

Fastow and Arthur Andersen: Some Reflections on Corporate Criminality, Victim Status, and Retribution

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In this essay, Professor Michaels uses some of the prosecutions arising from the recent corporate scandals to explore the criminal law's approach to cases in which the law can describe the same person as both the perpetrator and the victim of a single course of conduct. The essay suggests that the criminal prosecution of a corporation will be less appropriate when the corporation is also the victim of the conduct and that the importance of this "victim" status derives more from retributive than utilitarian concerns. In the course of examining these suggestions, the essay surveys the treatment of victim-perpetrators in other areas of the criminal law and offers some potential explanations for why such prosecutions generally are barred. The essay concludes by discussing what appropriate treatment of victim-perpetrators might suggest about the relevance of retributive justifications for punishment in the corporate context.

I. INTRODUCTION

Criminal law now plays a significant role in policing corporate conduct. Recent decades have seen white collar crime prosecutions become commonplace.¹ Many large law firms now have white collar crime practice groups,² and compliance departments in the business world have become a way of life.³ Nonetheless, academic controversy over the merits of criminally prosecuting the corporate entity persists.⁴

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¹ See, e.g., PAMELA H. BUCY, *WHITE COLLAR CRIME: CASES AND MATERIALS* 1 (2d ed. 1998) ("Over the past twenty years, prosecutions of white collar crime have increased exponentially in volume and visibility.").

² See, e.g., *id.* ("Prestigious law firms are building new litigation sections devoted to civil prosecution or defense of white collar crimes.").

³ See, e.g., Julie R. O'Sullivan, *Some Thoughts on Proposed Revisions to the Organizational Guidelines*, 1 OHIO ST. J. CRIM. L. 487, 490 (2004).

⁴ See, e.g., Julie R. O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 15 n.65 (2002) (collecting sources on both sides of the question); William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 648-49 (1994) (providing citations to recent literature surrounding the "controversy"); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1096 n.3 (1991)

Criminal punishment of the human wrongdoers behind the corporate activity, coupled with the possibility of civil penalties for the offending corporation, have long caused academic argument over the purpose and value of criminally prosecuting corporations.⁵ In evaluating the merits of charging corporations with crimes, academic attention in recent years has focused on utilitarian rather than retributive justifications.⁶ Some have found it nonsensical or impossible to seek retributive value in punishing corporations, given their complete lack of humanity.⁷ Yet, if utility is the sole justification for prosecuting corporations, there may be few appropriate circumstances for such prosecutions, given that available criminal sanctions so closely mirror possible civil penalties.⁸

This essay attempts a small contribution to the debate by considering a special situation the corporate context sometimes presents: a corporation can be both the perpetrator and the victim of a single course of criminal conduct. In such cases, the criminal law may describe the corporation as either the culpable defendant or the innocent victim. Both characterizations can be correct as a matter of law.

Corporations are not the only such potential “victim-perpetrators.” The same potential anomaly arises elsewhere in the criminal law. The treatment of such cases as a class, however, has received little explicit attention. This essay makes a start on reversing that oversight.

Using some of the recent corporate scandals as a jumping off point, the essay probes two hypotheses: (i) we are less likely to approve of the criminal prosecution of a corporation when the corporation is the victim of the criminal conduct at issue than when it is not; and (ii) the importance of “victim” status derives from retributive concerns. If true, these hypotheses suggest that notions of retribution are relevant to

(same).

⁵ See, e.g., Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996) (arguing that corporate civil liability could replace corporate criminal liability); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1143–44 & n.2 (1983) (collecting commentators arguing that civil sanctions should replace criminal ones for corporate liability).

⁶ See John C. Coffee, “No Soul to Damn: No Body to Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); O’Sullivan, *supra* note 3, at 508 n.74; Khanna, *supra* note 5, at 1494 nn. 91–93 (citing commentators who find that deterrence, not retribution, is the aim of corporate criminal liability); CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 149 (1993) (stating that “just deserts theories have had little impact” in the realm of corporate liability).

⁷ See Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 313 (1991); Coffee, *supra* note 6, at 448; GLANVILLE L. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 685 (1953) (contending that the “only” argument for punishing corporations “has nothing to do with the traditional theory of the criminal law”). *But see* Fisse, *supra* note 5, at 1167–83 (arguing that “retributive justice as fairness” would be a significant justification for punishing corporations in a system that based liability on “genuinely corporate fault”).

⁸ See Khanna, *supra* note 5. *But see* Coffee, *supra* note 6, at 447–48 (citing relative speed of criminal enforcement and existing public structure of criminal law enforcers, in addition to ability to focus public censure, as important reasons for preferring criminal sanctions in the corporate context, even with a goal of deterrence).

the criminal punishment of corporations, at least for those who find retributive principles critical outside the corporate context. While this essay does not reach definitive conclusions on the merits of these hypotheses, the exploration illustrates how the criminal law's treatment of victim-perpetrators can bear on first principles of criminality.

Part II begins by explaining how the law can consider a corporation the victim and the perpetrator of an offense. With this "victim-perpetrator" perspective in mind, Part II next discusses two recent prosecutions that arose from the Enron scandal. The essay suggests that, at least in these two cases (the Andrew Fastow prosecution and the Arthur Andersen prosecution), the "victim" status of the corporation ought to have had an important normative bearing on the charging decision regarding the corporation, thereby offering some support for the first hypothesis noted above. The essay then examines some other areas in the criminal law where individuals could be both the victim and the perpetrator of a single course of conduct, including complicity, conspiracy and the former crime of attempted suicide. In each instance, the law generally bars liability for such individuals, providing some further support for the first hypothesis.

Part III assumes the first hypothesis to be true and considers the second, that retributive concerns explain why the appropriateness of a criminal prosecution diminishes when the perpetrator is also the victim. The essay examines why utilitarian explanations alone seem insufficient to explain this effect and explores the manner in which retributive concerns might present a barrier to such prosecutions.

Part IV discusses what the two hypotheses would mean for the role of retribution in corporate punishment. Because victim-perpetrator status operates only as a reason not to punish, it is directly relevant only to retribution as a limiting principle. Nonetheless, the essay suggests that if this retributive limitation carries over to the corporate context—notwithstanding a corporation's lack of humanity—then perhaps that lack of humanity should not bar consideration of retribution as an affirmative justification for corporate punishment.

II. VICTIM, PERPETRATOR OR BOTH: ENRON AND ARTHUR ANDERSEN CONSIDERED

A. Corporation as Perpetrator and Victim

Corporate criminal liability is a form of vicarious liability.⁹ In other words, it is a doctrine that imposes criminal liability on one for the actions of another.¹⁰ A

⁹ Alan C. Michaels, *Vicarious Liability*, in 4 ENCYCLOPEDIA OF CRIME & JUSTICE 1622, 1624 (Joshua Dressler ed., 2d ed. 2002).

¹⁰ In the criminal law, courts and commentators use the term "vicarious liability" in several different ways. *See id.* at 1622 (discussing meanings of vicarious liability in the criminal law). In this essay, the term is used to refer to all situations in which X is held criminally liable for Y's conduct. This includes both situations in which X had a culpable mental state regarding Y's conduct and those in which X did not.

corporation is criminally liable for the acts of its employees. Under the federal approach to corporate criminal liability, the acts and mental states of an employee are attributed to the corporation, if the criminal actions were taken within the actor's scope of employment, with the intent to benefit the corporation.¹¹ The vicarious nature of the liability, however, creates the potential for corporations to be held criminally liable for acts that simultaneously victimize them.¹² With the help of vicarious liability, criminal acts that normally one could not do to oneself—such as misleading, defrauding or corruptly persuading—become possible matters of self-victimization.

In *United States v. Seigel*,¹³ for example, officers of a toy company made secret off-the-books cash sales of some clearance merchandise. They used the proceeds of those sales to create a slush fund for making illegal payments to buyers and labor unions, and they pocketed some of the money themselves. As a matter of current law, the corporation could properly be characterized as the victim or the perpetrator of this course of conduct. It was the victim of theft because of the misappropriation of money from the sale of its products; it was the victim of fraud not only by that misappropriation, but also by being deprived of the honest services of its officers¹⁴ and of the right to control its own operations.¹⁵

¹¹ See, e.g., *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247 (1979). The Supreme Court adopted this “respondent superior” approach in *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909); see also *United States v. Cincotta*, 689 F.3d 238, 241–42 (1st Cir. 1982); *D&S Auto Parts v. Schwartz*, 838 F.2d 964 (7th Cir. 1988). See generally Pamela H. Bucy, *Corporate Criminal Responsibility*, in 1 ENCYCLOPEDIA OF CRIME & JUSTICE 259 (Joshua Dressler ed., 2d ed. 2002) (setting out history of corporate criminal liability).

This approach to vicarious liability for corporations has many critics, see Laufer, *supra* note 4, at 659–60 (surveying commentary critiquing vicarious corporate fault), and other tests for imposing liability for employee conduct have been proposed. See, e.g., Bucy, *supra*; Fisse, *supra* note 5. This essay does not address the relative merits of these different proposals.

The American Law Institute's Model Penal Code also suggested a more restrictive test for applying vicarious liability, which requires that the act in question at least have been “recklessly tolerated” by a “high managerial agent” in order for it to be attributed to the corporation. MODEL PENAL CODE § 2.07 (1985). See generally Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593 (1988). Many states have adopted this more restrictive approach to corporate liability. See *id.* at 630; MODEL PENAL CODE § 2.07 cmt., n.18 (1985) (indicating that twenty-eight jurisdictions have adopted the Model Penal Code approach). The corporation can certainly be both perpetrator and victim under the Model Penal Code formulation, though the frequency of that result would decline with the correspondent decrease in the frequency of corporate liability.

¹² Because it is the nature of vicarious liability—holding X responsible for the conduct of Y—that introduces the likelihood of X being both perpetrator and victim, the issue also arises in the law of complicity, the other principal area in which the criminal law makes significant use of vicarious liability. See *infra* text accompanying nn. 45–47. See generally Michaels, *supra* note 9, at 1622–24 (discussing the uses of vicarious liability in criminal law).

¹³ 717 F.2d 9 (2d Cir. 1983).

¹⁴ See 18 U.S.C. § 1346 (2000) (defining a scheme to defraud for purposes of the federal mail and wire fraud statutes to include a scheme “to deprive another of the intangible right to honest services”).

¹⁵ Under the “right to control” theory, the federal mail and wire fraud statutes cover schemes that

On the other hand, because the sales and bribes were also vicariously attributable to the corporation, it could be viewed as the perpetrator of fraud¹⁶ and commercial bribery¹⁷ for this same course of conduct. Such liability is possible because most courts would conclude that a jury could find that each officer's conduct was within the scope of his employment and was taken with intent to benefit the corporation—even if they were strictly forbidden by corporate policy,¹⁸ and even if the conduct, while partly advancing the corporate cause, could also be seen as victimizing the corporation.¹⁹

deprive "some person or entity . . . of potentially valuable economic information." *United States v. Wallach*, 935 F.2d 445, 462–63 (2d Cir. 1991). Thus, "the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a . . . fraud prosecution." *Id.* at 463. While an employee's withholding or providing misleading information is not fraudulent when the act is taken in good faith, does not involve personal profit, and is otherwise legal, *see United States v. D'Amato*, 39 F.3d 1249, 1258 (2d Cir. 1994), the transactions in *Seigel* would not qualify for this exception, given that they involved bribery and self-enrichment.

In *Seigel* itself, the defendants were convicted of defrauding the toy company they worked for by violating their duty to act honestly and faithfully and thereby enriching themselves through misappropriation of the funds. *See* 717 F.2d at 13.

¹⁶ Under current law, the wholesale buyers and the union officials who accepted bribes from the *Seigel* defendants would likely be guilty of defrauding their employers of their right to honest services—assuming the employers and the union were not informed of the payments and the employees violated a fiduciary duty in accepting them. *See generally* J. KELLEY STRAUDER, UNDERSTANDING WHITE COLLAR CRIME 80–81 (2002) (describing the different approaches of the federal courts of appeals to defining "honest services" violations). By making the payoffs, the *Seigel* defendants and, through vicarious liability, their company would be liable for aiding and abetting those frauds.

¹⁷ The cash proceeds of the sales were used, in part, to fund payoffs to wholesale buyers of the toys and games of the defendants' corporation, in an attempt to influence future purchases. *Seigel*, 717 F.2d at 11. This conduct constitutes commercial bribery. *See, e.g.,* N.Y. PENAL LAW § 180.00 (McKinney 1999) ("a person is guilty of commercial bribing in the second degree when he confers . . . any benefit upon an employee, agent, or fiduciary without consent of latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.") .

¹⁸ *See, e.g., United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972); *United States v. Automated Medical Lab., Inc.*, 770 F.2d 399, 406 n.5 (4th Cir. 1985); Laufer, *supra* note 4, at 652 n.20; Kathleen F. Brickey, *Corporate Criminal Liability: A Primer for Corporate Counsel*, 40 BUS. LAWYER 129, 133 (1984) (explaining that within-the-scope-of-employment requirement "means little more than that the employee's crime must be committed in connection with his performance of some job-related activity").

¹⁹ *See United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 970 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999) (holding corporation may be liable as perpetrator, even though the facts make it "look more like the victim than a perpetrator," because while scheme came at "some cost" to corporation, "it also promised some benefit."); *Automated Medical Lab, Inc.*, 770 F.2d at 407 (holding that employee's conduct may be basis for liability if intended in part to benefit corporation, even if it harms corporation); *see also* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME 211 (2d ed. 2003) (describing *Sun-Diamond*, *supra*, as "representative" of judicial opinions on this issue). *But see* Brickey, *supra* note 18, at 134–35 (stating that the intent to benefit rule prevents the prosecution of the corporation that is the vehicle, rather than the victim, of criminal conduct, citing *Standard Oil Co. v. United States*, 307 F.2d 120 (5th Cir. 1962)).

If the employee's criminal conduct is intended to be exclusively contrary to the interests of the corporation (rather than potentially helping it and hurting it), such as in a case in which an employee

Two prominent Enron prosecutions—the Andrew Fastow case and the Arthur Andersen case—bear examination from the victim-perpetrator perspective.

B. *The Fastow Case*

Enron Corporation, once the seventh largest public corporation in America²⁰ with a market capitalization of nearly 70 billion dollars,²¹ collapsed into bankruptcy in December 2001, throwing eight thousand employees out of work.²² Andrew S. Fastow was Enron's Chief Financial Officer from March 1998 until October 2001. In April 2003, Fastow was charged in a 109-count indictment with conspiracy, wire fraud, securities fraud and other crimes.²³ From the perspective of the criminal law, Enron was both the perpetrator and the victim of the conduct with which Fastow was charged, as both the introductory portion of the indictment and the two counts to which Fastow pled guilty demonstrate.

The indictment charged that Fastow and his codefendants (who were also officers of Enron):

devised *various schemes to defraud Enron . . .* and others. The goals of the schemes included:

- (a) fraudulent manipulation of Enron's reported financial results *so that Enron would appear more successful than it was*;
- (b) artificial manipulation of the share price of Enron stock; [and]

steals directly from the corporation, then a court may conclude that the corporation is not vicariously liable because the acts were not taken to benefit the corporation. *Standard Oil*, 307 F.2d at 129; *see also* Matthew E. Beck & Matthew E. O'Brien, *Corporate Criminal Liability*, 37 AM. CRIM. L. REV. 261, 269 (2000) (citing *Standard Oil* for the proposition that acts "expressly contrary to the interests of the corporation" cannot provide the basis for vicarious liability). *Cf.* *United States v. Demauro*, 581 F.2d 50 (2d Cir. 1978) (stating that employees who took bribes to launder money, contrary to the interests of their employer, a bank, may not have been acting to benefit the bank). On the other hand, cases that have actually barred liability because the corporation is the victim seem to be limited to the Fifth Circuit, *see, e.g.*, KATHLEEN F. BRICKEY, 1 CORPORATE CRIMINAL LIABILITY 132 n.11 (1992) (stating that the rule is often "expressed by way of limitation" and citing only Fifth Circuit cases), leading some to doubt the status of the rule outside the Fifth Circuit. *See* James R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 110 (1976). Whatever the extent of this limitation, it does not bar liability for conduct that "is actuated by the dual purposes of performing the employer's work and of furthering objects in conflict with his interests. That may be true even if the dominant motivation of the disloyal agent is self-interest." Brickey, *supra* note 18, at 136 (citing *United States v. Gold*, 743 F.2d 800, 823 (11th Cir. 1984)).

²⁰ Howard Witt & Cam Simpson, *Enron's No. 3 Exec Pleads Guilty*, CHI. TRIB., Jan. 15, 2004, § 1.

²¹ Bill Barnhart, *Boom Gives Execs an Unnatural High*, CHI. TRIB., Nov. 4, 2003, § 11.

²² David Kaplan et al., *The Fall of Enron, 2 Years Later, Most Enron Survivors Back on Feet*, HOUSTON CHRON., Dec. 2, 2003, § 1 ("The company once boasted more than 20,000 employees worldwide, including 7,000 in Houston. Now about 12,000 remain, with 1,200 in Houston.")

²³ Superseding Indictment, *United States v. Fastow*, No. 02-CR-H-0665 (S.D. Tex. Apr. 30, 2003).

(c) circumvention of federal regulations so that *Enron would obtain benefits to which it was not entitled*. . . .²⁴

Thus, the indictment accurately listed Enron first among the victims of Fastow's frauds. Simultaneously, however, it noted that Enron was the intended beneficiary of the illegal acts its officers took within the scope of their employment—thereby casting Enron as perpetrator.

The charges to which Fastow pled guilty reveal the same duality. On January 14, 2004, Fastow pled guilty to a conspiracy to commit wire fraud and to a separate conspiracy to commit wire and securities fraud.²⁵ The wire fraud charge explicitly labels Enron as the victim of Fastow's conduct. According to the indictment, Fastow conspired to commit wire fraud by depriving "Enron . . . of [its] intangible right of honest services."²⁶ Although this victim perspective is hard to contest, since it was actions like Fastow's that landed Enron in bankruptcy, this conduct could also make Enron a criminal. The charge was that Fastow made Enron's financial statements unduly rosy by "generating improper earnings" and "improperly protecting Enron's balance sheet from poorly performing . . . assets."²⁷ Under standard vicarious liability principles, this conduct would mean that *Enron*, in the words of the indictment, defrauded "members of the investing public, in connection with purchases and sales of Enron stock,"²⁸ through the conduct of its employee, Fastow.

The other conspiracy to which Fastow pled guilty exhibits the same pattern. The essence of this charge was that Fastow duped Enron into improperly paying an extra \$19 million to a partnership Fastow controlled in a sale of the partnership's assets. While this conduct victimized Enron, which was tricked out of \$19 million, again the conduct could also make Enron criminal. Apparently, the \$19 million was an "overpayment" in large part only because—as a result of a conspiracy between Fastow and some others—the owner of some of the assets had agreed to sell them for \$1 million, far less than their actual worth, rather than the \$20 million Fastow reported to Enron. In short, Fastow, *acting in his capacity as an Enron employee*, defrauded a

²⁴ *Id.* at para. 8 (emphasis added).

²⁵ Plea Agreement, United States v. Fastow, No. 02-CR-H-0665 (S.D. Tex. Jan. 14, 2004).

²⁶ *Id.* For a discussion of the meaning of "honest services," see *infra* note 38 and accompanying text.

²⁷ Exhibit A to Plea Agreement para. 4–10, *Fastow*, No. 02-CR-H-0665 (S.D. Tex. Apr. 30, 2003). This count of the indictment charged that Enron used a purportedly independent entity to hide its problematic assets. In the example attested to in Fastow's plea allocution, Enron used a "hedge" with the supposedly independent entity to lock in the value of a volatile stock Enron owned at the stock's all-time high, although at the time of the "hedge," the stock had already declined in value. The entity was willing to make this deal with Enron despite the lack of any economic benefit to it, because it was not really independent. The general partner in the entity had put \$30 million into the entity (supplying its supposed "independence"), but Enron had already paid the general partner—through a disguised deal arranged by Fastow—\$41 million to cover its cost and provide a profit, and Enron (through Fastow) was exercising control over the "independent" entity. Thus, Enron's books showed that Enron had locked in the high value for this stock, when it had done so, essentially, by selling it to itself at an above-market price.

²⁸ Superseding Indictment para. 64, *Fastow*, No. 02-CR-H-0665 (S.D. Tex. Apr. 30, 2003).

third party into selling its partnership share for much less than its true value (Enron as perpetrator), but then duped Enron in the same transaction by tricking it out of those ill-gotten gains (Enron as victim).²⁹

Although Enron properly could have been charged as a defendant on the basis of the conduct with which Fastow was charged and pled guilty to, Enron was also properly characterized as the victim of that conduct. The government chose not to prosecute Enron.

C. *The Arthur Andersen Case*

The *Arthur Andersen* case, a separate prosecution arising from the Enron scandal, contrasts with the Fastow case. One of the so-called “Big Five” accounting firms in the United States, Arthur Andersen, L.L.P. (“Andersen”) provided accounting and consulting services to businesses worldwide and had been Enron’s auditor since 1985.³⁰ According to the government, Enron was one of Andersen’s biggest clients, paying annual fees of tens of millions of dollars.³¹

Andersen was charged with obstruction of justice in a single count indictment alleging that Andersen corruptly persuaded its own employees to alter and destroy documents in order to impair their use in anticipated Enron-related investigations. The charge centered on a decision by Andersen partners, including the members of the Enron audit team, to order the destruction of physical documentation and computer files related to Enron audits.³² Following a jury trial, Andersen was convicted and forced to drastically restructure its business, ceasing to conduct audits, winding down its affairs, and eliminating most of its employees’ jobs.³³

²⁹ Fastow’s allocation explained the transaction in greater detail:

Enron paid \$30 million for the Swap Sub buyout. That price was based on my misleading misrepresentation to Enron that the limited partners of Swap Sub had agreed to sell their interests in Swap Sub for \$20 million and \$10 million, respectively. In fact, NatWest had agreed to sell its interest in Swab [sic] Sub for only \$1 million, not \$20 million. I knew that the NatWest bankers induced NatWest to sell its interest in Swap Sub for \$1 million at a time that they knew the interest was worth significantly more.

As a result of their participation in the scheme, the three NatWest bankers together received approximately \$7.3 million in proceeds. The balance of the remaining proceeds went to [entities and individuals determined by Fastow and another Enron employee].

Exhibit A to Plea Agreement para. 15–16, *Fastow*, No. 02-CR-H-0665 (S.D. Tex. Jan. 14, 2004).

³⁰ Indictment para. 1, 3, *United States v. Arthur Andersen, LLP*, No. 02-CR-H-121 (S.D. Tex. Mar. 7, 2002).

³¹ *Id.* at para. 3.

³² *Id.* at para. 10.

³³ Jonathan D. Glater, *Last Task at Andersen: Turning out the Lights*, N.Y. TIMES, Aug. 30, 2002, at C3, available at <http://www.chron.com/cs/CDA/story.hts/special/andersen/1555856>; *Auditor: British Spent More Fighting Arthur Andersen for DeLorean Settlement Than It Got*, DET. FREE PRESS, Feb. 12, 2004.

A senior official at Andersen was criminally charged with the conduct that could have been (and indeed was) used to charge Andersen vicariously, just as Fastow was charged with criminal conduct that could have been (but was not) used to charge Enron. In Andersen's case, the senior official was David Duncan, the global managing partner on the Enron engagement team for Andersen. Duncan pled guilty to one count of obstruction of justice—essentially for the same conduct Andersen was charged with³⁴—and agreed to cooperate with the government.

Unlike Enron in the *Fastow* case, however, Andersen could not be characterized as the victim of its employee's criminal conduct. Instead Andersen only fit the role of perpetrator. The alleged acts of obstruction—destroying documents related to the Enron audit—were designed solely to protect Andersen and did not simultaneously loot or defraud the partnership.³⁵ Not only did these acts not steal from Andersen, but, because they were the product of meetings and consideration among the partners,³⁶ they also could not easily be characterized as fraudulently depriving Andersen of its

³⁴ Compare Information, *United States v. Duncan*, No. 02-CR-H-209 (S.D. Tex. Apr. 9, 2002) (“David Duncan . . . did knowingly . . . persuade . . . Andersen employees . . . to withhold records, documents and other objects from an official proceeding . . . and alter, destroy, mutilate and conceal objects with intent to impair the objects’ . . . availability for use in such an official proceeding.”), with Indictment para. 13, *Arthur Andersen*, No. 02-CR-H-121 (S.D. Tex. Mar. 7, 2002) (“Andersen . . . did knowingly . . . persuade other persons, to wit: Andersen employees, with intent to cause and induce such persons to (a) withhold records, documents and other objects from official proceedings, . . . and (b) alter, destroy, mutilate, and conceal objects with intent to impair the objects’ . . . availability for use in such official proceedings.”).

³⁵ That is not to say that vicarious liability in the Andersen case created no oddities. On the contrary, Andersen “corruptly persuaded” its own employees to obstruct justice, and, if one thought of Andersen as standing in the shoes of those employees, it really corruptly persuaded itself. Generally, though, the criminal law does not apply the *respondeat superior* theory to the victim side of the equation. *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 971 (D.C. Cir. 1998), *aff’d on other grounds*, 526 U.S. 398 (1999). Even if *respondeat superior* did apply in this sense, so that Andersen corruptly persuaded itself, Andersen would not be the victim of this conduct. In an obstruction of justice case, the victim is the tribunal or entity obstructed, not the individuals or entities corruptly persuaded to obstruct.

³⁶ Indictment para. 9–10, *Arthur Andersen*, No. 02-CR-H-121 (S.D. Tex. Mar. 7, 2002) (“[On Saturday October 20, 2001,] an emergency conference call among high-level Andersen management was convened to address the SEC inquiry. . . . Andersen partners assigned to the Enron engagement team launched on October 23, 2001, a wholesale destruction of documents at Andersen’s offices in Houston, Texas.”).

After the jury convicted Andersen, interviews with individual jurors, as reported in the press, indicated that the conviction had not been based on Duncan’s actions, but rather on an e-mail from another Andersen partner, in-house counsel Nancy Temple, addressed to Duncan suggesting changes in a draft memo Duncan had written regarding a meeting of Andersen partners about an Enron press release. See, e.g., Jonathan D. Glater & John Schwartz, *Jurors Tell of Emotional Days in a Small Room*, N.Y. TIMES, June 17, 2002, at A14; Carrie Johnson, *Memo Turned the Tide in Andersen Trial*, WASH. POST, June 17, 2002, at A1. Following the mandate of Federal Rule of Evidence 606(b), the district court refused to consider this evidence about the jury deliberations and denied Andersen’s motion for a new trial. Memorandum and Order, *United States v. Arthur Andersen, LLP*, No. 02-CR-H-121 (S.D. Tex. Sept. 11, 2002) (excerpted in JULIE R. O’SULLIVAN, FEDERAL WHITE COLLAR CRIME 461–62 (2d ed. 2003)).

employee's honest services. Fraud requires deception,³⁷ which seems to be missing given this deliberation. Moreover, many circuits presently require some level of intent to harm the employer in a private sector honest-services prosecution, which might not easily be demonstrated here—though the criminality of the conduct might provide sufficient evidence for that element.³⁸

D. *The Results Considered*

The government's decisions in both the Fastow and Duncan cases conform to the hypothesis that criminally punishing the corporation when it is also the victim of the conduct is peculiarly inappropriate in comparison to when the corporation is merely an intended beneficiary. In the Fastow case, the government chose not to prosecute Enron (the victim-perpetrator). In the Duncan case, the government chose to prosecute Andersen (the nonvictim-perpetrator).³⁹ Charging Enron with looting, when it was Enron's money that was lost, or with fraud, when Enron itself was duped seems wrong. The very suggestion sounds off key, and express articulation of the theory—Enron defrauded itself—sounds silly.⁴⁰ On the other hand, the intended victims of the conduct for which Andersen was held vicariously liable were the Securities and Exchange Commission and the general public. Blaming Andersen for acts of obstruction of justice designed to aid (by protecting) itself, victimizing others in the process, lacks the same dissonance.

³⁷ See, e.g., *Kehr Packages v. Fidelcor Inc.*, 926 F.2d 1406, 1415 (3d Cir. 1991).

³⁸ See generally John C. Coffee, *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 436–44 (1998) (discussing case law).

³⁹ Some commentators have criticized the Arthur Andersen prosecution on separate grounds. They contend that the conduct at issue ought not to have been considered chargeable obstruction of justice, either as a matter of law or as a matter of prosecutorial discretion. See David Ziemer, *Seventh Circuit Bar Association Meets in Milwaukee*, WIS. L.J., May 14, 2003 (“Mary Jo White, former U.S. Attorney, called the decision to indict the accounting giant ‘very wrongheaded,’ and a sacrifice of the best interests of the public in order to ‘message send.’ . . . ‘To indict a corporation, as a legal matter, is like shooting fish in a barrel.’”); Brenda Sapino Jeffreys, *Andersen Verdict May Change How In-housers Give Advice*, TEX. LAW., July 1, 2002, at S1 (2002) (“Indeed, if collaboration on the redraft of a document may so easily be deemed a crime, virtually every law firm in the United States engages in criminal conduct every day.”); David M. Zornow & Christopher J. Gunther, *After Andersen, Can Companies Get a Meaningful Jury Trial?*, 228 N.Y. L.J. 9 (2002) (arguing that Anderson jury may have lacked agreement on the particular criminal act on which liability hinged, rendering corporate liability “an unstructured free-for-all”). Indeed, it is possible as of this writing that some of these contentions may prevail; Anderson's appeal was argued on October 10, 2003, and no decision has yet been announced. See Mary Flood, *Court May be Likely to Overturn Andersen Verdict*, HOUSTON CHRON., Oct. 10, 2003, at 1. This essay does not address these questions. Rather, the discussion here simply assumes that the conduct vicariously attributed to Andersen was an appropriate target for retributive condemnation.

⁴⁰ That is not to suggest that Enron might not be an appropriate target for prosecution on the basis of other conduct, even other conduct of Andrew Fastow. The only point here is that conduct that victimized Enron—while potentially also making it criminally liable—does not in this case seem like an appropriate basis for prosecution.

E: Treatment of Victim-Perpetrators Elsewhere in Criminal Law

As noted earlier,⁴¹ in the corporate liability context the “intent to benefit” requirement is sometimes described as meaning that “courts cannot hold a corporation liable for the illegal acts of its agents when the corporation is the intended victim of the illegality.”⁴² Yet, prosecutions of corporations in which the corporation could be characterized as the victim, while also benefiting from the conduct, are not uncommon.⁴³ This reality could be used by both opponents and proponents of prosecuting corporations that are victim-perpetrators. The nominal existence of a bar against punishing victim-perpetrators obviously might suggest the prohibition’s appropriateness. On the other hand, the existence of regular departures from that nominal bar might suggest the opposite. Perhaps the present, somewhat muddled descriptive picture of corporate prosecutions from the victim-perpetrator perspective results in part from inadequate explicit consideration of the relevance of victim-perpetrator status. To commence such consideration, this section surveys legal rules that have developed in some other areas of the criminal law in which an individual or entity can be both the perpetrator and the victim of an offense that normally victimizes someone other than the offender, based on a single course of conduct.⁴⁴ As we shall see, in most such situations, the criminal law seems to have developed a rule against prosecution.

⁴¹ See *supra* note 19.

⁴² Bucy, *supra* note 4, at 1149 (citing KATHLEEN BRICKEY, CORPORATE CRIMINAL LIABILITY § 4.02 (1984)).

⁴³ See *supra* note 19.

⁴⁴ The discussion in this essay is limited to crimes whose victim is usually someone other than the perpetrator. The potential crimes of victim-perpetrators likely to arise in the corporate context, such as defrauding and misleading, clearly fall into this category, as exemplified by the Fastow and Andersen cases.

These situations may be distinguished from the category of crimes sometimes referred to as “victimless crimes,” such as prostitution and drug possession. While the justification for such crimes at one time centered on morality (and hence, there were no “victims”), recent decades have seen a shift towards justifications based on the harm to others flowing from such activities, and sometimes even on the harm to the perpetrator. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 137–76 (1999) (describing this change and tracing the evolution in the justificatory arguments offered for many such offenses). If one understands these crimes to be directed at harm prevention, then in some cases the perpetrator of the offense can also be considered its victim. See William E. Nelson, *Criminality and Sexual Morality in New York, 1920–1980*, 5 YALE J.L. & HUMAN. 265, 333 (1993) (“[t]he new radical feminists focused on prostitution not as an evil to society in general but as a harm to women in particular; in the radical view, it was the prostitutes themselves who were victimized and exploited and needed to be protected.”). While consideration of the perpetrator-victim perspective might be useful in consideration of the “traditional liberal theory . . . that no conduct should be criminal unless it causes harm to others,” Darryl K. Brown, *Third Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1398 (2002), the discussion in this essay is limited to the treatment of victim-perpetrator crimes that typically involve harm to others, and in the direct sort of way we mean when we call someone the “victim” of a crime.

1. The Law of Complicity

Another body of law to consider regarding the propriety of prosecuting victim-perpetrators is the law of complicity. Complicity liability, like corporate liability, is a form of vicarious liability, in the sense that it imposes liability for the acts of another.⁴⁵ The person who aids someone else's criminal conduct is held liable for that other person's actions. And such vicarious liability may not be imposed on the victim of the conduct. "[T]he victim of the crime may not be held as an accomplice even though his conduct in a significant sense has assisted in the commission of the crime."⁴⁶ Examples provided for this principle include a parent who pays ransom to a kidnapper or a businessperson who gives in to the extortion demands of a racketeer.⁴⁷ Vicarious liability opens the possibility of calling the victim the perpetrator because absent the special bar on such liability, the rules of complicity would allow the parent to be liable for the actions of the kidnapper, and the business person for those of the extortionist. The criminal law's rejection of this dissonance in the law of complicity may support the hypothesis of a similar restriction in the corporate context.

2. The Law Beyond Vicarious Liability

Outside of the vicarious liability context, crimes in which the defendant could be the victim, even theoretically, are unusual but also worthy of consideration, and such consideration shows that they too are disfavored. Conspiracy provides one example. In theory, a person could be a party to an agreement to commit acts that would also victimize that person.⁴⁸ The Model Penal Code expressly extends the complicity rule against victims as perpetrators to conspiracies,⁴⁹ and many state codes follow its example.⁵⁰ Even in jurisdictions without an express statutory limitation, the "legislative-exemption rule" protects the victim of a conspiracy from being charged as a co-conspirator, even if the individual was a part of the agreement.⁵¹

⁴⁵ See *supra* notes 9–10 and accompanying text.

⁴⁶ WAYNE R. LAFAVE, CRIMINAL LAW 693 (4th ed. 2003).

⁴⁷ See MODEL PENAL CODE § 2.06 cmt. at 323–24 (1985).

⁴⁸ The textual discussion refers to liability for the crime of conspiracy itself, rather than so-called "Pinkerton liability" for substantive crimes. Under the *Pinkerton* doctrine, "a party to a conspiracy is responsible for any criminal act committed by an associate if it: (1) falls within the scope of the conspiracy; or (2) is a foreseeable consequence of the unlawful conspiracy." See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 488 (3d ed. 2001). *Pinkerton* liability, of course, is another form of vicarious liability. See Michaels, *supra* note 9, at 1624 (explaining *Pinkerton* liability in the context of vicarious liability). Perhaps one could construct a hypothetical case in which a member of a conspiracy was victimized by a substantive crime that was both reasonably foreseeable and within the scope of the conspiracy. One might argue that the victimized conspirator should not be liable for that particular substantive crime; research for this essay did not discover any cases addressing this question.

⁴⁹ See MODEL PENAL CODE § 5.04(2) (1985).

⁵⁰ See MODEL PENAL CODE § 5.04 cmt. at 483 n.26 (1985).

⁵¹ This rule is often cast in the form of not permitting a conviction for conspiracy to commit an

The former crime of attempted suicide provided another possible context in which the perpetrator could also have been the victim of the crime.⁵² Attempted suicide was a misdemeanor at common law,⁵³ and as many as six states once made attempted suicide a crime by statute.⁵⁴ Such statutes have since been repealed, however, both in the United States⁵⁵ and in England,⁵⁶ and the prevailing contemporary view is that attempting suicide is not criminal.⁵⁷ Yet society still considers suicide a problem worthy of the criminal law's attention, as evidenced by the fact that most jurisdictions criminally punish assisting suicide.⁵⁸ Assisting suicide is criminal; attempting suicide is not. Once again, the victim cannot be the perpetrator. Suicide is criminally wrongful, but the "victim" of a suicide (or attempted suicide) cannot be criminally punished.⁵⁹

offense when doing so would undermine the legislative purpose in creating the offense. *See* DRESSLER, *supra* note 48, at 456–57; *see also* Gebardi v. United States, 287 U.S. 112 (1932) (rejecting on these grounds prosecution for conspiracy to transport a woman for the purpose of prostitution in the case of the woman who was to be transported).

⁵² I am indebted to Joshua Dressler for drawing attempted suicide (the legal concept!) to my attention.

⁵³ *See, e.g.,* Rex v. Mann, 2 K.B. 107 (Eng. C.A. 1914); 4 STEPHEN'S COMMENTARIES ON THE LAW OF ENGLAND 47 (L. Chrispin Warrington ed., 21st ed. 1950).

⁵⁴ *See* Lawrence T. Hammond, Jr., Note, *Criminal Law—Attempted Suicide*, 40 N.C. L. REV. 323, 325–26 n.20 (1962).

⁵⁵ *See* MODEL PENAL CODE § 210.5 cmt. at 94 n.10 (1985).

⁵⁶ England decriminalized both suicide and attempted suicide by the Suicide Act, 1961, 9 & 10 Eliz. 2, ch. 60, § 1 (1961).

⁵⁷ *See, e.g.,* LAFAVE, *supra* note 46, at 810; Paul Marcus, *Suicide: Legal Aspects*, in 4 ENCYCLOPEDIA OF CRIME & JUSTICE 1546, 1547 (Joshua Dressler ed., 2d ed. 2002).

⁵⁸ Putting to one side the controversial area of physician-assisted suicide for the terminally ill, it remains a crime in most states to assist another in committing suicide. *See* Washington v. Glucksberg, 521 U.S. 702, 710–11 n.8 (1997) (“[i]n total, forty-four states, the District of Columbia and two territories prohibit or condemn assisted suicide.”); Marcus, *supra* note 57, at 1547; *see also* the Suicide Act, 1961, 9 & 10 Eliz. 2, ch. 60 § 2 (1961) (establishing a 14-year maximum penalty for assisting suicide while simultaneously abrogating law criminalizing committing suicide).

Unlike the examples discussed above, of course, attempted suicide is *not* a crime clearly directed at preventing harm to others as opposed to harm to the perpetrator. For this reason, its decriminalization may have more to do with changing views on the question whether the criminal law is justly employed to punish immoral conduct that does not harm others, *see* Harcourt, *supra* note 44, at 120–34 (describing debate over the criminal enforcement of morality), than with the treatment of victim-perpetrators in the general case. The essay considers it nonetheless, because of the contrast with assisted suicide, which remains criminal. It is almost as though the law has created an exception to the general crime of homicide for the special case of victim-perpetrators.

⁵⁹ Perhaps conception of the individual as the “victim” of attempted suicide is a modern development that relates to its decriminalization. Suicide was viewed at one time as an act that harmed not only oneself, but also as an act that harmed God. “The earliest known formal prohibition against suicide among Jews occurred in the first century A.D. when Josephus . . . forbade his soldiers to kill themselves” after they had been captured by the Romans because “it was contrary to the law of God, who committed man’s soul to his body.” Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 20 (1985). Blackstone noted that “the law of England wisely and religiously considers that no

In summary, while ambiguous inside the corporate context, the criminal law outside the corporate context generally bars the prosecution of victim-perpetrators when such liability would otherwise be possible. One might find support in this general treatment for an intuition that such prosecutions are inappropriate in the corporate context as well.

III. VICTIM-PERPETRATORS AND RETRIBUTION

Let us accept for the moment the hypothesis that criminally punishing a corporation seems significantly less appropriate when the corporation was also the victim of the conduct in question. Would the explanation for this reluctance be primarily utilitarian or retributive?⁶⁰ Consideration of this question sheds additional light on the value of examining victim-perpetrator cases, and it also provides further insight into the hypotheses noted at the outset of this essay. The essay's tentative conclusion is that retributive concerns play a larger role.

It is possible, of course, to articulate a utilitarian explanation for not prosecuting victim-perpetrators. A utilitarian might argue that a reduced desire to punish corporate victim-perpetrators owes to a lesser need for deterrence in such cases. After all, if the illegal conduct directly harms the corporation (as victim status implies), avoiding that harm is itself reason for the corporation to avoid the illegal conduct. That built-in incentive to avoid the criminal conduct necessarily (from a utilitarian perspective) reduces the need for the criminal sanction. An instinct not to criminally punish in this context, then, might simply reflect the reduced deterrent utility of the punishment.

This utilitarian explanation is inadequate for several reasons. First, when a corporation is victim and perpetrator, the conduct may benefit the corporation as well as harm it. In such a case, the deterrence rationale for punishment would still be present, even if the corporation were the victim, albeit to a lesser degree. Second, if the instinct were utilitarian, the desire for civil sanctions (the utilitarian alternative for punishing corporations)⁶¹ would decline as well. If the need to deter is less, then the non-compensatory rationale for civil sanctions would be undermined to the same degree as the rationale for criminal sanctions. Yet, if Enron were able to pay, would

man hath a power to destroy life but by commission from God, the author of it; and as the suicide is guilty of a double offense, one spiritual, in evading the prerogative of the Almighty . . . the other temporal, against the king." 4 WILLIAM BLACKSTONE, COMMENTARIES * 189. Modern scholars regard suicide not as an act against God, but as an "appeal" for intervention in one's life. Marzen et al., *supra*, at 123.

⁶⁰ "Briefly stated, a retributivist claims that punishment is justified because people deserve it; a utilitarian believes that justification lies in the useful purposes that punishment serves. . . ." Kent Greenawalt, *Punishment*, in 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1284, 1284 (Joshua Dressler ed., 2d ed. 2002). In this context the question would be whether the reason it is not appropriate to punish corporations that are victims as well as perpetrators is because the punishment is not deserved (retributive) or because it would not be useful (utilitarian).

⁶¹ See, e.g., Khanna, *supra* note 5.

one feel a comparable scruple against civil sanctions from the S.E.C. on the basis of Fastow's machinations? The extent to which victim status does not eliminate the impetus for civil sanctions suggests that such status does not eliminate the utilitarian basis for punishment. In other words, if civil sanctions still seem appropriate, then it seems likely that utilitarian justifications for sanctions remain. This suggests that, if criminal sanctions do *not* seem appropriate when the perpetrator is also the victim, retributive concerns may be a necessary part of the explanation.⁶²

Third, and perhaps most importantly, consideration of the criminal law's treatment of victim-perpetrators outside of the corporate context again supports the retributive attribution. To begin with, as previously discussed, the law of complicity follows the rule against victim as perpetrator. This rule is often justified as a matter of natural understanding of legislative intent,⁶³ but that "natural understanding" must rest more firmly on retributive than utilitarian principles. From a deterrence perspective, after all, aiding and abetting liability for victim-perpetrators might have some value. Consider extortion: complicity liability would undoubtedly make some extortion victims less likely to pay their tormentors, and therefore, by hypothesis, extortionists less likely to make the attempt. The reason such liability seems abhorrent, why we assume the legislature would have rejected it, is the retributive inappropriateness of punishing the victim. The victim-perpetrator should not be punished, even if such punishment would deter, because the victim does not deserve to be punished.

The same reasoning applies to conspiracy. The rationale offered for the exclusion in conspiracy is the same as the rationale for the rule against liability in the complicity context discussed above—it would "frustrate legislative intent" to allow the individual the substantive statute is designed to protect to be prosecuted.⁶⁴ For the same reasons as discussed with complicity—deterrence could be effective and the victim does not deserve punishment—this is best understood as a retributive objection.

With regard to the example of attempted suicide, lack of retributive merit to such punishment may also underlie the bar on punishment. Undoubtedly, utilitarians would note the obvious point that the prospect of punishment in the event of failure is unlikely to deter a person who wants to kill herself. The desire to inflict what society considers the ultimate punishment on oneself strongly suggests that the sanctions available to the criminal law will not persuade a suicidal person to change her mind.⁶⁵

Even though deterrence through fear of punishment would be unlikely, however, punishing attempted suicide might well serve some utilitarian purposes. First, criminal law intervention could prevent a repeat suicide attempt by confining the

⁶² Cf. MICHAEL MOORE, *PLACING BLAME* 106, 106–10 (1997) (contending that retributivism can be justified by examining whether it fits our moral intuitions in particular cases better than utilitarianism).

⁶³ "[T]o view [the victim] as involved in the commission of the crime confounds the policy embodied in the prohibition; it is laid down, wholly or in part, for their protection." MODEL PENAL CODE § 2.06 cmt. at 324 (1985).

⁶⁴ DRESSLER, *supra* note 48, at 457 n.191; *see also* LAFAYE, *supra* note 46, at 658–59 (describing the rule and noting "the situation is comparable to that which obtains as to accomplice liability").

⁶⁵ *See* MODEL PENAL CODE § 210.5 cmt. at 94 (1980).

“perpetrator” under conditions that make suicide much more difficult, and such punishment might succeed in some cases by doing so long enough for the person to no longer wish to commit suicide. Second, attachment of the pejorative label “criminal” to the act of attempting to commit suicide might add sufficient negative association to such attempts to deter some from acting. Thus, if there were a retributive justification that *allowed* criminal punishment for attempted suicide, some role for the criminal law might well be justified under utilitarian principles.

The retributive explanation for not punishing attempted suicide, notwithstanding the wrongfulness of suicide in general, may be more robust. In the words of the Model Penal Code commentary, “it is clear that the intrusion of the criminal law into such tragedies is an abuse. There is a certain moral extravagance in imposing criminal punishment on a person who has sought his own self-destruction. . . .”⁶⁶ Simply put, the wrongfulness of the conduct in the criminal sense seems to dissipate when one seeks to attribute blame to the person trying to commit suicide. Finally, the fantastic example of self-battery further supports the view that utilitarian considerations do not explain the decriminalization of assisted suicide. Causing serious injury to oneself (or attempting to do so) is not a crime,⁶⁷ though of course causing a serious injury to another person is a criminal wrong, even if the injured person consents.⁶⁸ In contrast to attempted suicide, punishments sufficient to promote general deterrence would probably be possible for self-battery, yet the criminal law rejects them.

Beyond these arguments from intuition, descriptive observation, and the inadequacy of utilitarian explanations, an affirmative explanation of why victim-perpetrators are not deserving of punishment as a general matter would certainly be useful. Some moral arguments, however, are simply irreducible. One might simply make the statement that it is wrong to punish as the perpetrator a person who is the victim of a crime, give some examples, and conclude that, agree or disagree, not much more can usefully be said. Although that may be the case here, I will try to sketch briefly a possible explanation for a norm against prosecution of victim-perpetrators.

Retributivism, the idea that punishment is justified because it is deserved, takes a variety of forms and is defended in a number of different ways.⁶⁹ One very basic distinction, however, is between retributivism as a limiting principle and retributivism as an affirmative justification for punishment.⁷⁰ The former, also known as “negative

⁶⁶ *Id.*

⁶⁷ See MODEL PENAL CODE § 211.1 (1985) (defining “assault” to include both assault and battery, where one “attempts to cause or purposefully, knowingly, or recklessly causes bodily injury to *another*”) (emphasis added).

⁶⁸ See LAFAVE, *supra* note 46, at § 16.2(e) (“Other things being equal consent is more effective [as a defense] for offensive touchings and insignificant bodily injuries than for hard blows and other more serious injuries.”).

⁶⁹ See DRESSLER, *supra* note 48, at 17–18 (summarizing three leading alternative justifications for retributivism and providing bibliographic references); Russel L. Christopher, *Detering Retributivism: The Injustice of Just Punishment*, 96 NW. U. L. REV. 843, 865–67 (2002) (describing different forms of retributivism and providing bibliographic references).

⁷⁰ See Christopher, *supra* note 69, at 865–66. H.L.A. Hart drew a distinction between

retributivism,⁷¹ requires that punishment be deserved, but, if it is deserved, does not specify whether or for what reasons it should be meted out.⁷² Under this approach, which is widely endorsed,⁷³ desert is a necessary ingredient for punishment, whether or not it is a sufficient one.⁷⁴ Under the latter approach, desert is not merely a prerequisite for punishment, but a complete justification.⁷⁵

Because a prohibition on punishing victim-perpetrators operates only as a bar on certain punishments, rather than as an affirmative justification for punishment, if a retributive principle is involved, it must be tied to a species of negative retributivism. It says something about when punishment is wrong, not about when punishment is right. If the criminal law will not or ought not punish a victim-perpetrator—even if such punishment would provide a net benefit to society—because in some way the victim-perpetrator lacks the appropriate moral desert, that statement, by itself, does not tell us whether or not we must punish the perpetrator who is *not* a victim solely because of the perpetrator's desert.

What would be the reason for such a limiting principle regarding victim-perpetrators? Perhaps the answer is simply that acts of self-victimization do not normally constitute criminal wrongs. As noted earlier,⁷⁶ the crimes considered here generally conform to the requirements of the “harm principle,” that “punishment falls upon those who have voluntarily harmed others.”⁷⁷ The idea that “criminals deserve

“[R]etribution in Distribution” and “Retribution in General Aim,” with the former defined as a rule that punishment may be applied “[o]nly to an offender for an offense.” H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 9 (1968).

⁷¹ See J.L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 4 (1982).

⁷² A modest variant of “negative retributivism” is what J.L. Mackie called “permissive retributivism.” While negative retributivism says only that one who is not deserving of punishment cannot be punished, “permissive retributivism” says that one who is deserving of punishment may be punished. See *id.*

⁷³ See Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1451 & n.16 (1990) (noting, with citations, that this view is “accepted by many, or perhaps most scholars”).

⁷⁴ See *id.*; see also, e.g., R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, in 20 CRIME & JUSTICE 1, 7 (Michael Tonry ed., 1996) (distinguishing negative and positive retributivism). Scholars have disagreed about whether this view is properly characterized as a species of retributivism. For example, Michael Moore considers the term negative retributivism a “misnomer,” because, by not finding the desert of the offender a *sufficient* reason for punishment, it “leaves out what is so distinctive (and so troubling to many) about retributivism.” Michael S. Moore, *Retributivism*, in 4 ENCYCLOPEDIA OF CRIME & JUSTICE 1338, 1338 (Joshua Dressler ed., 2d ed. 2002). At the other end of the spectrum, Lloyd Weinreb argues that this approach “gives away everything to the retributive view,” because it uses just deserts principles to determine who can be punished. Lloyd L. Weinreb, *Desert, Punishment and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47, 49 (1986).

⁷⁵ See, e.g., Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 180, 180 (Ferdinand Schoeman ed., 1987) (“[t]he distinctive aspect of retributivism is that the moral desert of an offender is a *sufficient* reason to punish him or her”) (emphasis in original).

⁷⁶ See *supra* note 44.

⁷⁷ HART, *supra* note 70, at 22. Some offenses directed at harm to others are inchoate; they do not

punishment because they violate norms established by society” is a core aspect of an important mode of retributive thinking.⁷⁸ When vicarious liability or some other highly unusual circumstance (e.g., self-battery) allows the possibility of applying a statute in a case of harm to oneself rather than harm to others, a critical underlying justification for the statute therefore is absent. From a positivist perspective, one could argue that the victim-perpetrator has not violated a norm established by society, because the norm these statutes actuate—not to harm others—is not directly implicated by self-victimization. Failure to comport with the principle that punishment fall only on those who harm others seems a more likely explanation for the treatment of victim-perpetrators than several other possibilities discussed in the margin.⁷⁹

require that the actual harm occur. These include attempt and endangerment offenses. Certainly attempt fits within the rationale discussed here—as in the example of attempted suicide. The “harm” addressed by endangerment offenses is less straightforward. Imagine someone who commits reckless driving on a deserted country road late at night, so that she endangers no one but herself. Whether to count this driver as a victim-perpetrator and whether prosecution is appropriate may depend on a variety of factors including whether they knew that no one else could be hurt and whether they were in fact injured themselves. The permutations go beyond the scope of what can be addressed here. For a discerning analysis of the many different types of endangerment offenses, see Antony Duff, *Criminalising Endangerment*, in *DEFINING CRIMES: ESSAYS ON THE CRIMINAL LAW’S SPECIAL PART* (Antony Duff & Stuart Green eds., forthcoming 2005).

⁷⁸ Greenawalt, *supra* note 60, at 1285; see also Joel Feinberg, *The Classic Debate*, in *PHILOSOPHY OF LAW* 646, 646 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991) (distinguishing “legalistic retributivism,” in which punishment is for lawbreaking, from “moralistic retributivism,” in which punishment is for moral wrongdoing).

⁷⁹ If otherwise wrongful conduct is not appropriate for punishment when the perpetrator is the victim, one might also consider whether the reason is because the conduct is justified or excused, since those are two important grounds for limiting punishment. “A claim of justification maintains that the act is right; a claim of excuse concedes that the act in the abstract is wrong, but argues that the actor is not personally responsible for having committed the act.” George F. Fletcher, *Justification: Theory*, in 2 *ENCYCLOPEDIA OF CRIME & JUSTICE* 883, 883 (Joshua Dressler ed., 2d ed. 2002). Yet neither of these concepts seems applicable here. Justification, while perhaps plausible if the self-victimization was designed to avoid some greater harm (for example, “aiding and abetting” a kidnapping by paying the ransom in order to avoid the greater harm of a homicide), seems plainly inapplicable to self-victimization in general. Criminal acts—particularly in the context of creation of harms—do not become “right” simply because they are committed against oneself. We may not consider intervention of the criminal law appropriate in such circumstances, but we would not consider the conduct a good thing—something we would applaud under the circumstances—as we would with such classic justifications as choice-of-evils and self-defense. Excuse is less obviously inappropriate, but it is not apparent why one should not be held liable for acts of self-victimization if, as excuse assumes, the act itself still constitutes a wrong. Unlike established excuses such as insanity or infancy, there is nothing about the victim-perpetrator’s condition that provides a basis for eliminating blame for a wrong. Rather, it would seem that victim-perpetrator status changes the nature of the wrong itself.

Another possibility might be that a lessened desire to punish comes from a sense that the victim-perpetrator, by her victimization, has already been punished. Cf. Douglas N. Husak, ‘*Already Punished Enough*’, 18 *PHILOSOPHICAL TOPICS* 79 (1990) (defending the plausibility of a claim that bad treatment by others—specifically, the stigma from public ridicule in cases involving famous defendants—should be considered by the sentencing authority as punishment already imposed for the crime). Aside from problems with whether such “punishment” would be proportionate in self-victimization cases, this would

IV. RETRIBUTION AND VICTIM STATUS IN CORPORATE CRIME

The principle that “negative retributivism” bars punishing victim-perpetrators, if accepted, provides a useful window for examining the role of retributivism in corporate punishment. One’s view of the appropriateness of prosecuting corporations that are also victims should inform one’s view of whether retribution is part of the justification for corporate punishment more generally. On the one hand, if one finds punishment of the corporation for conduct that also victimizes the corporation seriously troubling, that fact would suggest that retributive concerns are relevant to the criminal punishment of corporations after all. On the other hand, if prosecuting corporate victim-perpetrators does not seem problematic, that would suggest that retributive concerns are not important in the context of criminally punishing corporations.

Assume, for example, that one concludes from what has been said so far that the check of retribution as a limiting principle is applicable to the prosecution of corporations. While that does not tell us whether or not retribution is an affirmative justification for punishment, it does suggest that positive retributivists, those who believe retribution is an affirmative justification for criminal punishment in general, should not make an exception for corporations. In other words, the relevance would suggest that, whatever purchase retributivism has in the criminal law in general, the result should be the same in the context of prosecuting corporations, notwithstanding their lack of humanity.⁸⁰

not be a good retributive reason to either not prosecute or not punish victim-perpetrators.

As to not prosecuting, “already punished enough” arguments are claims in mitigation of sentence; they do not deny the wrongfulness of the act or lessen the appropriateness of declaring that wrong through a criminal conviction. See *generally id.* at 94 (stating that “[t]he offender should not be understood to plead that she should not be punished, but rather to allege that some of the punishment she deserves for her crime has already been endured”). Incidentally, this same objection would apply to an argument based on mercy. As to not punishing, if the act of self-victimization were wrongful, the harm suffered through that victimization would not count as “punishment” on many accounts of the necessary conditions for “punishment,” because it would not be imposed by someone other than the offender nor imposed by a recognized legal authority. See HART, *supra* note 70, at 4–5; Greenawalt, *supra* note 60, at 1282–83. *But cf.* PETER WINCH, *Ethical Reward and Punishment*, in ETHICS AND ACTION (1972) (discussing “ethical punishment,” which Winch conceptualizes as deriving from the actor’s personal view of desert for his wrongdoing).

⁸⁰ As noted by H.L.A. Hart, endorsement of retribution as a limiting principle does not necessarily imply acceptance or rejection of retribution (as opposed to utilitarianism) as an affirmative justification for punishment. See HART, *supra* note 70, at 9. The justification of retribution as a limiting principle, however, appears no more or less dependent on notions of “humanity” or “personhood” than retribution as an affirmative justification for punishment. For example, Hart gave the following justification for the limiting principle of negative retribution in general:

[I]t is a requirement of Justice, and Justice simply consists of principles to be observed in adjusting the competing claims of human beings which (i) treat all alike as persons by attaching special significance to human voluntary action and (ii) forbid the use of one human being for the benefit of others except in return for his voluntary actions against them.

Taking the other possibility, if one concludes that the check of retribution as a limiting principle is *not* applicable to the prosecution of corporations, that would support the view that in the context of corporations, only utilitarian justifications merit consideration. Whether one is a retributivist or a utilitarian as a general matter, if one concludes that a corporation lacks the necessary characteristics to be worthy of protection from punishment with the shield of just desert, then it is hard to see how one could conclude that just deserts would require punishment of a corporation.

Finally, on a more doctrinal level, this result suggests that we may wish to consider whether the corporation is a victim of the conduct in question in considering whether to prosecute a corporation. Department of Justice policy directives list a broad array of factors that Assistant United States Attorneys are to consider in deciding whether or not to bring a criminal case against a corporation.⁸¹ The status of the corporation as victim or nonvictim, which is not currently one of the factors mentioned, likely merits further consideration. In addition to its application in charging decisions, such considerations may also be appropriate in statutory interpretation.⁸²

Id. at 22. If lack of humanity does not render this “requirement of Justice” irrelevant to corporate punishment, it presumably would not do so for positive retributivism either.

⁸¹ See Memorandum from Deputy Attorney General Larry Thompson, to Heads of Department Components, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm; United States Attorney Manual § 9-27.000 (2003).

⁸² For example, 18 U.S.C. § 1346 includes defrauding employers of an employee’s honest services within the ambit of the federal mail and wire fraud statutes. Federal courts are still struggling to define the elements of an honest-services prosecution. See STRAUDE, *supra* note 16, at 80–81; Coffee, *supra* note 38, at 436–44. As one court aptly described the matter:

The plain language of the “honest services” doctrine codified in § 1346 suggests that dishonesty by an employee standing alone is a crime. . . . This construction, however, potentially extends criminal liability to a broad range of employment contexts. . . . Therefore, courts construing and applying § 1346 have consistently utilized certain principles to limit its scope in the private employment context. . . . [O]ur sister circuits, however, have split over the proper approach. On the one hand, several circuits have held that the Government must prove that the employee intended to breach a fiduciary duty *and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach*. On the other hand, some circuits have construed the honest services doctrine merely to require a showing that the employee possessed a fraudulent intent and that the misrepresentation was material.

United States v. Vinyard, 266 F.3d 320, 326–27 (4th Cir. 2001) (citations and internal quotations omitted) (emphasis added).

A bar on punishment of corporate victim-perpetrators would inform the debate surrounding imposition of the “intent-to-harm” element to honest services prosecutions. If prosecution of corporate victim-perpetrators were deemed inappropriate, then, without the intent-to-harm requirement, corporate prosecutions would be severely limited by the honest services form of fraud. Consider cases that are grist for the mill of corporate prosecutions: an employee committing a criminal act in furtherance of a corporation’s interests (for example, paying a bribe or a kickback), even though such action was expressly forbidden by corporate policy. Because such an action might well violate a duty to the

V. CONCLUSION

The headline prosecutions arising out of the corporate scandals of 2002 provide an interesting opportunity to reflect on the import of an anomalous, but not unique, feature of corporate criminal law: the doctrine of vicarious liability raises the possibility that the corporation in certain cases could be both the perpetrator and the victim. Status as a victim-perpetrator seems to present a bar on prosecutions in the criminal law in some circumstances, and this general bar appears to be tied to retributive concerns. Although the doctrinal rules are fuzzy on this point when it comes to prosecuting corporations, consideration of those recent scandals may lead some to conclude that the retributive barrier also has normative force in the context of corporate prosecutions. Further, the answer to the question whether it does have such normative force may provide insight into the applicability of retributive concerns to corporate criminal law in general. If this idea of retribution as a limiting principle applies in the corporate arena, notwithstanding the corporation's own lack of humanity, then to the extent retribution serves as an affirmative justification for punishment in general, it may also do so in the context of corporate prosecutions.

corporation and disclosure of it might well lead the employer "to change its business conduct" (and therefore be material), *see* *United States v. Gray*, 96 F.3d 769, 775 (5th Cir. 1996) (upholding conviction of basketball coaches for fraudulently depriving the universities they worked for of their honest services by helping to create fraudulent academic records for potential transfer students the coaches wanted to add to the team), these heretofore routine cases of corporate criminality would be barred by a rule against prosecuting corporate victim-perpetrators, since the same conduct that would make the corporation guilty of commercial bribery or the like would also make it the victim of mail or wire fraud under § 1346. If one assumes that Congress did not wish so drastically to alter the scope of corporate criminal liability by enacting § 1346, a restriction on victim-perpetrator prosecutions would suggest the addition of the intent-to-harm element, under which the corporation would be less likely to be an "honest services" victim.

