this end, it must protect citizens against threats to their persons and property from other members of society acting in their individual capacities; it must provide protection against “criminals.” However, it would be pointless to do so in a way that left citizens exposed to threats to their persons and property from the individuals acting as governmental enforcement agents. To serve its purpose, the criminal law must be structured to provide citizens with the optimal amount of protection to their persons and property against invasion from *all* other members of society, whether acting individually or officially.

The need for protection against the human beings who administer the criminal justice system explains why criminal responsibility is *inherently* different from moral responsibility. Moral responsibility is an all or nothing affair. One has or has not acted in a morally blameworthy manner. If one has, he or she is liable to moral censure. Criminal responsibility, on the other hand, always involves a balancing of competing interests. Because the criminal law is administered by human beings who are as error-prone and susceptible to temptation as anyone else, every gain in protection against criminal activity that comes from more effective enforcement measures produces a loss in protection against ill-considered or improper official action. Conversely, every enhancement in protection against the state reduces governmental agents' ability to provide protection against individual criminals. Theorists can and do argue about where the line should be drawn to realize the optimal level of protection, but the line must be drawn somewhere. Thus, judgments of criminal responsibility necessarily involve a weighing of competing interests that judgments of moral responsibility do not.

IV. The Standard of Criminal Responsibility

The distinguishing feature of criminal responsibility is that it authorizes government officials to deprive citizens of their liberty, their property, and in some cases, their lives. Thus, any attribution of criminal responsibility carries with it an inherent danger—the danger that enforcement error or abuse will wrongfully deprive an innocent person of his or her life, liberty, or property. Consequently, the standards by which we assign criminal responsibility necessarily depend on the extent to which we are willing to incur this danger. How much risk of punishing the innocent are we willing to run in return for more effective law enforcement?

In the United States, the answer has traditionally been, “not very much.” The Anglo-

American system of criminal law is specifically designed to minimize this risk. The presumption of innocence, the prosecutorial burden to prove every element of a crime beyond a reasonable doubt, and the requirement of a unanimous jury verdict for conviction are all structural features of the criminal law that make it more difficult to punish the guilty in order to reduce the risk of improperly punishing the innocent. Indeed, Constitutional protections such as the right to trial by jury, to be represented by counsel, to confront one's accuser and be informed of the charges brought against one, and to be free from compulsion to testify against oneself and from double jeopardy were all originally derived from the common law of crime.²⁶ Taken together, these features create an inherent liberal bias in Anglo-American criminal law that is embodied in William Blackstone's oft-quoted aphorism that "it is better that ten guilty persons escape than that one innocent suffer."²⁷

This liberal bias reflects an underlying judgment that an abusive state constitutes a greater danger than do individual criminals. Even in a relatively lawless society, citizens can act to protect themselves against theft and injury. Installing burglar alarms, purchasing a gun, forming a neighborhood watch group, and hiring private security services are all steps citizens can take to protect themselves against the criminal activity of their fellows. However, there is little citizens can do to protect themselves against abuse by state officials. Self-help against official action is itself illegal. The only redress available against the state is an appeal to the state itself. This makes the danger of a state that has slipped its bonds significantly greater than that posed by even the most malicious of criminals.

²⁶*See, e.g.*, LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT ch. 1 (1968).

²⁷4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch 27. *352.

As noted in Section III, the nature of criminal responsibility requires a balancing of competing interests—the interest in protecting citizens against harm caused by their fellow citizens must be balanced against the interest in protecting citizens against improper punishment by the state. The inherent liberal bias of the criminal law instructs that the balance be drawn in favor of the interest in protecting citizens against the state. Thus, criminal responsibility must be carefully circumscribed within boundaries that minimize the risk of wrongful conviction. These boundaries may be translated into a set of three necessary conditions for the application of the criminal sanction: 1) Criminal sanctions may be applied only when doing so advances a legitimate purpose of punishment, 2) Criminal sanctions may be applied only when doing so does not create an unacceptable risk of prosecutorial error or abuse, and 3) Criminal sanctions may be applied only where necessary to address a public harm. If you will, these conditions may be said to “operationalize” the inherent liberal bias of the criminal law.

The first of these necessary conditions follows directly from the nature of criminal law. Criminal law is penal law. It is designed to punish wrongdoing. Hence, its sanction should be applied only where doing so advances the purpose of punishment. Unfortunately, precisely what constitutes the purpose of punishment remains a matter of perennial dispute among legal theorists and philosophers. One school of thought argues that it is retribution, the process of requiting evil with evil in which harm is imposed on a wrongdoer in recompense for or in dissipation of the harm that he or she has done. Another school of thought argues that the purpose of punishment is deterrence, which involves inflicting an evil on a wrongdoer to discourage others from committing similar wrongful acts. Some scholars argue that the purpose of punishment is rehabilitation, which involves imposing treatment designed to reform one’s character on a wrongdoer to ensure that he

or she will behave better in the future.²⁸ But regardless of which one (or combination) of these schools of thought is correct, punishment is justified only if it serves at least one of these purposes.

The second necessary condition indicates that there are cases in which criminal punishment is inappropriate even though one of the purposes of punishment would be advanced. These are the cases in which permitting punishment produces an unacceptably high risk of wrongful conviction due to the fallibility or venality of the human beings who act as law enforcement and prosecutorial agents. At the very least, this condition requires that criminal provisions be crafted to place objective limitations on prosecutorial discretion and provide adequate opportunity for parties to conform their behavior to the law.²⁹ But more generally, it means that law enforcement and prosecutorial techniques that pose a significant likelihood that the innocent will be swept up with the guilty must be eschewed.

Finally, the third necessary condition is designed to ensure that the criminal sanction is not used too freely. It requires that even where a purpose of punishment could be advanced without inordinate risk to innocent parties, the criminal sanction nevertheless be regarded as a last resort rather than a favored method of social control. Firstly, it requires that the criminal sanction be used to address only truly public harms—harms that damage a collective, societal interest as

²⁸The purposes of punishment are often divided into thinner, more variegated conceptual slices. Thus, incapacitation or special deterrence, education, and denunciation are sometimes added to the list of retribution, deterrence, and rehabilitation. *See, e.g.*, WAYNE R. LAFAVE, *PRINCIPLES OF CRIMINAL LAW* 221-26 (2003); JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 13-22 (3d ed. 2001); Michael S. Moore, *A Taxonomy of Purposes of Punishment*, in *FOUNDATIONS OF CRIMINAL LAW* 64-70 (Leo Katz et. al. eds., 1999). However, in the present context, the more fine grained distinctions are not particularly relevant and have been ignored.

²⁹*See City of Chicago v. Morales*, 571 US 41, 56 (1999).

opposed to a purely private interest that can be adequately vindicated via civil liability. Secondly, it requires that the criminal sanction be *necessary* to protect the societal interest. Thus, if the relevant public harm can be avoided by means of civil or administrative remedies, these must be employed in lieu of the criminal sanction. This condition ensures that the moral stigma associated with a criminal conviction is reserved for behavior that genuinely merits it.

Taken together, these three conditions describe the Anglo-American standard of criminal responsibility. Because of the inherent liberal bias of the criminal law, it is a significantly more restrictive standard than its cognate standard of moral responsibility.

V. The *New York Central* Standard of Corporate Criminal Liability

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

The Supreme Court answered that question in *New York Central* by importing the tort doctrine of *respondeat superior* into the criminal sphere.³⁰ Recognizing that corporations were civilly liable for the acts of their employees taken within the scope of their employment, the Court proceeded “go only a step farther”³¹ and permit corporations to be held criminally liable for the conduct of their employees as well. The Court held that for purposes of criminal punishment, both the actions and the mental states of individual employees who were acting within the scope of

³⁰*New York Central*, 212 U.S. at 494.

³¹*Id.*

their authority could be attributed to the corporation,³² even though the employee was acting “against the express orders of the principal.”³³ Subsequent cases refined the *New York Central* standard somewhat, first by making it clear that the employee must act, at least in part, for the purpose of benefitting the corporation³⁴ or with the belief that the corporation will benefit from his or her conduct³⁵ and that the employee need have only apparent authority to act on behalf of the corporation;³⁶ and then by underscoring that the employee’s actions and mental states will be attributed to the corporation despite being in violation of corporate policy and explicit instructions to the contrary.³⁷

Thus, since 1909, the law has been that a corporation commits a crime whenever an employee acting within the scope of his or her employment for the benefit of the corporation commits a crime.³⁸ The only problem with this definition of corporate criminal liability is that it

³²*Id.* at 494-95.

³³*Id.* at 493.

³⁴*Standard Oil Company of Texas v. United States*, 307 F.2d 120, 128 (1962).

³⁵*Steere Tank Lines v. United States*, 330 F.2d 719, 722-23 (5th Cir. 1964).

³⁶*United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1072).

³⁷*Id.* at 1007.

³⁸The *respondeat superior* standard created by *New York Central* is not the only basis for corporate criminal liability. Corporations can also be convicted of a crime under the collective knowledge doctrine. This standard of liability attributes all the knowledge possessed by a corporation’s employees to the corporation itself, allowing the corporation to have knowledge not possessed by any individual. (See *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987).) Under the collective knowledge doctrine, it is possible for a corporation to be guilty of a criminal offense requiring a *mens rea* of knowledge, even though none of its employees could be convicted of the offense because none of them individually possessed the requisite knowledge.

For purposes of concision, I do not intend to address the collective knowledge doctrine directly in this article. All the objections I raise against the *New York Central* standard of

violates all three of the necessary conditions for criminal responsibility.

A. Purposes of Punishment

The first necessary condition for criminal responsibility holds that the criminal sanction may be applied only when doing so advances a legitimate purpose of punishment. Imposing criminal sanctions on corporations for the offenses of their employees does not advance any legitimate purpose of punishment.

To see why, let us begin by noting that corporations are subject only to financial sanctions. Because corporations have no bodies, they cannot be incarcerated. They may be fined, which constitutes the direct application of a financial penalty. They may have licenses revoked or otherwise have their freedom to transact business restricted, but such measures merely constitute the indirect application a financial penalty—they are punitive only to the extent that they reduce the corporation’s profitability. They may be liquidated, which can be thought of as a corporate death sentence.³⁹ But since corporations are not literally living things, any “execution” is entirely metaphorical. Liquidation is to be feared only because of the financial losses that result from it.

Who pays when a financial loss is imposed upon a corporation? To the extent that such a loss cannot be passed along to consumers, it is the owners of the corporation, the shareholders, who incur the penalty. The defining characteristic of modern corporation is the separation of ownership and control. The shareholders, who own the corporation, have no direct control over

corporate criminal liability apply equally well to the collective knowledge doctrine. In fact, the collective knowledge doctrine is probably more vulnerable to them than the *New York Central* standard. I must hope application of these objections is self-evident enough to justify my decision to leave it to the reader.

³⁹Under the Organizational Sentencing Guidelines, this is reserved for “criminal purpose organizations,” see U.S. SENTENCING COMM’N, GUIDELINES MANUAL §8C1.1 (2004).

or knowledge of the behavior of the corporate employees who commit criminal offenses. Hence, inflicting punishment on a corporation's shareholders is punishing those who are personally innocent of wrongdoing for the offenses of others.⁴⁰ How can punishing the innocent advance any of the legitimate purposes of punishment?

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

What about deterrence? All but the staunchest retributivists would argue that a major purpose of criminal punishment is to deter wrongdoing. But not by *any* means. Specifically, not by punishing the innocent. In the Anglo-American criminal justice system, deterrence refers to inflicting punishment on a *wrongdoer* to discourage others from committing similar offenses.⁴¹ It

⁴⁰My arguments are intended to apply to business organizations generally, not merely to those that have undergone the formal process of incorporation. Hence, with regard to incorporated business organizations, this point must be adapted to the relevant organizational form. For example, in the case of limited partnerships, the issue would concern punishing the firm's innocent limited partners rather than innocent shareholders. In this regard, it must be admitted that in those business organizations in which there is true shared control among all parties—e.g., certain general partnerships—there may be no question of punishing the innocent because all parties are personally culpable. However, in such cases, punishing the firm as a corporate entity would be pointless because all members of the firm would be subject to conviction as individuals.

⁴¹This form of deterrence is sometimes referred to as general deterrence to distinguish it from specific deterrence or incapacitation. Specific deterrence refers to punishing a wrongdoer to discourage or prevent that particular individual from committing future offenses. Because in the present context the distinction between general and specific deterrence is immaterial—both justify inflicting punishment only on a wrongdoer—I have chosen not to break specific deterrence out as a separate justification for punishment. Further, there is really no point to discussing specific

does not refer to punishing the innocent to pressure them into suppressing the criminal activity of their fellow citizens.

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

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

deterrence in the context of corporate criminal liability, because, by hypothesis, the parties being deterred are not the parties who actually commit the offense.

There is no doubt that the threat of corporate criminal liability can influence managers to adopt legal compliance programs⁴² and to 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 Mao's China in which those whose conduct was unacceptable to the government were sent to psychiatric hospitals and "re-education" camps. Threatening innocent shareholders 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 can justify criminal punishment in a liberal legal regime.

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.

It is sometimes objected that this must be wrong because all criminal punishment inflicts harm on the innocent. The families and dependents of convicted criminals are inevitably adversely affected by the incarceration or impoverishment of the offender, both materially and emotionally. Hence, criminal liability always punishes the innocent, and corporate criminal liability is no

⁴²Such programs are not "ethics" programs. See John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U.L. REV. 579, 631-655 (2005).

different.⁴³

But this objection elides a crucial distinction. In the case of individual criminal liability, punishment is directed solely toward the wrongdoer. The harm that results to innocent third parties is not the intended object of the punishment. Such harm is always viewed with regret as an unfortunate collateral effect of visiting punishment on the blameworthy that should be minimized as much as possible. In the case of corporate criminal liability, however, punishment is intentionally directed toward those who have not committed an offense, the shareholders. Punishing the innocent is not a regrettable side effect and is certainly not to be minimized, but is the very object of the punishment regime.⁴⁴ It may be true that all criminal punishment wreaks incidental harm on innocent parties, but this fact cannot justify a form of vicarious criminal liability that is *intended* to punish those who have not themselves broken the law.

Enron is the poster child for corporate corruption. If any corporation is deserving of criminal punishment, it would have to be Enron. How better to send a signal that corporate misbehavior will not be tolerated than by nailing Enron? Yet no indictment was brought against Enron, and the company was never prosecuted. Why? The obvious answer is that it would be

⁴³I am grateful to both Professor David Luban of the Georgetown Law Center and Professor George Brenkert of Georgetown's McDonough School of Business for pointing this line of argument out to me.

⁴⁴The analogy contained in the objection holds to a point. When a corporation is punished, not only the shareholders suffer. A collateral effect of corporate punishment is that innocent employees may lose their jobs or receive reduced compensation. Such employees are analogous to the individual criminal's family members or dependents. The harm inflicted on them is not the intended result of the punishment, and may be viewed with regret. On the other hand, in the application of corporate criminal liability, no effort is made to ameliorate this collateral harm. The conviction of Arthur Andersen for a single instance of obstruction of justice cost over 28,000 employees their jobs in the United States alone. See Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 107 (2006).

patently unjust to impose a further penalty on Enron's shareholders who constituted the bulk of the innocent victims of the crimes that were committed by Enron's employees.

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

B. Prosecutorial Error and Abuse

The second necessary condition for criminal responsibility holds that the criminal sanction may be applied only when doing so does not create an unacceptable risk of prosecutorial error or abuse. It requires that criminal provisions place objective limitations on prosecutorial discretion, provide adequate opportunity for parties to conform their behavior to the law, and minimize the likelihood that the innocent will be punished along with the guilty. The *New York Central* standard of corporate criminal liability meets none of these requirements. Imposing criminal sanctions on corporations for the offenses of their employees is rife with opportunities for prosecutorial error and abuse.

The *New York Central* standard places no limitation on prosecutorial discretion. Under it, corporate criminal liability is strict vicarious liability. Anytime a corporate employee acting within the scope of his or her employment violates the law, the corporation is guilty of an offense as well. This gives prosecutors *carte blanche* as to whether to charge a corporation in addition to the culpable individual employee.

With regard to the decision to charge the individual employee, prosecutorial discretion is limited by the elements of the offense. The need to generate the evidence sufficient to establish the required physical and mental elements of the crime restrains the prosecutor's ability to file charges. But with regard to the decision to charge the corporation, there are no additional legally

required elements that the prosecution must establish. No new evidence is necessary. This means that the prosecutor may decide to charge the corporation or not at his or her whim.⁴⁵

This situation practically invites abuse, as is perhaps exemplified by recently negotiated deferred prosecution agreements that contained provisions requiring Bristol-Myers Squibb to endow a chair in business ethics at the prosecutor's alma mater⁴⁶ and Zimmer, Inc. to appoint former Attorney General John Ashcroft as a monitor, paying his firm between \$28 and \$52 million.⁴⁷ In deciding whether to indict a corporation, it is official Department of Justice (DOJ) policy is to consider, among other things, whether the corporation has an effective compliance program and has adequately cooperated with federal investigative authorities.⁴⁸ An effective compliance program is one that "is adequately designed for maximum effectiveness in preventing

⁴⁵A good account of the degree of discretion the *New York Central* standard invests in prosecutors is provided by Andrew Weissmann, former Director of the Department of Justice Enron Task Force and Chief of the Criminal Division of the United States Attorney's Office for the Eastern District of New York. See Andrew Weissmann, *A New Approach to Corporate Criminal Liability* 44 AM. U.L.REV. 1319, 1322-24 (2007) ("[T]here is little by the way of systemic checks on the overly aggressive, misinformed, or unethical prosecutor. . . . Save for her personal integrity, a prosecutor may seek to charge for improper reasons, such as personal or political advancement, or exact sanctions that are unwarranted, such as fines disproportionate to the harm.").

⁴⁶See Bristol-Myers Squibb deferred prosecution agreement at ¶ 20.

⁴⁷See Deferred Prosecution Agreement at 4-7, *United States v. Zimmer, Inc.*, No. 07-8130 (D.N.J. Sept. 28, 2007); Pedro Ruz Gutierrez, *Congress Scrutinizing Selection of Outside Monitors*, NAT'L L.J. at S11 (July 21, 2008). Other potentially abusive DPAs required the New York Racing Association to install slot machines at its venues 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), and WorldCom to create hundreds of jobs in Oklahoma, *id.* at 1894.

⁴⁸See Memorandum from Mark R. Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys 13 (Aug. 28, 2008).

and detecting wrongdoing by employees” and includes the prompt disclosure of any detected wrongdoing to the government.⁴⁹ And until late 2006, adequate cooperation required a willingness to disclose the results of its internal investigations, to waive attorney-client and work product privilege, to refuse to advance attorney’s fees to employees under investigation, and to refuse to enter into joint defense agreements with employees or otherwise aid employees in mounting a defense.⁵⁰ These provisions make it clear that whether a corporation is indicted or not depends at least in part on its willingness to serve the convenience of the prosecutor.

In addition, corporations have no opportunity to conform their behavior to the law. With

⁴⁹*Id.* at 14.

⁵⁰*See* Memorandum from Deputy Attorney General Larry Thompson, to Heads of Department Components, Principles of Federal Prosecution of Business Organizations § VI(B) (Jan. 20, 2003),

One factor the prosecutor may weigh in assessing the adequacy of a corporation’s cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. . . . [P]rosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation’s cooperation. . . .

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation’s promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government’s investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation’s cooperation.

Some of these requirements have been relaxed since December 2006 in response to intense criticism from the bar and Congress.

regard to any crime requiring scienter, an individual can avoid violating the law merely by controlling himself or herself and refraining from knowingly engaging in prohibited conduct. Even with regard to crimes requiring only recklessness or negligence, an individual may comply with the law by exercising the required degree of care. But there is literally nothing a corporation can do to ensure that it will not commit a criminal offense.

Corporate managers are acutely aware of the limits of their control over the conduct of their organization's employees. There is much that they can do to discourage unethical and criminal employee behavior. But all managers know that no matter how good their organization's internal controls may be, they cannot ensure that no rogue employee will intentionally violate the law, or, in today's highly regulated business environment in which many criminal offenses do not require intentional conduct, that no employees will inadvertently commit a crime.⁵¹ Indeed, one of the leading cases on corporate criminal liability, *United States v. Hilton Hotels Corp.*,⁵² arose out of an employee's decision to violate corporate policy and his manager's explicit instructions "because of anger and personal pique."⁵³ But since the *New York Central* standard imposes strict vicarious liability—since even a corporation that exercises its best efforts to suppress employee criminal activity has no defense—a corporation will be guilty of an offense whenever an employee transgresses.

⁵¹Although I am not addressing it directly in this article, managers are also aware that no set of internal controls can guarantee that the corporation does not commit a criminal offense under the collective knowledge doctrine, see *supra* note 37, on the basis of individual employees possessing diffuse instances of knowledge that, taken together, constitute the *mens rea* of an offense.

⁵²467 F.2d 1000 (9th Cir. 1072).

⁵³*Id.* at 1004.

Because there is no way for a corporation to avoid committing a crime should an employee go astray and no way to ensure that employees will never go astray, all the rational manager can do is try to avoid corporate indictment by acceding to whatever conditions prosecutors wish to impose.⁵⁴ This renders corporations extraordinarily vulnerable to prosecutorial discretion, and actually encourages prosecutorial abuse.

Finally, the *New York Central* standard of corporate criminal liability maximizes, rather than minimizes the likelihood that the innocent will be punished along with the guilty. As discussed above, corporate criminal liability is a form of collective punishment that targets the innocent to discourage wrongdoing by others.⁵⁵ What would in other circumstances constitute prosecutorial error or abuse—the mistaken or corrupt prosecution of the innocent—is in this case the very point of the exercise. It is either a misnomer or an understatement to say that the problem with the *New York Central* standard of liability is that it is unacceptably susceptible to prosecutorial abuse. Although it does create a prosecutorial tool that easily misused, the essence of the problem is not that the standard lends itself to misuse, but that its proper use is itself abusive.

Because the *New York Central* standard of corporate criminal liability is designed to punish the innocent, it is inherently abusive. Hence, it cannot satisfy the second necessary condition for criminal responsibility.

C. Public Harm

⁵⁴This helps explain Bristol-Myers Squibb's endowed ethics chair and John Ashcroft's appointment.

⁵⁵See *supra* page 40.

The third necessary condition for criminal responsibility holds that criminal sanctions should be applied only where they are necessary to address a public harm. Because criminal conviction carries with it the moral stigma of being publicly branded an enemy of society, it is essential that the criminal sanction not be overused. This is not merely to protect those who may be wrongfully accused, but to preserve both the deterrent and condemnatory power of the sanction, which is dissipated if applied too broadly or to trivial matters. Hence, this condition requires that the criminal sanction be applied only to address harm to a societal rather than private interest, and then only when its use is necessary to protect that interest. The *New York Central* standard of corporate criminal liability meets neither of these requirements.

To begin with, the *New York Central* standard does not address a public harm because it does not address a distinct harm at all. Fraud, embezzlement, and other financial crimes do indeed threaten public harm. These offences not only cause losses for their individual victims, but also undermine the trust that allows markets to function efficiently and commerce to flourish. Because there is a societal interest in preserving the conditions that facilitate voluntary trade and cooperative ventures, there is a justification for punishing individuals who commit these offenses, whether they work for a corporation or not. But assuming the offenders do work for a corporation, how does *the corporation* threaten any public harm?

The harm to the societal interest in well-functioning markets is the same regardless of the context within which the fraud or other white collar crime is committed. Punishing the corporation in addition to the individual perpetrators does punish a public harm, but it is the same one that is being punished by the prosecution of the individuals perpetrators. Punishing the corporation is punishing the same harm twice, not punishing a distinct harm threatened by the

corporation. But this is equivalent to saying that *the corporation* is not threatening any distinct public harm.

Let's say you don't buy this argument. Perhaps it is too metaphysical. Let's assume that it makes sense to say that when an employee commits an offense within the scope of his or her employment, the corporation threatens the public harm of the offense. Imposing criminal liability on the corporation would still violate the third condition for criminal responsibility because doing so is not necessary to protect the threatened societal interest.

In the absence of corporate criminal liability, there remains a wide array of legal protections for the societal interest in well-functioning markets. To begin with, there is the threat of criminal liability to the individuals who perpetrate the offenses. Individual corporate employees who commit crimes are always subject to prosecution if caught, and criminal conviction carries with it not only the disgorgement of their ill-gotten financial gains, but incarceration. This is surely a more potent deterrent to employees contemplating criminal activity than the threat that if they are caught, the corporation they work for will be subject to a fine.

Furthermore, corporations are already subject to significant financial penalties for the criminal activities of their employees. When an offense involves the breach of a regulation, the corporation is subject to an administrative, civil penalty for the violation. But more significantly, when an employee's offense results in a loss to the corporation's shareholders or any other party, the corporation is subject to civil lawsuits and the resultant payment of damages. Because corporations are strictly liable for the torts of their employees committed within the scope of their employment, any corporation that fails to exercise proper oversight to prevent deceptive or fraudulent practices by its employees can be made to pay not only compensatory damages, but

potentially massive punitive damages. Furthermore, because civil plaintiffs are not subject to many of the restrictions on criminal prosecutors—plaintiffs’ efforts at discovery cannot be thwarted by anyone’s Fifth Amendment privilege; the defendant is not vested with a presumption of innocence that plaintiffs must overcome, and plaintiffs are not required to prove the elements of their case beyond reasonable doubt—it is usually easier for them to establish liability. The deterrent effect of such civil liability should not be underestimated.⁵⁶ In fact, in the opinion of Congress, the availability of shareholder derivative suits constituted over-deterrence, prompting the passage of the Private Securities Litigation Reform Act of 1995⁵⁷ and the Securities Litigation Uniform Standards Act of 1998⁵⁸ to curtail the scope of such lawsuits.⁵⁹

Recall that the only criminal penalties that corporations can be subjected to are financial

⁵⁶See Harry Kalven, Jr., & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 691 (1941) (finding a “general agreement that [class action shareholder suits] furnishes the major sanction behind the fiduciary rules of corporation law”). See also Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2145 (2000) (“New Deal regulations had focused on the utility of statutory protections for consumers and the desirability of the federal courts as a forum for redress.... Ambivalence about how much government actors could and should do also prompted interest in class action litigation.”).

⁵⁷Pub. L. No. 104-67, 109 Stat. 737 (1995).

⁵⁸Pub. L. No. 105-353, 112 Stat. 3227 (1998).

⁵⁹This discussion ignores the considerable market pressure on corporations to prevent criminal activity by its employees. Recall that Enron and Worldcom disappeared upon discovery of their accounting irregularities, long before any legal action could be mounted. The value of the stock of companies whose employees are suspected of financial impropriety almost always plummets, frequently leading to the dismissal of top corporate executives. This is an extremely strong form of market discipline. Given that high level corporate managers are people who are strongly motivated to maintain the prestige and financial rewards associated with their positions, they have strong market incentives to suppress the illegal conduct of their subordinates that can cost them their jobs.

ones.⁶⁰ Thus, the most that corporate criminal punishment can do is pile an additional financial penalty on top of those supplied by administrative fines and tort judgments. This additional penalty can hardly be said to be necessary to the protection of the societal interest in well-functioning markets, given that Congress recently passed legislation to address the over-deterrence of the current civil liability system.⁶¹ Indeed, recent studies suggest that the additional criminal sanction can actually undermine the overall deterrent effect of civil liability by creating perverse compliance incentives that are not otherwise present.⁶²

Because the *New York Central* standard of corporate criminal liability is not necessary to protect the societal interest in well-functioning markets, if it can be said to protect any distinct societal interest at all, it is not necessary to address any public harm. Hence, it cannot satisfy the third necessary condition for criminal responsibility.

VI. The Rationale for the *New York Central* Standard

If the *New York Central* standard of corporate criminal liability does not advance any of

⁶⁰See *supra* page 16.

⁶¹Corporate criminal responsibility is frequently antithetical rather than complementary to civil liability. For example, before its criminal indictment, Arthur Andersen had negotiated a \$750 million settlement with Enron's shareholders which fell through when the firm was indicted. See Jonathan D. Glater, *Enron Holders in Pact With Andersen Overseas Firms*, N.Y. TIMES, August 28, 2002 at C3. Upon conviction of obstruction of justice, Andersen was assessed a criminal fine of \$500,000. See Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 278 (2008). Thus, \$750 million in potential restitution was sacrificed for \$.5 million penalty.

⁶²See, e.g., Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 274 (2008) ("we show that subjecting business entities to criminal liability carrying severe collateral consequences might, in fact, undermine deterrence. Indeed, purely financial penalties could contain misconduct more effectively than the threat of going out of business."). See also Andrew Weissmann, *A New Approach to Corporate Criminal Liability* 44 AM. U.L.REV. 1319, 1335-37 (2007).

the legitimate purposes of punishment, creates the danger of prosecutorial abuse by investing prosecutors with excessive discretion, and is not necessary to address any public harm, then how did it become law? What rationale did the Court offer in support of its decision?

In *New York Central*, the Court noted the appellant railroad's argument that to punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without due process of law. . . [and further, deprives] the corporation of the presumption of innocence,—a presumption which is part of due process in criminal prosecutions.⁶³

Yet, one searches the opinion in vain for a response to this argument. Instead, the Court launches into a discussion of *respondeat superior* liability in tort. After recognizing that “[i]t is now well established that, in actions for tort, the corporation may be held responsible for damages for the acts of its agent within the scope of his employment,”⁶⁴ the Court explains that such liability

is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and *justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct.*⁶⁵

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

Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him, . . . may be controlled, *in the interest of public policy*, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.⁶⁶

Pardon me for saying so, but this is not much of an argument. The Court explicitly

⁶³*New York Central*, 212 U.S. at 492.

⁶⁴*Id.* at 493.

⁶⁵*Id.* (emphasis added.)

⁶⁶*Id.* at 494 (emphasis added.).

recognizes that *respondeat superior* liability in tort is justified by a principle of corrective justice that requires compensation to a wrongfully injured party. It then turns around and applies that form of liability in the criminal realm where corrective justice is not at issue. It is a commonplace in tort that one who is without personal fault but who has nevertheless caused or benefitted from an injury to an innocent party may be required to pay compensation to restore the injured party to his or her previous condition. But what is needed in the context of the criminal law is a justification for punishment, not restitution. The problem is that no principle of justice condones punishing the innocent. Applying *respondeat superior* tort liability in the criminal sphere is not going “only a step farther,”⁶⁷ but leaping a broad conceptual chasm.

To the extent that the Court provides any justification for this leap, it appears to be the claim that taking it is “in the interest of public policy.”⁶⁸ But what public policy is advanced by subjecting corporations to *respondeat superior* liability? The Court’s answer is that “[i]f it were not so, many offenses might go unpunished and acts be committed in violation of law . . .”⁶⁹ The Court backs up this claim by noting that

[i]t is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions inured to the benefit of the corporations of which the individuals were but the instruments. . . . While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Id.* at 495.

corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.⁷⁰

This is a fairly explicit statement that the public policy interest that is being served by *respondeat superior* criminal liability is more effective law enforcement.

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

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

⁷⁰*Id.* at 495-96.

citizens between an accused and state-imposed punishment, and, until the *New York Central* decision, the ban on vicarious criminal liability. Taken together, these constraints form the fundamental theoretical and normative structure of the criminal law.

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

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

Despite all the obstacles that the liberal bias of the criminal law places in their way, prosecutors successfully prosecute criminals and enforce the law every day. This is because the traditional criminal law addresses actions that cause visible harm in the world. Murder, assault, robbery, rape, arson and similar violent offenses all have visible effects about which evidence can be gathered, and the nature of the conduct typically suggests the ill will or *mens rea* with which it

is undertaken. Even traditional state level fraud—the offense of false pretenses—requires an outright misrepresentation, actual reliance upon it by the victim, and a resulting loss of property.⁷¹ Such elements are susceptible of proof within the protective civil libertarian constraints built into the criminal law.

White collar crime is different. Over the course of the 20th century, Congress saw fit to create a broad array of amorphous and inchoate new offenses. The federal fraud statutes criminalize any scheme or artifice to defraud.⁷² This requires neither misrepresentation, reliance, nor loss, and can consist of any potentially deceptive conduct.⁷³ Money laundering consists of making any use of the proceeds of specified unlawful activity.⁷⁴ The Racketeer Influenced and Corrupt Organization Act criminalizes the direct or indirect investment in, acquisition or maintenance of an interest in, or participation in the affairs of an enterprise that is engaged in or

⁷¹*See* *People v. Drake*, 61 N.Y.2d 359, 362, 462 N.E.2d 376, 377, 474 N.Y.S.2d 276, 278 (1984) (false pretenses requires proof that the “defendant obtained title or possession of money or personal property of another by means of an intentional false statement concerning a material fact upon which the victim relied in parting with the property.”)

⁷²*See, e.g.*, 18 U.S.C. §1341, 1343.

⁷³*See* *Neder v. United States*, 527 U.S. 1, 24-25 (1999) (“The common-law requirements of ‘justifiable reliance’ and ‘damages,’ for example, plainly have no place in the federal fraud statutes.”); *United States v. Townley*, 665 F.2d 579, 585 (1982) (“Under the mail fraud statute, it is just as unlawful to speak ‘half truths’ or to omit to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading. The statements need not be false or fraudulent on their face, and the accused need not misrepresent any fact, since all that is necessary is that the scheme be reasonably calculated to deceive persons of ordinary prudence and comprehension.”); *United States v. Rybicki*, 287 F.3d 257, 264 (2d Cir. 2002) (“the potential reach of [the mail fraud statute] is virtually limitless”).

⁷⁴*See, e.g.*, *United States v. Jackson*, 983 F.2d 757 (7th Cir. 1993) (money laundering conviction of an alleged drug dealer for writing checks to purchase cell phones and pay his rent and for cashing checks for small amounts at his local bank upheld).

affects interstate or foreign commerce through a pattern of racketeering activity that consists of two or more predicate offenses during a period of ten years. Conspiracy requires only the agreement to achieve an unlawful objective and the commission of any overt act in furtherance of it.⁷⁵ Obstruction of justice criminalizes doing or attempting to do virtually anything to impede a federal investigation.⁷⁶ In addition, the federal government has enacted a myriad of arcane, *malum prohibitum* regulatory offenses that carry criminal sanctions.⁷⁷

As the Supreme Court correctly recognized in *New York Central*, enforcing such broad and amorphous statutes within the constraints of the traditional criminal law is extremely difficult. White collar offenses typically consist of deceptive behavior that provides no *corpus delicti* or

⁷⁵See, 18 U.S.C. §371. There are literally dozens of federal conspiracy statutes, *see, e.g.*, RICO conspiracy, 18 U.S.C. §1962(d), conspiracy to commit money laundering, 18 U.S.C. §1956(h), conspiracy to violate the Hobbs Act, 18 U.S.C. §1951, conspiracy to traffic in or import drug, 21 U.S.C. §§846, 963, some of which, such as the RICO conspiracy and the conspiracy to traffic or import drugs, do not even require the performance of an overt act.

⁷⁶See 18 U.S.C. §§1503, 1505, 1510, 1512, 1519, 1520. Section 1503 contains an omnibus provision that “is essentially a catch-all provision which generally prohibits conduct that interferes with the due administration of justice.” *United States v. Thomas*, 916 F.2d 650 n.3 (11th Cir. 1990). This section also criminalizes “endeavors to influence, obstruct, or impede[] the due administration of justice (emphasis added),” essentially converting the statute into a prohibition on attempted obstruction. Similarly, Section 1512(C) punishes anyone who corruptly “obstructs, influences, or impedes any official proceeding, or attempts to do so (emphasis added),” and §1519 punishes anyone who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object, with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . , or in relation to or contemplation of any such matter” dispensing both with the requirement that the accused act corruptly and the existence of actual official proceeding. A leading commentator has described the obstruction of justice statutes as “fairly incoherent, often redundant, and overbroad—leaving much to the discretion of prosecutor.” JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME* 346 (4th ed. 2009).

⁷⁷See George J. Terwilliger, III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. U.L. REV. 1417 (2007).

smoking gun to introduce into evidence and is intentionally designed to be indistinguishable from non-criminal activity. As a result, considerable investigation may be required merely to establish that a crime been committed, and even then, a great deal of legal and/or accounting sophistication may be required to unravel the deception. Further, the organizational setting can make it difficult to establish the *mens rea* required by many white collar offenses. The corporate form diffuses decision-making responsibility. Decisions made by one member of a firm may not be fully informed by what other members of the firm are doing or have decided, and corporations frequently take actions that were never explicitly known to or authorized by any identifiable individual or individuals within the firm. In addition, the right against self-incrimination and the attorney-client privilege can make it difficult for prosecutors to obtain the evidence they need to meet their burden of proof. Such evidence will usually consist of the business records of the firm for which the defendant works and the testimony of co-workers. To the extent that the evidence of business records are in the personal possession of the defendant, contain communications between the defendant or other members of the firm and corporate counsel, or are the work product of corporate counsel, it will be protected by the defendant's right against self-incrimination or attorney-client privilege, and hence, unavailable to the prosecution. And to the extent that it consists of the testimony of others members of the firm who may themselves fear prosecution, their right against self-incrimination similarly renders the evidence unavailable.

But the fact that these protective features of the traditional criminal law make it difficult to prosecute white collar criminal offenses is not something to be decried. Rather, it is the glory of the system.

Much of the federal white collar criminal law consists of inchoate offenses or offenses with

minimal *actus reus* requirements. Calling the federal fraud offenses “fraud” is actually a misnomer since they are by definition crimes of attempted fraud, complete whether they produce any harm or not. The *actus reus* of money laundering is satisfied by doing just about anything with the proceeds of specified unlawful activity, which can include the otherwise innocent acts of paying one’s bills, buying groceries, or cashing a check. Conspiracy consist of nothing more than the parties’ agreement. Obstruction of justice consists of otherwise perfectly innocent acts taken with the knowledge that they may interfere with some present or future federal investigation. These are crimes with virtually no visible, physical *actus reus* that distinguishes the defendant’s conduct from perfectly innocent behavior—crimes for which conviction is based almost entirely upon what was in the defendant’s mind.⁷⁸ The evidence for these crimes can consist almost exclusively of testimony about what the defendant was thinking and often comes down to nothing more than one person’s word against another’s. These are precisely the type of crimes for which it is most reasonable to fear prosecutorial error or abuse.

⁷⁸For example, Martha Stewart was prosecuted for securities fraud for publicly asserting her innocence of trading stocks on non-public information, which the government considered a false statement. Stewart, who sold her shares of Imclone stock immediately prior to a sharp decline in its price, publicly asserted that she did so in response to a pre-established stop-loss order rather than on the basis of a tip from her broker based on non-public information. Because “Martha Stewart’s reputation, as well as the likelihood of any criminal or regulatory action against Stewart, were material to MSLO’s [Martha Stewart Living Omnimedia, Inc.] shareholders because of the negative impact that any such action or damage to her reputation could have on the company which bears her name,” Indictment, *United States v. Stewart*, 37 (S.D.N.Y. 2003) (No. 03 Cr. 717), the government charged her with securities fraud for attempting to stop or at least slow the steady erosion of MSLO’s stock price caused by investor concerns [by making or causing] to be made a series of false and misleading public statements during June 2002 regarding her sale of ImClone stock on December 27, 2001 that concealed and omitted that Stewart had been provided [non-public] information . . . and that Stewart had sold her ImClone stock while in possession of that information. *Id.*

In addition, to the extent that white collar crime consists of *malum prohibitum* regulatory offenses, it consists of actions that are not wrongful in themselves. Hence, they are crimes that one can commit with no ill will, but merely out of ignorance of the legal prohibition. Here again, the blameworthiness of the defendant depends not on his or her conduct, which is by definition innocent, but entirely on what is in his or her mind. Because punishing those who act in ignorance advances neither retributivist, deterrent, nor rehabilitative purposes of punishment, and because the nature of these offenses nevertheless permit prosecutors to bring charges against such individuals, these *malum prohibitum* offenses are also the type of crimes for which it is reasonable to be on guard against prosecutorial error or abuse.

This shows that what we call white collar crime—the body of federal law designed to police the behavior of those engaged in business for compliance with regulatory requirements and general honest dealing—consists, to a large extent, of precisely the type of crimes for which it *should* be difficult for prosecutors to obtain a conviction. Like the checks and balances of the Constitution, the internal structure of the criminal law is designed to curtail the extent to which government can impinge upon the activities of innocent citizens in its efforts to combat those that engage in wrongdoing. In restraining the state’s efforts to reduce the level of deceptive or dishonest business practices through the enforcement of broadly-defined, inchoate, and *malum prohibitum* criminal offenses, the inherent bias of the criminal law is functioning exactly as it was designed to. A “public policy interest” in more effective law enforcement can never justify overriding those aspects of the criminal justice system designed to protect citizen’s civil liberties against law enforcement agents. Far from a justification, recognizing such an interest would be a repudiation of the fundamental theoretical structure and normative values inherent in the criminal

law. Hence, the rationale that the Supreme Court offered in *New York Central*, that in the absence of corporate criminal liability “many offenses might go unpunished,”⁷⁹ cannot possibly justify a form of collective punishment that targets the innocent as a means to discouraging the wrongful conduct of the guilty.

Over the past decade, the government has begun to fully exploit the gift of power the Supreme Court bestowed upon it in *New York Central*. As discussed above,⁸⁰ since 1999, DOJ has explicitly based its decisions on whether to indict a corporation, in part, on the corporation’s willingness to adopt a government-approved compliance program and to cooperate with federal investigations. And as DOJ defines these considerations, satisfying them requires corporations to do all that they can to aid in the prosecution of their own employees.⁸¹ But also as discussed above,⁸² because no corporation can guarantee that none of their employees will intentionally or inadvertently violate the law, and because the *New York Central* standard holds corporations strictly liable for the offenses of their employees, corporations know that there is nothing they can do to ensure that they will not violate the law. Thus, the *New York Central* standard brings almost irresistible pressure on corporations to do whatever they can to avoid indictment, which means signing on as deputy prosecutorial agents.⁸³

⁷⁹*New York Central*, 212 U.S. at 494.

⁸⁰See *supra* text accompanying note 46.

⁸¹See *supra* text accompanying notes 47-48.

⁸²See *supra* text accompanying notes 49-51.

⁸³See Andrew Weissmann, *A New Approach to Corporate Criminal Liability* 44 AM. U.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 consist largely of being

Today, it has become apparent that the purpose of corporate criminal liability is not to punish corporations, but to force them to cooperate in the prosecution of their employees. This is evidenced by the constantly increasing number of federal criminal investigations of business organizations that end in Deferred Prosecution Agreements coupled with the constantly decreasing number which end with corporate indictments and convictions.⁸⁴ It is anachronistic to think of the purpose of corporate prosecution as the imposition of punishment upon conviction. Today, it is corporate indictment that is the punishment and lack of cooperation that is the offense.⁸⁵ The actual indictment of a corporation, which carries with it the costs of going to trial,

an arm of the prosecutor.”). For a more detailed analysis of the workings of these incentives, see John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 619-630 (2005).

⁸⁴See Pamela H. Bucy, *Trends in Corporate Criminal Prosecutions*, 44 AM. CRIM. L. REV. 1287 (2007).

⁸⁵Professor Julie O’Sullivan suggests that the indictment that brought down Arthur Andersen was actually a punishment for its failure to agree to waive its attorney-client privilege. She states that

[t]he Arthur Andersen case may present a cautionary tale. Some argue that “[u]nder most objective standards, [Arthur Andersen, LLP] did everything in its power to avoid a prosecution that it knew would be a ‘death penalty’ for the firm,” except agree to waive the attorney-client privilege. Thus, Andersen reportedly notified the Justice Department and SEC immediately upon learning of the document destruction in its Houston office. Andersen was also apparently willing to enter into a deferred prosecution agreement, “in essence a guilty plea, under which the government could have appointed a special monitor to oversee compliance with its new document retention policy and with other reforms to be approved by the DOJ.” Finally, Andersen also agreed to expel the individuals responsible for the document destruction and did, of course, fire the head of Andersen's auditing team for Enron (and the government's cooperating witness in Andersen's criminal trial), David Duncan. Finally, Andersen “reportedly offered to pay as much as \$750 million to Enron shareholders who had sued Andersen for its role in auditing Enron's books.” Despite these efforts, DOJ decided to seek an indictment and ultimately secured a conviction of the partnership.

Julie R. O'Sullivan, *Some Thoughts on Proposed Revisions to the Organizational Guidelines*, 1

is a mark of failure. It means that the prosecution has failed to gain the “cooperation” that allows it to export the costs of its criminal investigation to the corporation.

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

There is no doubt that the *New York Central* standard of corporate criminal liability advances the “public policy interest” in more effective law enforcement. In general, prosecutors would have a much easier job if they could threaten to indict all those who might have knowledge relevant to their criminal investigations unless they aided in the prosecution of their fellow citizens. Generally, we do not permit this, and for good reason. It reminds us too much of the practices of the Nazi and Soviet regimes in which failure to inform on others was itself an offense. We don’t want a society in which police agencies pursue their missions by turning citizens against each other.

Corporate criminal liability is the exception to this, and it is an unfortunate one. For it turns employers into the adversaries of their own employees whenever those employees come under suspicion. This may not seem harmful in cases in which the employees have, in fact, acted purposely and malevolently. But given the amorphous nature of the federal criminal law and its

Ohio St. J. Crim. L. 487, 495-96 (2004).

myriad provisions that can be violated without awareness that one is doing anything wrong, this becomes a very harmful and destructive practice indeed. As knowledge of the incentives placed on corporations by corporate criminal liability slowly become more widely known to those involved in business, its poisonous effect on trust and loyalty spreads.⁸⁶ I have heard the echos of this in my own teaching. Years ago, my MBA students used to believe that they had a duty to help maintain an ethical workplace and that if they were loyal to their employer, came forward, and did the right thing, they were entitled to and could expect loyalty and support in return. Today, enough of the effects of how corporations respond to the incentives of corporate criminal liability have filtered into the corporate culture for my students to have absorbed the lesson that if they are asked about any suspicious behavior in the corporation, rule #1 is: say nothing and get your own personal attorney. In my opinion, this is a trend to be much regretted.

VII. Alternative Standards?

To this point, I have argued that there is no justification for the *New York Central* standard of corporate criminal liability. But this is not the only standard by which corporations may be subjected to criminal sanctions. What about alternative standards? Might they provide a theoretically justified form of corporate criminal liability?

One such alternative has been provided by the Model Penal Code (MPC). In the absence of an explicit legislative purpose to impose liability on corporations, the MPC would limit corporate criminal liability to cases in which “the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high

⁸⁶For a more detailed account of this process, see John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 631-55 (2005).

managerial agent acting on behalf of the corporation within the scope of his office or employment.”⁸⁷ In addition, even when the statutes do explicitly indicate the purpose to impose liability on corporations, the MPC provides that “it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.”⁸⁸

Another alternative was recently proposed by Andrew Weissmann, the former Director of the Department of Justice Enron Task Force. Weissmann advocates “[a] carefully constructed limitation of criminal corporate liability to those situations where a company reasonably should have taken steps to detect and deter the criminal action of its employee.”⁸⁹ Such a standard would place the burden of proof on the prosecution to establish that the corporation failed to take all reasonable preventative steps to obtain a conviction. And, along similar lines, many commentators have argued for a modification of the *New York Central* standard to allow corporations to assert that they have taken all reasonable preventative steps as an affirmative defense.⁹⁰

There is no doubt that all of these alternatives constitute an improvement over the *New York Central* standard. By making liability depend on the conduct of the board of directors and high managerial agents, the MPC approach would move the legal standard in the direction of

⁸⁷MODEL PENAL CODE § 2.07(1)(c) (Official Draft 1962).

⁸⁸MODEL PENAL CODE § 2.07(5) (Official Draft 1962).

⁸⁹See Andrew Weissmann, *A New Approach to Corporate Criminal Liability* 44 AM. U.L.REV. 1319, 1335 (2007). See also Geraldine Szott Moohr, *Of Bad Apples and Bad Tress: Considering Fault-Based Liability for the Complicit Corporation*, 44 AM. U.L. REV. 1343 (2007).

⁹⁰See, e.g., Ellen Podgor, *A New Corporate World Mandates a “Good Faith” Affirmative Defense*, 44 AM. U.L. REV. 1537 (2007).

those philosophers who argue that corporations can be morally responsible for the results of official corporate policy,⁹¹ which is at least a theoretical improvement. On the practical level, restricting the employees whose actions can subject the corporation to criminal liability to those who actually determine corporate policy significantly increases the corporation's ability to conform its behavior to the law.

Weissmann's approach is even better. By requiring the prosecution to establish that the corporation has not taken all reasonable steps to prevent employee wrongdoing, his standard adds an element of proof for a corporate conviction beyond those that are required to convict the offending employee. This greatly reduces the scope of prosecutorial discretion, and makes it even easier than the MPC standard for a corporation to ensure that it will not violate the law.

Finally, even retaining the *New York Central* standard of *respondeat superior* liability but adding an affirmative defense similar to that permitted by the MPC would constitute an improvement since the prospect of the corporation being able to assert an effective defense would reduce the amount of discretion the prosecution has over whether to bring charges.

The *New York Central* standard of corporate criminal liability effectuated an extreme shift in the balance of power between the prosecution and defendant in the favor of the prosecution. It represents the antithesis of the what is required by the internal liberal structure of the criminal law. All of the proposed alternative standards are an improvement because all of them shift power back in the direction of the defendant. And, given that I have admitted the quixotic nature of any campaign to entirely eliminate corporate criminal liability, one of these standards may be the best one can realistically hope to achieve.

⁹¹See *supra* text accompanying notes 4-8.

Nevertheless, none of them are theoretically justified. All of them still constitute a form of vicarious criminal liability in which some individuals are punished for the wrongdoing of others. All of them still constitute a form of collective punishment in which the innocent are intentionally targeted as a means to controlling the behavior of the guilty. Regardless of whether the offense is committed by a low level employee or a high managerial agent, corporate criminal liability still visits punishment on the innocent shareholder who had no control over the conduct of the employee. And regardless of whether the corporation can avoid criminal liability by taking all reasonable steps to prevent criminal wrongdoing by its employees, private parties are still being compelled to expend their resources to enforce the law.

This last point highlights why no form of corporate criminal liability is compatible with the maintenance of a liberal system of criminal justice. The purpose of the inherent liberal bias of the criminal law is to restrain the scope of social control the state may exercise through the threat of punishment. One of the most important mechanisms of this restraint is the requirement that is built into the combination of the presumption of innocence, the reasonable doubt standard, the right against self-incrimination, and the attorney-client privilege that the state establish its case with its own resources. As long as the state must enforce the laws that it passes itself, there is a limit on both the number and the breadth of the statutes that it can enact. Corporate criminal liability in any form allows the government to export the costs of law enforcement onto the private sector. This removes the limitations on the number and type of statutes that Congress may enact, significantly undermining the effectiveness of the law's liberal bias. Hence, I submit that corporate criminal liability in any form has no place within a liberal system of criminal justice.

VIII. Conclusion

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

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

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

This situation confronts the judiciary with a choice. It can require the prosecution to enforce these laws as best it can within the civil libertarian constraints inherent in the criminal law

or it can relax these constraints in order to render the problematic laws more enforceable. The former approach is consistent with the normative judgment at the heart of our criminal law that an unrestrained state represents a greater danger to citizens' liberty and well-being than do individual criminals; the latter is not.

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