

# The Blaming Function of Entity Criminal Liability

SAMUEL W. BUELL\*

*Application of the doctrine of entity criminal liability, which had only a thin tort-like rationale at inception, now sometimes instantiates a social practice of blaming institutions. Examining that social practice can ameliorate persistent controversy over entity liability's place in the criminal law. An organization's role in its agent's bad act is often evaluated with a moral slant characteristic of judgments of criminality and with inquiry into whether the institution qua institution contributed to the agent's wrong. Legal process, by lending clarity and authority, enhances the communicative impact, in the form of reputational effects, of blaming an institution for a wrong. Reputational effects can flow through to individuals in ways that reduce probability of future wrongdoing by altering individual preferences and forcing reevaluation and reform of institutional arrangements. Blame and utility are closely connected here: the impulse to blame organizations and the beneficial effects of doing so both appear to depend on the degree of institutional influence on the agent.*

*These insights imply that the doctrine should be tailored, unlike present law, to more fully exploit criminal law's expressive capital by selecting cases according to entity blameworthiness. Barriers to describing the phenomenon of organizational influence and culture prevent discovery of a first-best rule of institutional responsibility. A second-best step would be to enhance the existing doctrine's examination of agent mens rea, to impose fault only if the agent acted primarily with the intent to benefit the firm.*

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\* Visiting Assistant Professor and Fellow, Emerging Scholars Program, University of Texas School of Law. Email: sbuell@law.utexas.edu. Until July 2004, I was a prosecutor in United States Attorneys' Offices and for the Department of Justice Enron Task Force and during that time served as a lead trial counsel in *United States v. Arthur Andersen LLP*. The views here are my own. Many thanks to Jennifer Arlen, Rachel Barkow, Mitchell Berman, Richard Bierschbach, James Jacobs, Susan Klein, Douglas Laycock, Lawrence Sager, Deborah Schenk, and Stephen Schulhofer for helpful comments and criticisms.

INTRODUCTION.....	474
I. THE NATURE OF THE PROBLEM.....	478
A. <i>Example: United States v. Arthur Andersen LLP</i> .....	479
B. <i>Example: United States v. KPMG LLP</i> .....	488
C. <i>Questions About Contemporary Entity Criminal Liability</i> .....	490
II. FUNCTION OF ENTITY CRIMINAL LIABILITY .....	491
A. <i>The Social Practice of Blaming Institutions for Crime</i> .....	491
B. <i>The Relationship Between Institutions and Crime</i> .....	493
C. <i>The Legal Practice of Blaming Institutions for Crime</i> .....	498
D. <i>Reputation and Deterrence</i> .....	500
E. <i>Civil Substitution</i> .....	512
F. <i>Retribution and Expression</i> .....	516
G. <i>Costs</i> .....	522
H. <i>Conclusions and Empirical Questions</i> .....	525
III. LAW OF ENTITY CRIMINAL LIABILITY .....	526
A. <i>Inadequacy of Respondeat Superior</i> .....	526
B. <i>Unavailability of a First-Best Rule</i> .....	527
C. <i>A Second-Best Alternative</i> .....	530
D. <i>Enforcement</i> .....	535
CONCLUSION.....	537

## INTRODUCTION

Despite sustained and deep attention,<sup>1</sup> the criminal form of enterprise liability remains of puzzling legitimacy. This puzzle is well worth solving. The law and practice of entity criminal liability have grown increasingly salient, in tandem with the growth of the criminal law's regulatory role and the relative expansion of federal law and enforcement in the field of criminal law.<sup>2</sup> The market disruptions of 2001 and 2002, and their regulatory aftermath, have accelerated entity criminal liability's growth in the law.<sup>3</sup>

The law in this area had a weak start nearly a century ago when common law courts, looking to expand available means for regulating business enterprises, imported respondeat superior liability<sup>4</sup> from tort law into the criminal law, but without serious

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1. See Joseph F.C. DiMento, Gilbert Geis & Julia M. Gelfund, *Corporate Criminal Liability: A Bibliography*, 28 W. ST. U. L. REV. 1, 5–64 (2000) (listing hundreds of works on the subject).

2. I will speak of *entity* criminal liability. Most of the literature refers to *corporate* criminal liability. The corporate designation may be a misnomer when authors do not limit their arguments to the corporate form. The problem sweeps more broadly since many types of legal entities—including partnerships, nonprofits, and even some government bodies—can be subject to prosecution.

3. See, e.g., Deborah Solomon & Anne Marie Squeo, *Crackdown Puts Corporations, Executives in New Legal Peril*, WALL ST. J., June 20, 2005, at A1 (reporting more than nine hundred people charged in more than four hundred criminal corporate cases since 2002, and at least eight entity criminal cases resolved with nonprosecution settlements since 2003).

4. See RESTATEMENT (SECOND) OF AGENCY § 219(1) (2004); PAGE KEETON & WILLIAM

theoretical analysis.<sup>5</sup> At least as a matter of federal law—the law that governs most cases of criminal enterprise liability—if a master were an entity, the master could be convicted for virtually any crime the master's agent committed within the scope of agency.<sup>6</sup> Inquiry into an entity's criminal responsibility would proceed no further. The only slight modification to this rule has been to add a requirement that the agent have acted, in some part, to benefit the master.<sup>7</sup>

Since its inception, this form of liability has faced steady criticism.<sup>8</sup> Criminal law scholars have doubted the doctrine's theoretical soundness, pointing to illogic in retribution toward objects and the impossibility of fitting liberal concepts about responsibility with nonhuman actors. Entity criminal liability, these arguments go, is a purely imputed form of fault that has little or nothing to do with blameworthiness. And the doctrine is concerned with the fault of something without free will or character—that is, an apparition with “no soul to be damned and no body to be kicked.”<sup>9</sup>

Neoclassical economic analysis has propelled the critique further by leading scholars to question even the simple regulatory rationale that first gave rise to the doctrine. If the only pain that the state can inflict on a legal entity is fiscal, there is said to be little point, and perhaps waste, in maintaining a dual structure of civil and criminal enterprise liability.<sup>10</sup> In response to this argument, a few have reached, not yet

LLOYD PROSSER, PROSSER AND KEETON ON THE LAW OF TORTS 499–508 (5th ed. 1984).

5. See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494–96 (1909); GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 853 (2d ed. 1961) (describing the courts' acceptance of corporate criminal responsibility as “a striking instance of judicial change in the law”); Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1486 (1996) (“Given the absence of widespread public civil enforcement prior to the early 1900s, corporate criminal liability appears to have been the only available option that met both the need for public enforcement and the need for corporate liability.”); Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 353 (2003) (“[B]y the early 1900s, legislators and judges realized that the criminal law required modification to properly account for wrongs committed by increasingly powerful and prevalent corporate collectives.”).

6. See *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 HARV. L. REV. 1227, 1250 (1979) (stating that respondeat superior covers virtually every act that “occurred while the offending employee was carrying out a job related activity”).

7. See, e.g., *Standard Oil Co. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962), *rev'g* *United States v. Thompson-Powell Drilling Co.*, 196 F.Supp. 571 (N.D. Tex. 1961).

8. See, e.g., HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 360–61 (1968); WILLIAMS, *supra* note 5, at 853–57; Albert W. Alschuler, Comment, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307 (1991); Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285, 293–324 (1985); Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 37–41 (1957); *Developments in the Law—Corporate Crime*, *supra* note 6, at 1235–38, 1365–70.

9. Lederman, *supra* note 8, at 309 (quoting R. CROSS & P. JONES, *INTRODUCTION TO CRIMINAL LAW* 122 (10th ed. 1984)).

10. See John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1991); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); Khanna, *supra* note 5; Vikramaditya S. Khanna, *Should the Behavior of Top Management Matter?*, 91 GEO. L.J. 1215 (2003) [hereinafter Khanna, *Top Management*]; Vikramaditya S. Khanna, *Corporate*

entirely successfully, to find some utility in a separate criminal practice of institutional liability.<sup>11</sup>

Yet criminal enterprise liability has flourished in the legal system;<sup>12</sup> if not, persistent interest in the doctrine would be inexplicable. *Respondeat superior* has become firmly entrenched as, more or less, the across-the-board rule of enterprise liability for all manner of crimes. The use of the tool against business enterprises and other organizations has become a prominent, perhaps central, feature of the criminal justice system, particularly at the federal level and in matters of white-collar crime.<sup>13</sup> Most interesting, in the shadow of a strikingly broad *de jure* rule of liability that is nearly indistinguishable from its civil counterparts, the criminal system's actors gradually have developed a practice of imposing enterprise liability that looks much narrower and is tied to a form of heightened criminal law responsibility.<sup>14</sup>

At the same time, organizations are ubiquitous, and worries about their production of unwanted events have increased. Institutions—our businesses, employers, schools, nonprofits, and so on—determine the course of much of our lives and even our identities.<sup>15</sup> No matter what the law might have to say, we find ourselves continually wondering what to do about harmful human behavior, including behavior legally defined as criminal, that is explicable (even *describable*) only with reference to the institutional settings where it arises.<sup>16</sup>

Defendants and the Protections of Criminal Procedure: An Economic Analysis (Sept. 2004) (unpublished manuscript, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=657441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=657441)) [hereinafter Khanna, Corporate Defendants].

11. See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833 (2000); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998); William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285 (2000); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23 (1997).

12. See 1 KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY* 89–145 (1992) (collecting and summarizing cases).

13. The adoption and use of entity criminal liability is also on the rise in Europe. See Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 136–37 (2004).

14. See generally Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. (forthcoming 2005).

15. See, e.g., FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 4 (1995) (explaining that a “healthy and dynamic society” consists of “a complex welter of intermediate institutions, including businesses, voluntary associations, educational institutions, clubs, unions, media, charities, and churches”).

16. Recent scandals include large public companies undertaking deceptive financial practices, see U.S. Dep't of Justice, Corporate Fraud Task Force Cases and Charging Documents, <http://www.usdoj.gov/dag/cftf/cases.htm>; prominent professional firms failing in gatekeeping responsibilities, see John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 279–302 (2004); John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COL. L. REV. 57, 84–112 (2004); burgeoning charitable foundations diverting funds for the benefit of their keepers, see Beth Healy et. al., *Some Officers of Charities Steer Assets to Selves*, BOSTON GLOBE, Oct. 9, 2003, at A1; elite academic institutions concealing patterns of wrongdoing, see Michael Moss, *Pentagon Faces New Questions on Old Problem*, N.Y. TIMES, Mar. 2, 2003, § 1,

Treatments of this problem have run in one of three directions: toward the conclusions that retribution against nonhuman legal forms is nonsensical and pointless, and that therefore the legal slip-up of recognizing criminal liability for entities should be reversed; toward at least doubt, and sometimes deep skepticism, that criminal law could add anything useful to the project of regulating firms, which can suffer only financial consequences from legal action; or toward embrace of a popular impulse to condemn entities criminally for the harms they visit upon people.

Only the third (and newest) of these currents in the literature has begun to explain fully what is involved in the modern practice of imposing criminal liability on organizations, and why the practice has been so persistent. So far, however, the accounts have only scratched the surface of a genuine social account of entity criminal liability. This Article delves deeper, offering the thesis that the blaming function of entity criminal liability is linked closely to the utility of the doctrine. I will claim that the existence of institutional influence on an individual offender explains *both* the impulse to blame an entity *and* why such blaming can beneficially alter group behavior to make wrongdoing in organizations less likely. These features of blaming institutions look to be inseparable, potent, and dependent upon criminal process.<sup>17</sup>

This Article will develop its thesis in two primary steps. First, it will descriptively locate the social function of imposing criminal fault on entities. I will examine the de facto legal practice in the field of criminal enterprise liability, what is behind the widespread social practice of blaming institutions for agents' crimes, and what results when legal process accommodates that social practice.

Reassessing entity criminal liability in light of its contemporary social function will yield several helpful conclusions, some of them novel. In modern life, an organization can be blamed for wrongdoing with a kind of moral assessment characteristic of judgments of criminality and on the basis of the organization's relationship to the wrong. Unlike present law, social practice discriminates among cases of wrongdoing in organizations and, in determining where to ascribe blame, considers what a given case says about an organization and its tendency to produce unwanted individual behavior.

Effects of this kind of evaluation and condemnation can include altering an organization's reputation. Conducting such assessments through legal process gives

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at 26, Jonathan Saltzman & Heather Allen, *Groton School Trustees Are Indicted*, BOSTON GLOBE, June 8, 2004, at B1; churches enabling grievously harmful conduct by clergy that undermines the premises of systems of faith, see OFFICE OF THE ATTORNEY GEN., COMMONWEALTH OF MASS., THE SEXUAL ABUSE OF CHILDREN IN THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON (July 23, 2003), available at <http://www.ago.state.ma.us/filelibrary/archexecsumm.pdf>; government agencies harming the public they exist to serve, see DICK LEHR & GERARD O'NEILL, BLACK MASS: THE TRUE STORY OF AN UNHOLY ALLIANCE BETWEEN THE FBI AND THE IRISH MOB (2001); the military spawning and fostering cruelty and viciousness, see MAJOR GENERAL ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 15-22 (2004), available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf); and respected media organizations publishing fabricated reporting, see Elizabeth Kolbert, *Tumult in the Newsroom*, THE NEW YORKER, June 30, 2003, at 42; Jacques Steinberg, *Editor of USA Today Resigns; Cites Failure over Fabrications*, N.Y. TIMES, Apr. 21, 2004, at A5.

17. See *infra* Parts II.C-F. As that section describes, the role of blaming in entity criminal liability is more complex than the observation that a criminal law's consistency with retributive impulses encourages respect and compliance. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

them a clarity and authority that strengthens reputational effects. Such reputational sanctions can flow through to affiliated individuals in ways that can alter behavior, cause re-evaluation and reform of institutional arrangements, and reduce wrongdoing in organizational settings. Because of its communicative force and preference-shaping authority, only criminal process fully produces these effects of legally imposed entity blame.

Second, this Article considers what these descriptive insights mean for the law. Not surprisingly and as many have argued, replicating the tort rule of respondeat superior turns out to have been a wrong turn for the criminal law. Much of the confusion and doubt surrounding entity criminal liability stems from a large gap between the terms of the law and what the legal practice is really doing. Perhaps unexpectedly, the best theoretical defense of criminal enterprise liability calls for limitations on the tool's use in practice. Limiting the scope of entity criminal liability not only would make the doctrine fit better with its justifications. It also would better exploit the criminal law in regulating enterprises, because entity criminal liability's influence depends much more on what the law *says* than on what the law *does* by way of formal sanctions.

This Article will thus argue for a narrower standard of liability that would seek information about institutional effects on the individual, as revealed in the individual's mental state toward the entity at the time of the offense. This Article's proposal will be modest because barriers to describing the complex phenomenon of an institution's relationship to an individual crime prevent articulation of a first-best rule. Unavoidable gaps between the law's breadth and actual institutional responsibility mean that enforcers should endeavor to choose cases that maximize the message effects of imposing criminal liability on organizations. Entity criminal liability turns out to be an instance in which enforcement actions alone, with only loose connection to legally authorized sanctions, can send strong normative signals.

In Part I, I will offer two cases to illustrate the nature of current legal practice and to pose questions that necessitate further inquiry into the function of entity criminal liability. In Part II, I will begin to descriptively answer those questions; that is, I will examine the phenomenon of criminal entity liability in order to determine its social function and to explain its distinctive and useful purposes.

In Part III, I will consider implications of this Article's findings. I will argue that a narrower form of criminal entity liability would better serve its distinctive purposes. Finally, I will consider what this Article's analysis means for understanding the power of enforcement practices to determine the normative messages of the criminal law.

## I. THE NATURE OF THE PROBLEM

Let us begin with two concrete and recent examples that show that entity criminal liability can involve evaluation of behavior in institutional settings in ways that do not fully arise in cases of individual criminal liability or civil enterprise liability. After examining these cases, this Part will pose a series of questions about the function of entity criminal liability that will frame the theoretical analysis that follows in Part II.

A. Example: United States v. Arthur Andersen LLP

Most readers will recall *United States v. Arthur Andersen LLP*<sup>18</sup> as a case about large-scale shredding of documents at the giant auditing firm in the midst of a Securities and Exchange Commission (SEC) investigation of the Enron Corporation. Enron's collapse made it the leader in the financial upheavals of 2001 and 2002. Because of the Supreme Court's later review of the case, *Andersen* may become best known as a case about the line between criminality and permissible adversarial behavior when it comes to document destruction.

Before Supreme Court review, however, *Andersen* primarily told a story about criminal enterprise liability.<sup>19</sup> Setting aside the later controversy over the criminality of the firm's destruction of Enron-related documents,<sup>20</sup> at the time of the conduct, indictment, and trial, the firm seemed to be easily *liable* for its agents' acts on the strict terms of respondeat superior. Yet the question of whether the firm was to *blame* for what its employees did was substantial, challenging, and fully debated by the participants in the case.

1. Conduct

Consider the document destruction in its institutional context. Andersen, a limited liability partnership, was one of the largest global auditing firms. By June 2001, it had acquired probationary status after its chief regulator, the SEC, charged the firm for permitting one of its largest clients to publish misleading financial statements.<sup>21</sup> At the same time, Enron, a Houston company that was the nation's seventh largest, had become Andersen's second-biggest client, generating about \$50 million in annual fees that were projected to rise to \$100 million.<sup>22</sup> For several years, many of Andersen's senior partners knew that Enron's financial practices were "aggressive" and "high-

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18. 374 F.3d 281 (5<sup>th</sup> Cir. 2004), *rev'd* 125 S.Ct. 2129 (2005).

19. One authority has already examined the merits of the *Andersen* prosecution and Andersen's approaches to defending itself. Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 WASH. U. L.Q. 917 (2003).

20. For the controversy regarding the criminality of the firm's document destruction, see *Arthur Andersen LLP v. United States*, 125 S.Ct. 2129 (2005); *United States v. Arthur Andersen LLP*, 374 F.3d 281 (5<sup>th</sup> Cir. 2004), *rev'd*, 125 S.Ct. 2129 (2005); *United States v. Khatami*, 280 F.3d 907, 911–12 (9<sup>th</sup> Cir. 2002); *United States v. Shotts*, 145 F.3d 1289, 1301 (11<sup>th</sup> Cir. 1998), *overruled in part by Arthur Andersen LLP v. United States*, 125 S.Ct. 2129 (2005); *United States v. Farrell*, 126 F.3d 484, 488 n.2 (3<sup>d</sup> Cir. 1997); *United States v. Thompson*, 76 F.3d 442, 452 (2<sup>d</sup> Cir. 1996). Compare 18 U.S.C. § 1512(b) (2001) with 18 U.S.C. § 1512(c) (2004) and 18 U.S.C. § 1519 (2004).

21. Transcript of Record at 448–58, 460–89, *United States v. Arthur Andersen LLP*, No. H-02-121 (S.D. Tex. June 15, 2002) [hereinafter Transcript of Record]. Andersen's settlement with the SEC in the case was unprecedented among the "Big Five" accounting firms in the size of the fine and the gravity of the non-monetary sanctions. See Government Exhibits 120B, 120C, 120D, 120E, 120F, *United States v. Arthur Andersen LLP*, No. H-02-121 (S.D. Tex. June 15, 2002) [hereinafter Government Exhibit(s)].

22. Government Exhibit, *supra* note 21, 0206A.

risk,"<sup>23</sup> colloquialisms in the auditing industry for likelihood of legal action and liability of the auditor.

Enron's public unraveling began when its chief executive officer surprisingly announced his resignation for unspecified reasons just six months after his appointment, a move that puzzled Wall Street.<sup>24</sup> Almost immediately, serious accounting troubles at Enron commanded the attention of Andersen's partners.<sup>25</sup> Within a few weeks, the number of Andersen personnel handling the growing crisis at Enron widened to over a dozen senior partners.<sup>26</sup> It was immediately apparent to this group that, at a minimum, Enron was on the verge of reporting its first large earnings loss in many quarters and of announcing a downward correction of \$1 billion in an erroneous entry for shareholder equity.<sup>27</sup> The group also seriously deliberated over whether the company would have to file a large restatement (correction) of past reported earnings, a sometimes devastating market signal that nearly always draws SEC scrutiny of both auditor and client.<sup>28</sup>

Not surprisingly, Andersen's legal department in Chicago quickly assigned a legal partner (Nancy Temple) to participate in the partnership group's daily deliberations over Enron.<sup>29</sup> Within a few days, she took many steps showing that she and other Andersen partners viewed the Enron crisis as a serious liability problem for Andersen that could lead to further SEC action against the firm.<sup>30</sup>

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23. See Transcript of Record, *supra* note 21, at 819–23, 940–41, 1119, 1733–42, 1847–48, 3270, 5290, 5529–30, 6004.

24. *Id.* at 655–57; Government Exhibit, *supra* note 21, 0828B.

25. A senior Enron and former Andersen employee (Sherron Watkins) told Enron's general counsel that she was nervous about recent transactions; at one point Watkins said she feared "that Enron would implode in a wave of accounting scandals." Transcript of Record, *supra* note 21, at 806–19, 2804; Government Exhibits, *supra* note 21, 0821A, 3009C. More specific troubles came with Enron's decision to close down a series of large "aggressive" financial structures and report an earnings loss of hundreds of millions of dollars. Transcript of Record, *supra* note 21, at 1834–40.

26. These included the chief "relationship" partner in Houston, his several local partners also responsible for the audit, his regional supervising and consulting partners, the firm's top technical accounting partners at its Chicago headquarters, and several of the firm's most senior partners globally responsible for "risk management."

27. Transcript of Record, *supra* note 21, at 970–71, 5578–83.

28. The Chicago experts discovered that the Houston team had authorized Enron to apply an incorrect accounting treatment to the aggressive financial structures that the experts viewed as a "black-and-white" violation of generally accepted accounting principles. *Id.* at 5572–79. Moreover, the experts had explicitly advised against this technique months earlier, but were never told that the local auditors disregarded the advice. *Id.* Enron's overstating of its shareholder equity by more than \$1 billion was also a possible cause for restatement. *Id.* at 970–71, 1833–40, 5578–83. According to one Andersen partner, it was "as sure as night follows day" that litigation and an SEC investigation would follow a large earnings restatement. *Id.* at 6013–14, 6087.

29. *Id.* at 2878, 5588. Temple, who specialized in accountant liability work, was a former litigation partner at one of the largest national law firms. Andersen's most senior technical accounting expert knew of no other instance in which an Andersen lawyer participated in similar accounting decisions. *Id.* at 5583–84.

30. For example, she retained litigators at one of the largest New York law firms to serve as outside counsel; she obtained names of expert accounting witnesses who might be able to testify



Just as she was taking these anticipatory steps, Temple began to call the attention of the auditors on the Enron account to Andersen's document "retention" policy and to urge compliance with it.<sup>31</sup> This policy stated that one central set of firm work-papers should be created and retained, as required by accountants' professional rules,<sup>32</sup> and that all other audit-related documents, including drafts, hand-written notes, emails, and other computer files, should be permanently deleted or destroyed.<sup>33</sup> On October 12, she sent to a regional supervising partner in Houston an email saying that it "might be useful" to remind Andersen's team working on the Enron matters to follow the document policy;<sup>34</sup> this email repeated what she had said orally and would say at least once more in conference calls among senior Andersen partners about the Enron crisis.<sup>35</sup> After receiving Temple's October 12 email, the supervising partner quickly forwarded it to the lead partner responsible for the Enron account (David Duncan).<sup>36</sup>

When Enron publicly announced the surprising and large earnings loss on October 16 and obliquely disclosed the \$1 billion equity mistake,<sup>37</sup> the market and the SEC reacted with alarm. The company's stock price dropped sharply, and the next day, the SEC sent Enron a letter disclosing that it had opened an investigation and requesting production of documents and information about Enron's structured finance activities.<sup>38</sup> Enron shared the letter with Andersen.

On the morning of October 23, Duncan and several other Andersen partners in Houston responsible for the Enron account listened to an Enron conference call with Wall Street analysts. The call went badly for Enron and included pointed questions about Enron's "aggressive" accounting structures and the SEC's investigation.<sup>39</sup> After the call, the Houston partners agreed it would be a good time to update the Andersen auditors working on the Enron account about the situation and instruct them, as the Chicago office had requested, to ensure that they complied with the firm's document policy.<sup>40</sup> They called an unusual team-wide meeting that emails described as "urgent" and "mandatory."<sup>41</sup> At the meeting, the partners distributed copies of the policy and

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for Andersen; she discussed with senior partners in Chicago that an SEC investigation was "likely" and that the SEC might charge Andersen with violating an injunction in the Waste Management settlement; and she advised auditors working on the Enron account to leave out of work-paper documents the names of certain people who had participated in conversations so that they would not be called as witnesses. Government Exhibits, *supra* note 21, NT-0928 to NT-undated, 1018B, 1025F.

31. Transcript of Record, *supra* note 21, at 1367–68, 5617–27; Government Exhibits, *supra* note 21, 1012A.

32. Transcript of Record, *supra* note 21, at 563.

33. Government Exhibit, *supra* note 21, 160A. However, in cases of "threatened litigation," no such materials were to be destroyed. *Id.* The policy incorporated by reference another policy that specified regulatory scrutiny and potential restatement as situations requiring auditors to consult the firm's legal department and therefore implied that documents should be retained in those circumstances. *Id.* 160B.

34. *Id.* 1012A.

35. Transcript of Record, *supra* note 21, at 1367–68.

36. Government Exhibit, *supra* note 21, 1012A.

37. *Id.* 1016A, 1016B.

38. *Id.* 1020A.

39. Transcript of Record, *supra* note 21, at 1875–80.

40. *Id.*

41. Government Exhibits, *supra* note 21, 1023F, 1023H, 1023K.

Duncan said, "I'm not telling you to go shred a bunch of documents or anything, but you need to make sure you're in compliance with the firm's retention policy."<sup>42</sup>

The Andersen employees in Houston promptly followed instructions and, as the firm policy provided, destroyed a very large quantity of non-work-paper documents, such as notes, drafts, and emails.<sup>43</sup> Over the next week, the Andersen team responsible for Enron (and only those employees) shredded thousands of pounds of Enron-related documents and deleted unknown quantities of computer files, numbering at least in the thousands.<sup>44</sup> Andersen's employees had never previously been urged to make compliance with the firm's document policy a priority and many were unaware of its existence before October 2001.<sup>45</sup>

The destruction stopped on November 8—the same day Enron publicly announced a restatement of earnings—when the SEC served Andersen with a subpoena for all of its documents relating to Enron. The subpoena called for not just the official work-paper documents but also all of the non-work-paper documents that had been destroyed, such as emails, drafts, and notes.<sup>46</sup> Temple now sent a second email to Houston; this one contained detailed instructions to retain all forms of Enron-related documentation.<sup>47</sup> Duncan's secretary forwarded it to the team with the caption, "Stop the Shredding!"<sup>48</sup>

A number of factors explained the concerted directives and destruction in *Andersen* as institutional products of the firm. First, several important partners took independent action to bring about the document destruction.<sup>49</sup> Second, a theory of a bad apple or two did not fit. Such conduct would have been practically impossible to pursue in an environment involving real attention to public duties. Temple was an accomplished

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42. Transcript of Record, *supra* note 21, at 3237. In other settings that day, partners urged underlings to comply with the policy. In one instance, a partner confided to a manager that if he talked about "getting rid of documents . . . it would always be along the lines of being in compliance with the firm's retention policy." *Id.* at 3243.

43. *See id.* at 3232–48, 3896, 3951, 3954–55, 3990, 4171–75, 5766–67, 5783–89.

44. *See id.* at 3232–48, 3896, 3951, 3954–55, 3990, 4171–81, 5766–67, 5783–89; Government Exhibits, *supra* note 21, 180C, 180D. Previously, the Andersen team responsible for Enron had shredded, at most, about 100 pounds of documents in any prior week. *Id.* 180C, 180D.

45. *See e.g.*, Transcript of Record, *supra* note 21, at 1201, 1379–81. Andersen's most senior accounting expert had never been informed of the existence of the document policy in his thirty years at the firm. *Id.* at 5618. Accounting experts in Chicago, whom Temple also instructed about the policy, deleted large quantities of emails, their primary means of communication with auditors about accounting issues. They deleted only emails relating to Enron. *Id.* at 978–85, 1622–44, 5615–29.

46. *Id.* at 508–11; Government Exhibit, *supra* note 21, 1108C.

47. Government Exhibit, *supra* note 21, 1110A.

48. *Id.* 1110B. The email stated that all document destruction should stop since Andersen had been "officially served" for its records. *Id.*

49. Temple thought of the idea of pushing compliance with the moribund document policy and suggested it to her colleagues, some of whom seconded her recommendation, but she did not follow up or supervise the destruction in Houston. Houston partners received the suggestion and decided on their own to organize many employees there to shred documents, without further consulting the hierarchy in Chicago. At the same time, other senior partners in Chicago followed Temple's suggestion, recommending it to others and destroying their own Enron-related documents, but without further consulting her or being aware of the destruction in Houston.

lawyer,<sup>50</sup> while Duncan was celebrated within Andersen as a model partner.<sup>51</sup> Third, no one stepped forward to question the fairly overt instructions to destroy documents or the heavy shredding that went on for days.<sup>52</sup>

Fourth, the conduct in *Andersen*, unlike that in many white-collar crimes, did not have a direct monetary reward. Andersen's partners were certainly motivated financially, but their compensation and incentives paled compared to that of their clients at Enron and other large companies. More significant, destroying the documents would have helped the likes of Temple and Duncan only if it helped the *firm* come out better in its next dust-up with the SEC. The partners perceived that the firm's interests dictated that they destroy the documents. There was no suggestion, and still has been none, that Duncan, Temple or anyone else at Andersen was seeking to cover up an instance of criminality that might have landed any person at the firm in prison if fully revealed. Rather, the crisis was all about the firm's audit performance.

Finally, a variety of statements by senior Andersen partners showed that the conduct of the partners who directed document destruction was bound tightly to the objectives of the firm. For example, two days before Temple sent her October 12 email, a senior Houston partner conducted a regional training session for Andersen auditors during which he described the document policy as a justification for destroying non-work-paper documents when legal proceedings were imminent. If a document were destroyed under the policy and litigation were filed "the next day," he said that would be "great" because "whatever there was that might have been of interest to somebody is gone and is irretrievable."<sup>53</sup> Similarly, in a series of emails, numerous senior partners spoke of the importance of destroying "smoking guns" that, if left in the firm's official work-papers, could be "devastating" in litigation.<sup>54</sup> Another witness testified that he unapologetically believed it was necessary to destroy "smoking guns" because he had learned from experience that he could not count on the legal process to protect the firm.<sup>55</sup>

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50. See Greg Burns, *Panel Says Andersen Lawyer Lied*, CHI. TRIB., Dec. 18, 2002, § 1, at 1.

51. Transcript of Record, *supra* note 21, at 1677–79.

52. Over a dozen of Andersen's most senior global managers were party to discussions in which pursuit of the mostly ignored document policy was urged, and dozens more of the firm's lower level employees carried out the work of purging the record, without objection. Some auditors in the Portland, Oregon office, to whom the instruction to implement the document policy was conveyed, balked at the instruction because, in their view, in such crisis circumstances, "for God's sake, just don't [destroy documents]." Transcript of Record, *supra* note 21, at 5210, *Andersen*. However, they didn't sound the alarm. Two senior partners visiting the Houston office noticed evidence of shredding activity and suggested to one partner it wasn't a good idea, *id.* at 3667, 3808–10, 3827–28, 5901, 6185–86, but neither reported his observations to other senior managers.

53. Government Exhibit, *supra* note 21, 1010B.

54. Transcript of Record, *supra* note 21, at 4698–4714. At the same time, Andersen's number-two global partner sent his colleagues an email in which he forwarded a *New York Times* article on Enron and warned that "the problems are just beginning and we will be in the cross hairs. The marketplace is going to 'force' the SEC to be tough." Government Exhibit, *supra* note 21, 1026A.

55. Transcript of Record, *supra* note 21, at 4688–93.

Of course, such discussions alone were not criminal.<sup>56</sup> But they did reveal that the conduct of the transgressing partners was a product of the firm. That is, a good partner should push the envelope to high-risk, maximum advantage for the firm and its clients, without regard to effects on the public or markets.<sup>57</sup> Tellingly, important managers within the firm rationalized document destruction on the eve of an enforcement proceeding on the ground that Andersen could not trust the legal system (which was trusting Andersen) to fairly sort the consequences of Andersen's and its clients' conduct.<sup>58</sup> Not surprisingly, it turned out that the Enron affair was not the only client crisis in which an Andersen partner hastily directed the destruction of audit-related documents.<sup>59</sup>

## 2. Litigation

In light of the applicable rule, respondeat superior, one might say the matter of whether the conduct in *Andersen* was institutionally produced is of little interest. Temple and Duncan, at least, plainly acted within the scope of their employment and in part to benefit the firm. Several features of the litigation in *Andersen*, however, exhibit an impulse to examine institutional blameworthiness. First, as in all federal cases of entity criminal liability, the question whether to indict the firm—and the parties'

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56. See *United States v. Arthur Andersen*, 374 F.3d 281, 297 (5th Cir. 2004), *rev'd* 125 S. Ct. 2129 (2005) ("There is nothing improper about following a document retention policy when there is no threat of an official investigation, even though one purpose of such a policy may be to withhold documents from unknown, future litigation.").

57. See BARBARA LEY TOFFLER, *FINAL ACCOUNTING* 6–8 (2003).

58. Andersen's offense particularly threatened trust relations because the crime's setting was the vast commercial realm where, unlike street crime, the public confidence that the justice system and the capital markets require for effective operation depends largely on voluntary compliance. Cf. Jim Zarroli, *Investment Banker Frank Quattrone Is Charged with Obstructing Justice in Federal Investigation Into His Firm*, All Things Considered, Nat'l Public Radio, Apr. 23, 2003 (transcript available at LexisNexis News Database) (reporting the United States Attorney saying, "This is the kind of case that I believe has to be brought because we simply must enforce the honor system which is federal grand jury subpoenas. We'd love to have people think that we can go to every office and conduct a search, but we can't. We need to rely on people's voluntary compliance with those subpoenas."); see also DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* 43 (1990) (*pace* Durkheim, "Social relations are . . . like credit relations . . . they depend upon trust . . . . Breach of trust, or doubts about the strength of the guarantor, can quickly lead to a collapse of the credit system. Consequently, individual offences must be punished, not just because of the individual harm they do, but because of the ramifications such violations might have at the level of the moral order itself.").

59. See Greg Farrell, *4 Former American Tissue Execs Charged*, USA TODAY, March 11, 2003, at 2B (describing obstruction-of-justice charges against Andersen audit partner for directing employees to delete emails and shred files when he learned of government investigation of client). In *Andersen*, the question of institutional responsibility seemed to surpass that of individual fault. In some cases, institutional responsibility may not just exceed individual responsibility, it may displace it—the case even stronger than *Andersen* being one in which no individual perpetrator can be identified. See, e.g., Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 431–33 (1963); Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 16 (2002).

discussions about that question—was governed by detailed (but nonbinding) Department of Justice guidelines.<sup>60</sup> Those guidelines, which recognize the extraordinary breadth and lack of depth in the governing legal standard, go far beyond the law in describing what can make a case of crime in an organization a case of organizational responsibility. They direct the prosecutor to consider: the nature and seriousness of the offense; the pervasiveness of the wrongdoing within the organization; the organization's history of wrongdoing; the timeliness and voluntariness of the organization's disclosure of the wrongdoing; its willingness to cooperate; its compliance programs; any remedial actions it took; collateral consequences to others from a prosecution of the entity; the adequacy of individual prosecutions for the conduct; and the sufficiency of any noncriminal remedies.<sup>61</sup>

The prosecution guidelines do not go all the way to the assessment of institutional responsibility that, as this Article will develop, sets criminal enterprise liability apart from simple agency liability. However, they set terms for a discussion about institutional blameworthiness. Indictment was sought in *Andersen* not because respondeat superior easily allowed it or because the criminal process simply provided another means of imposing costs on the firm, but because of the seriousness and pervasiveness of the document destruction, the firm's history of treating its chief regulator with some diffidence, the firm's failure to police its auditors' conduct and their respect for regulatory obligations, and the firm's use of its own policy and practices to enable the obstruction. All these facts—and those described in Part I.A.1 that do not directly correspond to aspects of the prosecution guidelines—pointed toward institutional responsibility.

Second, the trial in *Andersen* was replete with evidence that the parties thought that institutional *blame* was worthy of argument, though the court's legal instructions would have virtually nothing to say about it. For example, the parties contested whether to apply a recognized, but somewhat controversial doctrine of aggregating the "collective knowledge" of Andersen's agents in order to determine the "firm's" mens rea, but the idea could not be fit with the specific intent requirement of the statute at issue.<sup>62</sup> Admission of Andersen's behavioral history, specifically its run-ins and probationary status with the SEC, caused serious concern, even though one might think that as

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60. See Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Dep't of Justice (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) [hereinafter Thompson Memo].

61. *Id.* at 3.

62. See 18 U.S.C. § 1512(b)(2)(B) (2000) (making it a crime to "knowingly . . . corruptly persuade" another to destroy evidence with intent to interfere with an official proceeding); Transcript of Record, *supra* note 21, at 4339. See also *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987) (describing application of "collective knowledge" instruction); Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210, 218–227 (1997) ("If an organization deliberately compartmentalizes information to escape the knowledge that might lead to its conviction, then collecting the knowledge scattered throughout its employees and utilizing it against the organization properly imputes liability . . ."); but see Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 668 (2000) (arguing that it is problematic to "split[] off the emotional element in criminal intent").

against an entity the problem of prejudice in admitting such evidence is diminished and the grounds for relevance are quite different.<sup>63</sup>

While describing a jury's analysis of a case requires speculation, the jurors here appeared to weigh the question of the firm's responsibility carefully. If the question before them had been only what the spare doctrine presented—whether a single Andersen agent, acting within the scope of employment and in part to benefit the firm, violated the statute—then we would expect little hesitation. After all, the jury heard Duncan—a government witness who pled guilty to committing the same crime charged against Andersen—testify that he instructed his charges to implement the firm document policy, knowing that this would result in the destruction of documents, in part to keep them from the SEC.<sup>64</sup> Such testimony would seem to have made Andersen guilty almost a priori,<sup>65</sup> yet the *Andersen* jury deliberated for ten days.<sup>66</sup>

More telling, the jurors sent the court a remarkable note during their deliberations, reflecting an apparent effort to fashion their own standard of institutional responsibility. The note read as follows:

If each of us believes that one Andersen agent acted knowingly and with a corrupt intent, is it [necessary] for all of us to believe it was the same agent[?] Can one believe it was agcnt A, another believe it was agent B, and another believe it was agcnt C[?]<sup>67</sup>

The court permitted the jury to pursue this theory, but the jury later reported in a special verdict that it had reached unanimity on the guilty agent, mooted the question of the theory's viability.<sup>68</sup>

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63. See FED. R. EVID. 404(b); 1A WIGMORE, EVIDENCE § 57 (Peter Tillers rev. 1983) (explaining that potential prejudice could lead to a conviction not for guilt for the charged crime, but for being a "bad man"); but see *id.* § 55 (explaining that character is undeniably relevant to probability of commission of crime). In the institutional setting, the relevance is not to prove character as in a person's trait as a lawbreaker, but to prove that a crime derived from, and so should be blamed on, the entity. In *Andersen*, the evidence was admitted even under the settled rule, because the firm's past troubles with the SEC proved its partners' motive to obstruct justice and their knowledge and expectations of how the SEC might proceed. See *Andersen*, 374 F.3d at 288–91.

64. Transcript of Record, *supra* note 21, at 1666–73, 1904–13, 2478–80, 2601–02, 2766–68, 2771–73. There was more evidence of Duncan's guilt than his admission. See *supra* note 42 and accompanying text.

65. That is to say, a priori under the trial court's instructions and the prevailing understanding of the statute at the time of the trial. The Supreme Court subsequently ruled that the statute required proof of "consciousness of wrongdoing," not just a purpose to obstruct the SEC. *Andersen*, 125 S.Ct. at 2136. One can only speculate whether an instruction on "consciousness of wrongdoing" would have affected the jurors' analysis of whether there was an agent crime, before they deliberated on the question of entity liability.

66. Criminal Docket at 21–23, *United States v. Arthur Andersen LLP*, No. H-02-121 (S.D. Tex. 2002).

67. Jury Note Number 9, *United States v. Arthur Andersen LLP*, No. H-02-121 (S.D. Tex. 2002). The jury included no lawyers.

68. Transcript of Record, *supra* note 21, at 6907–10, 6951–52; see also Stacey Neumann Vu, Note, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459 (2004) (arguing novel ruling on jury's question was

Third, consider the question of sentencing. After conviction, Andersen was sentenced to a \$500,000 fine and a period of probation. To anyone with passing familiarity with the impact of the crime and prosecution on the firm and the public consciousness this punishment is ironic. The court calculated the penalty—correctly and as-required at the time—under an elaborate punishment scheme for organizations that seeks to accomplish much that pure vicarious liability under respondeat superior does not.<sup>69</sup> As with the indictment guidelines for prosecutors, the sentencing guidelines for judges call for consideration of much more about the institution than its agency relationship to its offenders, including the organization's history of violations and the existence and sufficiency of its efforts to prevent, police, discover, report, and help punish wrongdoing by its employees.<sup>70</sup>

Punishing organizations by assessing their performance in light of a legal responsibility for deterring and punishing crime is entrenched within the modern practice of entity criminal liability. It is generally agreed that an optimal liability scheme for deterring individual misconduct should include not only enterprise liability, but also a mix of strict vicarious liability and a secondary form of liability that rewards or penalizes organizations on the basis of their deterrence efforts, as in the federal sentencing scheme.<sup>71</sup>

A richer version of entity liability has been created in the shadow of respondeat superior. Yet, in *Andersen*, that sanctioning scheme played little role.<sup>72</sup> The impact of the case was almost entirely about the liability phase, that is, the question of whether the firm should bear the blame for the crime. This suggests, as this Article discusses in depth in Part II, that criminal cases of enterprise liability can have significant effects that cannot be replicated by a scheme of private liability or regulation that uses only pricing to punish or reward organizations for practices and policies pursued at the institutional level.

Perhaps most important, the *Andersen* criminal case had social resonance. In spite of its limited direct financial impact, the case appears to have broadcast a public message with a powerful impact. According to Andersen, it was the criminalization of the firm that doomed it; the firm repeatedly stressed that any settlement that required admission of criminal fault would be no better than a guilty verdict after a trial, because of the brand it would sear onto the firm.<sup>73</sup> Although concrete evidence is hard

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correct).

69. See, e.g., U.S.S.G. MANUAL ch. 8 (2004).

70. See, e.g., *id.* § 8C2.5.

71. See, e.g., Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 735–41 (1997).

72. One might object that an important feature of the organizational sanctioning scheme is the government's power to revoke licensure and that, as a result of prosecution, Andersen faced loss of its right to practice before the SEC, a virtual death sentence for an auditing firm. However, the SEC was not required upon conviction to permanently deprive Andersen of its license. Revocation could have been accompanied by reinstatement, an arrangement discussed in settlement negotiations with Andersen.

73. But see TOFFLER, *supra* note 57, at 1 (quoting a former Andersen managing partner at a 1999 training program as saying, "The day Arthur Andersen loses the public's trust is the day we are out of business."); Barnaby J. Feder & Steven Greenhouse, *Andersen Says It Is Losing Clients*, N.Y. TIMES, Jan. 29, 2002, at C1 (reporting, before any clear prospect of criminal indictment, that Andersen was losing clients as a result of Enron's collapse); Jonathan D. Glater, *Partner Drain Crimps Future at Andersen*, N.Y. TIMES, Apr. 23, 2002, at C1 (reporting that in

to come by on such a question, it is reasonable to conclude (if for no other reason than the massive, and at times feverish, attention the case attracted in the press)<sup>74</sup> that *Andersen* also altered attitudes within the financial services industry and firms more generally. *Andersen* drew attention to a firm's reputation as capital, and the vulnerability of that capital in the criminal process.<sup>75</sup> And the case made clear that criminal entity liability was more than a lever for the acquisition of evidence of individual crime; sometimes at least, firms would face prosecution, qua firms, because they had produced harm in ways that made them blameworthy.

*B. Example: United States v. KPMG LLP*

A similar story is visible in the largest potential case of entity criminal liability since *Andersen*: the troubles of the auditing firm KPMG LLP arising from its tax shelter practice. KPMG recently entered into a comprehensive settlement with the Department of Justice in which prosecution was "deferred" (a felony charge was filed and is pending, but will be dismissed if the firm fully complies with the settlement). In that settlement, the firm admitted criminal wrongdoing in the design and marketing of abusive shelters, agreed to pay over \$400 million in penalties, agreed to cease aspects of its tax work, and consented to intrusive oversight of its tax practices by an outside monitor with considerable powers.<sup>76</sup>

Though a trial might have revealed fully whether the criminal conduct of KPMG's tax partners could be said to have been a product of the firm,<sup>77</sup> the settlement, and limited public documents, strongly imply that the KPMG case is like *Andersen*, and

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advance of trial, the firm considered bankruptcy filing and selling business units).

74. A search in the LexisNexis News database for all documents containing all of the terms "Andersen," "Enron," and "obstruction of justice" between January 1, 2002, and June 30, 2002 (roughly the period from revelation of Andersen's document destruction through the conclusion of the criminal trial) produces results numbering over the limit of 3000 at which LexisNexis terminates a search. A LexisNexis search using the same terms during the same period in just *The New York Times*, *The Wall Street Journal*, *The Washington Post*, and *The Los Angeles Times* produces 1581 results.

75. See Moniea Langley, *Behind Citigroup Departures: A Culture Shift by CEO Prince*, WALL ST. J., Aug. 24, 2005, at A1 (reporting that in response to a series of regulatory problems, the new CEO of a massive financial services firm emphasized "shoring up the firm's reputation and regulatory relations with a new concentration on internal controls and ethics"); Floyd Norris, *Who Killed Andersen? It Was Suicide*, N.Y. TIMES, June 3, 2005, at C1 (reporting that a twenty percent increase in incidence of public companies' financial restatements from 2003 to 2004 suggests that the remaining major audit firms are more willing to stand up to clients in the wake of Andersen's collapse); Kara Scannell, *KPMG Apologizes for Tax Shelters*, WALL ST. J., June 17, 2005, at A3 (reporting that the audit firm quickly took responsibility for illegal conduct of partners involving abusive tax shelters and obstruction of justice when it was revealed that the government was considering criminal indictment of the firm, reflecting "a broader change in attitude among corporations facing regulatory scrutiny, with many racing to cooperate by turning over damaging information and jettisoning culpable employees").

76. Agreement on Deferred Prosecution, U.S. Department of Justice-KPMG LLP, Aug. 26, 2005 (on file with author) [hereinafter KPMG Settlement].

77. More of that story might be revealed if there is a trial of the numerous individuals who face criminal charges for the shelter abuses. See Indictment, *United States v. Jeffrey Stein*, No. 05 Crim. 888 (S.D.N.Y. 2005) (on file with author).



perhaps even more institutionally anchored. KPMG admitted that it “[a]ssisted high net worth United States citizens to evade United States individual income taxes on billions of dollars in capital gain and ordinary income by developing, promoting[,] and implementing unregistered and fraudulent tax shelters.”<sup>78</sup> It further admitted that the “conduct was deliberately approved and perpetrated at the highest levels of KPMG’s tax management, and involved dozens of KPMG partners and other personnel.”<sup>79</sup> Many of these partners, KPMG admitted, were promoted to leadership positions and were compensated for their aggressiveness in marketing shelters.<sup>80</sup> To the extent the firm had any controls in place against such conduct, the firm admitted that tax managers were permitted to override those controls.<sup>81</sup> KPMG further admitted that it took extensive steps, through the actions of numerous partners, to conceal the abusive shelters from regulators and to thwart later regulatory inquiries into its shelter activities.<sup>82</sup>

A congressional subcommittee that investigated KPMG’s shelter activities concluded that the firm “pressured its tax professionals to generate new ideas, move them quickly through the development process, and approve, at times, illegal or potentially abusive tax shelters.”<sup>83</sup> Documents uncovered by this subcommittee revealed senior KPMG partners pressuring employees to “sell, sell, sell”; observing that “[w]e are dealing with ruthless execution, hand-to-hand combat, hlocking and tackling. Whatever the mixed metaphor, let’s just do it.”; and concluding in one instance that “we should be paid a lot of money here for our opinion since the transaction is clearly one the IRS would view as falling squarely within the tax shelter orbit.”<sup>84</sup> One expert, who closely examined one of the shelters that KPMG admitted was fraudulent, concluded, “KPMG culture considered the shelter to be fair game to apply against the United States, whereas the tax profession as a whole has reached a consensus . . . that the shelter did not meet minimum professional standards.”<sup>85</sup>

KPMG, unlike Andersen, decided to handle its criminal enterprise liability through settlement.<sup>86</sup> The KPMG settlement, though not unprecedented in cases of potential

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78. KPMG Settlement, *supra* note 76, Statement of Facts ¶ 2.

79. *Id.* at ¶ 3.

80. *Id.*

81. *Id.* at ¶ 4.

82. *Id.* at ¶¶ 23–24.

83. PERMANENT SUBCOMM. ON INVESTIGATIONS, THE ROLE OF PROFESSIONAL FIRMS IN THE U.S. TAX SHELTER INDUSTRY, S. REP. NO. 109-54, at 6 (2005).

84. Calvin H. Johnson, *Tales from the KPMG Skunk Works: The Basis-Shift Shelter*, 39 TAX NOTES 435, 436 Aug. 1, 2005.

85. *Id.* at 437; see also Lynnley Browning, *How An Accounting Firm Went from Resistance to Resignation*, N.Y. TIMES, Aug. 28, 2005, at 1 (quoting a former member of KPMG board as saying, “We came to the party late. We drank more, and we stayed longer.”).

86. Andersen rejected offers of deferred prosecution settlements both before and after indictment, on the ground that any admission of criminal fault (of the type KPMG made unambiguously) would doom the firm. One difference between the two cases might be the extent of potential civil liability each firm faced. An admission of criminal obstruction of justice might have hobbled Andersen in litigating multi-billion-dollar civil class action claims for accounting fraud filed on behalf of Enron shareholders. KPMG’s civil liability runs only to those taxpayers who purchased, and relied to their detriment, on the abusive shelters. See also *infra* note 153 (further discussing civil-criminal interactive effects).

entity criminal liability, is remarkable for how far it extends beyond monetary sanctions. It requires KPMG to abandon numerous components of its tax practice; it imposes minimum thresholds of likelihood of success that must be met for KPMG to provide any client with an opinion supporting a tax position; it creates a mechanism for centralized review and approval of all significant tax opinions generated within the firm; it requires KPMG to implement and maintain a new compliance and ethics program; and it imposes an independent monitor on KPMG, for a period of at least three years, who has access to all firm records and personnel, powers to review compliance programs and personnel decisions, and duties to report regularly to the court and prosecutors.<sup>87</sup> The KPMG settlement appears to be designed, above all, to cause fundamental institutional change, through both its reform measures and its requirement that KPMG fully concede at the outset, to itself and the public, that the criminal conduct of its partners was, in part, the *firm's* responsibility.

### *C. Questions About Contemporary Entity Criminal Liability*

Both *Andersen* and *KPMG* illustrate that institutional forces and institutional blameworthiness, not mere agency relationships, shape the contemporary practice of imposing criminal liability on firms. Neither result examined here—the highly public and reputationally important resolution of a dispute over whether a firm was responsible for producing its agents' bad acts, or the reform of a firm to ensure that it produced no further criminality—would have been possible in the absence of a blame-driven practice of entity criminal liability.

The features of organizational criminal cases like *Andersen* and *KPMG* call for evaluation of several phenomena, and their interaction, in both social practice and legal practice. Such cases imply a series of questions. As a matter of social fact, can we say that institutions produce crime? Do we have a settled practice of, in some instances, judging institutions responsible for criminal behavior? If both of these phenomena exist, are they linked? Does blame tend to arise when institutions actually produce crime?

Does the legal practice of blaming institutions involve de facto standards of institutional responsibility, even though its de jure scope is simple agency liability? What might imposition of institutional blame through legal process, and particularly criminal process, add to the social phenomenon of blaming organizations?

We then need to ask what effects a legal practice of institutional blaming might have on human behavior. That is, what messages might individuals take from the imposition of criminal liability on the institution, and how might those messages affect future conduct? Are such effects desirable, and not outweighed by any costs they entail? Finally, if the legal practice is found to be influential and desirable, we can ask whether any civil or regulatory regime could have similar effects and, if not, what regime of criminal law might optimally produce such effects.

This Article will proceed through these questions, in an effort to specify the justification for criminal enterprise liability and to suggest how the contours of liability might be refashioned to better fit and serve that justification. Doing so, it is hoped, will suggest a means of putting this somewhat troubled subject to rest.

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87. KPMG Settlement, *supra* note 76.

## II. FUNCTION OF ENTITY CRIMINAL LIABILITY

In this Part, I will argue that the social practice of sometimes blaming institutions for the wrongdoing of individuals has foundation and explanation. Institutions influence people in ways that sometimes make it rational to blame institutions for what people do. Criminal legal process, I argue, gives communicative force to an instance of institutional blame and provides an external viewpoint that is inaccessible to an institution's members.

Further, the criminal process can impose a unique form of reputational sanction, the effects of which can flow through to institutional members in ways that promise to deter individual wrongdoing and promote group endeavors toward compliance. No non-criminal legal process can fully replicate these effects.

In this Part, I will also consider some countervailing considerations, such as the concern that enterprise liability's effects may unfairly harm "innocents." I will demonstrate why these considerations do not call for the wholesale rejection of entity criminal liability. Finally, I will summarize my analytical conclusions and describe areas in which empirical information is lacking and could assist more decisive resolution of the problem.

### A. *The Social Practice of Blaming Institutions for Crime*

It is a fact of contemporary life that our conception of responsibility includes beliefs about institutional responsibility.<sup>88</sup> When we say, in a matter of importance involving serious harm, that "the school knew" or "the power company ignored" or "the manufacturer covered up," we mean much more than that somebody who worked there knew, ignored, or covered up.<sup>89</sup> We mean something about the entity qua entity. McDonald's markets. The Pentagon conceals. The police force refuses. The church enables. The university discriminates. And so on. This is our discourse about how

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88. See PETER CANE, *RESPONSIBILITY IN LAW AND MORALITY* 4–6 (2002) (explaining that "conventional" responsibility is "responsibility practices and . . . the concepts and ideas of responsibility on which they are based," that is, "a set of social practices"); D.E. Cooper, *Collective Responsibility*, in *COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS* 35 (Larry May & Stacey Hoffman eds., 1991) (Because "[b]laming attitudes are held towards collectives, as well as towards individuals," we must decide whether (1) such ascriptions are misuses of the term "responsible," (2) such ascriptions are reducible to statements about individual responsibility, or (3) collective responsibility is not reducible to individual responsibility.); Nicola Lacey, *Responsibility and Modernity in Criminal Law*, 9 J. POL. PHIL. 249, 274–75 (2001) ("[T]he concept of responsibility can best be interpreted in relation to the social practices out of which it arises. . . . [O]nce we let go of the metaphysical fantasy that responsibility just 'is' a certain kind of thing, and think instead of responsibility as a normative device—a matter of construction and ascription—then we can begin to ask common questions about responsibility across social institutions.").

89. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1517–19 (2000) (arguing that "all that is required for collectives to be subject to expressive theories of reason and morality" is that members are jointly committed to expressing a mental state "as a body" rather than as a collection of unilateral acts).

entities function in society. Working out ground rules for such talk is unnecessary. The words themselves show that we understand entities to exist independent of individual actors and to be responsible for consequences of actors' conduct.<sup>90</sup> The meaning of such talk grows stronger when we speak this way about whether the school, the power company, or the manufacturer should be criminally convicted for the knowing, the ignoring, or the covering up. There, we mean responsibility.<sup>91</sup>

Consider the difference between two hypothetical cases. In the first, a single driver for Acme Express, speeding to finish her route before an hour at which company policy says points toward qualification for an annual performance bonus must be deducted, strikes and kills a pedestrian. In the second, ten different Acme drivers in ten different cities, over a period of six months, each speeding to complete her route in the allotted time, strike and kill ten pedestrians.

In discussing the first, single-incident case, most people would say, "An Acme driver killed a man," even if it were widely understood that Acme's policy had played some role in fostering the driver's recklessness. In discussing the second, multiple-incident case, most people would say either, "Acme drivers are killing people" or "Acme is killing people." In either explanation of the second case, the import of the statement would be to ascribe causality and responsibility to the institution. It would be nearly impossible to describe the event—ten deaths in ten places with common causation—as a single phenomenon without reference to the institution.

Moreover, in referring to the institution, the description would do more than simply signal the institution's presence. It would begin to implicate the institution. The more deaths caused in this pattern of behavior and the more uniform the pattern, that is, the more it appeared that the institution was at *fault* in what happened, the more the reference to the institution would take on responsibility-ascribing, rather than only descriptive, import. In the strongest case—where Acme continued to push its drivers to hurry, from the fifth death right on through the tenth, without altering its approach—statements like "Acme is killing people" become both more likely to be made and more deeply imbued with ascription of blame.

Of course, people—by what they do or do not do, say, write, and desire—not an "institution" itself, behave and cause consequences.<sup>92</sup> Institutional responsibility for

90. See CANE, *supra* note 88, at 41, 144 ("[I]n day-to-day life we have little difficulty attributing moral responsibility to corporations and other groups, and the law is not alone in recognising group responsibility"; a "humanistic" approach to responsibility is at odds with law and everyday social practice in which people "frequently attribute responsibility to groups" and "have no difficulty with the idea that employers should accept responsibility to repair harm done by their employees in the course of employment."); CHRISTOPHER KUTZ, *COMPLICITY* 192 (2001) ("Political and legal life would be unintelligible and unrecognizable without . . . holistic talk of groups, and without holistic systems of accountability.").

91. Cf. Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility* 4–5 (U. of Mich. John M. Olin Ctr. for Law & Econ. Working Paper Series, 2005), available at <http://law.bepress.com/umichlwps/olin/art38> (follow "download the paper" hyperlink) (arguing that at critical junctures in the history of the corporation over two millennia, the "real entity" theory of corporate form repeatedly has prevailed over "aggregate" and "artificial entity" theories).

92. See, e.g., LARRY MAY, *SHARING RESPONSIBILITY* 75 (1992); CANE, *supra* note 88, at 42 (arguing that incorporation should be seen in terms of regulation of group activity and corporation should be seen as group of persons rather than as non-human person); KUTZ, *supra*

crime arises from institutional effects on *individual* behavior.<sup>93</sup> But we cannot describe institutional effects solely by reference to individuals. Where those effects make the difference in how someone behaves, we need the institutional referent to say so. Consider how we speak coherently and continuously about institutions while membership changes<sup>94</sup> and how we often cannot readily transfer our descriptions of institutions to their constituent members.<sup>95</sup> For example, we sometimes judge a particular place to be “dysfunctional,” and we say that easily, even though we might have no particular disdain (and even great affection) for the people who work there.

Legal analysis, of course, should not accept this social phenomenon without evaluation. We need to ask whether we are dealing with something that is the product of cognitive error and bias, irrationality, or atavism, or whether the social practice is empirically justified.<sup>96</sup> If we satisfy ourselves on this score, we then can move to consider the relevance of the legal process to this practice of institutional blame.

### *B. The Relationship Between Institutions and Crime*

The social practice of institutional blame may be an exception to the fundamental attribution error. Sometimes, it turns out, we do get context. People understand institutional influence, even if they cannot always see it in themselves.<sup>97</sup>

Ample empirical study establishes that people often behave differently—sometimes better, sometimes worse—in institutional settings. The truth is that institutions *do* produce wrongdoing. Instrumental legal analysis often has treated the collective entity solely as a vehicle that the state may wish to employ, through sanctioning, as a surrogate regulator to discourage individuals from pursuing their own preferences in

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note 90, at 112 (“collective action and intention is nothing but the action and intention of participating individuals”).

93. See CANE, *supra* note 88, at 145 (explaining that “because most forms of legal responsibility are ultimately responsibility for human conduct and its outcomes,” law starts with a paradigm of individual responsibility as a precondition, but that paradigm does not mark the boundary of responsibility, since responsibility practices aim to repair harm and groups cause harm).

94. See Cooper, *supra* note 88, at 37; BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 22 (1993).

95. Cooper, *supra* note 88, at 39 (“[T]he description of . . . stew as delicious cannot be reduced to descriptions of each ingredient as delicious.”).

96. Lawrence Solan observes that “people are designed to be moral actors” and the impulse to blame tends to occur “just when our theory of morality says that indignation is appropriate.” Lawrence M. Solan, *Cognitive Foundations of the Impulse to Blame*, 68 BROOK. L. REV. 1003, 1004 (2003). However, perceptions of causation also drive the psychological impulse to blame and “we do not want to blame people for every harm [people] cause, and we want to distinguish among different causal situations.” *Id.* Thus much doctrine corrects for over-blaming and under-blaming. *Id.* (using examples of justification and excuse as correcting for over-blaming, and inchoate liability as correcting for under-blaming).

97. See generally Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383 (2003) (discussing effort to determine where criminal law does and does not adequately account for fundamental attribution error); see also Ferdinand Schoeman, *Statistical Norms and Moral Attributions*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 287, 287–88 (Ferdinand Schoeman ed., 1987) (arguing that law often guards against fundamental attribution error).

ways that harm others.<sup>98</sup> But the complete account of the institution recognizes that it drives individual behavior, not just limits (or fails to limit) it.<sup>99</sup>

Freud described group psychology as “concerned with the individual man as a member of a race, of a nation, of a caste, of a profession, of an institution, or as a component part of a crowd of people who have been organized into a group at some particular time for some definite purpose.”<sup>100</sup> He found its mandate in “the surprising fact” that the person whom psychology understood one way “thought, felt and acted in quite a different way from what would have been expected” as a result of “his insertion into a collection of people which has acquired the characteristic of a ‘psychological group.’”<sup>101</sup>

This understanding of psychology has been durable. “[G]roups are not only external features of the world that people encounter and interact with, . . . they are also *internalized* so that they contribute to a person’s sense of self. Groups define who we are, what we see, what we think and what we do.”<sup>102</sup> A leading, empirically sturdy theory of social psychology examines people’s “social identity” as “their definition of themselves in terms of group memberships” and argues for “more emphasis to the way in which the psychology of the individual is a product of group life and its distinct psychological and social realities.”<sup>103</sup>

98. For a comprehensive survey of such instrumentalist accounts of the entity, see Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345 (2003). Some instrumental accounts recognize that organizations can encourage wrongdoing, through compensation and promotion policies and practices, but such accounts tend to do so under models that consider only economic incentives, not more subtle (and possibly more powerful and intractable) behavioral influences that may operate in institutional settings. See Arlen & Kraakman, *supra* note 71, at 702–03.

99. See, e.g., ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME & HOME BECOMES WORK* 204–05 (1997) (explaining that modern theories of corporate management depart from “Taylorist worldview” of industrial revolution, which was premised on coercion of worker, to “Total Quality” models that teach empowering worker in order to draw worker into firm culture); MAY, *supra* note 92, at 73 (arguing that groups change values of members to breed conformity by (1) structures, procedures, and policies (or their absence) that instill group values, and (2) solidarity, camaraderie, common interest, and alienation from others). These kinds of insights, while gaining influence over time, are not new to the study of crime in business associations. See EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME: THE UNCUT VERSION* 240 (1983) (discussing hypothesis of “differential association,” posited by pioneer in field, that states “criminal behavior is learned in association with those who define such criminal behavior favorably and in isolation from those who define it unfavorably”).

100. SIGMUND FREUD, *GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO* (1921) *reprinted in* 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, 1920–1922, at 70 (James Strachey et al. eds., The Hogarth Press 1955).

101. *Id.* at 72.

102. S. ALEXANDER HASLAM, *PSYCHOLOGY IN ORGANIZATIONS: THE SOCIAL IDENTITY APPROACH* 22 (2001) (emphasis in original).

103. *Id.* at 26; see also John Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 BROOKLYN L. REV. 1177, 1191 (2005) (“When an individual is a member of a group, in the sense that she is committed to the purposes of the group and that a group has tasks to do, the task of the individual is to first become a prototypical member of that group, and then help the group as best she can in reaching its goals . . . . [T]his may mean adopting the moral perspectives of the group.”); Michael A. Hogg, *A Social Identity Theory of*

Group membership serves as the primary means by which people reduce uncertainty about who they are and how they should behave, and decide whether to follow views discordant with their own.<sup>104</sup> The most influential group leaders are those who saliently exhibit characteristics prototypical of the group.<sup>105</sup> This salience empowers them to engage in "entrepreneurship of identity," that is, to manage the group's norms and prototypes through talk that accentuates the prototype, pillories deviants, and demonizes outgroups.<sup>106</sup>

Misbehavior is a common product of the institutional setting that should draw serious concern. People are more dangerous to society when they do bad things together.<sup>107</sup> They are more likely to stray when among peers and more likely to hurt others more seriously when acting together.<sup>108</sup> As John Darley summarizes from a wealth of study on this subject, "[M]any evil actions are not the volitional products of individual evildoers but rather essentially organizational products that result when complex social forces interact to cause individuals to commit multiple acts of terrible harm."<sup>109</sup> An obvious point (but one that bears repeating, given that questions of how

*Leadership*, 5 PERS. & SOC. PSYCH. REV. 184, 186–88 (2001).

104. See, e.g., Dominic Abrams, Margaret Wetherell, Sandra Cochrane, Michael A. Hogg & John C. Turner, *Knowing What to Think by Knowing Who You Are: Self-Categorization and the Nature of Norm Formation, Conformity and Group Polarization*, 29 BRIT. J. SOC. PSYCH. 97, 98 (1990) ("[S]ocial influence results from a process of self-categorization whereby the person perceives him- or herself as a group member, and thus as possessing the same characteristics and reactions as other group members."); *id.* at 98 ("information is more influential when it has come from consistent in-group members than from other sources"); Hogg, *supra* note 103, at 186–88.

105. See Hogg, *supra* note 103, at 188–93.

106. *Id.*

107. See CANE, *supra* note 88, at 145 (explaining that human beings, as social animals, combine in groups to do more, both good and ill, than they can achieve alone); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L. J. 1307, 1316–24, 1355–58 & nn.25–30 (2003) (citing some of the sources at *supra* notes 101–06 and others as among a "wide body of psychological research over the last century reveal[ing] that people tend to act differently in groups than they do as individuals," and supporting law's treatment of conspiracies as specially dangerous and harmful).

108. See Darley, *supra* note 103, at 1186–92 (arguing that people, including people who are not generally unethical, are more recruitable into corrupt practices than we would think because unethical actions often marginally expand on prior actions that were approved by the group, and people attempt to become prototypical group members by following cues sent by actions of prototypical group members); SUSAN P. SHAPIRO, U.S. DEP'T OF JUSTICE, THINKING ABOUT WHITE COLLAR CRIME: MATTERS OF CONCEPTUALIZATION AND RESEARCH 7 (1980) (arguing that role of organizations in illegality should be made explicit because white-collar crime exploits the fact that "[o]rganizations generate new occasions for illegality, many of which are different from traditional criminal opportunities"); Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1319 (2001) (arguing that doctrine of corporate criminal liability constitutes recognition that "responsibility, in some settings at least, is not fully captured by the model of individual moral agency that underlies traditional criminal law" and that "to prevent crime, we need to direct liability not only at the individual actor, but at the social context in which she acts—the social context that shares responsibility for her criminal conduct").

109. John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13, 13–14 (David M. Messick & Ann

to prevent self-interested agent misconduct tend to dominate discussions of enterprise liability) is that agent crimes often *benefit* organizations and are committed for that reason.<sup>110</sup>

For several reasons, the problem of misconduct in organizational settings can be virulent. People tend to experience a diffused sense of responsibility in groups and therefore may be even less likely to prevent, halt, or refrain from wrongdoing than in non-group settings.<sup>111</sup> At the same time, there is a "contagion" of sentiment and acts in the group setting, driven by an urge "to remain in harmony with the many," which may be especially responsive to "cruder and simpler emotional impulses."<sup>112</sup> Put another way, "[w]hen we act together, it becomes easy to inhabit an essentially *bureaucratic* frame of mind, in which ultimate ends are less salient than the instrumental procedures used to effect those ends."<sup>113</sup>

In addition, the interaction of cognitive dissonance with pressures on the individual in the group setting can make it extremely difficult to recognize, reveal, or stop harmful behavior once it begins.<sup>114</sup> An institutional actor who commits a first, perhaps small violation of a norm or rule is likely to rationalize the violation to herself in order to avoid signaling guilt and insecurity to peers and supervisors. Incrementally worse violations will be equally rationalized in order to maintain cognitive consistency. As the seriousness of violations increases, the actor may eventually appreciate the depth of her predicament and take increasing risks, causing greater harm, in order to avoid detection of what began as a minor transgression. Something like this dynamic might explain how executives at major multinationals like Enron and Worldcom pursued massive, snowballing accounting frauds in efforts to keep their companies afloat.<sup>115</sup>

The bearing of psychological and behavioral insights on the problem of organizational crime is clear enough without having to go as far as Freud's questionable conclusions that "in a group the individual is brought under conditions which allow him to throw off the repressions of his unconscious instinctual impulses" and that group psychology involves "a state of regression to a primitive mental activity" characteristic of "the primal horde."<sup>116</sup> The institution, of course, also

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E. Tenbrunsel eds., 1996).

110. Krawiec, *supra* note 14, at 27–29; see also Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315, 319 (1991) (arguing that although corporate crime sometimes benefits a firm, it is a mistake to treat management criminality as altruistic toward shareholders since "the real aim of criminal behavior by organizations is to advance the careers of the responsible corporate actors").

111. See MAY, *supra* note 92, at 73; John M. Darley, *Social Organization for the Production of Evil*, 3 PSYCH. INQ. 199, 204 (1992) (reviewing studies concluding that participation in mass murder "need not require emotions as extreme or demonic as would seem appropriate for such a malignant project" and that "ordinary people can commit demonic acts"); see generally STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974).

112. FREUD, *supra* note 100, at 75 (quoting LeBON, *PSYCHOLOGIE DES FOULES* 33 (1895)); *id.* at 84.

113. KUTZ, *supra* note 90, at 150 (emphasis in original).

114. See Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 89–90.

115. See Macey, *supra* note 110, at 326–29 (arguing that management in firms threatened with insolvency will have a strong incentive to commit crimes to stave off insolvency, in order to avoid the stigma associated with management of insolvent firms).

116. FREUD, *supra* note 100, at 74, 88, 122. Freud went a further step: "[A] group is clearly



“underpins people’s ability to achieve social cohesion, to communicate effectively, to influence and persuade each other, to act collectively, and to go beyond the call of duty.”<sup>117</sup>

The intuition beneath our social practice of blaming institutions may result from keen awareness of how institutions subtly shape human behavior or it may be pure intuition, the inevitable product of experiencing modern life as heavily determined by the corporation, the school, the bureaucracy, the charity, and so on. Either way, our blaming practice is rooted in the reality that, in the modern world, organizations do influence behavior.

At a time when institutions of employment increasingly dominate Americans’ lives—indeed, may be the primary engine of socialization—the available evidence suggests that this fact about individual behavior will only grow more important.<sup>118</sup> We thus can proceed with analysis of entity criminal liability in confidence that institutions can cause harm and therefore can be blameworthy. The next question is what the law might add to the picture.

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held together by a power of some kind: and to what power could this feat be better ascribed than to Eros, which holds together everything in the world?” *Id.* at 92.

117. HASLAM, *supra* note 102, at 26. There also is support in rational choice modeling for concluding that organizational culture, at least in organizations that profit from correct decisions—not just personal efforts—will tend to be homogeneous and determine individual actions within organizations, not necessarily resulting in efficient outcomes. See Eric Van den Steen, *On the Origin of Shared Beliefs (and Corporate Culture)* (MIT Sloan School of Management, Working Paper No. 4553-05, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=793884](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=793884); George A. Akerlof & Rachel E. Kranton, *Identity and the Economics of Organizations*, 19 J. ECON. PERSP. 9 (2005) (demonstrating how rational choice modeling of organizational behavior could be modified to account for how organizations alter individuals’ senses of identity in ways that change individual preferences, including by leading workers to desire to work harder without regard to increased pay); Donald C. Langevoort, Opening the Black Box of “Corporate Culture” in Law and Economics (Sept. 20, 2005) (unpublished working paper), available at <http://www.law.umich.edu/CentersandPrograms/olin/papers/Fall%202005/langevoort.pdf> (describing how emerging literature in economics treats firm culture as a coordinating device that is efficient because it facilitates cooperative exchange within an organization and reduces defection behaviors). Management study is another field that coalesces around the existence of organizational culture and effects. See, e.g., EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP (3d ed. 2004).

118. See, e.g., ELLEN GALINSKY, JAMES T. BOND, STACY S. KIM, LOIS BACKON, ERIN BROWNFIELD & KELLY SAKAI, FAMILIES AND WORK INST., OVERWORK IN AMERICA: WHEN THE WAY WE WORK BECOMES TOO MUCH 2, 7–8, 14 (2004) (finding that one-third of employees are “chronically overworked”; 26% reported being overworked “often” or “very often” in month preceding study, 36% reported that they did not plan to use their full vacations, and 21% reported working during vacations); HOCHSCHILD, *supra* note 99, at 6, 203, 219 (finding that percentage of married mothers in workforce rose from 12.6% in 1950 to 69% in 1994; in study of employees at major United States corporation with “family-friendly” policies, finding most were unable to escape work-centered lives despite strong desires to live family-centered lives; concluding that “[t]he takeover of the home by the workplace is . . . an unacknowledged but fundamental part of our changing cultural landscape”); JULIET B. SCHOR, THE OVERWORKED AMERICAN 1, 25, 29 (1991) (finding that the amount of time Americans spend at work increased over a twenty year period, to about 163 additional annual hours per worker, despite doubling of average worker’s productivity level and growth of women in workforce).

*C. The Legal Practice of Blaming Institutions for Crime*

A social practice of blaming institutions does not necessarily imply a *legal* practice of institutional blame. One might question whether we ought to treat our legal practice as part of the blaming process, rather than as a separate enterprise concerned only with apportioning costs attributable to institutional activities. Indeed, even if blaming at the institutional level furthers policy objectives by inflicting sanctions on the institution in the form of reputational effects, as will be fully developed in Part II.D, economic theory explains reputation as market-determined.<sup>119</sup> So why not leave it to firms' customers to impose whatever reputational sanction may be due and desirable?

Even a thin account of the function of the legal process—setting aside the existence of sanctions and the influence of legitimacy—finds that the legal system has a monopoly on a particularly important and strong form of normative expression.<sup>120</sup> Such a functionalist account shows that a society will create courts to have a source of widely available signals that assist individuals with conflicting views in achieving mutually advantageous equilibria.<sup>121</sup> Put in terms of the present subject, a *legal* practice of institutional blame might help address conflict in differing views about whether institutional blame is due.

If we relax the control on legitimacy, still leaving out sanctions, the case for law's role strengthens. The legal process monopolizes its particular form of expression because people confer special status on legal judgments. They do this not only because it is useful to have a single source of available signals, but also because it is useful to have a particular way of speaking collectively. A legal judgment of institutional blame speaks much louder and more definitively than does a series of individual attitudinal adjustments toward the institution. The legal judgment's purpose is, in part, to say that the conclusion of blameworthiness sweeps socially and that, measured fairly and analytically according to agreed ground rules, the conclusion has merit. In turn, because legal process—especially criminal legal process—speaks in this authoritative way, its expression gets attention, and therefore is particularly influential in shaping people's behavioral preferences, and so on.<sup>122</sup>

This account both explains the existence of a legal practice of institutional blame and is explained *by it*. As will be fully discussed in Part II.D, the serious attention that an entity criminal prosecution garners among institutional managers, and their deep worry about reputation, evidence that the social meaning of a legal judgment of

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119. See, e.g., Carl Shapiro, *Premiums for High Quality Products as Returns to Reputations*, 98 Q.J. ECON. 659, 659–60 (1983).

120. See Richard H. McAdams, *Expressive Adjudication* (Illinois Law & Econ. Working Paper Series, Paper No. LE04-006, 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=601341](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=601341).

121. *Id.* at 33–57.

122. Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 17–18; see also Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 212 (1996) (arguing that in a diverse society, criminal law may be the only mechanism that can transcend social differences to build norms and thereby harness the power of personal relationships and morality in order to promote compliance).

institutional *wrongdoing* exceeds the social meaning of just an institutional *wrong*. For example, there would be a significant difference in impact between wide circulation of allegations (or even strong conclusions) that tobacco companies had deliberately designed and manufactured cigarettes to enhance their addictiveness and a civil—or, even more so, criminal—legal judgment to that effect.<sup>123</sup>

The point is nearly too obvious: unless it lacks any legitimacy, a system for settling disputes will send messages that are stronger and clearer than any messages sent when a matter is in an *ex ante* state of dispute, before the system has settled it. Knowing this, persons with a stake in the dispute—not just because of penalties for losing it, but because of desire to have their views about the dispute accepted by others—will have strong incentive to avoid adverse judgments by the legal system.

A legal judgment about institutional fault may have a strong influence not only because its authority sweeps widely across society, but also because it is an external assessment of an institution. As follows from the discussion of institutional behavior in Part II.B, people have difficulty seeing institutional influence on themselves. If not, problems of institutionally produced wrongdoing might not arise in the first place. It is the subtlety of group influences that explains how they succeed in altering people's behavior, as measured against individual behavioral baselines, in ways that escape notice and therefore do not trigger resistance or corrective action. By definition, in a case of serious institutional lapse, harm results because the only group that could have averted it, the insiders, failed to see a looming threat. A legal judgment that imposes blame at the institutional level thus is apt to communicate an external identification and description of flawed institutional influence in a manner that alerts and reorients observers, and especially participants, to a problem that produced harm largely because it was not seen clearly.<sup>124</sup>

Here we should introduce a problem that will remain something of a puzzle throughout this Article's analysis. How much does the influence of a *legal* judgment of institutional blame depend upon the *public* broadcast of that legal judgment? For the most part, the kinds of cases this Article has discussed and will continue to consider (*Andersen, KPMG*, the Acme Express example, the tobacco example, and so on) have a public quality in common. They are important to everybody, not just to participants in their legal outcomes.

One tempting way to define these cases as a class might be to say that they are scandals. But the category is too broad. A scandal can involve anything from a serious question of institutional failure and harm to a notable person's peccadillo. While media attention might be necessary in a mass society to make entity cases matter, their special character is not their tendency to sell papers. They happen to sell papers because people worry about what these cases say about important and trusted entities, about

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123. Cf. Richard A. Nagareda, *Outrageous Misfortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121, 1158 (1998) (arguing that because the tort system is used in cases of "outrageous" mass harm to assess moral blame, at times without regard to proof of causation; this function properly belongs in legislative and prosecutorial domains of public law where jury blaming can be controlled).

124. See Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1220 (1982) (arguing that entity convictions can strike at the desire for power and prestige and signal a need for critical reappraisal and correction).

how we organize ourselves and behave in groups, and about how to pursue institutional reform.<sup>125</sup>

The relationship between the public quality of many of these cases of institutional blame and the functions and justifications of entity criminal liability, as we will see, is complicated and not quantifiable. For now, it suffices to note that legal judgments of entity fault will have greater effect and wider influence in cases of greater public attention, and to consider how a decision to emphasize the blaming function of entity criminal liability as a distinguishing characteristic might make the relative publicity of a case more important to a case's justification.

#### *D. Reputation and Deterrence*

Now we can examine entity criminal liability with greater precision, by considering effects of its imposition. I will argue that imposing entity criminal liability may inflict reputational harm at the level of the institution and that reputational effects are likely to flow through to institutional members in ways that deter wrongdoing and encourage compliance efforts. The following section will advance a thesis of such a reputational and deterrent mechanism, consider evidence of its existence and operation, and describe variables likely to determine its presence and potency.

##### 1. Theory of Reputational Effect

Consider how legal imposition of entity blame for crime might influence practical reasoning.<sup>126</sup> Deterrence theory assumes that punishing an individual for a crime sends two messages. The specific message is to the offender: violation causes this pain we are inflicting; if you want to avoid this pain, refrain from violating again. The general message is to others: see this person experiencing pain; you too will experience that pain if you violate.

When criminal sanction falls at the entity level, the reasoning process is likely to differ. Assume—as do virtually all accounts of entity criminal liability that directly culpable individuals should be punished, even if enterprise punishment also is pursued.<sup>127</sup> For those personally punished (especially by imprisonment), the message

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125. A more useful definitional move might be to draw a connection between the entity criminal case that communicates something important about blame and the mass tort case. See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 483–85 (1994) (“What renders a mass tort case different is the degree to which all participants—judges, lawyers, and litigants—must deal with the case as an institutional problem with sociopolitical implications extending far beyond the narrow confines of the courtroom.”).

126. See Lederman, *supra* note 8, at 314 (arguing that as matter of utility, the question about entity criminal liability is whether it inhibits criminal activity of *individuals* involved in the operation of an entity).

127. Cf. O’Sullivan, *supra* note 59, at 22–23 (finding that managers would prefer firm sanctions to individual sanctions if given choice). Deterrence would be hard to optimize in the absence of individual sanctions, and a message that entity sanctions can displace individual sanctions could severely undermine deterrence. The latter concern likely motivates the treatment of war crimes, in which any message that “just following orders” supplies an excuse is strongly discouraged. The special emphasis on individual responsibility in the war crimes context likely

conveyed by individual criminal liability is likely to crowd out most or all of any message imparted by entity liability. Entity liability thus has greatest import for those not personally liable for the crime or not prosecuted, for whom any individual punishments cause no pain and operate only as a general deterrent, that is, as a warning to avoid the fate of punished colleagues.

Entity liability can inflict pain on organizational members not individually liable for the crime. Of course, that pain may be simply monetary, as in the imposition of costs that reduce profits enjoyed by shareholders or cause cost-cutting that reduces agents' compensation or terminates their employment. But such financial pain can be as easily caused by civil liability or market sanctions, and such non-criminal sanctions easily can eclipse any fines associated with entity criminal liability. Criminal liability is distinguished by its communicative force. By signaling entity fault for crime, criminal liability is likely to convey that a particular institution may be flawed, unreliable, and apt to generate future harm. Such a message is likely to cause decline in the organization's reputational capital.

Organizational participants are likely to feel flow-through effects of such reputational decline in at least two ways. First, their own reputations may suffer. Upon observing an instance of entity fault for criminality, persons may be less willing to contract with, employ, and rely upon individuals known to have contributed, in some way at least, to the formation of institutional conditions that produced that criminality. Individuals who wish to avoid the sting of such reputational effects have incentive to encourage and monitor colleagues' compliance with the law.

Second, reputational effects on an entity may impact feelings of self-worth of organizational members. In a society in which people's lives are dominated, even defined, by their institutional affiliations, most people (and certainly all reputationally sensitive types)<sup>128</sup> prefer to think of their institutions as good. People are happier, and more likely to want to go to work in the morning, when they believe that their organizations are accomplishing positive things.<sup>129</sup> Being told the contrary—

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is connected to the circumstances that military organizations operate exclusively on orders (firms do so only partially), punish breach of orders criminally (firms do so only through employment sanctions), and authorize their members to engage in violence (only police departments also do so). These factors strongly increase concern about the potential effects and results of group dynamics.

128. See Kadish, *supra* note 59, at 437 (arguing that deterrence works not just because of the fear of getting caught but also because of the desire not to violate law, especially among people who think of themselves as "respectable"). As with white-collar criminalization generally, it makes sense when analyzing entity criminal liability to take account of the particular characteristics of its audience. See U.S. Department of Justice Press Conference Re: Charges in Enron Case Involving Andrew and Lea Fastow, FED. NEWS SERV. (Jan. 14, 2004) (reporting remarks of Deputy Attorney General noting that white-collar offenders are "exquisitely sensitive" to deterrence).

129. See KUTZ, *supra* note 90, at 137–202. Kutz questions whether entity blame is overly diffused and therefore unable to operate effectively on the agents, especially the more senior ones, who would be capable of reforming the entity. See also Kadish, *supra* note 59, at 434 (arguing that given the diffusion of responsibility, it is "unlikely" that stigma is felt by individuals). But Kutz grants that "a holistic reproach" may change behavior within a collective, destroy a collective, send a message to other collectives, and signal to members that they should relocate. He concludes that "holistic obligations" may "pose deliberative problems for participants, forcing them to think through the significance of their relationship to the collective

particularly by an authoritative source like the criminal law—is likely to induce people to take steps to alter their organizations in order to correct their own and others' perceptions that their organizations are deficient.<sup>130</sup>

A message of institutional fault says something different than a message of individual fault: not just that somebody pursued faulty preferences, but that the group arranged itself badly. Such a message is apt to lead to reevaluation of group arrangements, not just the rethinking of individual choice that might follow imposition of criminal liability on a person. Indeed, introspection within institutions is an adaptive behavior that can be critical to the success and, after failure, the recovery of firms.<sup>131</sup>

The extent of both of these effects of reputational sanction on a firm is likely to vary according to a given individual's position within the organization. The more senior and responsible a person, or the more closely associated with the locus of the wrongdoing in the firm, the more likely that others will conclude that the message of firm fault conveys something significant about the individual. Likewise, more senior people and people more proximate to the wrongdoing are likely to care more about maintaining good firm reputation and are more capable of altering behavior and culture to address the situation that led to the wrongdoing. Low-level employees with little discretion or influence are unlikely to be able to do anything about institutional wrongdoing and, for the same reason, are unlikely to suffer much reputational effect.<sup>132</sup>

Flow-through reputational effects will be strongest for firm management but not limited to that group. Consider, for example, the *Andersen* case. One might conclude that a variety of Andersen's employees suffered reputational effects from the imposition of criminal fault on the firm for the obstruction of the SEC inquiry into Enron, including: those such as Temple who directly instigated destruction of Enron documents; senior managers who participated in the Enron crisis and heard discussion of using the firm's document policy but did not ensure that improper destruction was not occurring; other senior managers who participated in instilling an attitude that document destruction in anticipation of legal proceedings was savvy behavior; and even lower-level employees who, without questioning the propriety of the instructions or their own conduct, responded to directives regarding the firm policy by destroying Enron documents, at a time when they knew legal proceedings were imminent.

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structure, and to act on the basis of that understanding." KUTZ, *supra* note 90, at 202.

130. See O'Sullivan, *supra* note 59, at 41 (arguing that deterrence in the entity context should be viewed as "catalyzing deterrence" because it incentivizes rather than inhibits); Fisse, *supra* note 124, at 1160 (explaining that individual punishment says "refrain from committing that offense," which calls only for self-denial, while corporate punishment says "refrain from committing that offense and take such steps as are necessary organizationally to guard against repetition," which calls for an affirmative response). But see PACKER, *supra* note 8, at 361 (arguing that considering the reputational effects from the "stigma of conviction itself" is largely irrelevant to the debate over entity criminal liability because "there is very little evidence to suggest that the stigma of criminality means anything very substantial in the life of a corporation").

131. See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1757–59 (2001) (arguing that firms that encourage trust among participants enjoy evolutionary advantage because increased trustworthiness makes costly opportunism less likely).

132. Cf. *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (holding that liability under the Racketeer Influenced and Corrupt Organizations Act (RICO) does not extend to persons who play no role in the operation or management of an enterprise).

This flow-through reputational effect of entity criminal liability likely also works generally beyond the sanctioned organization's participants. As Jean Hampton explains, punishment's lesson is one of public moral education; that is, it is directed not only to the wrongdoer but also to society.<sup>133</sup> A distinguishing function of the criminal law is its authority to shape preferences for legal compliance.<sup>134</sup> Education and shaping of tastes about institutional behavior should be valuable to a society in which socialization, at least for adults, takes place largely within institutions. Criminal law cannot and should not do all of this work, any more than with individual behavior outside the institutional setting. It probably should do little of it.<sup>135</sup> But there is a margin along which it can, should, and does operate.

Observable reputational effects from imposition of criminal responsibility on a firm likely will cause others to reflect upon their own institutions and their relationships to those institutions in ways that will promote avoidance of institutional conditions that can lead to crime. Managers will tend to understand their mandate to protect reputational capital as requiring them to promote responsible, compliant behavior within their firms. In some instances, such effects may substantially alter behavior within an entire industry to an extent inconceivable with individual liability except through massive prosecution efforts that usually would be neither feasible nor desirable.

Nobody wants to work at a place with a reputation for fostering criminality, for reasons of both self-image and economic self-interest (preservation of employment that could be jeopardized if a business failed, prevention of taint to one's resume, and so on). Even rank-and-file employees may respond to a visible instance of reputational damage from crime in another institution by engaging in introspection, discussion, and even change in their workplaces.

Evidence shows that the American workplace has become *the* central locus of discourse in our polity.<sup>136</sup> At the same time, decline in the presence of other centers for the exchange, creation, and implementation of ideas about change has concerned some observers.<sup>137</sup> In a society centered on the workplace, law's most authoritative communications about conduct in the workplace are likely to be highly influential.

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133. See Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 212 (1984); see also JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 69 (1970) ("[P]unishment is a standard vehicle for the expression of resentment of injury received and also (but perhaps much less commonly) for the expression of recognition and disapproval of evil."); Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1182 (2004) ("The educational impact of the criminal law is not a brittle Skinnerian stimulus and response, but rather one that works through a complex process of social interaction.").

134. See Dau-Schmidt, *supra* note 122, at 2–3.

135. See Hampton, *supra* note 133, at 218.

136. See CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 7, 34 (2003); FUKUYAMA, *supra* note 15, at 6; Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 6–7 (2000).

137. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 27 (2000) ("[W]e have been pulled apart from one another and from our communities over the last third of the [twentieth] century."). Putnam, however, rejects workplace dominance as the chief cause of declining community. *Id.* at 203.

## 2. Evidence of Reputational Effect

### a. Management Behavior

What evidence supports the conclusion that imposition of entity criminal liability can have these reputational effects? Start with the behavior of those who should be treated as the experts: firm managers. Managers care intensely about whether their entities will be tagged with criminal responsibility for wrongdoing.<sup>138</sup> This worry cannot just be about the cost of criminal monetary sanctions since the potential civil damages in such cases almost always far outstrip them.<sup>139</sup> Managers and their counsel apparently do not see civil and criminal sanctions as substitutes, and for good reason: it has been reported, for example, that no major financial services institution in the history of United States markets has survived indictment.<sup>140</sup>

No doubt managers have concluded that the constituents and audiences they are compensated for reading correctly—consumers, purchasers and sellers of securities, the media, government regulators, and so on—view the reputational impact of a criminal prosecution as informationally very important.<sup>141</sup> This must be because these

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138. The question of whether prosecutors will enter the scene, or whether the firm's problem will be limited to a garden-variety government regulatory matter, is among managers' main worries when a crisis involving wrongdoing hits a firm. See Jennifer Arlen, *Evolution of Corporate Criminal Liability: Implications for Managers*, in LEADERSHIP AND GOVERNANCE FROM THE INSIDE OUT 191 (Robert Gandossy & Jeffrey Sonnenfeld eds., 2004); Solomon & Squeo, *supra* note 3, at A1 ("Businesspeople and corporations are at greater risk of criminal liability than ever before . . . . Faced with this environment, companies that might once have resisted government investigations now scramble to cooperate. Corporate directors in particular have grown leery of appearing to defend any sort of impropriety.").

139. Consider the following example. Suppose (this was not proved or charged) that Citigroup's assistance to Enron in structuring misleading financial transactions was criminal. The utmost the United States Sentencing Guidelines could have provided as a fine range in such a criminal case would have been \$145 million to \$290 million. See U.S.S.G. MANUAL §§ 8C2.4–8C2.6 (2004). In the absence of even an allegation of criminality and long before trial, Citigroup settled civil charges for its conduct relating to Enron for \$2 billion. See Julie Creswell, *Citigroup Agrees to Pay \$2 Billion in Enron Scandal*, N.Y. TIMES, June 11, 2005, at A1. Some might speculate that management fear of criminal charges alternatively stems from the potentially devastating preclusive effect of criminal findings in parallel civil litigation. But a criminal indictment has no preclusive effect, and a criminal judgment must be obtained under a much higher burden of proof (and often a more discriminating legal standard) than a civil judgment. So in any case in which criminal charges are provable, civil liability is highly likely to attach and be costly, regardless of whether criminal charges are filed or proven.

140. See Monica Langley & Ian McDonald, *Marsh Averts Criminal Case with New CEO*, WALL ST. J., Oct. 26, 2004, at A1; Scannell, *supra* note 75, at A3 (stating that "a broader change in attitude among corporations facing regulatory scrutiny, with many racing to cooperate by turning over damaging information and jettisoning culpable employees").

141. See BRENT FISSE & JOHN BRAITHWAITE, *THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS* 243 (1983) (arguing that non-financial impacts of scandals deterred managers from future violations far more than financial penalties); Fisse, *supra* note 124, at 1153 ("Corporations value their prestige so highly that they subsidize image-making as an extensive light industry.").



constituents and audiences ascribe real and distinct meaning to the entity criminal sanction.<sup>142</sup>

Evidence of this belief among managers appears in two established procedural practices in entity criminal liability, both relating to privileges. First, the government expects firms to require employees to cooperate in criminal investigations—that is, to not assert their rights to silence in response to subpoenas and requests for interviews. In order to obtain the benefits of cooperation with the government, principally avoidance or mitigation of entity criminal sanctions, firms typically require such employee cooperation on pain of employment consequence (usually firing).<sup>143</sup> Second, the government asks firms to waive their rights to shield relevant evidence with the attorney-client and work-product privileges, particularly communications among employees and firm lawyers contemporaneous with the conduct under investigation.<sup>144</sup> As with employee interviews, the government's leverage to obtain the waiver comes from the firm's interest in avoiding prosecution by maximizing credit for cooperation.<sup>145</sup>

The practice of entity criminal liability has unique and potent procedural characteristics that encourage firms to disgorge (or even acquire and then disgorge) evidence of criminality that the government might not otherwise obtain.<sup>146</sup> An

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142. This form of argument is as old as the study of white-collar crime. See SUTHERLAND, *supra* note 99, at 54–62 (arguing that the treatment of corporate wrongdoing, such as antitrust violations, through civil rather than criminal legal process wrongly communicates to the public that corporate offenders have not done wrongs deserving of stigma).

143. See, e.g., Robert A. Del Giorno, *Corporate Counsel as Government's Agent: The Holder Memorandum and Sarbanes-Oxley Section 307*, CHAMPION, Aug. 2003, at 22. Job loss is a much more immediate sanction than imprisonment and therefore frequently will weigh heavily in an employee's calculus. See Robinson & Darley, *supra* note 17, at 460 (arguing that offenders discount punishments not likely to be imposed soon). Entity criminal liability thus lessens truth-dampening effects of the Fifth Amendment privilege.

144. See Thompson Memo, *supra* note 60, at 7. The government seeks such waivers for two reasons. The fruits of internal investigations which are almost always conducted by lawyers and therefore otherwise inaccessible, can both speed up an investigation and lead it to evidence of criminality that otherwise might go undiscovered. Additionally, the government needs to chart the contemporaneous involvement of lawyers in the underlying activity under investigation. See, e.g., *United States v. DeFries*, 129 F.3d 1293, 1308 (D.C. Cir. 1997) (holding that good faith reliance on advice of counsel establishes defense to specific intent crimes).

145. See Thompson Memo, *supra* note 60, at 7.

146. See Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship"*, 76 ST. JOHN'S L. REV. 979, 994–95, 1014–15 (2002); William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 646–47 (2001) (arguing that "adjudicat[ion] by a brand of negotiated compliance" now prevails in almost all cases of entity criminal liability). These practices are controversial. The obvious attack, that they do violence to the attorney-client privilege, comes chiefly from the corporate bar. See, e.g., David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 161 (2000) (warning of "impending death" of attorney-client privilege); Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469, 542–48 (2003); Del Giorno, *supra* note 143, at 22; see also Laufer, *supra*, at 648–62 (arguing that practices may drive corporations to engage in "reverse whistleblowing," that is, offer scapegoats to the government in exchange for non-

instrumental regulatory program would tend to welcome these features of entity criminal liability. Except for the balancing that arises when considering special values guarded by privileges, the question is similar to that of sanctions generally: does imposing costs on the firm enhance control of individual conduct?<sup>147</sup> Compelling the entity to disgorge evidence that otherwise would remain under shield increases the probability that wrongdoing will be detected and punished.

These procedural mechanisms have deeper significance than their instrumental rationales. They evidence the import of the social practice of entity blame. The government's procedural leverage tracks the punitive bite of the sanction the firm faces if it refuses to comply. Indeed, if criminal institutional blame were not actually imposed in at least some cases, the leverage would disappear and we would expect firms, at least some of the time, to refuse the government's requests for waivers and evidence.<sup>148</sup> The opposite holds true. Firms routinely require employee cooperation and grant the government its requested waiver.<sup>149</sup> Practitioners will attest that criminal investigative demands (by subpoena or otherwise) elicit far prompter and more serious compliance and that there is far less incentive in the civil context for a corporation to compel its employees to cooperate and to waive privileges. By now it should be clear why this is true. The social stigma of criminal entity blame can hurt firms badly and they badly want to avoid it.<sup>150</sup>

There is at least one more place where we can see that criminal liability means more for firms than just quantity of sanction. Settlement of a case in which entity criminal liability might be imposed sometimes turns on whether a firm is willing to publicly admit responsibility for the criminal conduct of its agents. *Andersen* failed to settle, in spite of non-prosecution proposals discussed both before and after indictment, largely because Andersen was unwilling to make such a statement, while the government insisted that it do so.<sup>151</sup> KPMG, in contrast, achieved settlement only with

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prosecution of entity, even when it may turn out that entity is more culpable); cf. Schoeman, *supra* note 97, at 312 ("[I]f quasi-authoritative social forces have significantly contributed to wrongdoing by themselves falling below a moral threshold, then these authoritative forces lack the standing to blame others for misdeeds attributable to this failing.").

147. See Arlen & Kraakman, *supra* note 71, at 695–97 (arguing that state properly views corporate form as a surrogate to be "harnessed" in "service of optimal deterrence"); *id.* at 754 ("[T]he purpose of corporate sanctions is not to punish wrongdoers but rather to induce firms to detect, report, and punish wrongdoers."); FISSE & BRAITHWAITE, *supra* note 94, at 15.

148. See FEINBERG, *supra* note 133, at 104 ("A statute honored mainly in the breach begins to lose its character as law, unless, as we say, it is *vindicated* (emphatically reaffirmed); and clearly the way to do this (indeed the only way) is to punish those who violate it.") (emphasis in original).

149. See, e.g., Zornow & Krakaur, *supra* note 146, at 153–58; ABA *Assails Sentencing Guideline Comment on Waiver of Attorney-Client Privilege*, 74 U.S.L. WK. 2119, 2120 (2005) (reporting that, according to the ABA, firms waive privilege claims for fear of being seen as uncooperative, which can have "profound effect on their public image, stock price, and creditworthiness" (quoting Letter from Robert D. Evans, Governmental Affairs Director, A.B.A., to U.S. Sentencing Commission (Aug. 15, 2005))).

150. See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2442 (1995); Fisse, *supra* note 124, at 1220.

151. Some might wonder whether Andersen refused to admit responsibility because it did not think anyone committed a crime. But in pretrial negotiations the firm did not seriously dispute

unambiguous admissions that its abusive tax shelters were fraudulent and that the fraud was *caused by the firm*.<sup>152</sup>

If a firm settles a case with a clear admission of wrongdoing, some beneficial message effects are accomplished from the government's point of view, while the firm dampens reputational damage by portraying itself as accepting responsibility, which is essential to the credibility of commitments to reform. Thus there seems to be a coin to the message and reputational effects of entity criminal liability that is partially susceptible to compromise and that enforcers and managers recognize as potent and valuable.<sup>153</sup>

The evidence of reputational effects in management behavior should not be surprising. If institutional blame is a social practice, and imposition of blame inflicts costs, then rational firm managers *will* seek to avoid blame, whether or not it seems rational to them that the entity pay a reputational penalty for a judgment of criminal fault that results from individual misconduct. The more serious and authoritative the blame, the more reputationally costly it is likely to be to the firm, and the more managers will strive to avoid its imposition. Criminal legal blame will be the strongest form of institutional blame, to be resisted most strenuously.<sup>154</sup>

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the government's and most lower federal courts' interpretation of then-existing federal law: that an auditor who suddenly destroys documents relating to a client upon learning of an SEC investigation of that client obstructs justice.

152. See, e.g., KPMG Settlement, *supra* note 76.

153. A problem for future study is how the civil liability system can inhibit beneficial settlements over reputation. By policy, for example, the SEC permits firms to settle allegations of securities fraud while neither admitting nor denying the allegations' truth. The policy is designed to overcome barriers to settlement created by the preclusive effects that a firm's admission can have in parallel private litigation. See, e.g., Jeff Bailey & Lynnley Browning, *KPMG May Dodge One Bullet, Only to Face Another*, N.Y. TIMES, June 21, 2005, at C1 (noting that an audit firm's public acceptance of responsibility for "unlawful conduct" by partners, meant to persuade government to refrain from prosecution, could greatly heighten its vulnerability to costly civil claims). But a policy excusing firms from admission undermines the normative significance of SEC settlements, creating a perhaps perverse incentive for the government to select criminal prosecution over SEC enforcement proceedings. This dynamic can inhibit settlement in cases of criminal entity liability, and probably inhibited settlement in *Andersen*. One question worth investigating might be whether collateral estoppel rules could be modified to reduce disincentives for firms to admit complicity in an agent's criminal act.

154. *Andersen* is perhaps an extreme case, but it nonetheless stands as proof of this proposition, in light of both the firm's reaction to the prospects of prosecution and the results of prosecution. How and why *Andersen* had strong communicative force is harder to isolate. Andersen's position as a leading fiduciary probably exerted considerable force. See Lynch, *supra* note 11, at 52 (arguing that corporate punishment is only likely to be effective where the corporation is big and stable enough to be affected by blame); Theodore Eisenberg & Jonathan R. Macey, *Was Arthur Andersen Different? An Empirical Examination of Major Accounting Firm Audits of Large Clients*, 1 J. EMPIRICAL LEGAL STUD. 263, 266 (2004) ("Auditors' reputations are central to the standard economic theory of auditing."). For organizations like Andersen that are reputationally sensitive, the plunge caused by imposition of criminal liability can be swift and deep. Cf. Cindy R. Alexander & Mark A. Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1, 28 (1999) (finding that reputational harm to publicly traded firms from crime was greater for firms that had lower pre-crime probability of crime).

## b. Inconclusive Studies

Some evidence has been described as leaning in the contrary direction, that is, suggesting not that reputational effects do not exist but that legal process does not influence them. If this were clearly true, there might be reason to doubt whether imposition of criminal entity liability has any real effect beyond monetary sanctions that could be imposed equally through other means. But the limited evidence is inconclusive. And the argument that law does not matter to reputational effects should be approached skeptically, for the same reason that society has long sought to impose institutional blame through legal process. The legal practice matters to those who pursue it and to those pursued by it.

Using a sample of 132 cases among seventy-one public firms, the perhaps leading empirical study found that reputational effects from allegation and proof of fraud, measured solely by loss in firms' equity values, are substantial, averaging 1.34% in the period following first disclosure of fraud.<sup>155</sup> However, this study then calculated that market-imposed reputational sanctions, representing 93.5% of the total loss to firms from incidents of fraud disclosure, hugely overshadow legal sanctions. It therefore argued that legal sanctions should be greatly discounted for the market effects of fraud disclosure.<sup>156</sup>

There are three principal problems with these assertions, and for any claim that they have implications for analysis of entity criminal liability. First and most obvious, treating immediate decline in a firm's equity value as the only measure of reputational effect is a severely limiting step. Second, the study's data supporting the comparison between market and legal sanctions is of questionable import. The study was able to analyze only fifteen of its 132 cases in comparing legal and reputational sanctions, and ten of those fifteen cases involved allegations of government contracting fraud; only four of the fifteen cases involved fraud on stakeholders, and in three of those four no criminal fine was imposed.<sup>157</sup> One would expect cases of government contracting fraud to involve much higher potential market sanctions because of fear that a firm could be temporarily or permanently ejected from its bilateral monopoly relationship with the government. In any event, the number of cases is so small, and their characteristics sufficiently atypical, as to leave doubt about conclusions drawn from the data.

Third and probably most significant, the study did not measure (and the authors did not address) whether any of the reputational decline in firm value should have been ascribed to some aspect of the legal proceedings—the fact of a firm's criminal conviction, publicity about a legal judgment of wrongdoing, the facts that supported such a judgment, and so on—that did not involve just the predicted monetary sanctions or the actual court-imposed sanctions. That is, the authors assumed that the *only* thing

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155. See Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J. L. & ECON. 757, 759, 773–80 (1993).

156. See *id.* at 780–84.

157. See *id.* at 783. Apparently, only fifteen of the 132 cases were susceptible to the authors' comparison of reputational and legal sanctions because only fifteen cases involved a first public announcement of fraud that included information about legal proceedings. The authors were attempting to compare the effects of the *prospect* of legal sanctions with overall market sanctions. That is, they assumed that the reputational penalty equated to all market decline beyond the predicted amount of legal penalties. *Id.* at 782.

that interests observers about a legal proceeding is what it will cost a firm in sanctions and that anything observers conclude about a firm in terms of willingness to deal with it in the future (i.e., about its reputation) is solely the product of learning the *fact* that fraud occurred, whether or not anybody brought a case over it.<sup>158</sup> As this Article has argued, there is good reason to think that legal proceedings can have much stronger informational significance; certainly, the contrary cannot be assumed in analysis of the relationship between the legal process and reputational sanctions.<sup>159</sup>

Subsequent studies have not clarified the dependency of reputational effects on the legal process. Another study again found that market-imposed sanctions resulting from disclosure of wrongdoing were substantial (an average decline in equity value of 2.26% in the period following disclosure of wrongdoing in a sample of sixty firms) and that market sanctions were much greater in cases of crimes by firms against related parties than crimes against third parties.<sup>160</sup> This is not surprising. It shows that observers will weigh the nature of a firm's wrongdoing in determining reputation. This study further found a strong relationship between market sanctions, in the form of equity decline, and information about termination of firms' customer relationships.<sup>161</sup> Again, no surprise here. We would expect that a firm's value would decline most when wrongdoing drives away customers, because such flight conveys that a firm is unreliable.<sup>162</sup>

Another study reaffirmed the significance of reputational effects and their variation with the nature of the wrongdoing.<sup>163</sup> This study then attempted to isolate effects of criminal legal proceedings by comparing the magnitude of equity declines following

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158. Cf. FISSE & BRAITHWAITE, *supra* note 141, at 231–32 (finding in qualitative study of seventeen cases of corporate wrongdoing that adverse publicity reduced earnings in four cases, reduced stock value in seven cases, and damaged image in fifteen cases).

159. There's at least a third problem with the study. It's somewhat odd to treat all reputational effects as a form of sanction to be equated with legal sanctions, that is, as part of the damages assessed for wrongdoing. See Karpoff & Lott, *supra* note 155, at 757. If buyers stopped purchasing from a vendor firm because information spread that the firm had begun to deliver a time-sensitive product (say live lobsters) slowly, but no lawsuit were filed (or even colorable), we wouldn't think of the firm as having paid "damages" for its tardy conduct. Reputational effects from legal wrongdoing should be separated from reputational effects from all available information about a firm. Failing to make this distinction may preordain a surprising conclusion, like the one reached by Karpoff and Lott's study, that markets all by themselves nearly optimally sanction firms.

160. See Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J. L. & ECON. 489, 504–22 (1999) (finding equity decline in 88% of cases of related-party harm but only 50% of cases of third-party harm).

161. See *id.*

162. The study also found that the typical victim of related-party wrongdoing in a federal criminal case against a firm is the *government*, not one or more private parties. See *id.* at 523. The author suggests for future study the question of whether such non-atomistic customers discount the amount of market-based penalties they impose by the amount of expected court-imposed penalties. *Id.*

163. See Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395, 410–15 (1991) (repeating the analysis of Karpoff and Lott's study, using data from an additional twenty-three cases; finding average decline in equity value of 2.23% in all cases of fraud but only 0.32% decline in cases of *malum prohibitum* offenses).

first fraud announcements to the magnitude of equity declines in a sample of ten cases of civil fines assessed by the Federal Aviation Administration (FAA) for airline safety violations.<sup>164</sup> It found the magnitude of equity decline comparable in both samples and therefore concluded that "criminal actions against corporations provide no unique informational benefits to corporate stakeholders."<sup>165</sup>

The claim that the reputational effects of government findings of airline safety violations in a sample of ten FAA regulatory actions is a reliable stand-in for the informational significance of all non-criminal forms of action seems doubtful.<sup>166</sup> The sample is extremely small and somewhat peculiar. FAA violations, possibly conveying information about an airline's susceptibility to a catastrophic accident, might be substantially more reputationally significant than the average non-criminal legal result.

### 3. Variables in Reputational Effect

Three things can be said with some confidence about reputational effects: they are real, they are complicated, and their complexity comes in part from their relationship to the legal process. In the absence of more textured empirical work (assuming it were feasible), we cannot quantify the relationship between the legal process and reputational effects. We can, however, describe variables likely to influence reputational effects.

The empirical studies discussed above establish that reputational effects begin to attach before legal proceedings, supporting the intuition that such effects are context-dependent. Observers will look at the facts of a case of wrongdoing in determining what to conclude about the reliability of a firm. The nature of the wrongdoing, the degree to which the wrongdoing is attributable to the firm, the nature of the victim, the nature and size of the firm,<sup>167</sup> the firm's products and industry, and the *ex ante* reputation of the firm all should affect the conclusions of a hypothetically careful observer.<sup>168</sup>

However, the legal process also will play an important role in shaping the conclusions of observers, in two respects. First, legal process, and especially criminal legal process, will tend to generate publicity that will increase both the depth of

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164. See *id.* at 414–15.

165. *Id.* at 415.

166. See Alexander, *supra* note 160, at 523 (arguing that research treats market penalties as independent of court-imposed sanctions but should examine whether they are jointly determined). There may be a mistaken assumption in an analysis like Block's: if the *form* of legal process matters to reputational sanctions, the view holds, we should find that all criminal cases have the same reputational effect. This view omits consideration of whether the *existence* of criminal charges and the *nature* of the charges are interactive. One could hypothesize a hierarchy of reputational effects, rising, for example, from toxic dumping with no legal action, to toxic dumping with regulatory action, to toxic dumping with criminal action, to fraud with no legal action, to fraud with civil action, to fraud with criminal action.

167. See Macey, *supra* note 110, at 323 (arguing that crime will tend to be more prevalent in smaller firms where managers can capture a larger share of the profits of crime, offsetting risk to managers of potential punishment for crime).

168. See Kadish, *supra* note 128, at 434 (arguing that deterrent effects of entity criminal liability will vary according to firm size, its market position, and the extent of public notice, among other factors).

observers' knowledge about an instance of wrongdoing and the number of observers with knowledge of the wrongdoing. Litigation tends to be public and to reveal facts. Of course, publicity depends on the nature of the wrongdoing, so the influence of these factors (and others) will be interrelated, and perhaps inextricable.

Second, legal process, and especially criminal legal process, is likely to communicate with a force of authority that will boost reputational effects among all observers, but particularly among less careful observers. A recent empirical study of industry reaction to instances of wrongdoing by firms found that the less careful observer—not the one who studies the facts of each case—is actually the typical observer and, for the less careful observer, the existence and severity of enforcement action are far more influential than the contours of a particular case.<sup>169</sup> In a noisy world in which costs of full information are prohibitive for most actors, the legal process enjoys a monopoly on a particularly influential form of communication that, in the context of entity criminal liability, can convey important information about the reputation of firms.

Other factors, beyond the facts of the wrongdoing and the presence or absence of legal action, will further affect reputational sanctions. Management and employees' sensitivity to reputational impact at the firm level will determine in part how influential reputational sanctions are in deterring wrongdoing and altering institutional arrangements to make subsequent wrongdoing less likely. Effects will be much stronger in some settings (for example, among partners in an auditing firm that abets publication of fraudulent financial statements) than in others (for example, among drivers in a waste-hauling firm that discharges chemicals from its trucks as they pass along the highways).<sup>170</sup>

As developed fully in Part III, the contours of the legal rule will affect the influence of legal process on reputational effects. If firm liability is imposed, as under respondeat superior, without regard to the degree of the firm's involvement in the agent's offense, a judgment against the firm will mean less to observers than under a legal system that requires a finding of firm responsibility before imposition of judgment. In the latter

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169. See Neil A. Cunningham, Dorothy Thornton, & Robert Kagan, *Motivating Management: Corporate Compliance in Environmental Protection*, 27 LAW & POL'Y 289 (2005); Dorothy Thornton, Neil A. Cunningham, & Robert A. Kagan, *General Deterrence and Corporate Environmental Behavior*, 27 LAW & POL'Y 262 (2005); J.L. Short & Michael W. Toffel, *Turning Themselves In: Why Companies Disclose Regulatory Violations* 25–29 (July 13, 2005) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=776586](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=776586) (examining data about firms that self-report under programs encouraging disclosure of environmental violations, and finding that firms that previously experienced enforcement actions were more likely to self-report violations, as were large firms, presumably because large firms are more sensitive to reputational effects).

170. A recent commentary observed that there might be some perversity in reputational sanctions. The firms most likely to spawn criminality will tend to have bad ex ante reputations and therefore will be less affected by stigma, while the most responsible firms will suffer the most from criminal prosecution. See Beale & Safwat, *supra* note 13, at 100. True enough, but reputationally sensitive firms (and the people who work there) may be at the margin where the criminal law can hope to accomplish the most deterrence. In addition, it often will not be pointless to stigmatize firms with low ex ante reputations. Even tobacco companies ultimately changed their behaviors in response to a drumbeat of charges of harmful and deceptive manufacturing and marketing of cigarettes.

context, observers are likely to treat a legal judgment as a more influential predictor of a firm's tendency to produce wrongdoing in the future. In turn, management is likely to have greater fear of the effects of a legal judgment under such a system, and thus will make greater efforts to arrange the firm's affairs so as to ensure that the firm does not generate instances of agent wrongdoing.

### *E. Civil Substitution*

Notwithstanding the proof of reputational effects, the inconclusiveness of the evidence on the relationship between those effects and legal process, and the good reasons to think legal process is influential in driving reputational sanctions, the argument has been advanced that *criminal* enterprise liability has virtually no features that a system of *civil* enterprise liability could not replicate.<sup>171</sup> In this view, advanced chiefly by Vikramaditya Khanna, reputational sanctions are both inefficient and of questionable influence.<sup>172</sup> Criminal sanctions against entities, the argument goes, chiefly include fines, probation, debarment, loss of license, and reputational harm. Fines are the most efficient of these because they are the cheapest to administer. Estimating the liquidated value of the other sanctions, especially loss of license and reputational harm, is costly and, because difficult and uncertain, carries heightened risk of producing over- or under-deterrence. Non-fine sanctions thus are preferable, the argument concludes, only when the entity is insolvent in relation to the optimal sanction. However, this view holds, even then we must account for a social cost of non-

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171. See Fischel & Sykes, *supra* note 10, at 319; Khanna, *supra* note 5, at 1534. This position's theoretical framework dates at least to the Model Penal Code. The Code, while adopting a form of entity criminal liability, described the problem in terms of the utility of fining firms, a "primary purpose" of which is "to encourage diligent supervision of corporate personnel by managerial employees." See AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES § 2.07 cmt. 6 (1985). It is settled that enterprise liability is a desirable means of reducing individual wrongdoing. Traditional arguments approved its risk-spreading efficiency and fairness. Compare Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 456 (1923) (risk spreading), and Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L. J. 499, 544-45 (1961) (same), with *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968) (Friendly, J.) ("[A] business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities."). More recent analysis has found entity liability necessary to correct suboptimal effects of personal liability as a deterrent where, as is common, the agent is insolvent in relation to the cost of her delict. See FEINBERG, *supra* note 133, at 229; Jennifer Arlen, *Corporate Crime and Its Control*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 492, 493 (Peter Newman ed., 1998); Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CAL. L. REV. 1345, 1365-66 (1982); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 858-76 (1984); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1233-59 (1984). However, there remains doubt about the optimal shape of enterprise liability. See, e.g., Arlen & Kraakman, *supra* note 71, at 735-41; Jennifer Arlen & W. Bentley MacLeod, *Beyond Master-Servant: A Critique of Vicarious Liability*, in EXPLORING TORT LAW 111 (Stuart Madden ed., 2005).

172. See Khanna, *supra* note 5, at 1494-1512; Fischel & Sykes, *supra* note 10, at 319.



fine sanctions. Nobody receives the value of the entity's lost reputation or license, which sunk resources produced.

The argument concedes only a very limited role for reputational sanctions. Because they apply early, often without regard to legal results at and after trial, and thus carry higher *expected* sanction, they might be desirable in a narrow group of cases in which either a very high expected sanction is needed that exceeds all other available sanctions, or the costs of litigation would exceed the additional costs that reputational sanctions carry over fines. And, the argument points out, this tool may not be available (because it will have no bite) with institutions with low *ex ante* reputations or with forms of wrongdoing that do not matter to observers.

Even if reputational sanctions are sometimes desirable, the argument continues, non-criminal means can impose them. This contention proceeds from the intuition that "it is hard to believe that consumers would ascribe stigma to a corporation solely on the basis of the category of legal proceeding in which it was involved."<sup>173</sup> The argument concludes that reputational sanctions will have import only in cases involving "grandiose" harm, in which monetary sanctions are inadequate, and in grandiose cases we should expect reputational penalties to be the same regardless of whether legal action is civil or criminal.<sup>174</sup> Criminal entity liability therefore is instrumentally indistinguishable from civil liability and is a less preferable means of imposing costs.<sup>175</sup>

This argument has several drawbacks. As we have seen, it is extremely difficult (maybe impossible) to account for reputational sanctions in a framework that seeks to determine sanction optimality.<sup>176</sup> We cannot forecast *ex ante*, or even measure *ex post*, the total effects of a criminal charge and conviction on the willingness of consumers, actual and prospective employees, vendors, customers, investors, lenders, donors, volunteers, beneficiaries, and others to deal with the entity. Further, the government cannot dial up a reputational penalty, even one that is less than precise, by manipulating the legal charge or the level of fine. Too many factors influence reputational effects.

Criminal entity liability may not allow for calibration of sanctions, forcing the legal system into a binary choice between imposing reputational sanctions (or at least that portion that flows from the legal process) or not imposing them. Richard Bierschbach and Alex Stein point out that attempting to offset reputational sanctions could require setting legal sanctions for firms at zero, which might drain meaning and influence from the legal process.<sup>177</sup> In their terms, some degree of "overenforcement," that is, total *ex*

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173. Khanna, *supra* note 5, at 1508; Arlen, *supra* note 171, at 496; David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1831–32 (2001).

174. Khanna, *supra* note 5, at 1509.

175. See Brown, *supra* note 108, at 1317–18 (arguing that monitoring-incentive rationale for entity criminal liability is weak because it could be satisfied with civil liability alone); Fischel & Sykes, *supra* note 10, at 319 (arguing that the case for corporate criminal liability must rest on the need to correct some deficiency in the system of civil liability and that "corporate criminal liability in practice produces serious problems of overdeterrence"); Fisse, *supra* note 124, at 1142 n.2, 1144–45 (discussing how some commentators urge replacing corporate criminal sanctions with civil penalties).

176. See Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743 (2005).

177. See *id.*

post sanctioning effects from enforcement that exceed the level of ex ante sanction optimal for deterrence, is unavoidable.<sup>178</sup>

At the same time, it is the remoteness of reputational sanctions from legal control—their socially determined nature—that makes them a potent influence on behavior. Because of the social meaning in criminal sanctions, non-criminal penalties cannot act as substitutes, and entities must internalize some portion of the criminal sanction. Reputational harm, unlike monetary sanctions, generally cannot be indemnified, insured, or otherwise passed through to others.<sup>179</sup>

Khanna, for one, has to make two problematic moves in his case against the utility of reputational sanctions. First, he assumes that reputational effects on firms can be quantified in monetary terms, so that fines can be a substitute, and the two forms of sanction can have the same effects in pricing firms' failures to prevent wrongdoing. Second, and more problematic, he assumes the same thing about reputational effects on people, that is, that other sanctions including civil liability can substitute (while simultaneously doubting whether reputational "rub-off" occurs).<sup>180</sup> Only stylized rational choice models of corporate actors and consumers allow for these assumptions. Neither assumption is likely to hold up under thickened behavioral analysis, much less against evidence of how corporate managers and consumers have tended to behave, and react to criminal sanctions, in actual cases.

Whether reputational sanctions are categorically inefficient depends on how inefficiency of sanctions is measured. If the efficient sanction is the sanction that induces socially optimal behavior, and we can determine and quantify that sanction ex ante, then reputational sanctions threaten efficiency because they are untamable. But what if we cannot fully determine ex ante, as an empirical matter, the quantity of sanction that will succeed in deterring misconduct in firms or, indeed, the amount of misconduct in firms that is acceptable because further deterrence would be too costly? Then we might want to adopt a more decentralized regulatory approach, relying on social assessment of the seriousness and costs of wrongdoing in firms.<sup>181</sup> From this perspective, reputational sanctions might be efficient not just because they are powerful and we might need powerful sanctions to deter, but also because they are controlled by the social response to the enforcement action. The problem of lack of control over reputational sanctions thus points to a balance of considerations, not to a conclusion that potential for inefficiency requires rejection of the sanction.<sup>182</sup>

Moreover, Khanna's claim that civil regimes can perfectly substitute for a criminal regime runs into the empirical problem discussed in Part II.D.2. Rehashing that

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178. See *id.*; Coffee, *supra* note 10, at 427 (arguing that negative publicity about corporations is "a loose cannon" that cannot be calibrated).

179. See FISSE & BRAITHWAITE, *supra* note 94, at 8; Kraakman, *supra* note 171, at 893 (arguing that reputation, an element of "firm-specific capital," is among professional firms' most valuable assets, is uninsurable, and cannot be protected by diversifying clientele); Lederman, *supra* note 8, at 312–13.

180. See Khanna, *supra* note 5, at 1500–12.

181. See Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1533 (1984) (arguing that when officials lack information about costs of behavior, it can be efficient to rely on a community standard that represents consensus about socially optimal behavior).

182. Moreover, as noted previously, reputational sanctions may be partially susceptible to compromise. See *supra* text accompanying notes 152–53.

material is unnecessary. Reputational sanctions are real and their contingency on the legal process, especially the criminal legal process, is complicated, likely to be substantial, and certainly not disproved.

In addition, there is inconsistency in Khanna's treatment of reputational sanctions. On one hand, his argument nods to their power, contending that such sanctions should be reserved only for cases in which a really big sanction is needed (one that might exceed a firm's entire asset pool) and conceding that such sanctions will tend to flow quickly in cases of "grandiose" wrongdoing, without regard to legal process.<sup>183</sup> On the other hand, the argument dismisses the reputational sanction that comes from the criminal process, going so far as to contend that the legal system can send messages as effectively through means such as "news conferences, corporate civil liability, and managerial criminal liability" or "a well publicized letter condemning the corporation's activities."<sup>184</sup>

This inconsistency probably reveals futility in fitting the social meaning of entity criminal liability into quantitative modeling. Indeed, the end point for the argument that criminality should not matter in the entity context is the view that if people just understood the problem properly, they would conclude that they had been mistaken, stop caring, and divest entity criminal liability of its meaning. In other words, the continued bite of the entity criminal sanction is a failure in informational markets, correction of which should cause the significance of entity criminal liability to leak away without regard to law reform. It might seem absurd or unfair to attribute this view to anyone, but the argument essentially has been made.<sup>185</sup> The claim has not been borne out under even a faultless respondeat superior regime, and it would be even less plausible under a more fault-based regime like the one described in Part III.

A final aspect of the argument that civil entity liability can replicate criminal liability, again advanced by Khanna, merits brief comment because it further demonstrates how claims that criminal entity liability may be pointless tend to assume away social facts. Khanna has contended that criminal procedure is probably unnecessary in legal action against entities because worries that lead to special protections for individuals, chiefly the high costs of error, do not apply to firms.<sup>186</sup>

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183. Khanna, *supra* note 5, at 1509.

184. *Id.* at 1532. *But see* Coffee, *supra* note 10, at 425–29 (arguing that difficulties with publicity strategy are that government is a poor propagandist, criticism of corporations already "inundates" channels of communication, corporations engage in counter-publicity, and publicity may not matter in cases of regulatory violations); Langevoort, *supra* note 114, at 102 (discussing how firms can make reputational effects ambiguous by settling while denying, scape-goating offenders, and blaming greedy civil plaintiffs for legal actions).

185. *See* Fischel & Sykes, *supra* note 10, at 332 (arguing that crime in entities is "perfectly appropriate if the costs of additional monitoring would exceed the benefits" and "[f]ailure to monitor in the abstract should no more result in reputation loss . . . than failure to build an accident-proof automobile").

186. *See* Khanna, *supra* note 5, at 1513–16; Khanna, Corporate Defendants, *supra* note 10, at 15; Fischel & Sykes, *supra* note 10, at 331–32. One might have expected Khanna to hold that the claimed high social cost of reputational penalty justifies *more* procedural protection in a criminal proceeding. *See* Coffee, *supra* note 10, at 403 ("[T]he accused corporation often cannot afford the time interval necessary to establish its innocence."). Instead, though, he maintains that trial-related procedure may be irrelevant because most reputational loss occurs following the first announcement of wrongdoing. Khanna further argues that since defendants have more to

Meanwhile, from the perspective of order maintenance, his argument goes, the government does not need the special investigative powers that operate in criminal cases such as those of the grand jury. Granting "virtually identical" civil investigative powers to regulatory bodies, such as the SEC's powers to subpoena documents and take testimony, would replicate such powers.<sup>187</sup> The sole procedural advantage to criminal enforcement, he says, is that it saves costs by maintaining a single proceeding in cases in which agents also are prosecuted.<sup>188</sup>

This argument eliminates the significance of criminal procedure by fiat. The more the criminal proceeding is stripped of its special procedural characteristics, the less meaning the reputational sanction will carry. As we will see in discussing the shape of the legal rule for entity criminal liability in Part III, the scope of liability is likely to influence reputational sanction. Khanna gets it backwards when he argues that proof beyond a reasonable doubt and the jury, as well as other defendant-protective rights, can be discarded in the corporate context once we agree that the costs of erroneous conviction are less because liberty is not at stake. The inquiry should begin with what comprises a criminal conviction. A major ingredient is that the proof unanimously satisfied a jury of twelve impartial citizens beyond a reasonable doubt.<sup>189</sup> Surely this fact, and the impact it has on the lesson people take from observing a criminal legal result, explain in part why a criminal conviction can have particularly strong reputational effects.<sup>190</sup>

#### *F. Retribution and Expression*

Retribution and expression warrant a brief detour here because of the importance of those concepts to any analysis of criminal law.

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lose than plaintiffs in civil proceedings (in the form of reputations), they will make up for the lower burden of proof by investing more in contesting the cases. *See* Khanna, *Corporate Defendants*, *supra* note 10, at 22–24. Yet he surprisingly concludes that we should consider stronger procedural protections for *civil* cases, where risk of improper government enforcement is said to be greater due to frequency of actions, often higher penalties, prevalence of lobbying, and higher risk of capture. *See id.* at 39–41.

187. *See* Khanna, *supra* note 5, at 1519–24.

188. *See id.* at 1529–30; Coffee, *supra* note 10, at 448 (arguing that restricting penalizing of corporations to civil remedies would underutilize the "decentralized infrastructure of public enforcers" in prosecutors' offices across country). However, Khanna's argument reminds us that we must trade off these savings against the higher sanctioning costs of criminal reputational penalties. (Recall the point that no one receives the value of lost reputation.) *See* Khanna, *supra* note 5, at 1530. This may be inconsistent with his argument that reputational sanctions should not differ between civil and criminal contexts.

189. *See In re Winship*, 397 U.S. 358, 364 (1970) ("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.").

190. *See* Friedman, *supra* note 11, at 856–57. Khanna's argument about procedure also misses the fact that *criminal* entity liability confers special power on the government that may further instrumental objectives of detecting and deterring wrongdoing within firms. *See supra* text accompanying notes 144–51.

## 1. Just Deserts

Application of retributive theory to entity criminal liability tends to lead in opposite directions. Traditional critics of the doctrine complained about its theoretical impurity. Entity liability does not belong in the criminal law, they said, because a corporation has “no soul to be damned, no body to be kicked.”<sup>191</sup> Such critiques made up ground lost when courts originally adopted entity criminal liability without thoughtful analysis. By worrying whether damning institutions makes any sense, they suggested the need to justify a particular blaming practice.

But the position of these critics made an argument that was really an assumption. Why should we *start* with the settled conception of individual criminal responsibility, however well-seasoned, in determining the limits of criminal law’s place in society? Social norms and practices would seem to be the right place to start in understanding the possible function of a criminal law rule, *even if* we were interested *only* in explaining and justifying a retributive device. We might end up choosing not to approve of those social practices, for reasons that might correspond to theories of individual responsibility. First, however, we would need to examine the reasons people *do* assign criminal blame to inanimate bodies.<sup>192</sup>

As Peter Cane explains, corporations cannot “act” any more than they can “think.”<sup>193</sup> If the objection to applying criminal liability to entities is that they lack culpable minds, then the same objection should apply to their lack of any body that can commit an act. If that objection held, then *all* entity liability, not just criminal entity liability, would be objectionable. Therefore, entity responsibility can *only* be explained with reference to social practices—specifically how we choose to balance the interests of a group in freedom of group action with the interests of others whom responsibility practices seek to protect—not through antiseptic inquiry into the true “nature” of entities.<sup>194</sup>

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191. Lederman, *supra* note 8, at 309 (quoting R. CROSS & P. JONES, INTRODUCTION TO CRIMINAL LAW 122 (10th ed. R. Card ed. 1984) (quoting remark of the second Baron Thurlow)); see also Alschuler, *supra* note 8, at 313 (arguing that “ordinary principles of culpability do not fit” the problem of institutional crime, and the practice of blaming institutions makes no more sense than the medieval practice of “deodand” in which retribution fell on swords or wheels for their roles in harmful events); Lederman, *supra* note 8, at 296 (“The theory which views the corporation as subject to criminal liability challenges . . . the ideological and normative basis of the criminal law and its mode of expression and operation.”); Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, in COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS 111, 117 (Larry May & Stacey Hoffman eds., 1991) (arguing that *actus reus* and *mens rea* “are at the heart of philosophical and legal notions of responsibility”).

192. See FISSE & BRAITHWAITE, *supra* note 94, at 24 (“[T]he issue is ‘more a matter of what we consider moral responsibility to be, rather than what sort of metaphysical entities corporations may turn out to be.’”) (quoting J. Surber, *Individual and Corporate Responsibility: Two Alternative Approaches*, 2 BUS. & PROF’L ETHICS J. 67, 81 (1983)); Fisse, *supra* note 124, at 1149 (“When people blame corporations, they are not merely channeling aggression against a deodand or some other symbolic object; they are condemning the fact that people within the organization collectively failed to avoid the offense to which corporate blame attaches.”).

193. CANE, *supra* note 88, at 162–63.

194. Cane concludes, “[T]he practice of attributing responsibility to abstract entities seems

In framing the wrong question, the retributivist critique has misled defenders of entity criminal liability into misguided and futile efforts to shoehorn entity liability into the criminal law with inapt metaphors and anthropomorphic analogies.<sup>195</sup> The persistence of respondeat superior as the dominant rule of liability has only encouraged these mistakes since it so sharply deviates from principles of individual criminal culpability.<sup>196</sup>

Alright, one might say, then let us embrace the social meaning of entity blame and follow it to the opposite result: entity liability belongs in the criminal law because entities *are* blameworthy, full stop. There is no need to consider the utility of the practice, the argument might go, because it fully accords with retribution as a justifying aim, whether or not metaphysics can determine if a legal entity is a proper object of retribution.

Aspects of existing expressive accounts of entity criminal liability appear to sound in this view. For example, it has been argued that punishing entities, regardless of the utility in harnessing the firm to control the conduct of people, repudiates the “false valuations” that corporate crimes express by sending the message that “people matter more than profits.”<sup>197</sup> Perhaps people want to engage in retribution against an entity for an agent crime, even when an entity *does not* influence the agent, simply because of the presence of the entity in the particular matter or the general ubiquity of entities in social harm.

Somewhat surprisingly, expressive theorists have not yet considered the legitimacy of such a legal practice of entity blame.<sup>198</sup> If we are interested in what should and should not be in the law (the discussion of entity criminal liability long has been, if nothing else, such an inquiry), we ought to consider whether repudiation of organizations belongs there and, if so, what rules would tend to confine the practice to the right cases.<sup>199</sup> If the objective in expressing criminal blame against entities is

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so deeply entrenched in social discourse that it is hard to understand why many philosophers cling so strongly to the traditional humanistic approach.” *Id.* at 164.

195. See Coffee, *supra* note 10, at 448 (“The study of corporate criminal responsibility too long has been led astray by commentators seeking to fashion retributive justifications and anthropomorphic analogies.”).

196. See Lynch, *supra* note 11, at 39 (“When corporations are held liable for the acts of relatively low-level managers, even acting in violation of express corporate policy, it becomes difficult to sustain the idea that ‘the corporation’ as an entity is blameworthy in any way that is easily analogized to the intentional actions of a natural person.”).

197. Kahan, *supra* note 11, at 618–19; see also Anderson & Pildes, *supra* note 89, at 1513–14; Friedman, *supra* note 11, at 843. For detailed defenses of expressive theory and its application to criminal law, see, e.g., Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 362 (1997) (“Economists speak of criminal law as a mechanism for pricing misconduct, but ordinary citizens think of it as a convention for morally condemning it.”); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (describing the expressive function as “making statements” rather than “controlling behavior directly”).

198. Cf. THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 147 (Harcourt, Brace & World 1962) (1935) (“[T]he only function which the criminal trial can perform is to express currently held ideals about crime and about trials.”).

199. See O’Sullivan, *supra* note 59, at 18 (“[I]f vicarious firm liability will not serve the purposes of incapacitation, deterrence or rehabilitation . . . the fact that it facilitates sanctioning should be troubling rather than reassuring.”).

loyalty to “just deserts”—a view that legal expression should express correct norms, and entity criminal liability expresses a correct norm—such a view requires an account of blameworthiness.<sup>200</sup> Only an *entity* wrong would call for a response directed at the *entity*.

Expressive theory has not yet articulated a standard for when norms impel us to criminally blame an entity, that is, it has not explained its own charter. To say that entities should be criminally condemned when people feel that individuals “were sacrificed to ‘corporate greed’”<sup>201</sup> does not state a principle with standing to support a regime of law.<sup>202</sup> It does not answer even the simple question posed by the traditionalist critique—that is, whether entity criminal liability is just irrational flogging.

## 2. Utility

Because expressive accounts have focused on the popular taste for entity criminal liability and have not sought the true nature of entity responsibility, they presumably are not about retributivism in the strict sense.<sup>203</sup> As it turns out, expressive theorists have sought to build a bridge from blameworthiness to utility. They have asserted that the imposition of entity criminal liability expresses important values even if it cannot inflict sanctions that differ materially from civil penalties. By satisfying public demand for condemnation and retribution, the law creates public welfare to replace the lost value of the corporation’s reputation.<sup>204</sup> Moreover, it expresses a degree of condemnation that civil liability lacks.<sup>205</sup> Civil liability conveys the message that

200. See Anderson & Pildes, *supra* note 89, at 1510–12 (arguing that while expressive theory does not argue for expression, it addresses the link between thought and action: because actions express thoughts and beliefs, actions may be evaluated by the normative value of thoughts and the beliefs actions express).

201. Kahan, *supra* note 11, at 619.

202. See Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 510 (2003) (arguing that the “norms school” in criminal law theory “portrays society in a way that encourages a dangerously unwitting acquiescence to populism”); *id.* at 590–91 (restating David Garland’s reading of Durkheim as warning against mistake of seeing ceremonies of punishment as necessarily coterminous with society or productive of harmony).

203. See Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1417 (2000) (arguing that Kahan’s “expressive” theory of criminal law is not a genuine expressive theory of law because it explains only causal deterrent effects of expression, not meaning).

204. See Kahan, *supra* note 11, at 619–21; Friedman, *supra* note 11, at 834 (arguing that corporations are subject to condemnation because “they have independent identities in the community, based upon attributes—identifiable personae and a capacity to express moral judgments—that substantively distinguish them from their owners, managers and employees”); Lynch, *supra* note 11, at 50 (“The victims of corporate misconduct may reasonably feel that they have been injured not (or at least, not only) by individual human actors, but by largely unaccountable anonymous conglomerate institutions, in which individual actors were driven by forces or incentives difficult to attribute to any one person.”). *But see* CANE, *supra* note 88, at 146 (“Corporations are legal persons because they are responsible, not vice versa.”).

205. See Kahan, *supra* note 11, at 621.

corporate crime is merely priced and is therefore less effective at shaping preferences against crime and inducing law-abiding behavior.<sup>206</sup>

This kind of account is on the right track. If this Article accomplishes nothing else, it ought to persuade the reader that no consequentialist evaluation of entity criminal liability can succeed without accounting for the role of social norms about institutions in the persistence and use of this criminal law doctrine. But saying that social welfare is enhanced when people derive utility from condemning entities does not say much more than that people are committed to the idea that an entity can be blameworthy and have beliefs about what makes an entity deserve blame.<sup>207</sup> We need a full analysis of the social function of entity blame and clear specification of the justification for accommodating the social practice of blaming institutions in legal practice.

It is unclear whether the expressive value of entity criminal liability would be its ability to shape norms by conveying disapproval of certain forms of crime, or its ability to satisfy popular demand for retribution against corporations and therefore to advance general contentment or general respect for the law (that is, in Paul Robinson and John Darley's phraseology, to accomplish "the utility of desert").<sup>208</sup> Choosing objectives matters; it will not only determine whether there ought to be a law, but also what the law should say. A satisfactory account of entity criminal liability should demonstrate how the law might optimally accomplish those objectives that the account holds are the right ones.

For example, an account of expressive effects centered on the special meaning of criminal condemnation, and its norm-conveying power, would contradict itself if it held that entity blame should attach, as under respondeat superior, virtually anytime an agent commits a crime related to the entity's affairs.<sup>209</sup> In any event, people simply do not blame entities for their agents' crimes across the board in such a level way. To be fair, almost no one has defended respondeat superior as the right liability rule. Because the case seems so doubtful, presumably no expressive account would try.

Alternatively, an expressive objective of furthering popular contentment might have some appeal. The criminal courts are a special locus for expression of norms that has no substitute.<sup>210</sup> Given the much greater scope of criminal law as written than as

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206. See *id.* at 619; Friedman, *supra* note 11, at 854–55; GARLAND, *supra* note 58, at 33 (restating Emile Durkheim as finding, "These outbursts of common sentiment—concentrated and organized in the rituals of punishment—produce an automatic solidarity, a spontaneous reaffirmation of mutual beliefs and relationships which serve to strengthen the social bond."); Dau-Schmidt, *supra* note 122, at 14–22 (arguing that criminal law is distinguished by its preference-shaping influence).

207. See Kahan, *supra* note 11, at 622 ("[T]he punishment of corporations yields a complex product consisting of both efficient behavioral incentives and appropriate social meanings" and therefore "[m]aximizing social welfare when these two objectives conflict is likely to be complicated.").

208. Robinson & Darley, *supra* note 17.

209. See O'Sullivan, *supra* note 59, at 37–41 (arguing that doctrine does not capture idea of what constitutes entity conduct deserving condemnation); *id.* at 64 (arguing that overuse of stigmatic sanctions reduces stigma).

210. Thurman Arnold put it this way in a celebrated essay (perhaps a tad strongly): [T]he criminal trial overshadows all other ceremonies as a dramatization of the values of our spiritual government, representing the dignity of the State as an



presently enforced, this court-articulated expression may dwarf the importance of expression in criminal legislation.<sup>211</sup> One could conceive of this expression in court as a counterpart to the democratic function of jury nullification.<sup>212</sup> Criminal cases, at least when tried, give the people a means for participating in the norm-articulation of governance.<sup>213</sup>

But this does not get us very far in justifying entity criminal liability, and certainly not all the way home. The same could be said about any form of criminal case, and the argument contains no limiting principle; its logical extension is mob justice. More important, acknowledging this democratic function does not excuse us from the necessity of justifying entity criminal liability. A baseless practice of institutional blame would make sense only to a public mistaken about what the legal process was saying, while the state knew of the mistake and chose to keep silent about it. This does not sound like minimally reasoned governance.

An expressive defense of entity criminal liability might say that the practice is a particularly influential way for criminal law to shape norms, perhaps because punishing firms has a salience that punishing individuals lacks. In considering this claim, it is important to distinguish between communicating *what* conduct is wrong and communicating what conduct is wrong *by various means*. Entity criminal liability adds nothing on the former score because it does not define an independent category of criminal behavior; enterprise liability is always derivative of an individual crime. Entity liability's only addition to the set of the criminal law's behavioral preferences would be a general message like "corporations are bad." That is hardly true, nor is it useful to any polity committed to an economy based on open access to capital—regardless of whether people think it, or would conclude it from imposition of criminal liability on firms.

That being said, entity criminal liability might have particular force, assuming it has some heightened visibility, in driving home the messages that criminal law has chosen to send.<sup>214</sup> It certainly can have the more particular communicative force of identifying

enforcer of the law, and at the same time the dignity of the individual when he is an avowed opponent of the State, a dissenter, a radical, or even a criminal.

ARNOLD, *supra* note 198, at 130.

211. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 520–23 (2001) (arguing that the problem that expressive theories of criminal law have not taken good account of wide variance between definition of law on the books and reality of law as enforced is "severe, maybe devastating" for such theories).

212. See *Blakely v. Washington*, 124 S. Ct. 2531, 2539 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 46–84 (2003) (mounting a detailed defense of "the criminal jury's structural power to check general criminal laws—to nullify them in particular cases," including "the power to elaborate the governing norms underlying criminal laws from the perspective of the community and its sense of moral blameworthiness").

213. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218–21 (1995).

214. See Cunningham et al., *supra* note 169, at 312–13 (finding that in an interview-based study of managers in two industries, the most salient cases of criminal enforcement tended not to be remembered specifically, but created a message of "implicit general deterrence" that caused managers to conclude that violations inevitably lead to sanctions).

conditions that make a firm responsible, and therefore blameworthy, for an agent's crime. But recognizing this communicative function begins, not ends, inquiry. We need to know, at least, what might be accomplished by sending such a message to individuals and what shape the law and practice of entity criminal liability should have if the objective is to send such a message.<sup>215</sup>

This Article's claim is that the bridge between entity blame and justification for entity criminal liability, which expressive accounts have not yet successfully built, is the *link* between the social practice of blaming institutions for individuals' wrongdoing and the reality of institutional influence on individuals. A complete thesis of entity criminal liability would hold that this connection *both* gives rise to the blaming impulse *and* means that the blaming can alter behavior in ways that attack the causes of institutional wrongdoing. With entity criminal liability, blame and utility go hand in hand.

### G. Costs

Legal imposition of entity blame inflicts costs that may undercut any benefits it carries. These costs include collateral consequences to stakeholders like loss of employment or equity; broader costs such as market effects from institutional failure; and, at least if entity liability is imposed without regard to blameworthiness, social costs such as misinforming people about institutional fault.<sup>216</sup>

Let us begin with a series of responses to the claim that entity criminal liability is *categorically* intolerable because of costs. First, entity punishment does not punish individuals like individual punishment.<sup>217</sup> It does not stigmatize people in the same way and its sanctions, even in their severest pass-through forms, do not hurt in the same way. Second, virtually all criminal punishment can inflict collateral consequences on

215. An additional form of criticism of expressive accounts of the criminal law is that they fail to develop predictive behavioral models. See, e.g., Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1627 (2000); Weisberg, *supra* note 201, at 468–74. These limitations do not undercut the explanatory force of expressive theory. See Scott, *supra*, at 1625 (arguing that the minimum requirement for expressive theory should be descriptive, even if not predictive, power). The problem with existing expressive accounts of entity criminal liability is that they have not yet done enough explaining, not that they have been examining the wrong questions. Khanna, for one, concedes that conveying messages can be a legitimate function of law in the corporate context. Khanna, *supra* note 5, at 1531. He also argues that it might be proper to account for the social utility of expressive condemnation, at least in varying sanctions according to blameworthiness. Khanna, *Top Management*, *supra* note 10, at 1250–53. Khanna pulls back however, worrying that a program of sending messages may be unnecessary where there is agreement that something is wrongful and that people may find imposition of criminal liability on non-human entities “farcical,” thereby weakening criminal law’s authority. Khanna, *supra* note 5, at 1531–32.

216. See, e.g., WILLIAMS, *supra* note 5, at 863 (“[A] fine imposed on the corporation is in reality aimed against shareholders who are not . . . responsible for the crime, i.e., is aimed against innocent persons.”).

217. See John Gardner, *Christopher Kutz’s Complicity: Ethics and Law for a Collective Age*, 114 ETHICS 827, 827 (2004) (book review) (arguing that the question of what turns actions of individuals into action of them collectively “is not a question about complicity,” that is, about accessorial responsibility).

others who stand close to the defendant.<sup>218</sup> Ordinarily we either accept this or see it as a basis to mitigate, not dispense with, punishment.<sup>219</sup> Third, civil entity liability can inflict equally severe collateral consequences, including the destruction of the entity. It would be odd to say that government should refrain from all action that affects the economic prospects of firms in ways that could harm stakeholders.

Fourth, it is not as if there is zero desert at the individual level. Group solidarity and opportunity for control provide a basis for ascribing some responsibility to group members for a transgression by one of their own.<sup>220</sup> Institutional stakeholders, especially equity participants, enjoy benefits and assume the risk of loss.<sup>221</sup> In addition, we are not dealing with punishment without notice, in the ordinary sense. It would be odd to think in terms of people being unfairly surprised by the appearance of criminal enforcement, given that an individual crime is a precondition to considering entity liability.<sup>222</sup> Fifth, entity blame may be justified if it is difficult to connect an individual with the group harm, simply because only the institution can be blamed and the claims of victims have "lexical priority" over the claims of non-faulty group members.<sup>223</sup>

218. See FISSE & BRAITHWAITE, *supra* note 94, at 50; PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 189 (1984).

219. See *Koon v. United States*, 518 U.S. 81, 95–96 (1996).

220. See FEINBERG, *supra* note 133, at 233–49 (arguing that group liability must satisfy same justifications as individual vicarious liability, that is, group solidarity, prior notice, and opportunity for control); KUTZ, *supra* note 90, at 67–74, 122 (arguing that "participatory intention," that is, how agents regard their own actions as contributing to a group outcome, should be the basis for determining whether "prior social and ethical relationships" are transformed into situations of group accountability); MAY, *supra* note 92, at 83 (discussing how shared responsibility is justified in cases of value transformation within groups because group members influence each other's behavior more within groups than outside them); LARRY MAY, THE MORALITY OF GROUPS 65 (1987) ("In order to show that intentions can be attributed in a limited sense to the corporation it is sufficient to show that the members of a corporation jointly engaged in purposive conduct."); Levinson, *supra* note 98, at 424–28 (arguing that group members who fail in delegated duty to prevent wrongdoing by other group members can be viewed as morally responsible for that wrongdoing).

221. See FRENCH, *supra* note 218, at 188; see also Fisse, *supra* note 124, at 1168–76. But see Kraakman, *supra* note 171, at 882 (arguing that penalizing firms into bankruptcy harms participants, such as employees and contractors, who receive no risk premium and cannot diversify their risk).

222. A different form of this objection holds that the entity itself has rights to fair treatment because it has legal rights and thus it is wrong, "logically inconsistent," and breeds disrespect for the law to punish corporations without regard to desert. See Laufer & Strudler, *supra* note 11, at 1290–95; but see *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284 (1989) (O'Connor, J., concurring in part and dissenting in part) ("In the words of Chief Justice Marshall, a corporation is 'an artificial being, invisible, intangible, and existing only in contemplation of law.' As such, it is not entitled to 'purely personal' guarantees" whose "historic function" . . . has been limited to the protection of individuals.") (quoting *Dartmouth College v. Woodward*, 4 Wheat. 518, 636 (1819), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 779 n. 14 (1978)). This argument misdirects us down an anthropomorphic path, which ends in the impossibility of mapping individual fault onto the entity. Any moral inquiry loses coherence if it doesn't consider effects on the entity in terms of effects on persons.

223. KUTZ, *supra* note 90, at 192–93, 200–01; O'Sullivan, *supra* note 59, at 37–38 (identifying responses that innocents suffer from individual punishment, stakeholders realize

While objections about the effects on individuals do not knock out entity criminal liability altogether, the responses do not excuse us from considering unwanted individual effects. Tolerance for injury to individuals should lessen as we consider persons within the institution further removed from the crime and thus less responsible for it even in a diffused sense.<sup>224</sup> A response at the institutional level should be proportionate in that it should impact just those parts of the institution implicated in the wrong.

The response to this position proceeds as follows. First, we might adopt a broad view of the scope of responsibility. Since we are considering only the institutional response, not response against individuals, we could justify the effects on individuals who contribute in any way, even by inaction, to constituting institutional conditions.<sup>225</sup> To be sure, institutional blame could still affect people whose action or inaction supplied literally no input into institutional arrangements.

Second and most important, this Article's finding that a legal practice of entity criminal liability has most traction where reputation is at stake—that is, where legal blame resonates socially—means that we are limited in how we can engineer sanctions. We might be forced into a binary choice between a legal response or no legal response. Assuming a case otherwise satisfies justifications for entity criminal liability, the balance is likely to weigh in favor of legal response. Even if such a response might trigger effects that are overly costly to certain persons, it is proportionate as to the entity because it results in the deserved reputational sanction.

The third point follows directly: the proportionality objection is on the mark in pointing to the need, to the extent possible, to limit a legal practice of institutional blame to those cases in which its justifications apply.<sup>226</sup> It does not make sense, for example, to inflict costs on peripheral individuals where there is a single agent's crime with no relationship to the institution other than the existence of an agency relationship. If communicating about group failure is effective because it forces groups to reconsider and reform group arrangements, such communication can be effective only to the extent that a group *did* fail. The blaming function of entity criminal liability and the fairness of the practice need not be at war.

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benefits and assume risks of loss, stakeholders experience entity sanctions only in diluted form, and stigma does not flow through).

224. KUTZ, *supra* note 90, at 159–62 (arguing that the degree of culpability, as measured by the responses of victims and outsiders, lessens from agents at the core of activity who “intend the collective end” to agents “whose roles are merely participatory at the periphery”); *see also* Gardner, *supra* note 216, at 829 (arguing that Kutz should have developed more exacting standards for differentiating degrees of complicity).

225. John Gardner argues that “complicity liability,” in contrast to vicarious liability, is a type of “personal” liability because it is based on something one did or failed to do. Gardner, *supra* note 217, at 829. Collateral consequences flowing through to individuals from entity blame might be considered, and defended, as a lesser form of complicity liability.

226. *See* O’Sullivan, *supra* note 59, at 36–37 (arguing that parsimony says that unfair flow-through effects of entity criminal liability should be minimized by limiting liability to cases in which firm actually is culprit).

*H. Conclusions and Empirical Questions*

To summarize, as a matter of social fact sometimes institutions do produce crime and sometimes people do blame institutions for that. There is good reason to think the popular blaming intuition is tied to the reality of institutional effects on individuals—that is, that blame tends to arise and be strongest not anytime somebody commits a crime on the job, but when the institution played a role in the offense. Empirical work, perhaps at least in survey form, might be able to bolster the point.<sup>227</sup>

Numerous reasons suggest that legal process, and particularly criminal legal process, adds unique and strong communicative force to any societal conclusion about institutional fault.<sup>228</sup> Not surprisingly, over the roughly 100 years of its life the *de facto* legal practice of imposing criminal liability on firms has grown much more fault-based than the broad (and thin) *de jure* rule. At a minimum, more empirical work on reputational effects, and particularly their interaction with legal process, would be needed before concluding that people, including firm managers, simply have been misguided in worrying about the effects of imposing criminal liability on firms.<sup>229</sup>

There is good reason to believe that reputational harm to firms can flow through to individuals in ways that can operate like sanctions, altering behavior and encouraging compliance efforts. Very little empirical work has been done on this dynamic and more would certainly be beneficial.<sup>230</sup> As with the link between institutional production of crime and social blame of institutions, it is probable that the flow-through of reputational effects is tied to the reality of institutional production of crime. The more a given crime is attributable to an institution, the more others will tend to conclude something significant from the event about individuals not directly culpable in the offense but who may have contributed to the problem by virtue of their contributions to the institution. In turn, to the extent they have control, institutional actors will seek to operate firms to prevent instances of wrongdoing in an effort to avoid personal reputational consequences.

Finally, the effects of entity criminal liability in altering individual behavior cannot be completely replicated in a system of civil liability, are more particular than a simple assertion of expressive function suggests, and are not categorically outweighed by possible unwanted costs. However, entity criminal liability should be tailored to its

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227. Cf. PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

228. It is a mistake to think that reputational effects must be either independent of legal process or entirely dependent on it. See, e.g., Richard A. Posner, *Optimal Sentences for White Collar Criminals*, 17 AM. CRIM. L. REV. 409, 417 n.25 (1980) (arguing that criminalizing non-reprehensible conduct could not dilute stigma of law because people would need to stigmatize for non-legal reasons for such effects to be possible).

229. If the criminal process proves impermeable to such analysis, a useful comparison might be to SEC enforcement, where data is likely to be more ample. We do not fully understand whether the reputational impact of an SEC enforcement case stems from prediction of ultimate sanctions, prediction of parallel civil actions, a canary-in-the-coal-mine effect, some combination of these, or other factors.

230. The only study I have found, which is largely anecdotal and interview-based, is FISSE & BRAITHWAITE, *supra* note 141.

purpose in order to minimize unwanted effects and maximize its influence. We can now turn to that imperative.

### III. LAW OF ENTITY CRIMINAL LIABILITY

The implications of this Article's findings about the function of criminal enterprise liability are both simple and problematic. They are simple because the conclusion that the law of entity criminal liability should be much more narrowly tailored to the fact of institutional responsibility—in order to maximize desired effects and reduce unwanted ones—follows without much further effort. The implications are problematic because, as prior evaluations of the law of entity criminal liability explicitly or implicitly demonstrate, there is no first-best rule of genuine institutional fault.

This Part thus will offer two concrete products of this Article's findings. First, I will suggest a move in the direction of second-best rules for institutional fault, namely more robust application of the existing doctrinal element of the agent's intention to benefit the firm. Second, I will consider how the necessity of second-best rules leaves a residual role for enforcement practice in determining the scope and effects of entity criminal liability. Entity criminal liability illustrates that enforcement practices alone, with only loose regard to sanctions, can be normatively influential.

#### *A. Inadequacy of Respondeat Superior*

By this Article's lights, respondeat superior is grossly overbroad since it has almost nothing to do with the social practice of institutional blame. The claim here has been that the legal process and the social practice of faulting the institution together produce the criminal entity sanction, in the form of reputational impact. The legal rule is not an afterthought. Logically, the more tightly the rule is fastened to institutional blameworthiness, the more that the practice of entity criminal liability will retain its justification, its bite, and its utility as a means of education. The rule functions as an input to that particular form of institutional blame that expresses itself through the courts.<sup>231</sup>

A rule deeming virtually all crimes committed by institutional agents in institutional settings to be institutional crimes is easy to apply but plainly does not fit with any persuasive account of the relationship between institutional effects and individual conduct. Much of the uncertainty about entity liability's place in criminal law may result from mixed messages. On one hand, the law says firms are virtually always answerable for their agents' crimes, almost without regard to the facts. On the other hand, the social practice of evaluating a firm's real responsibility has exerted a continual pressure on the criminal practice that has pushed enforcers to select entity criminal cases on more discriminating grounds.<sup>232</sup>

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231. See Robinson, *supra* note 122, at 212–13 (arguing that when expansion of criminal law's regulatory reach blurs distinctions between civil and criminal systems, morally communicative force of criminal law is weakened, perversely undermining utilitarian objectives).

232. See Laufer & Strudler, *supra* note 11, at 1299 ("Prosecutorial and sentencing guidelines reflect a growing consensus that vicarious fault, and its many variants, fail to capture the harm caused by corporate crime or the fault of an offending organization.").

Prior accounts of entity criminal liability often appear to evaluate the purpose of *criminal* entity liability on the assumption that it has to be based in ordinary agency liability. The *effects* of entity criminal liability might look different, and therefore require different evaluation, under a system that genuinely assessed firms' roles in their agents' criminal conduct. At a minimum, a responsibility-based system of law would clarify, and strengthen, any messages that result from imposing criminal liability on firms.

Feedback effects are likely. A tighter, better-justified doctrine of entity criminal liability is apt to begin settling theoretical controversy, then policy controversy, over the practice of imposing criminal liability on firms. Eliminating confusion about why particular firms deserve criminal liability and about why the criminal law includes enterprise liability will make impositions of entity criminal liability clearer and more influential in their reputational effects. The doctrine would enjoy both greater support and greater influence.

### *B. Unavailability of a First-Best Rule*

Unfortunately, under existing technologies of responsibility assessment, there is no optimal means of assessing firm fault. We do not have the slightest concept of how one could judge a firm to have committed a crime in the absence of an agent crime.<sup>233</sup> Some form of vicarious liability is unavoidable. Efforts to overlay forms of firm personhood on top of agency liability have been unsuccessful.<sup>234</sup> Anthropomorphisms and metaphors mistake personhood (rather than responsibility) as a precondition to legal fault. They are a reactive artifact of the traditional criticisms of entity criminal liability that maintained that criminal law's principle of *mens rea* does not fit firms.<sup>235</sup>

More to the point, personhood concepts do not work. For example, one proposal says firms should be criminally sanctioned when their "ethos," that is, a "corporation's characteristic spirit or prevalent tone of sentiment," encouraged agents to commit the crime.<sup>236</sup> Another says that *actus reus* should be found by considering "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"; and that *mens rea* should be found by considering "whether the corporation purposely, knowingly, recklessly, or negligently engaged in the illegal act,"

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233. Over a decade ago, a leading study on this subject concluded that no theory of organizational action could be derived as a basis for principles of entity criminal liability. FISSE & BRAITHWAITE, *supra* note 94, at 122. The more we appreciate the complexities of institutional influence on the individual and the more we embed the legal practice within a social practice of blame that responds to certain forms and results of that influence, the more remote a first-best solution looks.

234. See Lederman, *supra* note 62, at 689–90 ("[T]he variations of the model grant different weight and emphasis to such features as structure and hierarchy, size and complexity, policy and action, and particularly modes of management, decision making and monitoring processes in the corporation in question.").

235. See MAY, *supra* note 92, at 20, 23 ("[G]roups do not 'acquire a body, a tangible form, and constitute a reality in their own right' and do not have 'independent ontological standing, independent of the members of the group in relationships.'").

236. See Bucy, *supra* note 11, at 1099–1123.

that is, "whether the average corporation of like size, complexity, functionality, and structure, given the circumstances presented, would have the required state of mind."<sup>237</sup> It is extremely difficult to see what trial and appellate review of enterprise cases would look like under such legal rules.

At the same time, metaphoric approaches miss the import of ascribing institutional responsibility. As we have seen, this form of blame does not construct something nonexistent (a unitary nonhuman character) in order to have something to blame.<sup>238</sup> If that were the case, inquiry into entity criminal liability might have ended long ago with the argument that it is an irrational practice lacking empirical foundation, in the nature of medieval "deodand." Anthropomorphic methods also fail at describing the functional relationship between an institution and an agent's crime.<sup>239</sup>

Not surprisingly, most suggestions for reform of entity criminal liability have proposed second-best proxies, rather than full models of institutional responsibility. But such efforts tend to start from insufficiently focused conceptions of the justifications for *criminal* entity liability. For example, some argue that management complicity defines institutional fault.<sup>240</sup> Management can serve as a proxy for the entity but cannot replace it.<sup>241</sup> The management proxy works poorly because groups can

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237. Laufer & Strudler, *supra* note 11, at 1309–10.

238. See CANE, *supra* note 88, at 150, 168 (arguing that one can speak of corporate culture or actions of a corporation only by attributing human conduct to the entity—otherwise, such talk is "meaningless anthropomorphism"; by treating responsibility as a function of personality, metaphoric approaches leave gaps with social practices, which view the personality of groups as a function of responsibility).

239. Compare *id.* at 148 (arguing that because law reflects the paradigm of individual responsibility, it is necessary to attribute human conduct and mental states to entities in order to allocate legal responsibility, but these are "deeming" rules, not reflections of metaphysical conclusions about "the mind of the corporation" or "the corporation's conduct") with MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 624 (1997) ("It . . . makes sense to seek the meaning of 'persons' and its related terms ('action', 'reasons') in terms of the facts that must be true if these concepts are to be correctly employed" because "the concepts employed in discussing all such questions are not empty labels for a moral or legal conclusion reached on other grounds, or on no grounds at all; they are concepts having a descriptive and explanatory function, no matter what other expressive, prescriptive, or ascriptive functions they may serve in contexts such as those of responsibility assessment.").

240. The Model Penal Code is the leading authority for this proposition. See MODEL PENAL CODE § 2.07 (1985) (holding that strict master-servant liability applies only to regulatory offenses where legislature has specified corporate liability; defense of due diligence by high management to prevent the offense defeats prosecution in such cases; liability otherwise attaches only where offense "was authorized, requested, commanded, performed or recklessly tolerated" by high management or directors); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 230 (1991); *Developments in the Law—Corporate Crime*, *supra* note 6, at 1257–58; but see Coffee, *supra*, at 195–96 (discussing how control of internal policing may not be sufficient justification for criminal versus civil liability); Lynch, *supra* note 11, at 52 (arguing that a corporation should be held responsible "only when no individual can be proven culpable, or where the individuals who can be punished are insufficiently important to bear the weight of stigma appropriately attaching to the harmfulness or offensiveness of the wrong").

241. See Khanna, *Top Management*, *supra* note 10, at 1232–41; see also Fisse, *supra* note 124, at 1187 (finding that management fault does not necessarily correspond with corporate



commit crimes without the direct involvement of leaders.<sup>242</sup> It is easy to imagine serious harm produced by lower-level employees (such as telemarketing salespeople who defraud) without the knowledge of high managers, but explainable by institutional norms.<sup>243</sup> At the same time, managers can help produce a crime (say, by driving telemarketing salespeople to produce unattainable revenues) even when they do not participate in, or even know of, the offense. And, of course, a senior manager might deviate and commit a serious offense on the job without giving any reason to ascribe institutional responsibility. Aberrant behavior that happens to transpire in an institutional setting, even if it needs such a setting in order to be rewarded, is not the concern of a practice of blaming institutions.

Likewise, reliance on formalized institutional policy, controls, and practices fits poorly with institutional responsibility.<sup>244</sup> If an organization formalizes practices, that may strengthen the claim that those practices bear on the crime's relationship to the institution but by itself will not say whether practices affected the crime.<sup>245</sup> A firm might formalize practices in part to mask that it does not really practice them, or use them for that purpose *ex post* even if it did not design them for it *ex ante*. Indeed, there is reason to doubt the effectiveness of the modern emphasis under the United States Sentencing Guidelines on rewarding corporations simply for having compliance programs. It may be mostly a boon to compliance professionals.<sup>246</sup>

Other approaches—including attribution of negligence to firms,<sup>247</sup> and a recent proposal to narrow criminal liability for firms by altering evidentiary rules<sup>248</sup>—

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fault, so management-based standards are just another form of vicarious liability).

242. See CANE, *supra* note 88, at 157 (arguing that the doctrine of "identification" of senior management with the entity makes entity liability under-inclusive).

243. See Alexander & Cohen, *supra* note 154, at 3 (finding that involvement of lower-level employees outside the top management team was a precondition to many corporate crimes examined in an empirical study); see also Khanna, *Top Management*, *supra* note 10, at 1232–41 (arguing that high management involvement is an inefficient measure of internal monitoring efforts).

244. See, e.g., Peter A. French, *The Corporation as a Moral Person*, in COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS, *supra* note 88, at 133.

245. See Fisse, *supra* note 124, at 1191 (arguing that requiring proof of policy would exclude far too many cases of corporate fault).

246. See Krawiec, *supra* note 14, at 21–27 (reviewing empirical studies); Coffee, *supra* note 239, at 229 (discussing how management may use monitoring systems as an insurance policy to escape liability while still pressuring underlings to violate law); Langevoort, *supra* note 114, at 83–103 (arguing that social and cognitive psychology theory suggests that the law's emphasis on compliance efforts may be ineffective for a variety of reasons, including its tendency to overestimate managers' detection abilities, tendency to underestimate costs of third-party monitoring, and bias in favor of excessive monitoring).

247. See, e.g., MAY, *supra* note 92, at 85–96 (arguing that the given act should be ascribed to the corporation if an employee acts pursuant to a decision by "high-ranking managers," which will often take the form of "a decision not to interfere or effectively to acquiesce" in circumstances where a manager has a duty to prevent the employee from committing harm). Negligence can also be *under-inclusive*. For example, the idea of "reactive corporate fault" would impose criminal blame when an entity fails to act preventively and correctively in response to an agent delict. FISSE & BRAITHWAITE, *supra* note 94, at 48–49. People resent entities that stonewall and fail to redress harm, but that is only one reason for resentment of entities and it arises only in some cases. Entities can be palpably at fault at or before the agent's

similarly fail to define institutional *production* of crime. Because they do not accord with the social practice of blaming institutions, they do not support maintenance of a separate criminal regime of enterprise liability.

### C. A Second-Best Alternative

#### 1. Reshaping Existing Law

A more promising approach would be to turn back to the prevailing law of entity criminal liability itself, and consider how it might be thickened. Agent mens rea, consistent with longstanding practice, could be useful past the point of the agent's own liability, but not in the way long believed. *Imputation* of agent mens rea to the firm is only a legal device, a fiction that has nothing to do with firm responsibility. It is just a means of mobilizing criminal law against entities.

Agent mens rea might reveal the firm's influence in a different way, that is, through the agent's mental state not toward her own actions but *toward the firm*. If an agent commits a crime with the understanding that her crime furthers the purposes of her institution, it is more likely that the agent's conduct is explained by institutional influence.<sup>249</sup> The proxy of agent mens rea of course is imperfect because the agent's understanding is only evidentiary of institutional influence and is subject to limitations of mistake, incomplete information, lack of self-awareness, and so on. However, the proxy gets substantially closer to the fact of institutional influence than existing law or prior proposals do, chiefly because this proxy is workable. Law is equipped to examine the human mental state. Circumstantial evidence can paint a picture of a person's

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criminal act. *Id.* at 162; see also CANE, *supra* note 88, at 37 (arguing that the idea of reactive corporate fault, as based on rewarding good behavior, does not fit with the traditional framework of criminal process as a mode of punishing bad behavior). Lastly in this vein, "flagrant organizational indifference," that is, willful blindness, does not bridge the chasm between a criminal law founded on human free will and nonhuman entities because *intentional* lack of knowledge is the linchpin fixing willful blindness to the criminal law. Compare Hagemann & Grinstein, *supra* note 62, at 218-27 ("If an organization deliberately compartmentalizes information to escape the knowledge that might lead to its conviction, then collecting the knowledge scattered throughout its employees and utilizing it against the organization properly imputes liability.") with *United States v. Jewell*, 532 F.2d 697, 704 (9th Cir. 1976) (en banc) ("[R]equired state of mind differs from positive knowledge only so far as necessary to encompass a calculated effort to avoid the sanctions of the statute while violating its substance.").

248. See Bierschbach & Stein, *supra* note 176 (suggesting an expansion of attorney-client privilege for corporations, coupled with a recognition of corporate privilege against self-incrimination that could be overcome only with a probable cause warrant, as means of reducing the frequency of imposing criminal liability on firms, in order to reduce expected sanctions to offset over-deterrence caused by the imposition of reputational sanctions). This proposal to modify procedure may be a third-best substitute for narrowing substantive law and could sharply reduce the ability of the government to use firms to detect and punish individual wrongdoing.

249. See Krawiec, *supra* note 14, at 27-40 (arguing that theories that treat crime in entities solely as an agency cost confuse "organizational misconduct," which is meant to benefit firms, with "occupational misconduct," which is meant to benefit the agent and may victimize the principal).

attitude, and a person's attitude can tell us much about external conditions that gave rise to that attitude.

Existing law has a mostly dormant feature that ought to be doing some of this work. An entity cannot be convicted of a crime under respondeat superior unless the offending agent acted with the intent to benefit the entity.<sup>250</sup> This is a requirement of vicarious agency liability in tort and has been given a slightly stronger gloss in its criminal form.<sup>251</sup> But courts have rendered the element virtually meaningless. The only significant decision rejecting entity criminal liability on this ground involved a secret theft and diversion of oil belonging to a petroleum company by employees in cahoots with a third party with whom they shared the spoils.<sup>252</sup> More emblematic and recent is *United States v. Sun-Diamond Growers of California*,<sup>253</sup> in which the court found no difficulty imposing entity criminal liability where a single employee, in concert with an outsider, diverted corporate funds to help retire the campaign debts of a government official. What was more, the entity's convictions included two for wire fraud on the theory that it incurred criminal liability when its agent, by diverting the entity's money and hiding his diversion, breached his duty to provide honest services to the entity!<sup>254</sup>

*Sun-Diamond* deserves a chuckle, but the truth is that any theory of an intent to benefit, however slight, is enough. (In *Sun Diamond*, it was thought to help the company for its lobbyist to cultivate his friendship with the government official.) Cases of pure theft and embezzlement seem to be the only ones ruled out. This does not have to be so. The law is capable of handling problems of mixed motive.<sup>255</sup> That is not to

250. *Standard Oil Co. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962); *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 406–07 (4th Cir. 1985); *United States v. Gold*, 743 F.2d 800, 822–23 (11th Cir. 1984); *United States v. Cincotta*, 689 F.2d 238, 241–42 (1st Cir. 1982); *United States v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979).

251. See RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (Tentative Draft, No. 5, 2004) (stating the principle inversely: “An employee's act is not within the scope of employment when it occurs within an independent course of conduct *not intended by the employee to serve any purpose of the employer.*”) (emphasis added); see also *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 970 n.9 (D.C. Cir. 1998) (arguing that in a civil case of vicarious liability, a showing of apparent authority may be sufficient without regard to agent's intent to further principal's interest).

252. *Standard Oil*, 307 F.2d at 122–25.

253. 138 F.3d at 961.

254. To be fair, the *Sun-Diamond* court acknowledged the deep contradiction here, but defended it on the grounds that imputation of agent mens rea is a fiction with no purpose other than to encourage entity monitoring, and courts are free to impute it without any other basis. *Id.* at 971.

255. See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87 (1977) (holding that in determining whether an employee was terminated for a constitutionally impermissible reason, the court should require the employee to show that the prohibited reason was a “substantial” or “motivating” factor and then permit the employer to establish that it would have terminated the employee even in the absence of protected conduct). I do not mean to suggest in any broader sense that an analogy to employment law holds. See, e.g., 5 U.S.C. § 1221(e) (2000) (overruling *Mt. Healthy* for normative reasons by requiring plaintiff to prove that impermissible purpose was only “contributing factor” and requiring defendant to disprove but-for causation by clear and convincing evidence); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (noting that it is difficult to determine

say that the task is easy. But it is not hopeless, any more than it is hopeless to determine whether a defendant had the purpose of obstructing justice when she destroyed a document, or understood the nature of what she was doing when she lit her own house on fire while suffering from acute depression.

An important first step toward deeper examination of agent mental state, for the purpose of inferring institutional influence, would be to give real meaning to the element of intent to benefit. For imposition of *criminal* agency liability, courts could require the government to prove that the agent's primary purpose in committing the crime was to benefit the entity.<sup>256</sup> From this, we could infer (though this need not be a component of the decision rule)<sup>257</sup> that the agent acted with the understanding that the institution would favor her conduct and thus was under its influence.<sup>258</sup>

Such a rule would be far from a complete solution since it would leave many cases in which misguided, or "rogue," agents took it upon themselves to advance institutional interests criminally and without external suggestion. However, it would get started toward more careful consideration of the importance of agent *mens rea* to entity liability and it might lead to further rules for determining agent purpose, motive, intent, and their effects. It would eliminate the many cases of entity criminal liability that have involved only individual criminality that happened to take place in an institutional setting. The self-dealing executive, the embezzling stock broker, the lone obstructionist shredding evidence of her own crime, the inside trader, the deceptive salesperson seeking to pad her commissions, the gratuity-giver diverting assets for the benefit of an official friend, and the like would be cases for individual liability alone.

## 2. Some Objections

Critics of such a reform approach likely will argue either that it does too little or that it does too much. It does too little, it might be said, because it does not deal with a problem always present in the intent-to-benefit element of respondeat superior: in reality, agents do not act *either* to benefit themselves *or* their masters; benefitting the master is always good for the agent because good performance is generally rewarded. Rational agents seeking to benefit themselves will always act to benefit their masters.

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whether legislature or administrative body was motivated by a "dominant" or "primary" purpose).

256. See *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985) (finding that the trial court (unnecessarily) instructed jury that agent must have acted "for the purpose *primarily* of benefiting the corporation") (emphasis in original).

257. Cf. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9–13 (2004) (describing decision rules as means by which courts enforce norms (in Berman's case, constitutional ones) that for epistemic reasons cannot be replicated in the form of legal doctrine).

258. See *Standard Oil Co. v. United States*, 307 F.2d 120, 128 (5th Cir. 1958) (concluding that if the agent's act "is done with a view of furthering the master's business, of doing something for the master, then the expectation or hope of a benefit, whether direct or indirect, makes the act that of the principal"); RESTATEMENT (THIRD) OF AGENCY § 7.07(2) cmt. b (Tentative Draft No. 5, 2004) ("When an employee commits a tort with the sole intention of furthering the employee's own purposes, and not any purpose of the employer, it is neither fair nor true-to-life to characterize the employee's action as that of a representative of the employer.").

Thus even a substantial intent to benefit the firm may say little about the influence of a firm on its agent.

Such a thin account of agent motivation conflicts with the wealth of material discussed in this Article explaining how organizational influence on people is complex and context-dependent. For someone who believes that institutional influence is not potent or even real—that is, that a given individual will exercise the same rationally self-interested choices consistent with her set of preferences regardless of institutional setting—this Article’s entire approach to entity criminal liability would seem mistaken. I concede that if institutional influence on the individual is a fallacy, then entity criminal liability might have no purpose.

Of course there will be hard cases. Perhaps emblematic are cases of financial statement fraud by managers of publicly traded corporations. Falsifying a company’s numbers to boost its stock price can benefit both managers and shareholders (and particularly managers who hold shares), but can severely harm shareholders too, especially those lacking the knowledge necessary to make exit decisions before the fraud is revealed and the stock price plummets.<sup>259</sup>

The difficult problem of fraud-on-the-market cases suggests a need to develop proper baselines for measuring an agent’s intent to benefit her firm. One might view an agent’s parity of self-interest with the short-term interests of the firm, but not with the long-term interests of the firm, as a case of self-interest, not firm interest.<sup>260</sup> This might be a surprising conclusion, but it makes more sense if we recall the point that reputational sanctions are likely to be most effective at the margins, as applied to actors who care most about reputation and invest most in guarding it. In any case of pervasive accounting fraud, culpable managers have chosen to pursue a course of action that, if discovered, will reveal the firm to be a fake. Their motivation is solely to prevent detection, not to protect reputation in the event their conduct is discovered.

Alternatively, there are two arguments that this Article’s reform proposal does too much. First, relying on a strong element of the agent’s intent to benefit the firm will exclude some troubling cases that many might want to treat criminally. Suppose a sea captain, whose employer knows him to be a drunkard but takes no action, runs a petroleum tanker aground, despoiling an entire ecosystem. He had no intent to benefit his employer when he got drunk while on watch. But his employer looks awfully blameworthy (institutionally so) for having, at the least, recklessly countenanced employee recklessness, causing grave harm. We might see in a similar light a case, for example, of an investment house that ignores repeated red flags and instances of embezzlement by its own brokers.

Such cases of failure to supervise rogues clearly involve breakdown or abandonment in internal policing. But do they really represent *firm* crimes in the same sense as a case like *Andersen*, or the simple example of the delivery company with

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259. See Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 693–94 (arguing that fraud on the market is a product of agency costs when managers perceive themselves to be in the last period of employment).

260. See *id.* at 704–20 (arguing against any form of enterprise liability in cases of fraud on the market on the grounds that it does not deter such conduct better than individual liability and that sanctions in such cases generally only shift the loss from one group of “innocent” shareholders to another).

incentives that induce its drivers to careen around recklessly and strike pedestrians? This is a hard question. One might say no, on the grounds that even really bad negligence resulting in mass harm belongs and can be handled in the tort system and that, at the level of the firm, the wrong in these cases is only negligence, even if the agent committed a crime.

Or one might say yes, on the ground that there is no difference in terms of entity blameworthiness between a firm inducing its agents to offend and sitting on its collective hands knowing they are offending or are about to offend. Both cases, it might be argued, involve a link between the firm and the conduct that both explains the impulse to blame the firm and makes that blaming more likely to alter the behavior of firm agents. If egregious nonfeasance cases are best seen in this light, one might want to supplement the criminal liability standard with allowance for cases of reckless monitoring of agent wrongdoing.

Second, one might complain that the proposal here does too much because it would eliminate many cases from a system that has developed a strong framework of incentives for firms to police and punish wrongdoing. What happens to the exhaustively treated problem, found everywhere from the United States Sentencing Guidelines to academic commentary, of how to calibrate entity criminal liability's rules and sanctions to optimize use of the firm as an instrument for control of individuals?<sup>261</sup> Would narrowing entity criminal liability sap strength from that system?

If fining firms to induce compliance is the only purpose of a enterprise liability, then there probably is no reason to have a separate criminal system. Sanctions can be extensively calibrated in any set of civil liability systems, regulatory and private, one might want to construct. If one nonetheless wants to retain a criminal liability system because its stronger impact provides special leverage in encouraging firms' compliance efforts, then a narrower, more responsibility-based criminal system will only *increase* that leverage. Its messages will say more, so firms will fear its effects more. In addition, in the criminal cases that remained under a narrower liability standard, one could still tinker with court-imposed sanctions to optimize incentives.

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261. See, e.g., U.S. SENTENCING GUIDELINES MANUAL ch. 8 (2004). *But see* United States v. Booker, 125 S.Ct. 738 (2005) (holding that the United States Sentencing Guidelines are unconstitutional as binding law; they are merely advisory). For a leading analysis, see Arlen & Kraakman, *supra* note 71, at 735–41 (advocating the efficiency of a composite regime of strict liability with mitigation of sanctions to credit policing); see also *id.* at 691 n.12 (choosing not to address whether corporate liability should be civil or criminal); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (discussing how master-servant liability might discourage an entity from monitoring since monitoring will uncover (and thereby make more likely to be proven) wrongs the entity could not have prevented); Arlen & MacLeod, *supra* note 171, at 136 (arguing that vicarious liability should be based on the master's "capacity . . . to structure[] its relationships with the agent to allow it to influence the agent's behavior" because the existing "control" test encourages masters to structure relationships with servants in order to avoid liability); V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 403–05 (1999) (advocating the efficiency of strict liability not just as to master-servant connection but also as to the servant's mental state, coupled with inquiry into agent mens rea at sentencing, to aggravate or mitigate a baseline sanction, on the ground it would enhance entity control of agents who harm unintentionally).

*D. Enforcement*

Even a strong requirement of proof of an agent's intent to benefit the entity would leave many existing cases of entity criminal liability unaffected. More often than not, the offender in the firm setting who pursues criminal means does so to reap advantage for both herself and the firm. At least some of these cases will not really be about how institutional conditions spawned criminality. No matter what legal standard is pursued for entity criminal liability, the lack of a first-best rule will leave a gap between the scope of liability and the objective to communicate about group wrongdoing.

Enforcers should confront such a gap by selecting cases in which the imposition of entity criminal liability will address institutional production of crime. On this Article's account, those will be the cases in which reputation is at stake. Prosecutorial guidelines ought to counsel the selection of cases that will convey the message that a serious institutional lapse that produces crime is deviant. Prosecutors should consider whether an entity criminal prosecution will impose a reputational sanction that is roughly commensurate with the seriousness of the wrongdoing and the entity's role in producing the harm.<sup>262</sup>

Reputational sanction is not an end. It is an indicator of social meaning and assists in the educative function of criminal law. Reputational sanction is also the bite in criminal entity liability that causes credible enforcement threats to encourage firms to disclose and rectify wrongdoing by their agents. If entity criminal liability did not impose a unique sanction, and certainly if enforcers never actually inflicted that sanction, firms would operate under much less powerful incentives to control individual behavior. Thus, achieving instrumental benefits of entity criminal liability and tailoring its scope to firms' true blameworthiness go hand in hand.

Responsibility-based enforcement practices would be liable to eliminate many cases, since over ninety percent of entity criminal cases have involved privately or closely held firms, many of which likely experience little reputational effects.<sup>263</sup> The fewer prosecutions and the more socially important the defendants in those cases, the more meaning an institutional conviction will carry and the more reputational sting it will inflict. The more meaningful and punitive the institutional conviction grows, the more prosecutors will tend to reserve it for the most important cases.<sup>264</sup>

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262. Current guidelines do not include this consideration. See Thompson Memo, *supra* note 60, at 3.

263. Gilbert Geis & Joseph F.C. DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AM. J. CRIM. L. 341, 365 (2002) (discussing an early report that found ninety-seven percent of firms sentenced under United States Sentencing Guidelines were privately or closely held); see also Alexander & Cohen, *supra* note 154, at 9–10 (explaining that according to the United States Sentencing Commission, during years 1984 to 1990, only about twenty publicly held corporations per year were convicted of a crime). It is hard to see the justification for entity criminal liability in cases of sole or near-sole proprietorships. Assuming that entity liability is implicated because of the *owner's* crime, the entity effectively represents just another personal asset of the offender. Individual sanctions can be structured to reach corporate assets and the marginal reputational effect on an offender of also prosecuting the offender's own company is apt to be negligible.

264. See KUTZ, *supra* note 90, at 113 ("The most important and far-reaching harms and wrongs of contemporary life are the products of collective actions, mediated by social and

With entity liability, criminal enforcement is highly normative *by itself*, not just because of legal sanctions that may follow. This is not a novel insight. We have long spoken about how an indictment or conviction makes a statement, inflicting reputational or psychological harm or expressing values.<sup>265</sup> But we have underexplored the mechanism of this production. As a consequence, we do not have a good understanding of how to trigger what we could call “enforcement sanctions,” to control them, or to measure or interpret their effects.<sup>266</sup>

Entity criminal liability is a case in point because when we strip it down to its justifiable purpose, we are left with a law that is influential far more by its invocation than through the sanctions it authorizes. There are other cases in which enforcement alone sanctions, and further such problems for analysis. People have reputations too, and the criminal law’s public cases are by no means limited to entity prosecutions. Sometimes not only do indictment, trial or plea, and conviction impose distinct costs, but those costs can surpass those of statutory sanctions.<sup>267</sup> Undeniably, enforcers often act in such contexts because enforcement has sanctioning effects.<sup>268</sup> Such motives can pose problems, but cabined within the right conception of the enforcer’s mandate they can produce expressive benefits.

Reputation is not enforcement’s only capital. Consider, for example, areas where levels of compliance are opaque, such as falsehood or fraud in the legal process or the financial markets. Enforcement in such contexts may signal to others who are inclined to comply, even if only weakly, for normative reasons or for benefits of reciprocity, that the state is serious about deterring free riding, and thereby discourage defection. We might ask whether the effect of such enforcement signaling is decoupled from the actual performance of deterrence among putative free riders, thus explaining the state’s sometimes overblown expressions of devotion to deterrence. In other words, enforcement might be a powerful heuristic.<sup>269</sup>

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institutional structures.”); see also ARNOLD, *supra* note 197, at 161 (arguing that the view that rare cases, however spectacular, are of minor importance because they do not stand out statistically is based on the “assumption that courts are business institutions” which “lose[s] sight of the dramatic functions of the court”).

265. See, e.g., *Lewis v. United States*, 518 U.S. 322, 334 (1996) (“Opprobrium attaches to conviction of those [crimes punishable by sentences of more than six months] regardless of the length of the actual sentence imposed, and the stigma itself is enough to entitle the defendant to a jury.”).

266. The problem is how the enforcement act alone sanctions and thereby communicates, not the problem of how sanctions might be tailored to exploit expressive effects. See, e.g., Skeel, *supra* note 173, at 1823 n.48 (citing materials on shaming penalties).

267. Public corruption and serious crime in major financial markets come immediately to mind but there will be other settings. See, e.g., John B. Owens, *Have We No Shame?: Thoughts on Shaming, “White Collar” Criminals, and the Federal Sentencing Guidelines*, 49 AM. U. L. REV. 1047, 1053–55 (2000) (briefly naming ways in which enforcement process can affect targets and defendants).

268. See Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

269. Dan Kahan begins to describe this problem in recent work. See Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003); Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333 (2001). The implications of how enforcement practices normatively operate should be explored in specific contexts beyond Kahan’s observations that crackdowns may perversely undermine compliance by signaling



## CONCLUSION

Perhaps surprisingly, this Article has both embraced entity criminal liability and argued for cutting back on its presence in the legal system. The two agendas are linked. Properly understood, entity criminal liability need not be an instance of “overcriminalization,” that is, another strand in an expanding web of criminal law that is encroaching on civil means of regulating behavior. At its core, entity criminal liability instantiates a social practice of blaming institutions for crime that is characteristic of criminal law in its morally infused message, and in the stigmatic impact of that message.

That blaming, channeled through the legal system, can yield beneficial effects by altering organizational behavior. But such benefits will flow optimally only if law is shaped to convey blame, and if enforcers appreciate the normative impact of their own actions. With some modest reforms, we might finally begin to complete after a century the unfinished work of situating enterprise liability in the criminal law.

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widespread defection, or may fortify trust if transparently directed at free riders widely expected to resist incentives to reciprocate.