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# Tort Answers to the Problem of Corporate Criminal Mens Rea

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## TORT ANSWERS TO THE PROBLEM OF CORPORATE CRIMINAL MENS REA\*

ERIN L. SHELEY\*\*

*The respondeat superior (vicarious liability) standard, by which courts hold corporations liable for the crimes of their employees, has been widely criticized as being overinclusive insofar as it punishes faultless entities. Less acknowledged is that, due to its requirement that the employee intended in part to benefit the corporation, the standard is also underinclusive in cases of sexual violence facilitated by a corporate entity. This Article argues that, to solve these corporate liability problems within criminal law, we should learn from the parallel development of corporate liability in the sphere of tort law, from which respondeat superior was derived in the first place. No comprehensive effort has yet been made to examine how courts have, in tort respondeat superior, addressed the problems of over- and underinclusiveness that emerge in that realm. In light of the lessons revealed in tort case law, I argue that criminal respondeat superior should apply where the government can show (1) a crime occurred, regardless of whether or not any individual employee had the intent to benefit the corporation; (2) an omission by the corporation to take reasonable steps to prevent the crime; and (3) the substantial risk of such a crime was objectively foreseeable to a reasonable person undertaking the corporation's enterprise.*

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#### INTRODUCTION

The concept of mens rea has had something of a political moment over the past few years. A rare bipartisan effort to reform the Federal Criminal Code, which would have, among other things,

relaxed mandatory minimums in sentencing,<sup>1</sup> failed recently due to disagreement over its “mens rea reform” provision.<sup>2</sup> The proposed bill would have amended the Federal Criminal Code to provide that, “the Government [must] prove beyond a reasonable doubt that the defendant acted . . . willfully, with respect to any element for which the text of the covered offense does not specify a state of mind.”<sup>3</sup> Supporters of the provision note that the massive Federal Criminal Code<sup>4</sup> and the broad discretion it already allows prosecutors<sup>5</sup> has grown even more threatening to the morally innocent due to the low mens rea standards that distinguish federal criminal law from its state counterparts.<sup>6</sup> They argue that, due to the size and complexity of the Federal Criminal Code, the absence of a mens rea requirement increases the likelihood that people will be convicted without having known or reasonably anticipated that they were violating criminal law.<sup>7</sup>

Opponents of this provision, however, argue that requiring a mens rea element of willfulness would essentially render offenders immune from liability for reckless or grossly negligent conduct.<sup>8</sup> The federal government currently prosecutes conduct such as fraud, environmental offenses, and other common white-collar crimes that

1. Justin George, *Can Bipartisan Criminal-Justice Reform Survive in the Trump Era?*, NEW YORKER (June 6, 2017), <https://www.newyorker.com/news/news-desk/can-bipartisan-criminal-justice-reform-survive-in-the-trump-era> [https://perma.cc/WJ8D-LMFD].

2. See Matt Apuzzo & Eric Lipton, *Rare White House Accord with Koch Brothers on Sentencing Frays*, N.Y. TIMES (Nov. 24, 2015), <https://www.nytimes.com/2015/11/25/us/politics/rare-alliance-of-libertarians-and-white-house-on-sentencing-begins-to-fray.html> [https://perma.cc/258B-GZYJ (dark archive)] (discussing disagreement over the bill).

3. Mens Rea Reform Act of 2015, S. 2298, 114th Cong. § 28(b) (2015).

4. While over 4000 criminal statutes exist, that number does not include the countless other federal “crimes” created by administrative agencies. See Julie Rose O’Sullivan, *The Federal Criminal “Code”: Return of Overfederalization*, 37 HARV. J.L. & PUB. POL’Y 57, 57–58 (2014).

5. Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN. ST. L. REV. 1107, 1119–21; see also O’Sullivan, *supra* note 4, at 60, 62–63.

6. *Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. 14–15 (2013) (prepared statement of Dr. John S. Baker, Jr., Visiting Professor, Georgetown Law School); cf. O’Sullivan, *supra* note 4, at 62–63 (providing the example of honest services fraud).

7. See John G. Malcolm, *The Pressing Need for Mens Rea Reform*, HERITAGE FOUND. (Sept. 1, 2015), <https://www.heritage.org/crime-and-justice/report/the-pressing-need-mens-rea-reform> [https://perma.cc/VLK2-82GD] (stating that “innocent mistakes or accidents can become crimes” if there is a lack of adequate or any mens rea requirement).

8. See Zach Carter, *House Bill Would Make It Harder to Prosecute White-Collar Crime*, HUFFPOST (Nov. 16, 2015, 3:23 PM), [https://www.huffingtonpost.com/entry/white-collar-crime-prosecution\\_us\\_564a2336e4b06037734a2f84](https://www.huffingtonpost.com/entry/white-collar-crime-prosecution_us_564a2336e4b06037734a2f84) [https://perma.cc/VK63-RYQL].

already lack a specified mens rea requirement.<sup>9</sup> Officials in the Department of Justice under the Obama administration contended that the legislation “would make it significantly harder to prosecute corporate polluters, producers of tainted food and other white-collar criminals.”<sup>10</sup>

The fact that a dispute over mens rea for white-collar offenses derailed what would have been a historic bipartisan effort at criminal justice reform underscores the political fault lines around the question of how corporate crime fits into our traditional understandings of punishment. To oversimplify the situation into a crude dichotomy: the outcome of the reform effort suggests that liberals wish to maintain a broad swath of potential criminal liability for white-collar offenders, while conservatives wish to reduce the overall amount of criminal liability for regulatory offenses, including white-collar offenses. In other words, views on the current federal enforcement of white-collar crime seem to have eclipsed common ground on drug offenses and other areas more commonly affecting individual offenders.

The sudden political stakes of white-collar mens rea urge that we revisit a narrower question that is well trodden but unresolved in the scholarly literature: When should a *corporation* be held liable as an entity for the crimes its employees committed? The current standard, announced by the Supreme Court in 1909 and unchanged since then, imports the concept of respondeat superior from tort law: employers are vicariously liable for all of the crimes of their employees committed within the scope of their employment, without any showing of corporate fault.<sup>11</sup> Critics of this corporate liability standard make nearly identical arguments to those of the low mens rea standards in the Federal Criminal Code: it offends the notion that criminal culpability tracks with moral guilt,<sup>12</sup> it overdeters commercial conduct through its vagueness and lack of predictability,<sup>13</sup> and its

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9. See Apuzzo & Lipton, *supra* note 2; Carter, *supra* note 8.

10. Apuzzo & Lipton, *supra* note 2.

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

12. See, e.g., John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1339 (2009); see also William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 655 (1994); Gerhard O. W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 41–46 (1957).

13. See generally Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996) (arguing that corporate criminal liability results in overdeterrence).

overbreadth allows prosecutors unfettered discretion to shape criminal justice through charging decisions.<sup>14</sup>

In this Article, I take seriously the overbreadth critique of the respondeat superior standard for corporate criminal liability. In addition to the well-known issues of overbreadth, I identify a significant area in which criminal respondeat superior—at both state and federal levels—is underinclusive. Specifically, the current requirement that an employee must intend to benefit the corporation has the effect of shielding even reckless or knowing corporate employers from liability in the very worst criminal cases: those of physical and sexual violence by employees committed in connection with their employment. Ironically, while the overbreadth of corporate criminal liability offends the core aim of criminal punishment, so too does its underbreadth. Morally innocent corporations may be punished while prosecutors are unable to punish some of the most morally guilty.

This Article argues that, to solve these problems within the criminal law, we should learn from their parallel development in the sphere of tort law. Respondeat superior was, after all, a tort doctrine in the first place. Yet no comprehensive comparative effort has been made to examine how courts have, in tort respondeat superior, addressed the problems of over- and underinclusiveness that are nearly as pervasive in that realm and apply those lessons to criminal law. Here, I apply the judicial and theoretical developments in tort respondeat superior to the purposes of corporate criminal law and offer a new standard for corporate criminal liability.

This analysis starts with a comparison of the purposes and functions of tort and criminal law, which have similar competing goals. Just as criminal jurisprudence has been plagued by conflict between utilitarian and retributive theories of punishment,<sup>15</sup> the traditional instrumentalist view of tort law as motivated by either deterrence or risk spreading has faced a significant challenge by the “rights-based” account, which turns on the duties of one person to another.<sup>16</sup> Yet the particular tort goal of risk spreading—which courts

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14. See, e.g., Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1045–48 (2008); Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 414–15, 427 (2007).

15. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 307–08 (1972) (Stewart, J., concurring).

16. See CHARLES O. GREGORY & HARRY KALVEN, JR., *CASES AND MATERIALS ON TORTS* 689 (1959) (claiming that “[t]he central policy issue in tort law is whether the principal criterion of liability is to be based on individual fault or on a wide distribution of risk and loss”); Kenneth S. Abraham, *Strict Liability in Negligence*, 61 DEPAUL L. REV.

regularly cite as the justification for strict liability doctrines such as respondeat superior—applies far less clearly to criminal law, which generally prioritizes the redress of public harm over making a victim whole. This in and of itself argues against a system of pure vicarious criminal liability for faultless corporations.

Tort case law suggests mechanisms for refining the concept of corporate criminal fault. In cases where respondeat superior might be potentially overinclusive—specifically, cases of unintentional torts by employees—the common law tempers its harshness. Unlike in criminal law, with its vast array of statutory strict liability offenses, tort law’s background principles of negligence make it nearly impossible for a faultless corporation to be on the hook for the actions of a faultless employee.<sup>17</sup> In addition, we see foreseeability doctrines emerging in the case law, imposing liability only where harm is typical of a particular commercial enterprise.<sup>18</sup> This strongly suggests that criminal respondeat superior can be profitably modified by some form of negligence requirement.

On the flip side, courts have also dealt with the potential underinclusiveness of respondeat superior in the tort context in cases where plaintiffs sue employers for the sexual misconduct of their employees. Recovery in these cases was once greatly limited by courts’ refusal to hold entities liable for the intentional torts of their employees, on the theory that such torts could not have benefitted the corporation.<sup>19</sup> Yet, over time, courts have increasingly replaced the intent-to-benefit requirement with a form of causation analysis, asking whether there was a nexus between the assailant’s employment and the harm to the victim.<sup>20</sup>

In light of these lessons, I argue that criminal respondeat superior should apply where the government can show (1) a crime occurred, regardless of whether or not any individual employee had the intent to benefit the corporation; (2) an omission by the corporation to take reasonable steps to prevent the crime; and (3) the substantial risk of such a crime was objectively foreseeable to a reasonable person undertaking the corporation’s enterprise. Criminal negligence standards already exist throughout the law. Developing

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271, 273 (2012) (arguing that “tort law doctrines may need to satisfy both instrumental and rights-based concerns in order to be stable and persistent”).

17. See *infra* text accompanying notes 239–47.

18. See *infra* text accompanying notes 267–70.

19. See *infra* Section III.B.2.

20. See *infra* text accompanying notes 270–80.

such a standard for corporate criminal mens rea makes sense given the tort foundations of respondeat superior.

This Article proceeds in four parts. Part I summarizes the state of criminal respondeat superior and its substantial critical literature, including the most significant alternative proposals. Part II argues that, in addition to creating the much-lamented overbreadth problems, the current law of criminal respondeat superior likewise underpunishes in cases of what I call “corporate violence.” Part III presents the lessons to be learned from the theory and common law of respondeat superior in tort law. Part IV incorporates these tort developments into a new, better-tailored standard for corporate criminal liability.

### I. ENTITY LIABILITY AND ITS CRITICS

As far back as the thirteenth century, Pope Innocent IV articulated what has come to be known as the “fiction’ theory” of the corporation when he described ecclesiastical bodies as both distinct entities as a matter of social fact and *personae fictae*—lacking a body or will and thus not susceptible to excommunication.<sup>21</sup> Over the past 200 years, legal theorists have clashed over two views of the fundamental nature of a corporation.<sup>22</sup> Corporate realism holds that a corporation’s legal personality is actually a manifestation of its real personality in society.<sup>23</sup> Corporate nominalism holds that a corporation is simply a contractual arrangement amongst individual shareholders.<sup>24</sup> While corporate nominalism lost ground in the 1920s, it has been revived more recently with the contractual theory of the firm, a descendant of corporate nominalism, which defines corporations as “legal fictions which serve as a nexus for a set of contracting relationships among individuals.”<sup>25</sup> The question of whether a corporation should be criminally liable separate from its employees turns to some extent on which of these views we take to be more accurate. Can a network of contracts legitimately be said to have independent moral agency such that it should receive the

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21. See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 665–66 (1926); Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 584 (1999).

22. See Iwai, *supra* note 21, at 583–84.

23. See *id.* at 584.

24. *Id.*

25. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976) (emphasis omitted) (footnote omitted); see also Iwai, *supra* note 21, at 584–85.

denunciative sanction of the criminal law? U.S. courts have answered this question in the affirmative.<sup>26</sup> In so doing, however, they have created a loose and highly controversial doctrine of entity liability that has bedeviled scholars and practitioners alike for over a century.

A. *The Legal Standard for Corporate Criminal Liability*

In 1909, in *New York Central & Hudson River Railroad v. United States*,<sup>27</sup> the Supreme Court expressly abandoned the rule that corporations could not be held criminally liable.<sup>28</sup> At issue in that case was whether it was constitutional for Congress to hold entities liable for violating the Elkins Act, which amended the Interstate Commerce Act to criminalize both parties to an arrangement where shippers demanded and received rebates from railroad companies in restraint of trade.<sup>29</sup> The Court concluded that the law “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.”<sup>30</sup> The Court found that allowing corporations continued immunity from prosecution “would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.”<sup>31</sup>

Even the Court’s recognition of corporate criminal liability, which it declared was “in the interest of public policy,”<sup>32</sup> has been described as a burst of “judicial activism.”<sup>33</sup> The means the Court chose to accomplish this, however, have been even more controversial. It merely imported the tort doctrine of respondeat superior into the criminal law, holding that both the actus reus and mens rea of any individual employee acting within the scope of his or her authority could be attributed to the corporation, even when acting “against [the corporation’s] express orders.”<sup>34</sup> Courts subsequently elaborated on this standard in two significant ways. First, the employee must act, at least partially, for the purposes of benefitting

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26. *See infra* Section I.A.

27. 212 U.S. 481 (1909).

28. *Id.* at 492–96.

29. *Id.* at 491–92 (citing Elkins Act, ch. 708, 32 Stat. 847 (1903), *repealed by* Hepburn Act, ch. 3591, 34 Stat. 584 (1906)).

30. *Id.* at 495.

31. *Id.* at 495–96.

32. *Id.* at 494.

33. Philip A. Lacovara & David P. Nicoli, *Vicarious Criminal Liability of Organizations: RICO as an Example of a Flawed Principle in Practice*, 64 ST. JOHN’S L. REV. 725, 733 (1990).

34. *N.Y. Cent.*, 212 U.S. at 493–96.

the corporation (a requirement that is not ironclad in respondeat superior doctrine under tort law).<sup>35</sup> Second, an employee need only have apparent authority to act on behalf of the corporation, which is met where a third party reasonably believes the agent has the authority to perform the act in question.<sup>36</sup>

Respondeat superior was not the inevitable standard for corporate criminal liability. Six years after the Court decided *New York Central*, the House of Lords addressed a similar issue in a 1915 case called *Lennard's Carrying Co. v. Asiatic Petroleum Co.*<sup>37</sup> but did not apply the doctrine of respondeat superior. While this was a civil case, the court created a standard for entity liability that became the touchstone for criminal cases in the United Kingdom, and it remains so, with a few exceptions, to this day.<sup>38</sup> In *Lennard's Carrying*, Viscount Haldane announced the so-called directing mind test, also known as the identification test, for entity liability:

A corporation is an abstraction. It has no mind of its own any more than it has a body of its own. Its active and directing will must consequently be sought in the person of somebody who for some purposes may be called the agent, but is really the directing mind and will of the corporation, the *alter ego* and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting. That person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with that of the board of directors, given to him under the articles of association, and, being appointed by the general meeting of the company, he can only be removed by the general meeting of the company.<sup>39</sup>

35. See *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 722 (5th Cir. 1963); *infra* Section II.A.

36. See *United States v. Great Am. Ins. of N.Y.*, 738 F.3d 1320, 1334 (Fed. Cir. 2013); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972) (“[L]iability may attach without proof that the conduct was within the agent’s actual authority . . . .”); RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. LAW INST. 2006) (“Apparent authority is the power held by an agent or other actor to affect a principal’s legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.”).

37. [1915] KB 1281 (Eng.).

38. See Neil Cavanagh, *Corporate Criminal Liability: An Assessment of the Models of Fault*, 75 J. CRIM. L. 414, 416 (2011) (“Under the common law, the identification doctrine has been the primary method employed to attribute criminal liability to a corporation. The identification doctrine originates from the civil law case of *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.*”).

39. *Lennard's Carrying*, [1915] KB at 1284.

In other words, unlike simple respondeat superior, the directing mind test requires that the prosecution identify a particular employee whose stature in the corporation is significant enough that he or she can be said to represent the “ego” of the organization. It is *that* person’s mens rea that can be imputed to the corporation for the purposes of establishing corporate criminal intent. Canadian courts adopted this standard in criminal cases, until a Parliamentary intervention in this century,<sup>40</sup> with the additional feature that there could be more than one directing mind within a corporation.<sup>41</sup>

Despite the novelty and fairly dramatic new world order announced in *New York Central*, the Supreme Court has not since weighed in substantively on the essence of corporate criminal liability. This has left lower courts with the unenviable task of figuring out how to apply the respondeat superior standard to the vast range of potential criminal offenses and across the spectrum of fault requirements. For criminal offenses with a scienter element—a showing of subjective fault by the offender—a straightforward application of respondeat superior would leave a corporation liable if any individual employee possessed the requisite degree of fault. However, because this seems inconsistent with the presumption of fault as a precondition to criminal liability, some federal courts have declined to impute an employee’s subjective fault to the corporate employer without evidence that management in some way knew about or acquiesced to the misconduct.<sup>42</sup>

In contrast, another doctrinal puzzle arises when no single employee possesses the requisite mens rea necessary for the offense but a number of employees have, together, committed the unlawful act. In these cases, a minority of courts have applied the so-called collective knowledge doctrine, in which they aggregate the knowledge of all of the employees to create the necessary scienter.<sup>43</sup> The leading case on collective knowledge is *United States v. Bank of New England, N.A.*,<sup>44</sup> in which a bank was charged with violating the Currency

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40. See Peter MacKay, *Corporate Liability in Canada*, GLOBAL COMPLIANCE NEWS, <https://globalcompliancencnews.com/white-collar-crime/corporate-liability-canada/> [https://perma.cc/3TWA-6Z8Y].

41. See, e.g., *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, 693 (Can.).

42. See J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME § 2.07[A] (4th ed. 2017).

43. 1 JAMES D. COX & THOMAS LEE HAZEN, THE LAW OF CORPORATIONS § 8.21, at 531–32 (3d ed. 2010); see also *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974).

44. 821 F.2d 844 (1st Cir. 1987).

Transaction Reporting Act (“CTRA”) by failing to report cash transfers greater than \$10,000.<sup>45</sup> To be liable under the CTRA, a defendant must “willful[ly]” commit the violation, a mens rea element that other courts have held requires “proof of the defendant’s knowledge of the reporting requirement and his specific intent to commit the crime.”<sup>46</sup> The court noted that “[w]illfulness can rarely be proven by direct evidence, since it is a state of mind,” but “is usually established by drawing reasonable inferences from the available facts.”<sup>47</sup> On thirty-one separate occasions, Bank of New England tellers cashed checks to the same customer that added up to a sum greater than \$10,000.<sup>48</sup> While each individual check valued less than \$10,000, on each of the thirty-one occasions the individual checks were presented simultaneously to a single bank teller and valued more than \$10,000 in aggregate.<sup>49</sup> Dismissing the bank’s argument that the compartmentalized nature of knowledge within the corporation shielded it from liability, the court upheld the corporation’s conviction based on the collective knowledge of its disparate employees.<sup>50</sup>

The collective knowledge approach has been criticized by courts and commentators alike for essentially imposing the unrealistic requirement that senior management keep track of the knowledge of all of its employees.<sup>51</sup> As the Fifth Circuit observed when declining to consider the collective knowledge of all corporate officers in determining scienter under the Securities and Exchange Act,

where, as in fraud, an essentially subjective state of mind is an element of a cause of action also involving some sort of conduct, such as a misrepresentation, the required state of mind

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45. *Id.* at 846–47.

46. *United States v. Hernando Ospina*, 798 F.2d 1570, 1580 (11th Cir. 1986) (quoting *United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984)).

47. *Bank of New England*, 821 F.2d at 854 (citing *United States v. Wells*, 766 F.2d 12, 20 (1st Cir. 1985)).

48. *Id.* at 847–48.

49. *Id.*

50. *Id.* at 856.

51. *See, e.g., United States v. Sci. Applications Int’l Corp.*, 626 F.3d 1257, 1275 (D.C. Cir. 2010), *vacating in part*, 653 F. Supp. 2d 87 (D.D.C. 2009); Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210, 238–39 (1997); *cf. In re Tex. E. Transmission Corp.*, 870 F. Supp. 1293, 1307 (E.D. Pa. 1992) (dismissing “the imputation of every bit of knowledge known to each individual employee” and instead requiring both that the employee have learned the information in the course of an employment-related activity and that the employee be of a “sufficient level of corporate responsibility to justify charging the corporation with that knowledge” (emphasis added)), *aff’d*, 995 F.2d 219 (3d Cir. 1993).

must actually exist in the individual making ... the misrepresentation, and may not simply be imputed to that individual on general principles of agency.<sup>52</sup>

With even the courts at odds as to how exactly to apply criminal respondeat superior, it is unsurprising that the doctrine has attracted extensive criticism.

### B. *Criticisms of Respondeat Superior*

Before addressing the particular criticisms of the respondeat superior standard itself, there is a preliminary question of whether it is appropriate for corporate criminal liability to exist in the first place. Detractors argue that criminally punishing an entity violates all three of the general purposes of criminal punishment: retribution, deterrence, and rehabilitation. For example, John Hasnas characterizes vicarious liability as, inherently, the punishment of innocents—in this case shareholders, stakeholders, and other employees—which he argues is incompatible with the retributive principle of punishing no more and no less than what is deserved.<sup>53</sup> Some empirical literature also suggests that corporate criminal liability—which obviously cannot result in imprisonment but only fines—may inefficiently overdeter misconduct relative to existing administrative and civil sanctions.<sup>54</sup> In light of these problems, Miriam Baer has proposed an insurance system to replace criminal liability, in which insurance carriers would review a company's compliance programs, use a number of factors to estimate the likelihood that its employees would commit crimes, and then charge the company for insurance on that basis.<sup>55</sup>

Supporters of corporate criminal liability point to the sheer amount of harm corporations can cause,<sup>56</sup> as well as the expressive value, from the moral perspective of the general public, of punishing

52. *Southland Sec. Corp. v. INSpire Ins. Sols. Inc.*, 365 F.3d 353, 366 (5th Cir. 2004).

53. See Hasnas, *supra* note 12, at 1339; see also Laufer, *supra* note 12, at 655; Mueller, *supra* note 12, at 41–46. Hasnas also argues that, whatever the benefits of corporate criminal liability in terms of deterrence or rehabilitation, they can only be justified by punishing guilty parties, not innocents. Hasnas, *supra* note 12, at 1339–40.

54. See generally Fischel & Sykes, *supra* note 13 (arguing against corporate criminal liability and in favor of appropriate civil remedies); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996) (arguing that civil liability avoids the undesirable consequences of corporate criminal liability).

55. Baer, *supra* note 14, at 1035, 1079–81.

56. Pamela H. Bucy, *Corporate Criminal Liability: When Does It Make Sense?*, 46 AM. CRIM. L. REV. 1437, 1437 (2009).

corporations in addition to their constituents.<sup>57</sup> Others draw upon the recent scholarship on the “utility of desert” to suggest that if social norms support criminal liability for corporations, we risk delegitimizing the criminal law by failing to impose it.<sup>58</sup> Elsewhere I have defended the existence of corporate criminal liability under certain circumstances on the grounds that when a corporation commits a crime it imposes a unique set of harms on its victims that flow from the nature of the corporate structure itself.<sup>59</sup> I contend that it is appropriate, retributively, for criminal law to redress the increased psychological and cultural harms related to a corporation’s enduring nature and institutional connections with state power.<sup>60</sup> Redressing this harm is an important function of criminal punishment that cannot be attained by civil penalties alone. We may also reap additional expressive benefits from redressing such harm, though I argue that expressive benefits alone cannot justify punishment in the absence of actual harm.<sup>61</sup>

A new deep dive on this question is, however, beyond the scope of this Article. It is also not terribly pressing given that, whatever its theoretical challenges, some form of corporate criminal liability is likely here to stay.<sup>62</sup> The bases for critics’ objections to its mere existence remain relevant to the second question: Is respondeat superior the appropriate standard for determining when corporations should be liable for the crimes of their agents?

### 1. The Case that Respondeat Superior Punishes Too Much

The most common argument against respondeat superior is that it exacerbates the problems of justice already inherent in vicarious criminal liability by overly broadening the range of employee conduct that can be attributed to the entity.<sup>63</sup> Under a theory of respondeat

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57. See Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618–22 (1998).

58. See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 521 (2006).

59. Erin Sheley, *Perceptual Harm and the Corporate Criminal*, 81 U. CIN. L. REV. 225, 259–63 (2012).

60. See *id.*

61. *Id.* at 238.

62. See Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 612 (2012) (“[C]orporate punishment is not likely to yield to corporate regulation any time soon. The public has increasingly registered greater moral outrage in response to corporate governance scandals. Moral outrage, in turn, fuels retributive motivations and therefore supports those institutions best poised to take advantage of such motivations.”).

63. See Deborah A. DeMott, *Organizational Incentives to Care About the Law*, LAW & CONTEMP. PROBS., Summer & Autumn 1997, at 45 (“[I]n the absence of complicity at

superior, one rogue, low-level employee acting against company policy—and even against specific instruction—can bring criminal liability down upon the entire operation, even for criminal offenses that require the defendant to act knowingly or willfully.<sup>64</sup> If the notion of corporate “intent” makes sense at all, it seems illogical to infer it from the individual intent of one rogue employee.

These theoretical problems of overbreadth have become exacerbated in practice. Prosecutors have a significant amount of leverage in the criminal justice system generally, usually due to an asymmetry of resources vis-à-vis individual defendants. But in the case of corporations, prosecutorial leverage is due in large part to the devastating market consequences of an indictment.<sup>65</sup> This leverage, combined with such a broad liability standard as respondeat superior, which precludes as it does any hope of arguing lack of corporate mens rea, leaves corporations with so little chance of success at trial that they have little incentive to test the government’s case.

This state of affairs gave rise to the popularity of the deferred prosecution agreement (“DPA”) as a means of resolving federal corporate criminal investigations.<sup>66</sup> In a deferred prosecution agreement—which, unlike a plea bargain, is not subject to judicial implementation—the government agrees not to prosecute the corporation in exchange for various financial penalties and investigative cooperation, a practice which has been widely described as requiring the corporation to be “agents of the state.”<sup>67</sup> There is at

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high levels, vicarious liability often taxes the corporation and its shareholders with the consequences of conduct that the corporation itself has prohibited.”); Laufer, *supra* note 12, at 655–56; Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1319–20 (2007).

64. See *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) (“[A] corporation may be held criminally responsible for antitrust violations committed by its employees . . . even if, as in *Hilton Hotels* and *American Radiator*, such acts were against corporate policy or express instructions.”); see also *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972); *United States v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204 (3d Cir. 1970).

65. See Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 AM. CRIM. L. REV. 1481, 1483 (2007); Weissmann, *supra* note 63, at 1321. It is worth noting that the degree of the adverse market reaction to an indictment appears to vary depending on the crime alleged: among fraud offenses, for example, financial reporting offenses see the largest stock drops, fraud offenses against the government second, fraud offenses against stakeholders third, and fraud offenses involving regulatory violations showing little effect. See Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395, 412 (1991).

66. See Bohrer & Trencher, *supra* note 65, at 1481–84.

67. *Id.* at 1481.

least some evidence that federal prosecutors have started to abuse this power. Recently, a series of corporate defendants in Foreign Corrupt Practices Act (“FCPA”) cases made the unusual decision to take their cases to trial rather than cooperate.<sup>68</sup> These trials revealed instances of the DOJ and FBI resorting to improper tactics to make their cases in the absence of the cooperation attained through a DPA.<sup>69</sup>

## 2. The Case that Respondeat Superior Punishes Too Little

While the lion’s share of criticisms of respondeat superior relate to the excessive amount of criminal exposure it leaves corporations, there are circumstances under which it can also be underinclusive. Given the size and complexity of the modern corporation, it is often difficult to keep track of what employee is making what decision at

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68. See, e.g., *United States v. Aguilar*, 831 F. Supp. 2d 1180, 1182 (C.D. Cal. 2011) (explaining that the present case was “the first Foreign Corrupt Practices Act criminal prosecution against a corporation to proceed to jury trial”); Nat’l Ass’n of Criminal Def. Lawyers, *FCPA Case: U.S. v. Goncalves (Gun Sting Case)*, CRIM. DEF. ISSUES, <https://www.nacdl.org/criminaldefense.aspx?id=23896> [<https://perma.cc/6PVF-QQWM>].

69. The conviction of Lindsey Manufacturing Company, the first corporation to stand trial under the FCPA, was subsequently overturned by a federal judge who noted that

the Government team allowed a key FBI agent to testify untruthfully before the grand jury, inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants, improperly reviewed e-mail communications between one Defendant and her lawyer, recklessly failed to comply with its discovery obligations, posed questions to certain witnesses in violation of the Court’s rulings, engaged in questionable behavior during closing argument and even made misrepresentations to the Court.

*Aguilar*, 831 F. Supp. 2d at 1182. In the case of the so-called Africa Sting operation, the government drafted notorious con man Richard Bistrong to make cases against twenty-two executives and employees in the military and law enforcement products industry for engaging in a scheme to pay bribes to the defense minister of an African country. See Richard L. Cassin, *Where is Richard Bistrong Today?*, FCPA BLOG (Oct. 31, 2012, 5:28 AM), <http://www.fcpablog.com/blog/2012/10/31/where-is-richard-bistrong-today.html> [<https://perma.cc/FS58-YY54>]. While dismissing the charges against the defendants, the judge, who had earlier expressed concerns about how the case was being prosecuted, said, “This appears to be the end of a long chapter in the annals of white collar criminal enforcement.” *Africa Sting—in the Words of Judge Leon*, FCPA PROFESSOR (Feb. 23, 2012), <http://fcpprofessor.com/africa-sting-in-the-words-of-judge-leon/> [<https://perma.cc/CWR5-JZZP>]; see also Nat’l Ass’n of Criminal Def. Lawyers, *supra* note 68. Two weeks into the trial of Joseph Sigelman, a former co-CEO of PetroTiger who had been accused of conspiring to pay bribes to a former worker at Colombia’s state-owned Ecopetrol SA in exchange for a contract, a chief witness against him recanted. *Ex-PetroTiger Co-CEO Avoids Prison in Bribery Case*, REUTERS (June 16, 2015, 3:31 PM), <https://www.reuters.com/article/petrotiger-sigelman/ex-petrotiger-co-ceo-avoids-prison-in-bribery-case-idUSL1N0Z21U> [<https://perma.cc/U644-DCFB>]. Sigelman took a plea and did not receive any jail time. *Id.*

any given time.<sup>70</sup> Because respondeat superior requires that *some* employee have the requisite mens rea while committing the requisite actus reus, it may be impossible to find such a person—either as an evidentiary matter or because, particularly for crimes that require some heightened mental element of intent or knowledge, such a person literally does not exist despite the fact that a crime has actually occurred.<sup>71</sup> Particularly in cases involving specific-intent offenses where multiple employees appear guilty, each of whose potential guilt casts doubt on the guilt of the others, a corporate defendant may be able to obtain a so-called patchwork verdict where jurors agree that the accused has done something illegal but do not agree upon which of several distinct acts have occurred.<sup>72</sup>

As mentioned above, some courts developed the doctrine of collective knowledge to adapt respondeat superior to deal with such situations, but the majority have rejected it.<sup>73</sup> And, in any case, the doctrine fails to account for how to assign liability in cases requiring specific intent above and beyond knowledge—what can be done where multiple employees responsible for partial portions of the actus reus have conflicting intents?<sup>74</sup>

### C. *Alternative Theories*

In the face of this morass, commentators have developed a range of alternative mens rea standards for corporate criminal liability, intended to impart coherence to the field. Many of them would improve the status quo, but most suffer from at least one or another practical or theoretical flaw. This section briefly describes the most significant proposed alternatives.

*Identification Theory.* The oldest and most historically established alternative to respondeat superior, identification theory,

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70. Cf. Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scierter*, 2006 COLUM. BUS. L. REV. 81, 107 (discussing the difficulty of “locat[ing] the single guilty agent or the constellation of guilt in the corporation”).

71. See *id.*

72. See Stacey Neumann Vu, Note, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459, 460 (2004). For an example of a patchwork verdict, see *United States v. Gipson*, 553 F.2d 453, 455–56 (5th Cir. 1977) (reversing the trial court’s instruction to a jury that concurrence on facts was unnecessary so long as each juror found that the defendant had committed either one or the other of two charged acts constituting “selling or receiving” a stolen vehicle).

73. See text accompanying notes 43–52; see also Hagemann & Grinstein, *supra* note 51, at 227 (noting that “only a few courts addressing criminal or civil issues have alluded to the collective knowledge rule” (footnotes omitted)).

74. Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2071 (2016).

remains the law of the land in the United Kingdom for most cases of corporate crime that do not involve death.<sup>75</sup> The American Law Institute has also endorsed it in the Model Penal Code, under which a corporation may be held criminally liable if “the commission of the offense was authorized . . . by the board of directors or by a high managerial agent.”<sup>76</sup> The problem with identification theory is that it does not capture the internal reality of the large, modern corporation and makes it too difficult to punish corporations where pervasive wrongdoing cannot be traced to the specific knowledge of one high-ranking official.

In Canada, the gross negligence of Curragh Resources Inc., the private company that managed the Westray coal mine, and its political supporters resulted in the deaths of twenty-six Nova Scotia miners in 1992.<sup>77</sup> After the Crown’s failure to obtain any criminal convictions, widespread public outcry resulted in Parliament supplanting common law identification theory with a statutory provision intended to make it easier to convict corporations.<sup>78</sup> During the parliamentary debates over what was then called Bill C-45, critics of identification theory pointed out that “[r]arely do high-level corporate officials personally engage in the specific conduct or make the specific decisions that result in [workplace disasters].”<sup>79</sup> Instead, through policy decisions or cultural habit, they maintain a corporate environment where subordinates feel encouraged or expected to cut corners on compliance, in spite of the existence of compliance policies.<sup>80</sup> It is also easy to see how, if identification theory were the law of the land, corporations could avoid liability for any subjective-fault crime simply by shielding their top brass from actual knowledge of the relevant goings-on, like organized criminal syndicates.

*Genuine Corporate Fault.* A number of proposed models of corporate liability attempt to replace vicarious liability with efforts to define fault through features of the corporate form.<sup>81</sup> One variant,

75. See Cavanagh, *supra* note 38, at 416–17, 421.

76. MODEL PENAL CODE § 2.07(1)(c) (AM. LAW INST. 1962).

77. *Westray Remembered: Explosion Killed 26 N.S. Coal Miners in 1992*, CBC (May 8, 2012, 3:18 PM), <http://www.cbc.ca/news/canada/nova-scotia/westray-remembered-explosion-killed-26-n-s-coal-miners-in-1992-1.1240122> [<https://perma.cc/B9DB-T32N>].

78. See *id.*

79. DAVID GOETZ, PARLIAMENTARY RESEARCH BRANCH, LS-457E, BILL C-45: AN ACT TO AMEND THE CRIMINAL CODE (CRIMINAL LIABILITY OF ORGANIZATIONS) 2 (2003), [http://publications.gc.ca/collections/collection\\_2016/bdp-lop/lp/YM32-3-372-C45-eng.pdf](http://publications.gc.ca/collections/collection_2016/bdp-lop/lp/YM32-3-372-C45-eng.pdf) [<https://perma.cc/XT6E-HFYA>].

80. *Id.*

81. William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1307 (2000).

proactive corporate fault, “attributes liability where a corporation’s practices and procedures are inadequate to prevent the commission of a crime.”<sup>82</sup> Another, reactive corporate fault, focuses on the failure of the corporation to respond adequately to a criminal offense after it has been discovered.<sup>83</sup> Both of these models violate the basic concept of mens rea. While they focus on actual “corporate” conduct rather than the acts of an employee, they measure fault with respect to acts other than the actual actus reus of the offense (namely, ex ante creation of policies or ex post investigation and remedies).

Another variant of the genuine corporate fault school is Peter French’s theory of the Corporate Internal Decision Structure (“CID Structure”).<sup>84</sup> French has identified the CID Structure—the combination of an organizational structure and formal corporate policies—as the appropriate proxy for actual corporate intentionality.<sup>85</sup> According to French, “Corporate agency resides in the possibility of CID Structure licensed redescription of events as corporate intentional.”<sup>86</sup> In other words, actions that appear authorized by the CID Structure can truly be said to be willed by the corporation as a whole. While French’s CID Structure theory works well to justify the *possibility* of corporate intentionality against its various critics (i.e., it does describe a mechanism by which corporate intentionality, above and beyond the disparate intents of individual employees, can be identified), it is a bit thin as an actual liability standard. If we limit corporate criminal liability only to those offenses where some intention can be identified through formal corporate structure and policy, we are narrowing the scope of corporate criminal law to the point of ineffectiveness. Crimes unanticipated by formal policy happen all the time. CID Structure as a liability standard also suffers from some of the same problems as identification theory in the sense that those responsible for crafting formal policies may nonetheless be willfully ignorant of, or even encouraging of, deviations from them.

*Compliance Program / Safe Harbor.* One of the easier-to-administer alternatives to pure respondeat superior would be retaining the current vicarious liability standard but allowing some

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82. *Id.*

83. *See id.* at 1308.

84. *See* Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 211–15 (1979).

85. *Id.* at 212.

86. *Id.* at 215.

sort of affirmative defense based on the corporation's good faith.<sup>87</sup> For example, Ellen Podgor has proposed that corporations should be able to use evidence of a compliance program as part of a good faith defense.<sup>88</sup> She notes that this would avoid punishing innocent shareholders when the corporation itself could be shown to have had compliance programs in place to avoid the misconduct (presumably also creating incentives for corporations to continue to implement these programs).<sup>89</sup> Another variant of this idea would require the government to prove the *lack* of bona fide compliance program as part of its affirmative case.<sup>90</sup> For example, Andrew Weissman and David Newman have proposed a form of negligence standard that requires proof of a "fail[ure] to have reasonably effective policies and procedures to prevent the conduct."<sup>91</sup> This proposal would create a beneficial limitation on prosecutorial discretion but has been criticized for creating a vague standard of liability that would generate confusion and overdeterrence.<sup>92</sup> Another downside to all of these theories is that allowing a safe harbor for liability could incentivize corporations to create "paper" compliance programs behind which misconduct occurs under the table. It would be, essentially, a dodge for evaluating actual mens rea.

*Corporate Ethos.* Like the safe harbor model, a corporate ethos theory of corporate criminal liability also considers the existence of a compliance program, but as part of a broader inquiry into corporate culture generally. Australia, for example, allows proof of corporate intent or recklessness through evidence that "a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision."<sup>93</sup> The leading

87. See Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 462–64 (1993); see also H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279, 309–12 (1995).

88. See generally Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1538 (2007) ("[A]n affirmative defense should be offered to those who present 'good faith' efforts to achieve compliance with the law as demonstrated in their corporate compliance program.").

89. See *id.* at 1543.

90. See Weissmann, *supra* note 63, at 1322; Weissmann with Newman, *supra* note 14, at 440 (dismissing concerns about "paper" compliance programs as unrealistic because, "[f]or a company to succeed at such a ruse, it would need to implement an inadequate program, pass it off as sufficient, not otherwise be subject to criminal liability because of the pervasiveness of the criminal conduct at issue which would undermine establishing the adequacy of any program, and fool prosecutors, the court, and jurors").

91. Weissmann with Newman, *supra* note 14, at 414.

92. Baer, *supra* note 14, at 1074.

93. *Criminal Code Act 1995* (Cth) s 3 ch 2 div 12.3(2)(c) (Austl.).

American proponent of corporate ethos theory, Pamela Bucy, urges a similar rule: conviction should result only where the government “proves that the corporate ethos encouraged agents of the corporation to commit the criminal act.”<sup>94</sup> Aspects of ethos that Bucy considers include hierarchical structure, corporate goals, post-offense behavior, and the existence of a compliance program.<sup>95</sup> The most immediately apparent problem with corporate ethos theory is that showing causation would seem to present evidentiary issues. Even with Bucy’s specific criteria, it is hard to pinpoint a direct causal link between something as diffuse as “culture” and a specific instance of wrongdoing. Mihailis Diamantis has pointed out that if only evidence of culture as a generalized contributing cause were sufficient, then the case would run afoul of the evidentiary prohibition against character evidence used to show a propensity to commit a crime.<sup>96</sup>

*Constructive Corporate Fault.* William Laufer has proposed perhaps the most nuanced mechanism for assigning criminal liability to corporations, which he describes as constructive corporate fault.<sup>97</sup> This standard requires proof of two things: “(1) an illegal corporate act; and (2) a concurrent corporate criminal state of mind.”<sup>98</sup> To determine whether the act is attributable to the corporate entity, “[a]n objective test determines whether given the size, complexity, formality, functionality, decision making process, and structure of the corporate organization, the agents’ acts are fairly said to be the actions of the corporation.”<sup>99</sup> Once it is determined that the acts may be attributed to the entity, the next question is what particular state of mind such a corporation would have.<sup>100</sup> To determine whether a corporation possessed the appropriate level of mens rea to meet that element of the particular offense, we would ask “whether the average corporation of like size, complexity, functionality, and structure, given the circumstances presented, would have the required state of mind.”<sup>101</sup> As Diamantis points out, however, this test nonetheless

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94. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099 (1991).

95. *See id.* at 1101, 1138.

96. Diamantis, *supra* note 74, at 2072–73. *But see* Robert E. Wagner, *Criminal Corporate Character*, 65 FLA. L. REV. 1293, 1294 (2013) (arguing that evidence concerning the character of a corporation should be admissible in criminal settings to prove that the corporation acted in conformity with its alleged character).

97. *See generally* Laufer, *supra* note 12 (proposing a new standard for corporate culpability).

98. Laufer & Strudler, *supra* note 81, at 1308.

99. *Id.* at 1309.

100. *Id.*

101. *Id.* at 1310.

presupposes some prior understanding of what mental state an “average corporation” would have in a particular set of circumstances, thereby immediately reconstituting the problem of determining what constitutes corporate mens rea.<sup>102</sup>

*Fact-Finder Inferences.* Diamantis proposes that, in lieu of seeking theories of corporate mens rea, we allow fact finders to apply the same inferential processes for determining intent that they would use for natural persons.<sup>103</sup> He notes that juries already discern individual human intent by drawing inferences from actions and circumstances in the absence of a clear view into the defendant’s brain.<sup>104</sup> Pointing to cognitive science literature that shows humans assign blame to groups in the same way that they assign blame to individuals,<sup>105</sup> he suggests that juries be allowed to “determine which narrative [of corporate intent] they find most plausible.”<sup>106</sup>

This idea, while appealingly simple to implement, runs afoul of the rule of law. While jurors infer individual intent from actions, they necessarily do so by comparing the case to what they already know about how individual intent works, based upon *being* individuals with the capacity to form intent. Juries are frequently told, for example, to rely on their “common sense” and “intuition” to evaluate the credibility of witnesses.<sup>107</sup> The law’s reliance on this particular function of juries has already been heavily criticized. Specifically, research suggests that jurors assimilate the evidence they hear along with their own past experiences into a coherent narrative, which acts as a sort of cognitive filter and affects their evaluation of individual pieces of evidence.<sup>108</sup> Thus, we already have reason to believe that, as Diamantis says, jurors certainly can and do use narrative to assign blame to individuals. But we also know that, due to the potentially

102. Diamantis, *supra* note 74, at 2074.

103. *Id.* at 2053, 2076–77.

104. *Id.* at 2076–77.

105. *Id.* at 2077–80.

106. *Id.* at 2082.

107. *See, e.g.,* Barnes v. United States, 412 U.S. 837, 845–46 (1973) (explaining that the jury could use its common sense and experience to find that the defendant knew he had possession of stolen property).

108. *See* REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY 22–23 (1983); Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JURY DECISION MAKING 192, 192–203 (Reid Hastie ed., 1993); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 560–61 (2004). It is this phenomenon that has, for example, been used to explain evidence suggesting that jury race affects trial outcomes due to jurors’ sympathy for victims of the same race. *See* Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 78 (1993).

subjective quality of these narratives, this may not always result in like cases being treated alike, which is an important feature of the rule of law.<sup>109</sup> Even assuming this effect is unavoidable in a world of human fact finders—and even assuming, as has been argued, that scholars overstate the extent to which this phenomenon results in irrational jury decisions<sup>110</sup>—it seems unwise to actively rely on it and even amplify it. At least when jurors incorporate their own subjective narratives into their inferences about intent, they are comparing the facts of the case to something about which they have actual experience: what it means, as an individual, to intend something. If we ask them to perform the blaming function without any instruction about what the essence of corporate intent is, we are throwing the entire process of corporate criminal adjudication into an open-ended fog of subjectivity. There is no avoiding the need for a workable theory of entity liability.

*D. The Interaction of Respondeat Superior and the Federal Criminal Code*

The problem raised by critics, that respondeat superior results in excessive corporate criminal liability for blameless entities for the acts of rogue employees, is amplified in the federal context. To understand this problem, take as an example a pair of hypothetical prosecutions under § 331 of the Food, Drug, and Cosmetic Act. Section 331 prohibits, among other things, “causing” the “adulteration or misbranding of any . . . drug . . . in interstate commerce” or “causing” the “introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded.”<sup>111</sup> Any person who takes or causes any of the actions proscribed in § 331 is guilty of a misdemeanor;<sup>112</sup> if he or she had “the intent to defraud or mislead,” or was previously convicted under § 331, then he or she is guilty of a felony.<sup>113</sup>

In the first example, we have Happy Drugs, a chain of compounding pharmacies that does business across most of the

109. JOHN RAWLS, A THEORY OF JUSTICE § 38, at 237 (1971).

110. See David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 409 (2013) (criticizing the “myth” that juries ignore evidentiary instructions and arguing that “evidentiary instructions probably do work, but imperfectly, and better under some conditions than others”).

111. 21 U.S.C. § 331(a)–(b) (2012).

112. See *id.* § 333(a)(1); see also Yi-Chen Su, *The Extent of Harm to the Victim as an Alternative Aggravating Factor for the Conviction of Felony Fraud in the Context of Food-Safety Violations*, 71 FOOD & DRUG L.J. 658, 659 (2016).

113. See 21 U.S.C. § 333(a)(2) (2012); see also Su, *supra* note 112, at 659.

American East Coast and Midwest. The company has a strict training program for its employees, including education about the Food, Drug, and Cosmetic Act, and the many other complex FDA rules governing its business. Every three months, each facility is subject to regular inspections, as well as periodic random inspections. The company also conducts a yearly audit. John Doe, the manager of the Madison, Wisconsin, facility has fallen on hard times due to his daughter's unexpected health issues and decides to make a little side cash by selling the active ingredient of one of Happy's opioid painkillers on the street. Happy Drugs detects the problem in about a month upon random testing of a sample of product as part of their regular inspection. Doe is apprehended and charged with a variety of trafficking offenses. But, due to the fact that his theft of the ingredient caused underdosed medication to be sold on the street, Happy Drugs is also successfully prosecuted for a felony. Doe intentionally introduced adulterated medication into interstate commerce and, because the sales of the watered-down drug benefitted the corporation, his crime can be imputed to the wholly nonnegligent corporation.

In the second example, we have the same basic players, with the exception that John Doe is distracted by his daughter's health problems and does not notice when one of his employees made a mathematical error on the compounding specs for a new drug, which results in half doses of opioid being bottled and consequently mislabeled as full doses, which Happy Drugs immediately detects. In that case, due to the lack of mens rea element for a misdemeanor conviction under § 331, John Doe is arrested and criminally convicted, without the opportunity to make a defense of nonnegligence. Furthermore, Happy Drugs can be criminally convicted as well, despite being nonnegligent vis-à-vis their employee's *unintentional* conduct.

The first example showed the potential harshness of holding generally well-behaved, faultless corporations responsible for the criminal acts of individual employees. The second showed that the relationship between true fault and criminal liability is even more attenuated when courts impute even *inadvertent* employee actions to nonnegligent corporate employers for the purposes of imposing criminal liability.

## II. THE PROBLEM OF CORPORATE VIOLENCE

The critique of criminal respondeat superior summarized thus far focuses primarily on the extent to which it is *overly* punitive.<sup>114</sup> The exception is the concern raised by critics who fear that evidentiary barriers and the complexities of corporate operations may sometimes result in corporate crimes going unpunished entirely where a criminal employee cannot be identified.<sup>115</sup> Part II identifies another way in which respondeat superior systematically *undercriminalizes* corporate employers, precisely when the worst sorts of crimes have occurred.

### A. *The Requirement that the Crime Benefit the Employer*

One of the few limiting principles of respondeat superior is that a corporation may only be bound by the acts of its employees when the employee has acted, at least in part, to benefit the corporation.<sup>116</sup> This is a separate question from the related requirement that the employee have acted within the scope of his or her employment.<sup>117</sup> As mentioned earlier, under traditional principles of agency in tort law, the question of whether an employee acted within the scope of his employment for the purposes of holding his employer liable for civil fraud is *informed* by the intent to benefit the employer.<sup>118</sup> Under criminal law, however, they remain distinct elements.

114. See *supra* Section I.B.1.

115. See *supra* Section I.B.2.

116. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 502 (5th ed. 1984) (noting that the rule applies when a “servant’s conduct . . . is actuated, at least in part, by a purpose to serve the master”); see, e.g., *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (stating that a corporate employer can be held liable for an employee’s actions if “the agent is ‘performing acts of the kind which he is authorized to perform,’ and those acts are ‘motivated—at least in part—by an intent to benefit the corporation’” (quoting *United States v. Cincotta*, 689 F.2d 238, 241–42 (1st Cir. 1982))); *United States v. Jorgensen*, 144 F.3d 550, 560 (8th Cir. 1998) (“A corporation is criminally responsible for the ‘acts of its officers, agents, and employees committed within the scope of their employment and for the benefit of the corporation.’” (quoting *United States v. Richmond*, 700 F.2d 1183, 1195 n.7 (8th Cir. 1983))).

117. See, e.g., *United States v. A & P Trucking Co.*, 358 U.S. 121, 126–27 (1958) (holding that a partnership can be liable for acts committed knowingly by employees in the scope of their employment).

118. See RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (AM. LAW INST. 2006) (“When [a transactional activity] is misused, for example to perpetrate a fraud for the employee’s sole benefit, the employer’s responsibility is often determined by whether the party injured reasonably believed the employee’s activity to be authorized.”); RESTATEMENT (SECOND) OF AGENCY § 235 (AM. LAW INST. 1958) (“An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.”).

Indeed, in *New York Central* the Supreme Court highlighted the relevance of benefit to the employer as a particular justification for importing respondeat superior from tort law into criminal law in the first place. Discussing the findings of the Interstate Commerce Commission, which formed the basis for the Elkins Act, the Court stated:

It 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 enured to the benefit of the corporations of which the individuals were but the instruments.<sup>119</sup>

The Court's interest here, as elsewhere in the opinion, is pragmatic: the regulation of interstate commerce would be impossible without the power to reach the benefitted corporations through the conduct of their employees.<sup>120</sup> Employees are "instruments" when they act to the advantage of their employers. To be held criminally liable under respondeat superior, it is not necessary that the corporation received a benefit in fact from its employee's actions so long as the employee intended to bestow it.<sup>121</sup> On the flip side, as an evidentiary matter, courts allow the inference that an employee intended to benefit the corporation wherever his misconduct did indeed have that effect.<sup>122</sup>

That said, when an employee commits a crime that is contrary to the interests of the corporation and from which the corporation derives no benefit, the corporation is *not* subject to criminal

119. *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 495 (1909).

120. *See supra* text accompanying note 119.

121. *See United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985) ("[W]hether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation."); *United States v. Cincotta*, 689 F.2d 238, 242 (1st Cir. 1982) ("[A] corporation may not be held strictly accountable for acts that could not benefit the stockholders, such as acts of corporate officers that are performed in exchange for bribes paid to the officers personally."); *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 128–29 (5th Cir. 1962) ("[An employee's] act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is undiscernible, or, for that matter, the result turns out to be adverse.").

122. *See United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 970 (D.C. Cir. 1998) (holding that an employee's actual defrauding of his corporation nonetheless met the element of benefitting the corporation because his actions "promised some benefit" to the corporation); *Automated Med. Labs.*, 770 F.2d at 407 (finding the element satisfied because the employee's efforts at personal advancement also "depended on [the corporation's] well-being"); Michael Nagelberg et al., *Corporate Criminal Liability*, 54 AM. CRIM. L. REV. 1073, 1080 (2017).

liability.<sup>123</sup> In *Standard Oil Co. of Texas v. United States*,<sup>124</sup> the Fifth Circuit overturned the convictions of the defendant oil corporations whose employees engaged in a scheme involving the moving and reassigning of oil to other wells in violation of the Connally Hot Oil Act.<sup>125</sup> The court found that the government had not proven intent to benefit the corporation, observing that while “[w]ithout Pasotex and its pipeline transportation, and without Standard’s purchase of such ‘hot’ or non-existent oil, Thompson could not succeed,” nonetheless the employees “were doing their usual tasks in handling run tickets not to advance or further the interest of Pasotex” but “to further the criminal enterprise of which they were an indispensable part.”<sup>126</sup>

In *United States v. Ridglea State Bank*,<sup>127</sup> two banks had been charged with violating the False Claims Amendments Act after the federal government reimbursed the banks for losses on loans a single employee had fraudulently approved.<sup>128</sup> In holding the banks not liable because the employee did not intend to benefit them, the court stated that the employee “must have known that the loans he approved would be defaulted, so that the banks would not make any money on interest on the loans.”<sup>129</sup> Indeed, the employee’s “approval of fraudulent applications for FHA-insured loans endangered the bank’s ability to continue to handle FHA business and jeopardized the reputation of the banks and their financial integrity.”<sup>130</sup> The employee’s actual purpose “was to line his own pockets . . . and to get money to make payments on loans previously approved by him on the basis of fraudulent applications, so that these earlier wrongdoings would remain concealed.”<sup>131</sup>

Significantly, the Fifth Circuit rejected the government’s reliance on civil case law establishing that an employer is generally “held liable for the fraudulent misrepresentations of his agent, even though the agent acted without any intent to benefit his employer, so long as the third person reasonably believed that the agent was acting within the scope of his employment.”<sup>132</sup> The court distinguished traditional

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123. Nagelberg et al., *supra* note 122, at 1080–81.

124. 307 F.2d 120 (5th Cir. 1962).

125. *Id.* at 122–24, 131.

126. *Id.* at 129.

127. 357 F.2d 495 (5th Cir. 1966), *superseded by statute*, False Claims Amendments Act of 1986, Pub. L. 99-562, § 2(b), 100 Stat. 3153.

128. *See id.* at 496–97.

129. *Id.* at 498.

130. *Id.*

131. *Id.*

132. *Id.* at 499.

compensatory civil actions from the False Claims Amendments Act context, with its potential for forfeitures and double damages in excess of actual loss rendering it punitive in purpose.<sup>133</sup> In so doing, the court reaffirmed the fact that, in a criminal case, the scope-of-employment requirement and benefit to employer requirement are distinct.<sup>134</sup>

The requirement that agents intend to provide a benefit to the corporation is meant to “insulate the corporation from criminal liability for actions of its agents which be *inimical* to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.”<sup>135</sup> *Standard Oil* remains the rule by which courts decline to hold corporations criminally liable where the employee acted entirely in his or her own interest.<sup>136</sup> Furthermore, while “a corporation *may* be liable for acts of its employees done contrary to express instructions and policies, . . . the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation.”<sup>137</sup>

Recently, however, the Fifth Circuit—again leading the way in developing this doctrine—added a new wrinkle. In *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*,<sup>138</sup> a qui tam suit initiated by private parties under the Anti-Kickback Act, the government alleged the defendant defense contractor was vicariously liable for its employees’ acceptance of kickbacks in exchange for favorable

133. *See id.* at 499–500.

134. *See id.* at 498–99.

135. *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985) (first citing *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120 (5th Cir. 1962); and then citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 33 (1972)).

136. *See* Michael E. Tigar, *It Does the Crime but Not the Time: Corporate Criminal Liability in Federal Law*, 17 AM. J. CRIM. L. 211, 228 (1990) (describing *Standard Oil* as the “leading case” for the defense of no intent to benefit the corporation); *see also* *United States v. Demauro*, 581 F.2d 50, 53 (2d Cir. 1978) (“However, since the Chemical employees involved here had been bribed to wash the currency without reporting the transactions as required by the Bank Secrecy Act, the bank could well have argued that it was not liable for their violations of the Act since the employees had acted in their own and not the bank’s interests.” (first citing *United States v. Ridglea*, 357 F.2d 495 (5th Cir. 1966); and then citing *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120 (5th Cir. 1962))); *First Fed. Sav. Bank of Hegewisch v. United States*, 52 Fed. Cl. 774, 792 (2002) (citing *Standard Oil* and later cases to hold that a corporation could not be held liable when an employee admitted to “embezzlement, misappropriat[ing] funds through unauthorized loans, and extortion,” because these crimes did not “benefit[] [the corporation] in any way”).

137. *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979).

138. 727 F.3d 343 (5th Cir. 2013).

treatment on subcontracts.<sup>139</sup> Relying on *Ridglea* and the fact that the Anti-Kickback Act (like the False Claims Amendments Act) allowed recovery in excess of loss and was thus quasi-criminal, the district court granted the defendant's motion to dismiss on the grounds that the government had "not sufficiently alleged that [Kellogg Brown & Root] employees were acting for the corporation's benefit."<sup>140</sup> The Fifth Circuit reversed, finding no evidence of congressional intent to vary from the civil law standard and that actual compensation to the government for kickback-related losses might require penalties in excess of the value of the kickback itself.<sup>141</sup>

Because *Kellogg Brown* did not, technically, involve criminal liability, it did nothing to change the rule that an employee's crime be intended to benefit his employer in order for the employer to be held criminally liable. In demonstrating the blurry conceptual line between the scope-of-employment requirement and the intent-to-benefit requirement, however, it does underscore how precarious the doctrine is. Complex federal statutory regimes create what amounts to quasi-punitive liability, and courts now appear to treat some, but not all of them, like civil actions for the purposes of excusing the government from proving the intent to benefit. Given that fact, and given how few cases seem to turn on the intent-to-benefit requirement in the first place, it may seem that this doctrine excludes very few corporations from potential prosecution. That, however, is far from true.

It is now a basic feature of our criminal justice system that the majority of prosecutions are resolved by plea bargain rather than trial.<sup>142</sup> Thus, the outcome of any given case turns heavily on the prosecutor's initial charging decision. These decisions turn at least in part on whether the government *could* win a case if it were to go to trial. While states have different rules governing a prosecutor's use of discretion, they are all bound by the requirement that charging

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139. *Id.* at 344–45.

140. *Id.* at 350–52.

141. *See id.* at 344, 352.

142. *See* Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, ATLANTIC (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/> [https://perma.cc/BT5T-MAWU] (stating that approximately ninety-seven percent of federal cases are settled by plea bargaining); Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html> [https://perma.cc/6T69-CKGF (dark archive)].

decisions be limited by probable cause.<sup>143</sup> Indeed, some states evaluate charging decisions based on objective, rather than subjective, standards, asking not whether a particular prosecutor *believed* she had probable cause to bring charges but whether a *reasonable* prosecutor would have so believed.<sup>144</sup> Thus, a prosecutor should not—and generally will not—bring charges if a particular element of an offense cannot be met.

Federal prosecutors have specific guidance about how and when to charge corporations with misconduct, using the elements of criminal respondeat superior as a starting point. The *Justice Manual* states that “[a]gents may act for mixed reasons—both for self-aggrandizement (direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation.”<sup>145</sup> This suggests that federal prosecutors should not pursue corporate liability in cases where the agent’s sole motivation was self-aggrandizement. Against this backdrop, the requirement of intent to benefit the corporation necessarily screens out many claims against organizations where such intent to benefit cannot be shown. While state prosecutors generally lack such formalized guidance about corporate crime in their policy documents, they are, of course, subject to the same substantive law on the question of respondeat superior.

This part reviews certain scenarios where, likely as a result of the intent-to-benefit requirement, prosecutors cannot and do not address corporate complicity in the very worst sorts of offenses, which I will call acts of “corporate violence.” I have argued elsewhere that when a corporation commits a crime, it imposes additional harms on its victims distinct from that which can be attributed to the individual employees who were its agents.<sup>146</sup> These harms boil down to the oft-documented sense of helplessness a victim feels when faced with a perpetrator that is temporally enduring, powerful, and

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143. See NAT’L DIST. ATTORNEYS ASS’N, NATIONAL PROSECUTION STANDARDS § 4-2.4 (3d ed. 2009) (listing the probability of conviction as one of the factors appropriate for prosecutors to consider in making their charging decisions and noting that “commencing a prosecution is permitted by most ethical standards upon a determination that probable cause exists” but that “the charging standard should be the prosecutor’s reasonable belief that the charges can be substantiated by admissible evidence at trial”).

144. See Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2199 (2010). These states include California, Hawaii, Illinois, Iowa, Maine, and New York. *Id.*

145. *Justice Manual* § 9-28.210(B), DEP’T JUST., <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.210> [<https://perma.cc/MCR9-YAPB>].

146. See Sheley, *supra* note 59, at 259–63.

organizationally complex.<sup>147</sup> The shattering of a victim’s “belief in a just world”—a core psychological heuristic, central to wellbeing—that occurs when a corporate offender goes unpunished becomes a unique sort of harm flowing from the corporate structure itself.<sup>148</sup> My original argument was directed toward conduct that easily meets the current standard for criminal respondeat superior—the long-term psychological harms suffered by the victims of corporate environmental offenses, for example.<sup>149</sup> That argument was speculative in some respects because of the need for more psychological research on the victims of corporate crime. But there are a wealth of recent examples of how this harm arises most dramatically and most discernably in cases of corporate violence, where prosecution is *not* generally an option due to the intent-to-benefit requirement.

*B. Corporate Sex Crimes*

In 1996, Dr. Larry Nassar was named national medical coordinator for the USA gymnastics team (“USA Gymnastics”).<sup>150</sup> The next year he also became team physician for the Michigan State University (“MSU”) gymnastics team and assistant professor at the university.<sup>151</sup> Throughout the 90’s and early aughts, multiple parents and athletes reported to USA Gymnastics coaches, MSU coaches, MSU athletic staff, and, on one occasion, the Meridian Township Police Department, that Nassar performed irregular “treatments” that they perceived as sexual molestation.<sup>152</sup> For almost twenty years, both MSU and USA Gymnastics failed to investigate the complaints, accepted Nassar’s assertions that his conduct constituted valid medical treatment, and continued to refer their athletes to him.<sup>153</sup> In 2014, MSU graduate Amanda Thomashow reported to a doctor at the MSU Sports Medicine Clinic that she had been sexually assaulted during an examination.<sup>154</sup> At this time, University President Lou Anna K. Simon learned that a police report had been filed, but Nassar was allowed to continue seeing patients during the sixteen

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147. *See id.*

148. *See id.*

149. *See id.* at 261–63.

150. James Dator, *A Comprehensive Timeline of the Larry Nassar Case*, SBNATION, <https://www.sbnation.com/2018/1/19/16900674/larry-nassar-abuse-timeline-usa-gymnastics-michigan-state> [https://perma.cc/RG5C-YZU8] (last updated Jan. 16, 2019).

151. *Id.*

152. *Id.*

153. *See id.*

154. *Id.*

months of the police investigation.<sup>155</sup> In August 2016, the *Indianapolis Star* published an investigation of sexual abuse of the USA Gymnastics team, featuring the account of Rachael Denhollander, Nassar's first victim to go public with her story.<sup>156</sup> In the end, Nassar pled guilty to seven counts of first-degree criminal sexual misconduct in Ingham County Circuit Court, three counts of first-degree criminal sexual conduct in Eaton County Circuit Court, and federal child pornography charges.<sup>157</sup>

At Nassar's state sentencing hearing, nearly 160 of the athletes he had abused delivered victim-impact statements.<sup>158</sup> As I have argued elsewhere, close attention to the accounts of harm expressed in victim-impact statements is important not only for victim vindication and expression but also as a measure of the nature of the public harm created by the crime.<sup>159</sup> Because victims' narratives circulate through society outside the courtroom as well, the public experiences that harm through the lens of the victim's subjective account.<sup>160</sup> A survey of the Nassar victim-impact statements demonstrates how clearly the harm suffered by Nassar's victims was magnified by the institutional roles of USA Gymnastics and MSU. The most famous victim, Aly Raisman, was team captain of both the 2012 and 2016 gold-medal-winning USA Gymnastics teams and an individual silver medalist in the all-around and floor competitions at the 2016 games.<sup>161</sup> Due to her high profile and eloquence, Raisman's victim-impact statement became one of the most widely reproduced.

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155. *Id.*

156. Eric Levenson, *How the Indy Star and Rachael Denhollander Took Down Larry Nassar*, CNN (Jan. 25, 2018, 5:27 PM), <https://www.cnn.com/2018/01/25/us/larry-nassar-indy-star/index.html> [<https://perma.cc/G5CK-E72Q>]; see also Dator, *supra* note 150 (reporting that Denhollander also filed criminal charges that month).

157. Dator, *supra* note 150.

158. Anne E. Gowen, *How the Judge in Larry Nassar's Case Undermined Justice*, TIME (Jan. 26, 2018), <http://time.com/5119433/larry-nassar-judge-rosemarie-aquilina-justice/> [<http://perma.cc/XL3E-R8WV>]. Allowing the 160 victim-impact statements has been criticized for raising due process issues, given that Nassar only pled guilty to assaulting seven victims. Marie Weidmayer, *Michigan Law, Courts Clash on Definition of "Victim"*, ST. NEWS (Apr. 5, 2018, 9:44 AM), <https://statenews.com/article/2018/04/state-vs-court-victim-meaning> [<https://perma.cc/B7E5-YCCR>].

159. See Erin Sheley, *Reverberations of the Victim's 'Voice': Victim Impact Statements and the Cultural Project of Punishment*, 87 IND. L.J. 1247, 1248–49 (2012) (“[T]he complexity of a victim narrative effectively conveys the social experience of harm, without which the criminal justice system loses its legitimacy as a penal authority.”).

160. *Id.* at 1249–50.

161. *Aly Raisman*, BIOGRAPHY (Apr. 2, 2014), <https://www.biography.com/people/aly-raisman-20900231> [<https://perma.cc/SMA8-99TQ>].

Notably, her indictment of Nassar emphasized the particular position of power he had been given by USA Gymnastics: “You were the USA Gymnastics national team doctor, the Michigan State’s Olympic team doctor. You were trusted by so many and took advantage of countless athletes and their families.”<sup>162</sup> Her description of his abuse reveals how helpless she felt in a situation that had been created and imposed by USA Gymnastics as a condition of maintaining her career: “I don’t want you to be there, but I don’t have a choice. Treatments with you were mandatory.”<sup>163</sup> And she notes how the organizations to which she was beholden as an athlete elevated him to positions of institutional importance: “You were decorated by USA Gymnastics and the United States Olympic Committee, both of which put you on advisory boards and committees to come up with policies that would protect athletes from this kind of abuse.”<sup>164</sup>

Most significantly, Raisman criticized USA Gymnastics’ failure to do anything when they had notice of a problem: “False assurances from organizations are dangerous, especially when people want so badly to believe them. They make it easier to move away from the problem and enable bad things to continue to happen.”<sup>165</sup> In pointing out the timespan of the ongoing denials, she suggested the enduring nature of USA Gymnastics as an organization, one of the precise features of a corporate criminal I have identified in my earlier work as contributing to a victim’s sense of helplessness in the face of a power asymmetry.<sup>166</sup> She also points out the facilitating role played by USA Gymnastics in maintaining Nassar’s sexual power.

Rachael Denhollander echoed Raisman’s theme, describing how organizational complicity by MSU and USA Gymnastics exacerbated and extended her sexual violation. Referring to her first experience of abuse, she said:

[T]hree things I was very sure of. First, it was clear to me this was something Larry did regularly. Second, because this was something Larry did regularly, it was impossible that at least some women and girls had not described what was going on to

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162. Mahita Gajanan, *‘It’s Your Turn to Listen to Me.’ Read Aly Raisman’s Testimony at Larry Nassar’s Sentencing*, TIME (Jan. 19, 2018, 4:52 PM), <http://time.com/5110455/aly-raisman-larry-nassar-testimony-trial/> [<http://perma.cc/9PR8-3LWW>].

163. *Id.*

164. *Id.*

165. *Id.*

166. Sheley, *supra* note 59, at 258–59.

officials at MSU and [USA Gymnastics]. I was confident of this. And third, I was confident that because people at MSU and [USA Gymnastics] had to be aware of what Larry was doing and had not stopped him, there could surely be no question about the legitimacy of his treatment. This must be medical treatment. The problem must be me.<sup>167</sup>

And, like Raisman, she conveyed how nonfeasance by the organizations that employed Nassar constituted additional acts of violence to the victims: “MSU, you need to realize that you are greatly compounding the damage done to these abuse victims by the way you are responding.”<sup>168</sup>

Similarly, victim Amanda Thomashow stated that MSU exacerbated her sexual violation by normalizing it in the language of medicine, to which she, presumably, had no claims of knowledge: “Michigan State University, the school I loved and trusted, had the audacity to tell me that I did not understand the difference between sexual assault and a medical procedure.”<sup>169</sup> In this account, Nassar and MSU formed a kind of interconnected block of authority; as Nassar wielded sexual control over her body, MSU claimed authority over her mind by denying her even interpretive agency.

What these accounts all emphasize is the extent to which Nassar’s victims experienced organizational complicity by USA Gymnastics and MSU—through both their empowering Nassar and rejecting his victims’ stories—as additional acts of bodily violence. While these impact statements were intended to be directed to Nassar himself, the victims appeared to find it almost impossible to navigate their shared trauma from the sexual assault without addressing his organizational employers directly. Nassar had power not due to any intrinsic property but due to his identity as an agent of USA Gymnastics and MSU—the organizations upon which these girls and women perceived their athletic futures to rest.

Given the deep involvement of USA Gymnastics and MSU from the perspective of the victims—so deep that these organizations became the focus of victim-impact statements directed at Nassar—the question arises as to whether the organizations themselves should be

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167. *Read Rachael Denhollander’s Full Victim Impact Statement About Larry Nassar*, CNN (Jan. 30, 2018, 7:34 AM), <https://www.cnn.com/2018/01/24/us/rachael-denhollander-full-statement/index.html> [<https://perma.cc/SD2G-KLUB>].

168. *Id.*

169. Sonia Moghe & Lauren del Valle, *Larry Nassar’s Victims, in Their Own Words*, CNN (Jan. 17, 2018, 5:03 PM), <https://www.cnn.com/2018/01/16/us/nassar-victim-impact-statements/index.html> [<http://perma.cc/RB78-N3A5>].

criminally accountable. Surely the harm perpetrated under their auspices and with their authority for over two decades is worse than many of the federal regulatory offenses for which prosecutors routinely charge corporations. Unfortunately, however, even setting aside the unique sovereign immunity issues presented by MSU, a state organization, the respondeat superior standard most likely precludes criminal action based on Nassar's agency.<sup>170</sup>

Despite the seeming breadth of criminal respondeat superior, courts have routinely held that corporations cannot be liable for rape.<sup>171</sup> Yet, as V.S. Khanna notes, the argument that corporations cannot commit these acts is weak because “[o]nce society is willing to accept vicarious liability and to impute agents’ acts to the corporation, the corporation should in theory be capable of ‘committing’ rape or murder.”<sup>172</sup> Khanna suggests that the more powerful conceptual roadblock to corporate liability under these circumstances is the fact that most crimes of violence and sexual violence do not fall within the scope of the perpetrator’s employment.<sup>173</sup> If anything, traumatizing their athletes is inimical to the goals of the organizations.

It would seem prosecutors could try to reach beyond Nassar himself to prosecute individual officers and employees of USA Gymnastics and MSU for negligent oversight of their physician, particularly in light of the complaints they received.<sup>174</sup> After Penn State Assistant Football Coach Jerry Sandusky was convicted for numerous counts of child sexual abuse in connection with the nonprofit organization for youth he ran under university auspices, several Penn State administrators were convicted of child endangerment.<sup>175</sup> The various officials who ignored the reports on

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170. As a private 501(c)(3) entity, USA Gymnastics poses no such sovereign immunity concerns. See *About USA Gymnastics*, USA GYMNASTICS, [https://usagym.org/pages/aboutus/pages/about\\_usag.html](https://usagym.org/pages/aboutus/pages/about_usag.html) [<https://perma.cc/HYD4-FUWW>]; see also *Jack’s Canoes & Kayaks, LLC v. Nat’l Park Serv.*, 937 F. Supp. 2d 18, 40 (D.D.C. 2013) (holding that “a 501(c)(3) non-governmental organization [was] not entitled to sovereign immunity”).

171. See RICHARD S. GRUNER, *CORPORATE CRIME AND SENTENCING* § 3.2.3(d), at 177–78 (1994).

172. Khanna, *supra* note 54, at 1484 n.37; see also GRUNER, *supra* note 171, § 3.2.3(b), at 175–76.

173. Khanna, *supra* note 54, at 1484 n.37.

174. See Michael McCann, *Four Key Sports Law Implications of the Larry Nassar Scandal*, SPORTS ILLUSTRATED (Jan. 19, 2018), <https://www.si.com/olympics/2018/01/19/larry-nassar-scandal-sports-law-implications> [<https://perma.cc/3ADE-DSV7>].

175. Camila Domonoske, *3 Ex-Penn State Officials Get Jail Time for Failure to Report Sandusky Abuse*, NPR (June 2, 2017, 2:56 PM), <https://www.npr.org/sections/thetwo-way/2017/06/02/531243225/3-penn-state-officials-sentenced-to-jail-time-for-failure-to-report-sandusky> [<https://perma.cc/GJX4-G29Y>].

Nassar are potentially similarly guilty; language of the Michigan child abuse laws, however, seems to preclude this.

The Michigan child abuse statute includes in its definition of applicable parties “any . . . person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person,” which would seem broad enough to include USA Gymnastics staff.<sup>176</sup> Yet the requisite mens rea stipulated is either knowing or intentional harm to the child,<sup>177</sup> something that could be very hard to prove on the facts. Those accused could also be liable for an omission that results in harm to a child, but the statute defines “omission” somewhat narrowly as “a willful failure to provide food, clothing, or shelter necessary for a child’s welfare or willful abandonment of a child.”<sup>178</sup> Thus, the specific omissions of USA Gymnastics and MSU employees do not seem to fall into this prohibition. In short, while cases like Sandusky’s demonstrate how prosecutors of sexual assault in the course of employment *might* be able to address institutional misconduct by targeting employees beyond the assailant himself, not all state criminal codes make that possible. Even where prosecutors are able to make charges stick to other employees (which they should do in these cases where possible, and may yet find a way to do in the case of USA Gymnastics/MSU),<sup>179</sup> failure to impose criminal liability on the organizations themselves will leave unredressed the institutional harm articulated by Nassar’s victims.

If respondeat superior precludes vicarious criminal liability due to Nassar’s lack of intent to benefit the organization, another possibility could be direct liability for the organizations for aiding and abetting his conduct. Michigan has abolished the distinction between the principal and accessories to an offense, such that “[e]very person concerned in the commission of an offense, whether he directly

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176. MICH. COMP. LAWS ANN. § 750.136b(1)(d) (Westlaw through P.A.2019, No. 2 of 2019 Reg. Sess.).

177. *See id.* § 750.136b(2)–(7).

178. *Id.* § 750.136b(1)(c).

179. Michigan Attorney General Bill Schuette has said that “[i]t is abundantly clear that a full and complete investigation of what happened at Michigan State University from the president’s office down, is required” and that the investigation will seek to determine “who knew what and when, who took action, who failed to take action.” Amy Held, *State AG: Michigan State University Under Investigation in Ongoing Nassar Fallout*, NPR (Jan. 27, 2018, 4:57 PM), <https://www.npr.org/sections/thetwo-way/2018/01/27/581324655/state-ag-michigan-state-university-under-investigation-in-ongoing-nassar-fallout> [<https://perma.cc/C4XS-XHH6>].

commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.”<sup>180</sup> However, Michigan, like most jurisdictions, requires as an element of aiding and abetting that “the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time [the defendant] gave aid and encouragement.”<sup>181</sup>

Under this rule, coupled with respondeat superior, USA Gymnastics or MSU (were it not for sovereign immunity issues) could therefore be criminally liable if prosecutors could find an employee who intended or knew that Nassar intended to commit sexual assault. Institutional prosecution for aiding and abetting, then, faces the same problems as an effort to go after other individuals for child abuse: it may be very difficult to show actual knowledge of his misconduct by any particular person. These organizations can simply argue that their employees had the honest but mistaken (even if unreasonable) belief that Nassar’s methods were legitimately medical.<sup>182</sup> Indeed, MSU already seems to be organizing that defense; its Board of Trustees released a letter reiterating the belief held by former U.S. Attorney Patrick Fitzgerald, MSU’s outside counsel, that “the evidence will show that no MSU official believed that Nassar committed sexual abuse prior to newspaper reports in the summer of 2016.”<sup>183</sup> It is clear that the intent-to-benefit requirement of respondeat superior dramatically limits opportunities to hold at least USA Gymnastics criminally liable for the collective gross negligence that allowed so many young girls and women to be institutionally sexually assaulted.

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180. MICH. COMP. LAWS ANN. § 767.39 (Westlaw through P.A. 2019, No. 2 of 2019 Reg. Sess.).

181. *People v. Robinson*, 715 N.W.2d 44, 48 (Mich. 2006) (alteration in original) (quoting *People v. Moore*, 679 N.W.2d 41, 49 (Mich. 2004)).

182. The most promising possibility for prosecutors aiming for either individual employees or the organizations is a theory of willful blindness. In cases where the defendant has intentionally kept himself unaware of facts that, had he known them, would have made him criminally liable, evidence of this fact can substitute for proof of actual knowledge. See *United States v. Jewell*, 532 F.2d 697, 700–04 (9th Cir. 1976). While a showing of consciously intentional ignorance may also prove challenging, there is some evidence that federal courts, at least, have allowed the application of willful ignorance under circumstances better described as merely “reckless ignorance.” See Alexander F. Sarch, *Beyond Willful Ignorance*, 88 U. COLO. L. REV. 97, 158–67 (2017).

183. Letter from the Bd. of Trs. for Mich. State Univ. to Bill Schuette, Attorney Gen. of Mich. (Jan. 19, 2018), <https://msu.edu/ourcommitment/news/BOT%20Letter%20to%20AG%20011918.pdf> [<https://perma.cc/B2Y7-D68X>].

The Nassar and Sandusky cases are hardly the only examples of what could properly be termed *corporate sexual violence*. The increasingly high profile of the #MeToo movement provides many others, but perhaps none so clear cut as the allegations against Miramax cofounder Harvey Weinstein and the institutional wrongdoing of his production companies.<sup>184</sup> Sixteen former and current executives and assistants at Weinstein's companies told *The New Yorker* that they were fully aware of the unwanted sexual contact Weinstein routinely imposed on women in professional settings.<sup>185</sup> Employees identified "a culture of complicity at Weinstein's places of business, with numerous people throughout his companies fully aware of his behavior but either abetting it or looking the other way."<sup>186</sup> Perhaps most disturbingly, some employees admitted to actively engaging in subterfuge to facilitate Weinstein's assaults.<sup>187</sup> While Weinstein himself is now being prosecuted, no charges have been filed as of yet against his companies.

### C. *Corporate Homicide*

Sexual assault cases are unique insofar as it is difficult (though not impossible) to conceive of a set of circumstances where an employee's abuse of his professional position for sexual gratification was intended to benefit his employer. A more common example of corporate violence that better fits the current criminal respondeat superior framework is homicide. Obviously, corporations and their employees that are engaged in dangerous work may commit homicide through reckless or unlawful behavior that was intended to benefit the corporation. Every mining disaster or oil spill that claims lives due to reckless or criminally negligent behavior falls into this category.

During the 1980s, state legislatures began to amend their criminal codes to include corporations and organizations within the definition of "person" for the purpose of opening corporations up to criminal punishment for crimes of homicide.<sup>188</sup> For example, Indiana

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184. See generally Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/5PN9-8VYY>] (describing Weinstein's behaviors as an "open secret to many in Hollywood and beyond").

185. *Id.*

186. *Id.*

187. *Id.*

188. See Kathleen F. Brickey, *Death in the Workplace: Corporate Liability for Criminal Homicide*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 758 (1987); James W. Harlow, Note, *Corporate Criminal Liability for Homicide: A Statutory Framework*, 61 DUKE L.J.

prosecuted Ford Motor Company (albeit unsuccessfully) for reckless homicide after three women died when their Ford Pinto exploded after being rear ended.<sup>189</sup> Illinois prosecuted Film Recovery Systems, Inc. for involuntary manslaughter after a worker died from acute cyanide toxicity due to working in an unventilated plant full of open vats of sodium cyanide.<sup>190</sup> Yet, after this apparent uptick in prosecutorial activity, the drive to criminally prosecute corporations for homicide appears to have lost momentum.<sup>191</sup>

There have been some difficulties in judicial construction of the offense. For example, while corporate homicide has been recognized by New York courts,<sup>192</sup> it has been limited to cases where the cause of death was foreseeable.<sup>193</sup> In *People v. Warner-Lambert*,<sup>194</sup> six of the defendant-gum-manufacturer's employees were killed when magnesium stearate residue accumulated on the plant's machines and in the air, causing an explosion.<sup>195</sup> The court held that

[a]lthough [the defendants] were aware that there was a broad, undifferentiated risk of an explosion in consequence of ambient magnesium stearate dust arising from the procedures employed in [Warner-Lambert's] manufacturing operations, the corporate and individual defendants may nonetheless not be criminally liable, on the theory of either reckless or negligent conduct, for the deaths of employees occasioned when such an explosion

123, 131–32 (2011). *But see* State v. Pac. Powder Co., 360 P.2d 530, 532 (Or. 1961) (en banc) (holding that the Oregon homicide statute does not allow corporations to be prosecuted).

189. See *Fatal Ford Pinto Crash in Indiana*, HISTORY (Nov. 13, 2009), <https://www.history.com/this-day-in-history/fatal-ford-pinto-crash-in-indiana> [<https://perma.cc/H2LL-MKLS>]; Larry Kramer, *Jury Indicts Ford in Ind. Pinto Crash*, WASH. POST (Sept. 14, 1978), [https://www.washingtonpost.com/archive/business/1978/09/14/jury-indicts-ford-in-ind-pinto-crash/39d186d8-b83a-44fd-88cf-d0e94f931045/?utm\\_term=.4e93f9484d83](https://www.washingtonpost.com/archive/business/1978/09/14/jury-indicts-ford-in-ind-pinto-crash/39d186d8-b83a-44fd-88cf-d0e94f931045/?utm_term=.4e93f9484d83) [<https://perma.cc/HYF2-G33X> (dark archive)].

190. See *People v. O'Neil*, 550 N.E.2d 1090, 1092 (Ill. App. Ct. 1990); Barry Siegel, *Officers Convicted: Murder Case a Corporate Landmark*, L.A. TIMES (Sept. 15, 1985), [http://articles.latimes.com/1985-09-15/news/mn-23348\\_1\\_corporate-officers](http://articles.latimes.com/1985-09-15/news/mn-23348_1_corporate-officers) [<https://perma.cc/Y43C-G6TQ>]. The convictions of Film Recovery and its individual employees were eventually reversed on the basis that “the same conduct [was] used to support offenses [that had] mutually exclusive mental states.” *O'Neil*, 550 N.E.2d at 1092, 1101.

191. Harlow, *supra* note 188, at 134. For a detailed history of corporate homicide prosecutions, see *id.* at 128–34, 144–49.

192. See Peter T. Edelman, Comment, *Corporate Criminal Liability for Homicide: The Need to Punish Both the Corporate Entity and Its Officers*, 92 DICK. L. REV. 193, 206–07 (1987).

193. See, e.g., *People v. Warner-Lambert Co.*, 414 N.E.2d 660, 661, 666 (N.Y. 1980).

194. 414 N.E.2d 660 (N.Y. 1980).

195. See *id.* at 661–62. The compound is generally inert but can be combustible when airborne. *Id.* at 662.

occurred where the triggering cause thereof was neither foreseen nor foreseeable.<sup>196</sup>

While the foreseeability requirement is arguably no different from the ordinary showing of objective fault necessary to prove an individual guilty of negligent homicide,<sup>197</sup> some have argued that it raises unique causation dilemmas in the context of entity liability.<sup>198</sup> Specifically in cases where death was likely due to a corporation's generalized negligence in the form of "latent failures," under the rule in *Warner-Lambert* a corporation might nonetheless escape liability if the highly specific causal pathway to the actual death is not foreseeable.<sup>199</sup>

Even in states without such precedent, however, critics say that prosecutors undercharge corporate offenders for homicide relative to the harm that they cause.<sup>200</sup> Older data suggests that prosecutors seem likely to let large corporations off the hook to focus on smaller, privately held businesses.<sup>201</sup> At the federal level, for example, in the forty years since Congress enacted the Occupational Safety and Health Act up until 2012, there were more than 400,000 workplace fatalities, yet fewer than eighty cases were criminally prosecuted.<sup>202</sup> Of these, only approximately a dozen resulted in convictions.<sup>203</sup> At least fifteen states, in addition to the federal government, have cases on record reflecting a corporation being prosecuted for manslaughter or negligent homicide.<sup>204</sup>

196. *Id.* at 661.

197. Compare MODEL PENAL CODE § 210.4(1) (AM. LAW INST. 1962) ("Criminal homicide constitutes negligent homicide when it is committed negligently."), with *id.* § 2.02(2)(d) ("A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.").

198. See Harlow, *supra* note 188, at 146–49.

199. See *id.* at 147–49.

200. *Id.* at 134; see also *The Case for a Corporate Homicide Law*, CORP. CRIME REP. (July 16, 2013, 6:55 AM), <https://www.corporatecrimereporter.com/news/200/corporatehomicide07152013/> [<https://perma.cc/KC4A-AYC9>] (stating that only "rarely [do you] see a prosecutor bring criminal charges against a corporation for the death of a worker").

201. See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1344 n.1 (1999) ("On average, small privately held businesses account for more than 95% of all corporate convictions each year.").

202. Jordan B. Schwartz & Eric J. Conn, *OSHA Criminal Referrals on the Rise*, EPSTEIN BECKER & GREEN (Dec. 18, 2012), <https://www.oshalawupdate.com/2012/12/18/osha-criminal-referrals-on-the-rise/> [<https://perma.cc/LJF7-NPWE>].

203. *Id.*

204. See Harlow, *supra* note 188, at 133 & n.65 (noting that fifteen states and the federal government have prosecuted corporations for manslaughter or criminally negligent homicide).

In short, corporate criminal liability appears underinclusive when it comes to the sorts of conduct most clearly at the heart of criminal law: grossly negligent and even intentional acts of violence against victims. In cases of sexual assault, it is clear that the intent to benefit element of criminal respondeat superior blocks corporate liability as a matter of law. In cases of manslaughter and negligent homicide, the causes of underinclusivity appear to be confusing state statutes and potentially prosecutorial reluctance to pursue criminal charges on the basis of an overbroad liability standard. To address the ways in which corporate criminal liability is *underinclusive*, we may need a standard that also addresses the ways in which it is *overinclusive*.

### III. TORT ANSWERS

Unlike its newer criminal counterpart, the tort doctrine of respondeat superior has had the advantage of common law development across various jurisdictions over time. That tort law has remained so largely a creature of the common law allows it to change in accordance with social need while retaining internal coherence—or, as Roscoe Pound optimistically put it, “in accordance with fixed and definite rules in every way comparable to those which determine the events of nature.”<sup>205</sup> An attempt to create a more coherent standard for attributing criminal liability through respondeat superior should include a look at how courts have refined the doctrine in the tort context.

#### A. *The Purposes of Respondeat Superior in Tort and Criminal Law*

Both criminal and tort law can be said to redress a form of wrong.<sup>206</sup> Both systems are also motivated by competing utilitarian concerns such as deterrence.<sup>207</sup> In criminal law, the conflict between

205. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 163 (Transaction Publishers 1999) (1963); *see also* O. W. HOLMES, JR., *THE COMMON LAW* 5 (Boston, Little, Brown, and Co. 1881) (describing how the law adapts over time in response to new realities).

206. *See* 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*2 (“[Private wrongs] are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: [public wrongs] are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*.”); *cf.* G. W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 220 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) (arguing that, while revenge vindicates a victim’s subjective interest in retribution, only a criminal prosecution in a court vindicates the public’s universal moral interest).

207. *Cf.* JEREMY BENTHAM, *THE RATIONALE OF PUNISHMENT* 101–10 (London, Robert Heward 1830) (discussing the role of imprisonment); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 39–45 (1968) (discussing the role of deterrence);

justifications for punishment is quite familiar. The moral purposes of criminal law, such as retribution and denunciation, tend to be the flashpoints of public discourse.<sup>208</sup> Yet policymakers and criminal courts take utilitarian goals equally into account, and there is a deep law-and-economics literature on the appropriate levels of punishment necessary to achieve optimal deterrence.<sup>209</sup> Certainly both sets of goals, moral and utilitarian, are constitutionally acceptable purposes of punishment, even though they are often famously at odds.<sup>210</sup>

Tort law is similarly fraught with tensions and outright conflicts between moral and utilitarian justifications for liability. Instrumentalists have been deeply influential in tort law, where resource allocation,<sup>211</sup> risk distribution,<sup>212</sup> compensation,<sup>213</sup> and deterrence<sup>214</sup> are frequently cited goals. Perhaps most famously, Learned Hand's formulation of negligence sets the level of care required to avoid fault as that which will theoretically achieve optimal deterrence of risk; a function of the burden of adequate precautions, the probability of loss, and the resulting injury if that loss occurs.<sup>215</sup> In contrast to negligence, strict liability attaches regardless of how much

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Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33–34 (1972) (proposing a “hypothesis that liability for negligence is designed to bring about an efficient level of accidents and safety”).

208. See, e.g., Robert J. Cottrol, *Hard Choices and Shifted Burdens: American Crime and American Justice at the End of the Century*, 65 GEO. WASH. L. REV. 506, 507–11 (1997) (book review) (noting that “since the mid-seventies retribution has come back with a vengeance, enjoying today a greater prominence in public discourse over crime and punishment than at any other time in post-war America” (footnote omitted)).

209. See, e.g., Keith N. Hylton, *The Theory of Penalties and the Economics of Criminal Law*, 1 REV. L. & ECON. 175, 175–76 (2005); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985).

210. See *Furman v. Georgia*, 408 U.S. 238, 307–08 (1972) (Stewart, J., concurring).

211. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500–17 (1961).

212. *Id.* at 517–27.

213. See RESTATEMENT (SECOND) OF TORTS § 901(a) (AM. LAW INST. 1979) (identifying “compensation, indemnity, or restitution for harms” as purposes of tort liability); Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585, 589–90 (2003).

214. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 cmt. d (AM. LAW INST. 2010) (stating that negligence liability supplies an incentive to deter unjust behavior); RESTATEMENT (SECOND) OF TORTS § 901(c) (AM. LAW INST. 1979) (identifying the deterrence of wrongful conduct as a purpose of tort liability).

215. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (setting forth the Learned Hand formulation of negligence).

care the defendant has taken, and its proponents typically cite the instrumentalist goals of risk distribution and resource allocation.<sup>216</sup>

That said, rights-based tort theorists have made significant headway, particularly in the development of fault doctrines.<sup>217</sup> Similar to moral-based retributivists in criminal law, rights-based theorists define reasonable care under a negligence standard with reference to moral or social norms, with the relevant question being what level of concern individuals ought to be entitled to receive from others with respect to their safety.<sup>218</sup> Ernest Weinrib argues that negligence is the appropriate standard for responsibility (as opposed to either extreme of subjective fault or strict liability) because it balances two aspects of the relationship of risk to human action: “the legitimacy of action” and “the illegitimacy of indifference to the suffering that action can cause.”<sup>219</sup> By this standard, according to rights-based theorists, the court can measure the entitlement of a particular plaintiff to reparation from a particular defendant.<sup>220</sup>

Interestingly, despite the well-observed conflict between negligence and strict liability as theories of tort responsibility—and, indeed, the plurality of conflicting justifications for each of these theories<sup>221</sup>—certain discrete doctrines have survived the test of time. It has been suggested, in fact, that a tort doctrine can only endure in the common law if it can be reconciled in some way with the concerns of both instrumentalist and rights-based theories of tort.<sup>222</sup> One such durable doctrine is respondeat superior, and its development is thus particularly salient to its counterpart in the similarly conflicted field of criminal law.

216. See Calabresi, *supra* note 211, at 541; see also Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 349–58 (1996).

217. See Kenneth S. Abraham, *Strict Liability in Negligence*, 61 DEPAUL L. REV. 271, 273 (2012) (arguing that “tort law doctrines may need to satisfy both instrumental and rights-based concerns in order to be stable and persistent”); cf. GREGORY & KALVEN, *supra* note 16, at 689 (claiming that “[t]he central policy issue in tort law is whether the principal criterion of liability is to be based on individual fault or on a wide distribution of risk and loss”).

218. Abraham, *supra* note 217, at 274.

219. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 151 (1995).

220. *Id.* at 155; see also John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 946 (2010) (“Tort law provides victims with an avenue of civil recourse against those who have committed relational and injurious wrongs against them.” (emphasis omitted)).

221. See Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1309 (2001).

222. See Abraham, *supra* note 217, at 299–301.

Vicarious liability has been called the “most ancient and ubiquitous form of strict liability,”<sup>223</sup> with respondeat superior—a type of vicarious liability—holding “an employer . . . liable, despite having no fault whatsoever, for the acts of its employees taken within the scope of their employment.”<sup>224</sup> As mentioned, strict liability arises wherever a defendant may be held liable for a loss without any showing of fault. It is liability imposed *regardless* of whether it would have been cost effective under Learned Hand’s formula to take precautions that would have eliminated the harm.<sup>225</sup> Justifications for strict liability as an alternative to negligence turn heavily on the instrumentalist goal of risk distribution: a commercial injurer is in the best position to insure against risk or otherwise broadly distribute the costs of nonnegligently caused accidents among itself, its consumers, and its other stakeholders.<sup>226</sup> Furthermore, Guido Calabresi has argued that strict liability will generally achieve better resource allocation by causing the price of goods to reflect all of the costs of their production, so demand can more accurately reflect how much of something people truly want.<sup>227</sup> Strict liability also serves other instrumentalist goals, such as reducing the overall amount of a dangerous activity engaged in (which negligence cannot generally reach) and reducing the information and error costs accompanying a jury’s factual determination of fault.<sup>228</sup>

There is also at least one moral, or rights-based, justification for strict liability that seems particularly relevant to respondeat superior: the idea that those who benefit from an activity should bear its costs.<sup>229</sup> Liability, according to this theory, arises not due to any instrumental purpose but due to the relationship between the actor who imposed the harm (its beneficiary) and its victim. As Kenneth Abraham notes, however, this theory alone cannot explain a manufacturer’s strict liability for harm to customers—arising, for example, in products liability cases—because customers themselves

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223. Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1198 (1996).

224. *Hamilton v. Carell*, 243 F.3d 992, 1001 (6th Cir. 2001) (first citing *Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 965 (6th Cir. 1998); and then citing *KEETON ET AL.*, *supra* note 116, § 69, at 499–501).

225. Abraham, *supra* note 217, at 274–75.

226. *See id.* at 280.

227. Calabresi, *supra* note 211, at 505.

228. Abraham, *supra* note 217, at 276–80.

229. *See Keating, supra* note 221, at 1287; *see also Abraham, supra* note 217, at 281 (“The notion at the core of [the benefit] theory is that those who benefit from engaging in an activity should rightly bear the costs associated with the activity.”).

benefit from the manufacturer's enterprise.<sup>230</sup> He contends, therefore, that some instrumental theory is necessary to fully justify strict liability.<sup>231</sup>

Weinrib makes a somewhat different rights-based defense of respondeat superior as a discrete doctrine. He argues that it is not true strict liability at all based on the fact that, while “employers cannot plead their own reasonable care in selecting or supervising the employee, the employee’s exercise of reasonable care precludes liability.”<sup>232</sup> In other words, respondeat superior should not be seen as a no-fault liability rule but as a means of channeling fault in cases where a “faulty actor is sufficiently integrated into [an] enterprise” and his “faulty act is sufficiently close to the assigned task” such that they form an integrated legal persona.<sup>233</sup> Once one accepts this conceptual integration, one can then return to balancing the interests of the employer-acting-through-the-employee and the injured party.

On the whole, however, respondeat superior has seen primarily instrumentalist justifications in the modern era.<sup>234</sup> Tort theorists have advanced risk spreading as a primary justification for holding an employer liable without fault for the torts of its employees.<sup>235</sup> This immediately poses a challenge for any application of respondeat superior to the criminal context: most of the time, criminal law is not about pure risk spreading, insofar as a criminal punishment does not usually make a private victim whole, except on the occasions—still inconsistently arising—in which a court imposes restitution as part of a sentence.<sup>236</sup> Furthermore, the distortive effects of the role of prosecutorial discretion in our criminal system alter the allocation of risk in ways that are difficult to predict.

It is, however, possible to think of risk spreading in terms of nonmonetary currency. As Dan Kahan puts it, “[W]hen a corporation is subjected to the stigmatizing effect of criminal conviction[,] what the corporation loses is recovered, at least in part, by the public in the

230. Abraham, *supra* note 217, at 281.

231. *Id.* (“For answers to these questions, reference to incentive-based or insurance-based arguments is likely to be necessary.”).

232. WEINRIB, *supra* note 219, at 185.

233. *Id.* at 187.

234. See Rabin, *supra* note 223, at 1199.

235. See, e.g., P.S. ATIYAH, VICARIOUS LIABILITY 22–28 (1967); 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 1365, 1368–71 (1956) (discussing the historical origins of vicarious liability and arguing that one of the main justifications for vicarious liability is accident prevention); cf. Calabresi, *supra* note 211, at 499–500 (discussing the “theoretical justifications” of “risk distribution”).

236. See Courtney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 95–97 (2014).

form of the satisfaction that citizens take in seeing the corporation's crime authoritatively repudiated."<sup>237</sup> In other words, the social meaning of criminal punishment has a value which courts and policymakers should factor into utilitarian cost-benefit analyses. Perhaps, then, risk spreading can be a coherent benefit of criminal punishment via respondeat superior if it can be argued that corporate employers are better able to bear the risk of the stigma of conviction than the general public is able to bear the expressive costs of failing to see a corporation punished. The biggest challenge to this argument, of course, is that the criminal punishment of a corporate employer, in cases where it has no fault, may not carry much social meaning as compared to prosecution of an individual employee who does have the requisite mens rea. And while an employer may generally be better positioned than an employee to compensate for financial harms, this is not necessarily true or even coherent for expressive harms. In other words, it is difficult to identify a purely expressive value served by criminalizing a truly faultless entity. This fact suggests that a negligence standard for corporate fault would—theoretically—not only serve the instrumental goal of optimal deterrence but would also better capture the denunciative benefits Kahan identifies as a purpose of corporate punishment.

For the moment, it is sufficient to recognize that similar categories of justification motivate both the criminal and tort systems but that the expressive justification does more work in criminal law than in tort and the risk distribution justification somewhat less. This is, perhaps, a major reason why respondeat superior has proven so unwieldy upon importation to the criminal arena. With that in mind, we turn to how courts have dealt with the potential over- and underinclusiveness of respondeat superior in tort cases.

#### *B. Common Law Refinements of Respondeat Superior*

Earlier I reviewed the extensive critical literature on the potential overinclusiveness of the respondeat superior standard in criminal law. Particularly under the federal criminal code, with its voluminous list of strict liability offenses, the standard can impute criminal liability to faultless employers for the actions of employees who were *themselves* acting without fault. At the other extreme end of the spectrum, it can criminalize corporations for employees' offenses, such as fraud and bribery, that require a high standard of subjective intent regardless of the corporation's collective fault—but

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237. Kahan, *supra* note 57, at 621.

only where the employee was motivated by an intent to benefit her employer. Generally speaking, the scope-of-employment doctrine has been understood to limit vicarious liability to cases where torts are “‘caused’ by the business enterprise.”<sup>238</sup> Yet on the tort side, courts have done more to resolve the potential over- and underinclusiveness of the doctrine.

### 1. Unintentional Torts and Overinclusiveness

The potential overinclusiveness of no-fault corporate liability has been magnified in the criminal context by the proliferation of no-fault federal criminal offenses. When it comes to tort law, however, the effects of civil respondeat superior must be read against the background of general tort law, in which negligence doctrine has come—to some extent controversially—to replace no-fault liability in cases of unintentional torts.<sup>239</sup> While many scholars have argued that the boundary between strict liability and negligence is more porous than conventional wisdom suggests,<sup>240</sup> courts generally only overtly apply strict liability in a couple of contexts, such as strict liability for abnormally dangerous activities (“SLADA”) and products liability.<sup>241</sup>

Historically, the common law has justified the predominance of negligence liability through the notion of reciprocity. When a party is injured by a reasonable risk, he cannot get compensation under a negligence regime because “[h]e receives his compensation for such damage[s] by the general good, in which he shares, and the right

238. Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 609 (1988).

239. See G. Edward White, *The Unexpected Persistence of Negligence, 1980-2000*, 54 VAND. L. REV. 1337, 1346–47 (2001).

240. See, e.g., Abraham, *supra* note 217, at 272 (arguing that “some forms of liability imposed in negligence seem more like strict liability,” including the imposition of liability under negligence “even when the defendant was not capable of exercising what amounts to reasonable care,” application of the so-called thin-skull rule for unforeseeably excessive harm, and the requirement of “perfect compliance with precautionary requirements” in order to prove reasonable care); Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1291–92, 1295–96 (1992) (“[The two doctrines] stand in a ‘nested’ relationship, such that the optimal care inquiry both incorporates and adds to the cheapest cost-avoider inquiry. To determine optimal care, a court must not only determine the cheapest precautions that would have avoided an accident, but also whether the cheapest precautions *should* have been taken. The cheapest cost-avoider test, by contrast, omits the latter inquiry; the cheapest cost-avoider is liable regardless of whether the cheapest means of avoiding the accident were in fact optimal” and thus “will *privately* make this second cost-benefit analysis—that is, will determine which accidents are worth avoiding—in order to minimize his or her total liability by taking optimal care.”).

241. See Gilles, *supra* note 240, at 1307 n.45.

which he has to [engage in similarly risky conduct].”<sup>242</sup> Implicit in this notion are the ideas that compensation for one party necessarily limits the liberty of the other and that negligence strikes a kind of balance that maintains the greater good. (The contours of which, of course, are necessarily and perhaps imperfectly defined by jury determinations of “the reasonable.”)

Mark Geistfeld has argued that the reciprocity principle can also explain strict liability for SLADA: “Highly significant risks created by uncommon activities are not reciprocal and do not merge into the background level of social risk. For these risks, the negligence rule does not provide an adequate reciprocal benefit for potential victims.”<sup>243</sup> If we apply this reciprocity value to respondeat superior as a strict liability doctrine, we might say that there is no reciprocity between a complex entity and its potential victims. In the same way that most people do not engage in highly dangerous activities and therefore do not benefit from the reciprocal benefit of having their own liability bounded by negligence, an injured person is not a commercial entity with employees and would only in rare cases reciprocally benefit from a fault limitation on his or her own vicarious liability.

Yet most of the actual tort claims for which an entity might be held vicariously liable sound, themselves, in negligence due to the systemic preference for tolerating “reasonable” risks based upon the reciprocity principle. Furthermore, even in the “special” cases of SLADA and products liability, the operation of strict liability has come to be softened around the edges by negligence doctrine. For example, with respect to abnormally dangerous activities, the *Restatement (Second) of Torts* says that strict liability may be inapplicable when the high degree of risk can be eliminated by the exercise of reasonable care.<sup>244</sup> In a 1999 study of 100 decisions, Gerald Boston found that rarely do plaintiffs raise successful SLADA claims, due to courts determining that “the negligence system can function effectively in enforcing safety concerns associated with the activity.”<sup>245</sup> And with respect to products liability, the *Restatement (Third) of*

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242. *Losee v. Buchanan*, 51 N.Y. 476, 485 (1873).

243. Geistfeld, *supra* note 213, at 616.

244. RESTATEMENT (SECOND) OF TORTS §§ 519(2), 520(c) (AM. LAW INST. 1979) (limiting strict liability to “the kind of harm, the possibility of which makes the activity abnormally dangerous” and listing as a factor in this inquiry the “inability to eliminate the risk by the exercise of reasonable care”).

245. Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 599 (1999).

*Torts* proposed to resolve the question of what constitutes a “defect” with reference to whether there exists a safer alternative, the omission of which was unreasonable, thus shifting even products liability law away from strict liability and into the field of negligence.<sup>246</sup> Thus, while respondeat superior itself remains a strict liability rule, an employee must generally have been negligent in order to bind the employer through unintentional conduct because the backdrop tort law has—unlike federal criminal law—moved so far away from no-fault liability.<sup>247</sup>

Finally, both strict liability and negligence jurisprudence have been influenced in ways particularly relevant to respondeat superior by the concept of “enterprise liability.”<sup>248</sup> Enterprise liability rests on the premise that “(1) an enterprise has superior risk-spreading capacity compared to victims who would otherwise bear the costs of accidents, and (2) an enterprise is generally better placed to respond to the safety incentives created by liability rules than is the party suffering harm.”<sup>249</sup> While George Priest initially identified the theory to describe the strict-liability origins of products liability,<sup>250</sup> subsequent scholarship has demonstrated the influence of enterprise liability on negligence as well.<sup>251</sup> Most notably, Robert Rabin has argued that, despite its emphasis on risk allocation, enterprise liability has come to serve not as a mechanism for “enthroning strict liability as a replacement” for negligence but as a “different way of thinking

246. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 2 cmt. d (AM. LAW INST. 2010); see also Richard L. Cupp Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 880 (2002) (describing the *Restatement (Third)*’s functional approach to “risk/utility balancing” as “a triumph of negligence over strict liability”).

247. It should be noted that while some theorists, such as Weinrib and Abraham, consider the coexistence of strict liability and negligence in the application of respondeat superior to be a feature, others consider it a bug. Compare WEINRIB, *supra* note 219, at 185–87, and Abraham, *supra* note 217, at 301 (arguing that the negligence standard has endured so long due, in part, to its aspects of strict liability), with Calabresi, *supra* note 211, at 545 (noting that enterprise liability cannot explain why tort liability “generally retains a semi-fault basis” and that “[t]he inconsistenc[ies] between these limitations based on fault and the philosophy of workmen’s compensation [underlying respondeat superior] . . . still remains” (footnotes omitted)). Further, Keating has argued that “the whole of *respondeat superior* doctrine,” from the perspective of fault theorists, is “an anomalous special case governed by other principles.” Keating, *supra* note 221, at 1311.

248. See generally George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (reviewing the intellectual history of enterprise liability).

249. Rabin, *supra* note 223, at 1190.

250. See Priest, *supra* note 248, at 463–64.

251. See, e.g., Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 639–45 (1992).

about the social function of the tort system—in particular, viewing tort as a redistributive and regulatory mechanism—that has evolved independently of doctrinal change.”<sup>252</sup>

To illustrate this doctrine’s effects on the structure of negligence law, Rabin points to the 1976 California Supreme Court decision in *Tarasoff v. Regents of University of California*,<sup>253</sup> in which the court held that a therapist had a duty to warn a potential victim of death threats made by a patient in the course of therapy despite competing considerations of therapist-patient privilege.<sup>254</sup> Rabin points out that because “therapists are *in the business of* treating disturbed patients, some subset of whom have violent propensities,” they are “singularly positioned to take reasonable steps to warn when this occupational hazard arises.”<sup>255</sup> Rabin argues that this outcome does not turn on a risk-spreading function, otherwise a dentist or bartender would be equally liable for warning of overheard risks as they would still be better situated than the oblivious victim to prevent the harm.<sup>256</sup> Rather, the law appears concerned with deterrence “grounded in the notion of intrinsic occupational risk.”<sup>257</sup>

Rabin goes on to identify the thread of enterprise liability throughout negligence law with other examples of professional liability premised on the foreseeability of particular sorts of harm, including relaxation of negligence standards in medical malpractice law and the liability of auditors to foreseeably injured third parties who rely on misrepresentations about a client’s financial state.<sup>258</sup> In cases involving auditors, Rabin notes that, while some states have rejected foreseeability of harm as a touchstone of liability, citing the potentially “crushing liability” possible under such a standard, many have adopted it for enterprise liability-based reasons.<sup>259</sup> In so doing, for example, the New Jersey Supreme Court asked “[w]hy should an innocent reliant party be forced to carry the weighty burden of an accountant’s professional malpractice” and whether “a rule of foreseeability [would] elevate the cautionary techniques of the accounting profession.”<sup>260</sup>

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252. Rabin, *supra* note 223, at 1198.

253. 551 P.2d 334 (Cal. 1976) (en banc), *superseded by statute*, Act of Sept. 17, 1985, ch. 737, 1985 Cal. Stat. 2394 (codified as amended at CAL. CIV. CODE § 43.92 (West 2018)).

254. *Id.* at 339–40, 346–47.

255. Rabin, *supra* note 223, at 1200 (footnote omitted).

256. *Id.*

257. *Id.*

258. *Id.* at 1200–02.

259. *Id.* at 1202.

260. *Id.* at 1203.

To summarize then, the potential overinclusiveness of the respondeat superior standard in tort law has been muted by the simultaneous movement of tort law generally into the field of negligence. Furthermore, to the extent that the risk-spreading purpose of respondeat superior has gained traction through the ideology of enterprise liability, it has taken the form of a foreseeability analysis. Even in applying negligence standards, courts have questioned what sorts of risks attendant to the particular enterprise are foreseeable to the defendant. While controversial as a potentially harmful expansion of tort liability in cases such as those of the negligent auditors, the foreseeability standard nonetheless combines the goal of shifting risk to the beneficiaries of an enterprise with the check provided by a reasonableness inquiry as to the objective foreseeability of harm.

## 2. Intentional Torts and Underinclusiveness

At the other end of the spectrum, the law of respondeat superior liability for intentional torts has evolved as well. Unlike in criminal law, in tort cases, courts and commentators have been divided on whether an employee's intent to serve his master is a necessary precondition to vicarious liability.<sup>261</sup> Most notably, the frolic and detour rule excludes from vicarious liability employee conduct actuated for a purely private purpose.<sup>262</sup> Yet the dual-purpose doctrine allows a master to be liable for a servant's negligent conduct even in situations in which the servant's predominant motive was to benefit himself.<sup>263</sup> And the *Restatement (Second) of Agency* makes an exception for torts committed outside the scope of employment where the master itself has been negligent or reckless.<sup>264</sup> Due in part to the fact that intentional torts do not always serve the master's

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261. Compare RESTATEMENT (SECOND) OF AGENCY § 228(2) (AM. LAW INST. 1958) ("Conduct of a servant is not within the scope of employment if it is . . . too little actuated by a purpose to serve the master."), with WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 87(A) (1964) ("The ultimate question in the minds of the judges is whether it is just to make the master's enterprise bear the loss caused by the particular act . . . . It is just to do this if it can be said rationally that the employment is the primary cause of the tort.").

262. 20 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PERSONAL INJURY: ACTIONS, DEFENSES, AND DAMAGES § 95.05[3][a] (Matthew Bender rev. ed., 2013) ("If [conduct] is . . . for a purely private purpose or a 'frolic' of the employee's own, no liability attaches." (internal citations omitted)).

263. RESTATEMENT (SECOND) OF AGENCY § 236, cmt. b (AM. LAW INST. 1958).

264. *Id.* at § 219(2).

benefit,<sup>265</sup> some jurisdictions only rarely recognize an employee's intentional torts as the basis for respondeat superior liability.<sup>266</sup>

Yet in many jurisdictions, the so-called motive test has given way to the question of how much responsibility an enterprise should take for injuries that may be typical of its business.<sup>267</sup> This thread of jurisprudence is typified by *Ira S. Bushey & Sons, Inc. v. United States*,<sup>268</sup> where the United States Court of Appeals for the Second Circuit famously held the U.S. government liable for the drunken property damage caused by its sailor on shore leave, despite the obvious lack of motive to benefit the employer, on the theory that “a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities” and the fact that the sailor’s conduct “was not so ‘unforeseeable’ as to make it unfair to charge the Government with responsibility.”<sup>269</sup> Numerous other examples of vicarious liability for intentional torts unmotivated by intent to serve an employer can be found in state law.<sup>270</sup>

More specifically, civil courts are beginning to hold employers vicariously liable for the sexual torts of their employees regardless of motivation to benefit in cases where the plaintiff can allege a sufficiently close relationship between the harm suffered and the defendant’s position as an employee. For example, the D.C. Circuit

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265. *Cf.* 2 FLORIDA TORTS § 50.10[4][d][ii] (Matthew Bender rev ed., 2018) (“[I]n the case of an intentional tort, vicarious liability may be imposed only if the conduct in some way furthers the interests of the employer or is at least motivated by a purpose to serve those interests, rather than the employee’s own. . . . [For example, a]n employee who assaults a person solely because of personal malice is deemed to act outside the scope of employment. However, when an assault is committed during an attempt to fulfill an employment-related duty, it is considered to be within the scope of employment.” (citations omitted)).

266. *See, e.g.,* *Borneman v. United States*, 213 F.3d 819, 828 (4th Cir. 2000) (“[U]nder the North Carolina law of *respondeat superior*, an intentional tort is ‘rarely considered to be within the scope of an employee’s employment.’” (quoting *Medlin v. Bass*, 327 N.C. 587, 594, 398 S.E.2d 460, 464 (1990))).

267. *See, e.g.,* *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171–72 (2d Cir. 1968) (criticizing the “motive test”).

268. 398 F.2d 167 (2d Cir. 1968).

269. *Id.* at 168, 170–72.

270. *See, e.g.,* *Carr v. Wm. C. Crowell Co.*, 171 P.2d 5, 6, 8 (Cal. 1946) (en banc) (holding employer liable for actions of carpenter who attacked a coemployee with a hammer out of frustration), *rev’g* 166 P.2d 371 (Cal. Dist. Ct. App. 1946); *Rodgers v. Kemper Constr. Co.*, 124 Cal. Rptr. 143, 146, 150, 152 (Cal. Ct. App. 1975) (upholding the imposition of vicarious liability against a subcontractor for his employee’s drunken assault of two of the general contractor’s employees); *Leonbruno v. Champlain Silk Mills*, 128 N.E. 711, 711 (N.Y. 1920) (holding employer liable under worker’s compensation statute for eye injury sustained when employee threw an apple at another because the accident arose “in the course of employment” because such horseplay should be expected).

held that a jury could impose vicarious liability on a trucking company for its employee's rape of a customer due to the fact that the deliveryman's "badge of employment" allowed him to get into the victim's home.<sup>271</sup> Considering a case involving allegations of sexual abuse by the staff of a psychiatric hospital, the Minnesota Supreme Court eliminated the "motivation to serve" element, noting that "it would be a rare situation where a wrongful act would actually further the employer's business," and thus concluded that motivation was irrelevant to the availability of vicarious liability.<sup>272</sup> The Oregon Supreme Court announced that, in a case of sexual abuse of a minor by a priest, the question was not whether the sexual assault itself was in the course of employment but, rather, whether the priest's conduct leading up to the assault was in the course of employment.<sup>273</sup> The court found that a reasonable jury could conclude that the priest's legitimate employment-related actions "were a necessary precursor to the sexual abuse" and that the sexual assaults therefore "were a direct outgrowth of and were engendered by conduct that was within the scope of [the priest's] employment."<sup>274</sup> The Ninth Circuit applied the Oregon rule in holding that a plaintiff "sufficiently alleged that [the priest] was an employee of the Holy See acting within the 'scope of his employment' under Oregon law" and that the acts come within the "tortious act exception" to the Foreign Sovereign Immunity Act.<sup>275</sup> The court held that the church could be vicariously liable on the alleged facts because the plaintiff had "c[ome] to know [the defendant] as his priest, counselor and spiritual adviser," and the priest had "used his 'position of authority' to 'engage in harmful sexual contact.'"<sup>276</sup> Other examples abound.<sup>277</sup> Some use the *Bushey*

271. *Lyon v. Carey*, 533 F.2d 649, 650–51 (D.C. Cir. 1976).

272. *Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W.2d 306, 310–11 (Minn. 1983).

273. See *Fearing v. Bucher*, 977 P.2d 1163, 1166–67 (Or. 1999) (quoting *Chesterman v. Barmon*, 753 P.2d 404, 406–07 (Or. 1988) (reasoning that vicarious liability may be found when acts conducted within the scope of employment result in the acts which led to injury).

274. *Id.* at 1168.

275. *Doe v. Holy See*, 557 F.3d 1066, 1069, 1083 (9th Cir. 2009) (per curiam).

276. *Id.* at 1083.

277. See, e.g., *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 345, 348–50 (Alaska 1990) (holding that a clinic may be held liable under respondeat superior when a therapist had sexual relations with a patient); *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1342, 1349, 1352 (Cal. 1991) (en banc) (holding that the city may be vicariously liable when city police officer raped motorist after placing her under arrest); *Samuels v. S. Baptist Hosp.*, 594 So. 2d 571, 573–74 (La. Ct. App. 1992) (holding hospital liable for nursing assistant's rape of patient); *Turner v. State*, 494 So. 2d 1292, 1295–96 (La. Ct. App. 1986) (holding the

logic of foreseeability,<sup>278</sup> while others turn on a finding that the employee's sexual misconduct arose from or was in some way related to his or her essential duties.<sup>279</sup> The Supreme Court has even commented on the increasingly broad tort liability of employers for the sexual crimes of employees unmotivated to serve them, contrasting it with the more parsimonious vicarious liability standard governing a Title VII claim.<sup>280</sup>

It should be recognized that these new developments do not mean that courts now consistently apply vicarious liability to the sexual torts of employees—far from it. Martha Chamallas, who has made the most comprehensive scholarly critique of the field, notes that “tort law gives no crisp answer to the question of whether a business is vicariously liable for the sexual torts committed by its employees” and criticizes as “sexual exceptionalism” the fact that “[m]any courts continue to treat sexual abuse cases as exceptional, echoing the sentiments of old-fashioned (pre-1970s) criminal laws that once approached rape and sexual assault as qualitatively different from other forms of violence.”<sup>281</sup>

Nonetheless, unlike in criminal law, tort respondeat superior has at least begun to move away from an intent-to-benefit requirement that in some jurisdictions had wholly precluded vicarious liability for intentional torts. This shift to a focus on the relationship between the tort and the employer's enterprise demonstrates that courts are increasingly thinking of respondeat superior as a form of causation. This focus on the nexus between the harm caused and the employer's business could resolve the underinclusiveness issues in criminal respondeat superior as well.

### C. *The Project of Doctrinal Borrowing*

Before moving on to consider these tort developments in the criminal arena, one must first ask: Is it appropriate to do so? This part began with a consideration of the very different purposes of and justifications for tort and criminal liability, which may suggest that the

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State of Louisiana vicariously liable when National Guard recruiting officer committed sexual battery during sham physical examinations).

278. See, e.g., *Mary M.*, 814 P.2d at 1350–51.

279. See, e.g., *Samuels*, 594 So. 2d at 574 (finding that tortious conduct was “reasonably incidental” to the performance of the nursing assistant's duties in caring for a “helpless [patient] in a locked environment”).

280. *Faragher v. City of Boca Raton*, 524 U.S. 775, 795–96 (1998).

281. Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 135, 137 (2013).

whole endeavor is flawed. The law of criminal procedure has already seen a notable example of courts “borrowing” from tort law to create a new constitutional standard: the importation of the good faith defense to a constitutional tort claim against a police officer into the application of the Fourth Amendment exclusionary rule.<sup>282</sup> That move was controversial insofar as it applied the jurisprudential logic of one remedy to another with entirely different aims and design: the logic of a personal defense to a constitutional tort action for damages recoverable from an individual, applied to a remedy for a criminal procedural violation to which no individual is personally entitled, whose cost is borne by the system.<sup>283</sup>

Jennifer Laurin has noted that the convergence of the good faith defense between the constitutional tort and constitutional procedural realms presents the particular problem of simultaneously shutting down two remedies for the same violation—on occasions that the officer’s conduct meets the good faith test, the accused can neither get tort compensation for the violation of his Fourth Amendment rights nor have the seized evidence excluded from his trial.<sup>284</sup> Laurin concludes that, to the extent that the case law “facilitates complete convergence of the good faith exception with immunity doctrine, such that its culpability test applies across the range of Fourth Amendment contexts, this new conduct rule will often . . . set the bar lower than what the Court has held the Constitution itself to require.”<sup>285</sup> By contrast, Nelson Tebbe and Robert Tsai defend constitutional borrowing on rule-of-law grounds.<sup>286</sup> They say it promotes “generality, participation, and accountability,” in part by “[c]reating a shared repertoire of persuasive moves” that will empower citizens and officials to recognize governing principles.<sup>287</sup> Scholars in other fields have made similar arguments about the values of transsubstantive borrowing generally.<sup>288</sup>

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282. See Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 672–73 (2011).

283. *Id.*

284. *Id.* at 676.

285. *Id.* at 740.

286. Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 462 (2010).

287. *Id.*

288. See ANN-MARIE SLAUGHTER, *A NEW WORLD ORDER* 59–61 (2004) (discussing convergence in international law); John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 293, 306 (2010) (identifying convergence between European and United States class action regimes).

In considering the propriety of borrowing from tort jurisprudence to flesh out a criminal mens rea standard, note that the proverbial cow is already out of the barn. *Respondeat superior* has already been imported into criminal law; what remains is only to consider whether further recourse to tort law to develop the doctrine runs into any of the problems attendant to applying a constitutional tort defense to the Fourth Amendment exclusionary rule. Like the good faith defense, *respondeat superior* occupies two distinct settings. In one, the corporation faces criminal punishment, and the public stands to gain expressive redress for the harms the entity has imposed and potential deterrence of future similar offenses. In the other, an individual plaintiff seeks compensation for harms he has personally suffered at the hands of the corporation's employees.

But unlike the good faith defense, the question of vicarious liability does not implicate dual constitutional remedies. Rather, it is a way for the law to define a party on the same side of the "v." in separate criminal and civil matters. The victims of that party's violation—the individual defendant and the public—are distinct (even assuming there are in fact parallel litigations in the first place). Thus, using the contours of tort jurisprudence to shape a criminal mens rea standard is not going to doubly limit any one party's remedies, much less any party's constitutional remedies. Indeed, it is likely to serve the rule-of-law purpose identified by Tebbe and Tsai, given the current state of affairs in which the power to label a corporation as a criminal currently rests almost solely in the hands of prosecutors. That is not to say, however, that we can or should borrow in full cloth. A workable standard should adapt the developed principles of tort *respondeat superior* to a distinctively criminal setting and the preexisting rules of criminal mens rea.

#### IV. A NEW STANDARD

The foregoing has shown that a new standard for criminal *respondeat superior*, if it is to benefit from the development of the doctrine in tort, should (1) take into account the differing importance of risk-spreading as a purpose of liability as between tort and crime, (2) be tempered by a component of negligence and/or foreseeability, and (3) replace the intent-to-benefit requirement with a causation analysis. I have elsewhere stated in passing that my preferred corporate mens rea standard would limit criminal liability to cases where a corporation committed criminal negligence; that is, when it

has “failed to perceive a substantial and unjustifiable risk of misconduct occurring and take reasonable measures to prevent it.”<sup>289</sup> This part expands upon this standard and demonstrates how it would look in action.

My standard takes as a starting point a negligence-based model, such as that proposed by Weissman and Newman.<sup>290</sup> Yet it seeks to reduce uncertainty and vagueness for defendants on the one hand and the moral hazards of a safe harbor on the other by applying the doctrinal developments from the respondeat superior doctrine in tort. Specifically, I propose that corporate criminal liability require three elements: (1) proof that a crime occurred, regardless of whether any individual employee had the intent to benefit the corporation; (2) an omission by the corporation to take reasonable steps to prevent the crime; and (3) proof that the substantial risk of such a crime was objectively foreseeable given the nature of the employer’s enterprise.

The three proposed elements work together to expand the corporate liability analysis away from solely what the individual employee intended and toward the question that more properly captures corporate harm: What could the entity collectively have foreseen and prevented its agent from doing in the scope of employment, such that the crime can be said to have been *caused* by a corporate omission? In answering this question, I draw upon several of the existing proposals for alternative corporate mens rea standards already discussed but propose a coherent test that improves, rather than fully supplants, the respondeat superior test.

As I have argued previously, the idea that a collective omission to take steps to prevent a crime constitutes a valid form of criminal mens rea runs into some of the same problems posed in the first place by the very concept of criminal negligence generally.<sup>291</sup> In a debate with H.L.A. Hart, J.W.C. Turner proposed that the basic idea of criminal, or “gross,” negligence is problematic.<sup>292</sup> The concept of negligence, he argued, requires that a negligent action be inherently unconscious—a failure to meet a standard rather than an act of will.<sup>293</sup> Following this reasoning, negligence cannot, therefore, be mens rea

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289. Sheley, *supra* note 59, at 232.

290. Weissmann with Newman, *supra* note 14, at 414.

291. Sheley, *supra* note 59, at 233.

292. See Patrick M. O’Neil, *The Moral Blindness of the Positivist Legal Hermeneutic and the Non-Proximate Mens Rea in the Law of Criminal Negligence*, 41 AM. J. JURIS. 289, 290, 291–92 (1996).

293. *Id.* at 294, 301.

because it is inherently *unintended*.<sup>294</sup> By contrast, if an ostensibly negligent act is done with any awareness of the consequences, it becomes recklessness, rendering the category of criminal negligence irrelevant.<sup>295</sup> This argument is intellectually akin to the claim that a corporation cannot unilaterally “intend” its conduct and should therefore not be subject to the moral condemnation of the criminal law.

Yet the criminal law routinely recognizes criminal negligence, albeit controversially. The Model Penal Code defines criminal negligence as a lack of awareness of “a substantial and unjustifiable risk that the material element [of an offense] exists or will result from [the actor’s] conduct” and that the “failure to perceive it” must represent “a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”<sup>296</sup> Furthermore, there is a valid theoretical basis for doing so. The idea of importing a negligence standard into the criminal law is nothing new; for all the theoretical debate that has surrounded it, it is hard at work every time someone is prosecuted for criminally negligent homicide or involuntary manslaughter. And conceptually it is a relatively easy fit to apply to a corporation as a condition of vicarious liability.

Patrick O’Neil has described the concept of criminal negligence as “non-proximate *mens rea*,” which is

one or more points of choice when the perpetrator either chose to indulge in the habits of mind which ultimately led to patterns of negligence or (more likely) chose not to take steps to correct patterns of negligence or patterns of mental inadvertency having the potential to lead to acts of negligence.<sup>297</sup>

So, for example, when someone chooses to become intoxicated and subsequently kills a person on the drive home, his conscious intent (to get drunk) may have been temporally removed from the actual *actus reus* (the reckless driving resulting in death, which was itself inadvertent). It is on this basis that the criminal law has no problem pairing the remote subjective *mens rea* of intent to drink with the foreseeable, if inadvertent, *actus reus* of killing someone while driving drunk.

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294. *Id.* at 292, 301.

295. *Id.* at 301.

296. MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1985).

297. O’Neil, *supra* note 292, at 301.

The corporate context poses an additional conceptual challenge: unlike the case of the drunk driver, here, the criminally negligent state of mind arises from a different legal entity than the actual perpetrator of the actus reus. Nonetheless, by examining the effects of corporate omissions according to familiar principles of causation, it is possible to formulate a test whereby an individual employee's mens rea may be more justifiably attributed to recognizably criminal misconduct of the corporate employer. I propose, in short, that the rule of respondeat superior is justified where a negligent corporate omission is a legal cause of the relevant crime.

*A. A Crime, Regardless of Intent to Benefit*

The standard begins with proof of individual liability, similar to the existing respondeat superior standard, but with a couple of key differences. First, the doctrine of collective knowledge—inconsistently applied under the current regime—makes much more sense where some form of genuinely corporate fault exists. As discussed above, scattered knowledge among various employees would not seem to justify corporate criminal liability on its face where there would be no way for management to be aware of all of the disparately held pieces of knowledge. Yet if it can also be shown, as discussed below, that a substantial risk of this state of affairs would have been foreseeable to a reasonable person undertaking the corporation's business, and that no reasonable steps had been taken by anyone in the corporation to prevent it, criminal liability can be justified.

Second, the showing of corporate fault required by the second and third prongs of the test should eliminate the old requirement that the offending employee have acted with the intent to benefit the corporation. We have seen how courts applying respondeat superior in tort cases have begun to shift away from this understanding of the doctrine to instead scrutinize the nexus between the employer's enterprise and the resulting crime. Where a criminal has used his status as an employee to commit an offense, if such an offense was reasonably foreseeable given the employer's business, respondeat superior should operate to impose criminal liability.

*B. The Omission of Reasonable Steps to Prevent the Crime*

In Part II, I discussed a number of proposals that looked to preoffense conduct by the corporation in the form of inadequate practices and procedures that failed to prevent the relevant offense. I

noted that such proposals have been rightfully criticized for tying criminal mens rea to conduct other than the actual actus reus—the specific action of the employee. Yet the focus on preoffense negligence *does* at least capture conduct that can be properly termed “corporate.” Specifically, while it is difficult to formulate a rule whereby a corporation can be said to have collectively *acted*, it is fairly easy to conceive of a collective omission. The question becomes whether *anyone* in the corporation had taken reasonable steps to prevent an offense from occurring.

In a corporation, composed of many actors engaging in cooperative behavior over extended temporal periods, the collective failure of any and all corporate actors to prevent substantially foreseeable criminal misconduct constitutes an identifiable omission that does not require applying individual states of mind to a corporate body. Such a collective failure can properly be said to be at least a but-for cause of the misconduct. It does not require a theory of collective intent to determine what steps—if taken by *anyone* in a corporation—could reasonably have prevented a crime and conclude that they were taken by no one. And the same concept of nonproximate mens rea that implicitly justifies criminal negligence generally also justifies pairing that negligence to the subsequent criminal misconduct of an employee. Yet but-for causation alone is an inadequate basis for criminal liability, which brings us to the final step.

### C. *The Objective Foreseeability of the Crime*

To result in criminal liability, an omission must not only be a but-for cause of the prohibited harm but also a proximate cause. While proximate causation is, in and of itself, a topic rife with doctrinal confusion,<sup>298</sup> American courts generally follow the Model Penal Code in cases of criminal negligence and require that the prohibited harm be foreseeable to the wrongdoer.<sup>299</sup> So, for example, if my taxi driver

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298. See generally Mark F. Grady, *Proximate Cause Decoded*, 50 UCLA L. REV. 293 (2002) (analyzing the history of proximate causation in the civil system).

299. See, e.g., *United States v. Lee Peng Fei*, 225 F.3d 167, 168–69, 171 (2d Cir. 2000) (affirming the manslaughter conviction for the deaths of six undocumented immigrants over a challenge on causation grounds because, “regardless of whether the beach was sandy or rocky at the point of impact, the multiple deaths that in fact occurred were an entirely foreseeable result of [the defendant’s] arrangements and orders to his subordinates”); *United States v. Main*, 113 F.3d 1046, 1049 (9th Cir. 1997) (asserting that involuntary manslaughter should only be imposed when death was “within the risk foreseeably created by the [defendant’s] conduct”); *United States v. Escamilla*, 467 F.2d 341, 346 (4th Cir. 1972) (observing that “awareness of the tendency to danger, or the

fails to pick me up on time and I am forced to take a later flight, which crashes, he is indeed a but-for cause of my death, but as my death is not a foreseeable result of his omission, he cannot be said to be a proximate cause of it. In other words, when dealing with the criminal negligence of individuals, courts *already* apply the same analysis from tort enterprise liability cases: they consider what harms are foreseeable given the activity engaged in. The requirement that the harm be substantially foreseeable, a requirement of the Model Penal Code and the states that follow it, recognizes the heightened degree of negligence necessary to rise to the level of criminal, rather than merely tortious, conduct.

Thus, for a collective omission by a corporation to *prevent* a crime from occurring to meet the standard required to show proximate causation in criminal negligence, there must be a substantially foreseeable risk of a particular crime occurring. This begs the question: Foreseeable to whom? William Laufer's proposal—that we ask what state of mind a reasonable corporation under similar circumstances would have had with respect to a particular crime—sought to introduce a welcome element of objective analysis into the inquiry.<sup>300</sup> Yet, as mentioned previously, that proposal has been criticized for leaving unresolved the question of what a “reasonable corporation” is in the first place.<sup>301</sup> While determining whether the risk of a particular crime is foreseeable may be less complex than Laufer's proposal, which requires measuring the full gamut of states of mind against that of a reasonable corporation, it is clear that even the narrower question of objective foreseeability involves reference to a baseline reasonable corporation.

Tort law again provides us with useful guidance here. When the question is simply whether a risk is foreseeable in determining whether an individual has been negligent, the prevailing analysis involves the dangers inherent in the underlying risky activity and the circumstances that surround it.<sup>302</sup> The law does not ask whether a

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foreseeability of injury, from the act or omission is an indispensable element of negligence” (first citing *Copeland v. State*, 285 S.W. 565, 566 (Tenn. 1926); and then citing *State v. Tankersley*, 172 N.C. 955, 959–60, 90 S.E. 781, 783 (1916)).

300. Laufer, *supra* note 12, at 676–78, 701.

301. Diamantis, *supra* note 74, at 2074 (“To apply [Laufer's] test for corporate mens rea, courts must already know what mental states an average corporation would have in various circumstances.”).

302. See Fowler Vincent Harper, *The Foreseeability Factor in the Law of Torts*, 7 NOTRE DAME LAW. 468, 468–70 (1932) (“The whole idea of *risk* or *threat* is comprehended in the notion of foresight—foresight in the sense of the probability of harm resulting from conduct. Experience suggests the danger incident to certain activity. Not

tortfeasor took the steps that he personally should have but rather whether his conduct met the standard of a reasonably prudent actor according to an “aggregate community measure.”<sup>303</sup> While physical disability may be taken into account when measuring a tortfeasor’s conduct,<sup>304</sup> the individualized mental characteristics of the defendant do not generally change the analysis unless the defendant is a child.<sup>305</sup>

It is unclear why the corporate nature of the defendant should be any more relevant than the specific mental characteristics of an individual in determining whether a risk was objectively foreseeable. The question of whether there is a substantially foreseeable risk of an employee, acting within the scope of his or her employment, committing a crime is simple: Would a reasonable *person*, undertaking the same potentially risky enterprise as a corporation, have perceived the risk? Because the question of foreseeability is objective, it may not be necessary to look into the actual knowledge of individual constituents of a corporation to determine whose mental state should govern. The question of whether a risk is foreseeable attaches to the act itself and the degree of care desired from an individual undertaking it—whether the activity is running a factory or controlling the medical care of prepubescent girls.

Indeed, the *Restatement (Third) of Torts* takes into consideration the specialized skills of a tortfeasors in its negligence analysis: “If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person.”<sup>306</sup> Doctors are the most obvious example of defendants held to a heightened standard of care; some jurisdictions have also applied it to architects, physical therapists, engineers, and construction workers.<sup>307</sup> How to attribute a corporation’s employees’ collective knowledge and skills to the entity itself for the purposes of determining whether a risk is objectively

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particular experience of particular individuals, but general experience—experience that often defies analysis—the multitude of factors, knowledge, hunches, instincts or what they may be called, the common sense that makes social intercourse possible, all operate to prompt the ‘ordinary reasonable man’ that harms are ‘probable’ or ‘natural’ as normal results of certain situations and certain conduct.”)

303. Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 N.Y.U. L. REV. 627, 636–37 (2016).

304. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11(a) (AM. LAW INST. 2010).

305. *Id.* § 11(c).

306. *Id.* § 12.

307. Ben-Shahar & Porat, *supra* note 303, at 641–42.

foreseeable would prove to be the trickiest part of this proposed standard. Yet to do business in nearly any sector a corporation must, as an entity, meet a myriad of licensing and certification standards. It does not require particularly elaborate mental gymnastics to ask what standard of care a reasonable person with the expertise required to meet those standards would adhere to in evaluating criminal risk associated with those areas of expertise. Doing so is entirely consistent with the philosophy of enterprise liability that has grounded respondeat superior in tort cases.

*D. Examples*

To understand how this new, tort-based rule would apply in practice, consider the following six hypothetical scenarios.

1. The Rogue Bid Rigger

ABC Corporation is a government contractor doing business across the country. It has strong compliance programs in place to prevent its contracting officers from rigging bids for government contracts in violation of the Sherman Act.<sup>308</sup> An individual officer is approached by his counterpart at DEF Corporation who proposes a scheme whereby ABC and DEF will coordinate bids for two upcoming construction contracts with the City of Toledo, allowing each of them to submit the lowest bid on one project. The ABC officer agrees. Here, the first and third prongs of the test are met: bid rigging is a crime, the substantial risk of which is foreseeable by anyone who undertakes a government contracting enterprise, and the crime occurred, the officer committed the actus reus of Sherman Act § 1, with the requisite mens rea insofar as he knowingly entered an anticompetitive conspiracy.<sup>309</sup> The corporation would need to make a defense based upon its having taken all reasonable steps to prevent the crime. The evidentiary inquiry should not be simply whether a compliance program existed but how it operated in the specific circumstances.

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308. 15 U.S.C. §§ 1–7 (2012).

309. *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 435, 443–46 (1978) (construing § 1 of the Sherman Act and concluding that “the perpetrator’s knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent”).

## 2. Collective Fault

A bank has failed to report cash transfers greater than \$10,000 in violation of the CTRA.<sup>310</sup> The facts are identical to those of the *Bank of New England* case described above: multiple employees cashed checks to the same customer that added up to a sum greater than \$10,000.<sup>311</sup> Liability under the CTRA requires “proof of the defendant’s knowledge of the reporting requirement and his specific intent to commit the crime.”<sup>312</sup> Assigning culpability to the employer would require a bit more than simply tallying the knowledge of the group, as the court did in that case. The question would be whether the multiple-transaction scenario was substantially foreseeable and whether the bank had taken reasonable steps to prevent it. Given the commonplace nature of the problem, the answers to these questions appear to be yes and no, respectively. This analysis again borrows from the structure of respondeat superior in the tort context. There may be cases where intentional torts cannot be vicariously imputed against an employer due to the frolic-and-detour principle. Yet direct liability for negligent hiring or entrustment may exist where the employer failed to exercise due care in giving responsibility to a particular employee and that employee committed a tort.<sup>313</sup> Here, one could say that the employer’s negligence in allowing uncoordinated receipt of funds caused the foreseeable harm of these transactions. At that point, and only at that point, does it make sense to impute all of the employees’ disparate knowledge to the employer.

## 3. The Sexually Abusive Doctor

USA Gymnastics employed a doctor who repeatedly molested the little girls in his care. The evidence suggests that the organization routinely ignored complaints about his behavior and allowed him to continue in his role for years. The sexual abuse of vulnerable children by a doctor tasked with the care of particularly intimate sorts of medical problems is reasonably foreseeable by someone undertaking to run an athletic organization that will largely shape the health and lives of its participants throughout their childhoods and adolescence. (It would be far less foreseeable in a situation involving less physical intimacy and/or a lesser degree of control by the employee over the

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310. See 31 U.S.C. §§ 5311–5322 (2012); *supra* text accompanying notes 45–47.

311. See *supra* text accompanying notes 48–49.

312. *United States v. Hernando Ospina*, 798 F.2d 1570, 1580 (11th Cir. 1986) (quoting *United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984)).

313. See, e.g., *Henderson v. Prof'l Coatings Corp.*, 819 P.2d 84, 90–92 (Haw. 1991).

child.) The crime occurred and USA Gymnastics appears to have taken few, if any, reasonable steps to prevent it or even to act upon the subjective awareness of irregularities by many of its employees. USA Gymnastics would be criminally liable. This hypothetical also provides a good opportunity to consider the role of subjective knowledge held by individual employees within this standard. The benefit of the foreseeability prong of my test is that it creates an objective standard that avoids philosophical conundrums about corporate subjectivity. Yet actual subjective knowledge held by individual employees becomes relevant, instead, at the second prong: it is very hard for a corporation to argue that its omission of reasonable steps did not cause the crime where its procedures were insufficient to receive and adequately respond to this information received by its employees. Subjective knowledge has evidentiary value on the question of whether an unreasonable omission occurred.

#### 4. The Unforeseeable Offense

A Seattle-based armored truck driver is loading a multimillion-dollar transport load from a bank in downtown Seattle. During the tense process of getting the money into the truck, a particularly aggressive Canada goose descends from the heavens and begins attacking him. While the driver is in no actual danger, he cannot pick up the safes he is moving without the goose biting his hands. He draws his work-issued pistol and shoots the bird dead, in violation of the Migratory Bird Treaty (“MBT”).<sup>314</sup> While this action was clearly within the scope of employment, the employer would be able to argue that the death of a protected bird was not a substantially foreseeable crime from the perspective of a reasonable operator of an armored truck company.

#### 5. Corporate Homicide

Take the facts of another earlier-mentioned case, *Warner-Lambert*, where six of the defendant-gum-manufacturer’s employees died after magnesium stearate accumulated on the plant’s machines and in the air, causing an explosion.<sup>315</sup> In that case the court held that,

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314. 16 U.S.C. §§ 703–712 (2012). The MBT requires a deliberate action resulting in the death of a protected bird, so the elements are met vis-à-vis the employee’s intentional shooting of the goose. *See* United States v. CITGO Petroleum Corp., 801 F.3d 477, 488–89 (5th Cir. 2015) (explaining that, for the purposes of the MBT, “a ‘taking’ is limited to deliberate acts done directly and intentionally to migratory birds”).

315. *People v. Warner-Lambert Co.*, 414 N.E.2d 660, 662 (N.Y. 1980); *see also supra* note 195 and accompanying text.

because the corporate defendant was aware only of a “broad, undifferentiated risk of an explosion,” it could not be held liable as the particular pathway through which the explosion occurred was unforeseeable.<sup>316</sup> Without getting too deep into the chemistry of magnesium stearate, assume for simplicity’s sake that an explosion occurred because one employee nonnegligently left dust of the compound on a machine and the other did something to render it airborne. The second employee’s action would not have been negligent had the compound, of which he was reasonably unaware, not been there. Like the knowledge of the bank employees in hypothetical #2, we can aggregate the conduct of the two employees into one criminally negligent transaction resulting in death (involuntary manslaughter), meeting the first prong of my test. The next question is whether the crime objectively substantially foreseeable. We know from the facts that the corporation was aware of the risk of explosion, so the question of whether a reasonable person engaging in the gum-manufacturing business would be aware of the substantial risk of involuntary manslaughter can probably be answered in the affirmative.<sup>317</sup> The final question is whether anyone in the corporation took reasonable steps to prevent this sort of explosion. The corporation could use its evidence on how the particular pathway to explosion was unforeseeable to argue that there were no reasonable steps it could have taken to prevent it. But the government would then be free to argue that, particularly given the generalized risk of explosion, the manufacturer should have taken more steps to determine unknown unknowns and that this particular pathway was reasonably discoverable.

#### 6. The Deliveryman Rapist

The final example comes from one of the tort cases referenced above, in which the court found the employer liable when its truck driver raped a woman to whom he made a delivery. In this case we would, again, ask whether a substantial risk of the crime was objectively foreseeable. Without more facts, arguably not. Unlike a team doctor with repeated, unsupervised access to little girls, a deliveryman has limited access to and intimacy with his employer’s clients. Similarly, the government would have difficulty proving lack of reasonable steps (barring readily discoverable information that the

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316. *Id.* at 661, 665–66.

317. Note that this analysis turns on whether a particular crime is foreseeable without reference to the particular logical pathway.

particular truck driver is a violent sex offender). Unlike USA Gymnastics, which had the same group of gymnasts in its care for many years and could reasonably have had far better reporting mechanisms in place, it would basically require an armed escort to police every deliveryman's one-off interaction with every mail recipient to prevent this particular harm. This would likely be a case where the removal of the intent-to-benefit requirement would not render the employer liable for the sexual assault.

*E. Counterarguments*

There are two obvious potential objections to my proposal, one arguing that it will overly reduce corporate criminal liability and the other that it will burdensomely expand it. Both raise the basic problem inherent in any standard that turns on reasonableness and foreseeability. Such standards rely on jury decisionmaking (or at least the threat of jury decisionmaking) around the question of what constitutes reasonableness. And all such standards run the risk of so-called hindsight bias, where a risk seems more foreseeable after it has occurred in fact.<sup>318</sup> On one level, the critiques are valid; there is no more escaping those problems in the context of corporate criminal mens rea than in any other area of the law in which negligence standards carry weight. Considering both of these concerns together, however, gives reason to hope that the balance created by this standard will nonetheless be a substantial improvement over the status quo.

The argument that removing pure strict liability from criminal respondeat superior would *underpunish* corporations says that to do so would allow corporations to waste enforcement resources by increasingly taking cases to trial and presenting complicated evidence about best practices in order to confuse juries. The argument that removing the intent-to-benefit requirement in favor of a causation analysis premised on foreseeability would *overpunish* says that corporations would be on the hook for all of the intentional torts committed in fact by their employees, based on an irrational view of foreseeability driven by hindsight bias.

The underpunishment critique is valid to a point. Deep-pocketed corporations could and would hire experts to defend their practices

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318. See Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 LAW & HUM. BEHAV. 501, 502 (1996); Gregory N. Mandel, *Patently Non-Obvious: Empirical Demonstration that the Hindsight Bias Renders Patent Decisions Irrational*, 67 OHIO ST. L.J. 1391, 1394 (2006) (examining how hindsight bias impacts the nonobviousness determination in patent cases).

and procedures and to attest to the unforeseeability of particular events. In cases where shades of grey exist, it would be harder for the government to get a conviction than under the status quo where they have no obligation to show institutional fault and can, thus, more easily attain a plea or a deferred prosecution agreement. The response is that it is not clear that this is a bad thing. In the first place, evidence suggests that juries generally make the same determinations of negligence as judges considering the same facts.<sup>319</sup> Even if there were fewer prosecutions than in a world without trials—a world which is hardly desirable<sup>320</sup>—there is no reason to believe that there would be a rash of actually culpable corporations getting a pass. The opposing position might counter that any theory should not worry about limiting corporate liability to the genuinely culpable; instead the theory should prioritize the deterrent power of allowing prosecutors to reach the corporate employer in all cases. Yet, by removing the intent-to-benefit requirement, my proposal gives prosecutors, in exchange for a tougher row to hoe in ambiguous cases, *more* enforcement bang for their buck in cases likely to be of higher profile and greatest expressive (and, thus, potentially deterrent) value. In their public statements, relatives of victims who perish due to corporate negligence routinely mention the lack of criminal punishment for the corporation as particularly outrageous.<sup>321</sup> Under

319. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 63–64 (1966) (“[O]ver-all agreement on liability of 78 per cent [sic.]”); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Trenches*, 28 GA. L. REV. 1, 42–43 (1993) (discussing findings of the trial bar’s perceptions of the jury’s objectivity, obedience to law, and capacity for comprehension).

320. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2467–68 (2004) (arguing that uncertainty, money, self-interest, and demographic variation greatly influence plea bargains, such that they do not capture the outcomes that might be expected at trial). See generally LAURA I. APPLEMAN, *DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION* (2015) (detailing the various challenges created by the justice system’s failure to integrate the community’s voice in the form of jury trials).

321. See, e.g., *Legal Liability Issues Surrounding the Gulf Coast Oil Disaster: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 25 (2010) (statement of Keith D. Jones) (“Transocean, Halliburton, and any other company will be back because they have the infrastructure and economic might to make more money. But Gordon will never be back. Never. And neither will the 10 good men who died with him.”); *THE BUFFALO CREEK FLOOD: AN ACT OF MAN* TRANSCRIPT 5, <http://www.buffalocreekflood.org/media/BCF-transcript.pdf> [<https://perma.cc/4M3Z-DN8F>] (“We think that this coal company, Pittston, has murdered the people, and we call upon the prosecuting attorney and the judge . . . to prosecute and bring to trial this coal company . . .” (statement of statement of the Citizens’ Commission)); *id.* (“[T]he fact of the matter is that these are all laws on the books which the company felt completely free to ignore, which says something about the relationships between coal companies and state governments . . . just this

my proposal, prosecutors would get a wider range of tools to pursue corporations for crimes of particularly high public interest, such as involuntary manslaughter, which is a beneficial trade off.

The overpunishment position is more easily dealt with. If there indeed exists a hindsight bias around the question of foreseeability, it would still result in fewer convictions of faultless corporations than in the current world, where the foreseeability of harm need not be proven at all! While the removal of the intent-to-benefit requirement could pose a danger of hindsight bias, leading to irrational liability in the fairly narrow category of cases involving intentional crimes, like sexual assault, it would greatly improve the chances of actually innocent corporations in the far, far broader swath of prosecutions involving the myriad strict liability offenses in the Federal Code. Negligence-based tests are imperfect but far better for innocent corporations than respondeat superior, where the after-the-fact distortions come not from the cognitive biases of jurors but the varied motivations of prosecutors.

#### CONCLUSION

In this Article, I have demonstrated how common law tort doctrines can be used to refine what remains a purely common law rule of criminal respondeat superior. Background tort developments around foreseeability and negligence as the touchstones for enterprise liability and the replacement of the intent-to-benefit requirement with a causation analysis shed light on the problems of over- and underinclusiveness on the criminal side. Therefore, the common law already contains the tools courts need to refine the poorly developed *New York Central* standard and resolve many of its sins in the modern enforcement era. There are obvious procedural challenges to a comprehensive judicial solution, most significantly that an elaborate redefinition of a criminal standard—particularly when it expands liability, as it would in some cases—creates a kind of ex post facto situation, or at least a stare decisis issue. Common law change would need to be extremely gradual to avoid these problems.

That said, this Article opened with the observation that mens rea for regulatory and white-collar offenses has become an important enough political flashpoint as to have exploded a hard-won bipartisan coalition for criminal justice reform. While it is unlikely that my proposal on the specific issue of corporate criminal mens rea will fully

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complete freedom to ignore these laws with no fear of any kind of prosecution.” (statement of Thomas N. Bethell)).

please either side in that debate, it does contain a bit of something for everyone, which would make it a viable legislative fix in the absence of judicial intervention. Proponents of mens rea reform will argue that, even if we eliminate pure respondeat superior, individual defendants will nonetheless remain subject to the wide range of federal strict liability offenses. Critics of mens rea reform will argue that, due to the challenges inherent in prosecuting complex criminal offenses, requiring prosecutors to show any kind of corporate fault will reduce the number of successful white-collar prosecutions.

Both objections are correct. Yet under this rule, reform proponents would certainly see some reduction in no-fault prosecutions and less uncertainty for commercial actors. And opponents would still see negligent corporations punished and an increase in corporate liability for the most egregious crimes of violence. Furthermore, unlike many sudden, broad-sweeping statutory revisions<sup>322</sup>—and like most state criminal codes—this proposal benefits from common law development. If the Supreme Court remains silent for another century on the question of white-collar mens rea, the moment seems uniquely right for legislative intervention.

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322. This includes the original proposal for mens rea reform, which suffered from many logical uncertainties when read in the context of the rest of the federal criminal code. See Orin Kerr, *A Confusing Proposal to Reform the ‘Mens Rea’ of Federal Criminal Law*, WASH. POST (Nov. 25, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/25/a-confusing-proposal-to-reform-the-mens-rea-of-federal-criminal-law/?utm\\_term=.e9a13ad80298](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/25/a-confusing-proposal-to-reform-the-mens-rea-of-federal-criminal-law/?utm_term=.e9a13ad80298) [<https://perma.cc/X5P6-ALD6> (dark archive)] (pointing out numerous drafting problems, including that it was unclear whether the new “willfulness” requirement would have been triggered only if *no* element of an offense stipulated a mens rea element or if *any* single element lacked one).

