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# ORGANIZATIONAL LIABILITY AND THE TENSION BETWEEN CORPORATE AND CRIMINAL LAW

*Miriam H. Baer\**

## INTRODUCTION

On February 5, 2010, Brooklyn Law School brought together a group of psychologists, philosophers, and corporate criminal law experts to explore the implications of blaming corporate groups. During the afternoon session, I had the pleasure of moderating a roundtable discussion that included Professors James Fanto, Peter Henning, and Leonard Orland. The essays that follow are our reactions to the wide range of topics we covered with regard to organizational criminal liability.

As the Symposium itself demonstrated, corporate criminal liability continues to be an important and complex topic in public discourse. Our preoccupation reflects our intuition that wrongdoers ought to be punished, and our uneasy relationship with large, powerful corporate organizations. We fear both the harms that corporate organizations can produce (British Petroleum's massive oil spill being the most recent example), and the agglomeration of economic power that they represent. These fears have led us to

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adopt various mechanisms for restraining corporate conduct. Corporate criminal liability has become, over the years, one of the most important of these mechanisms because it stems not only from theories of restraint, but also from notions of group blame.<sup>1</sup> The legal equivalent of one-stop shopping, it promises consequential, retributive and expressive benefits, all at the same time.

Drawing on psychology and organizational management literature, Professor Fanto's piece explores the extent to which group dynamics explain corporate malfeasance and, therefore, justify the need for corporate criminal liability.<sup>2</sup> Professor Henning focuses on several recent cases, which demonstrate criminal liability's imperfect potential for corporate rehabilitation.<sup>3</sup> Together, their comments demonstrate the pragmatic benefits and drawbacks of employing the corporate unit as the measure of group blame. If we blame the corporation, we can (supposedly) improve the organizational dynamics that led to its decline. On the other hand, if we blame the corporation, we may (sometimes) impose rehabilitative regimes that are less helpful than we presume.<sup>4</sup>

In my own contribution, I want to suggest that corporate criminal liability, as currently constituted in federal jurisdictions, fails to perform the sorting and rehabilitation mechanism that Professors Fanto and Henning envision. That is, as a legal matter, corporate criminal liability is so broad that it cannot possibly

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<sup>1</sup> See generally Samuel Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006). For a proposal for using civilly-imposed punitive damages to express moral condemnation, see generally Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009), and Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383 (2009).

<sup>2</sup> James Fanto, *Organizational Liability*, 19 J.L. & POL'Y (forthcoming Fall 2010).

<sup>3</sup> Peter J. Henning, *Should the Perception of Corporate Punishment Matter?*, 19 J.L. & POL'Y (forthcoming Fall 2010).

<sup>4</sup> To this end, the two essays demonstrate the problem that deterrence strategies in criminal law "may have hidden crimogenic costs—that is, they may generate crime in unexpected ways." Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst When Doing its Best*, 91 GEO. L.J. 949, 951 (2003).

identify those corporations whose cultures are particularly corrupt.<sup>5</sup> As a result, corporate criminal liability is not, by itself, a particularly good vehicle for rehabilitating corporate culture; instead, prosecutors must fill that gap by screening a few “unworthy” corporations from a multitude of entities that technically qualify for criminal charges.<sup>6</sup> As a result, federal prosecutors acquire an oversized role in governing corporate entities, with little to no oversight from the courts or the public.

## I. THE RESPONDEAT SUPERIOR THEORY OF CORPORATE CRIMINAL LIABILITY

Under our federal law’s *respondeat superior* theory of criminal liability, corporations may be held liable for their employee’s crimes, provided the employee acted in the scope of her authority and acted with an intention to benefit the corporation.<sup>7</sup> The Supreme Court originally justified such liability on grounds that there existed no other way to restrain business entities, who were growing in size and power at the turn of the 20<sup>th</sup> century during the

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<sup>5</sup> See Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, 1517 PLI/CORP. 815, 817 (2005) (describing broad scope of corporate criminal liability).

<sup>6</sup> In a 2005 presentation before the Practising Law Institute, former United States Attorney Mary Jo White bluntly reminded her audience of this fact:

On the federal level especially, the sweep of corporate criminal liability could hardly be broader. All of you in this audience probably know the law well, but its breathtaking scope always bears repeating: If a single employee, however low down in the corporate hierarchy, commits a crime in the course of his or her employment, even in part to benefit the corporation, the corporate employer is criminally liable for that employee’s crime. It is essentially absolute liability.

*Id.*

<sup>7</sup> See generally *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909). For early discussions of *respondeat superior* corporate criminal liability, see generally John C. Coffee Jr., *Does Unlawful Mean “Criminal”?* *Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 313 (1991); John C. Coffee, Jr., “No Soul to Damn: No Body to Kick.” *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981).

industrial revolution.<sup>8</sup> Today, however, those concerns are rather quaint;<sup>9</sup> a host of administrative agencies and civil liability can restrain corporate wrongdoing and reduce harmful externalities. Why, then, does corporate criminal liability not only persist, but in fact flourish?

Corporate criminal liability relies on what some might call a “communitarian” view of the corporation, which posits that the corporation is a social institution with an identifiable personality.<sup>10</sup> The communitarian vision of the firm is at odds with the dominant view among corporate scholars and jurists, which is that the corporation is little more than a nexus of contracts.<sup>11</sup>

If the contractarian view dominates the world of corporate law, then the communitarian view most surely governs criminal law. As the presentations and comments during the Trager Symposium demonstrated, the communitarian view is supported by more than just scholarly opinion; it also appears to be fueled by powerful societal intuitions.<sup>12</sup> We can credibly blame the financial

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<sup>8</sup> *N.Y. Cent. & Hudson River R.R.*, 212 U.S. at 495 (reasoning that criminal liability is necessary to restrain corporate wrongdoing).

<sup>9</sup> V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1486 (1996) (theorizing that corporate criminal liability may have served a “useful purpose” prior to the emergence of strong civil enforcement regimes).

<sup>10</sup> See, e.g., Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 455 (2006). “Communitarians insist that corporations have political and social dimensions as well as the obvious economic dimension.” Another view of the corporation is that it is the equivalent of a living, sentient animal. See Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1374–76 (2009) (describing and critiquing theory of corporate punishment that posits a corporation as the equivalent of a human being).

<sup>11</sup> William T. Allen, *Contracts and Communities in Corporation Law*, 50 WASH. & LEE L. REV. 1395, 1400 (1993).

The dominant legal academic view does not describe the corporation as a social institution. Rather, the corporation is seen as the market writ small, a web of ongoing contracts (explicit or implicit) between various real persons. The notion that corporations are ‘persons’ is seen as a weak and unimportant fiction..

*Id.*

<sup>12</sup> David G. Trager Public Policy Symposium, *Sharing the Blame: The Law and Morality of Punishing Collective Entities* (Feb. 5, 2010) (unpublished

institution known as “Goldman Sachs” because we believe, on multiple levels, that Goldman Sachs is an identifiable entity. It means something to refer to “Goldman Sachs” and not “Citibank” or “Morgan Stanley,” just as it feels different to work for Goldman Sachs than it does to work for some other institution. Indeed, it feels different to work for *any* financial institution than it does to work for any corporation in some other industry, and so forth. It is that feeling, often referred to as “corporate culture,” that allows prosecutors both to generate narratives of corporate blame (i.e., the “greedy culture” at Goldman led to excessive risk-taking and allegedly fraudulent conduct) and invoke notions of just desserts.<sup>13</sup> The communitarian view also enables prosecutors to argue that criminal law provides better tools with which to punish or reform the previously identified “corporate culture.”<sup>14</sup>

Unfortunately, the communitarian approach, as expressed through *respondeat superior* liability, does not do a very good job of taking into account differences between firms. Consider two primary arguments one might make in defense of a corporation whose employees have violated the law:

—*Don’t blame us. Blame our employees or officers.* This is a variant of a “rogue employee” argument, whereby the company as a whole should not suffer the direct and indirect costs of a criminal indictment, simply because a “rogue” employee made unauthorized decisions (and sometimes went to great lengths to hide those decisions) while in the company’s employ.<sup>15</sup> One should note, however, that many of the cases that make the morning

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transcript) (on file with Brooklyn Law School Journal of Law & Policy).

<sup>13</sup> See, e.g., Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991) (arguing that existence of an identifiable corporate ethos justifies imposition of punishment and criminal liability).

<sup>14</sup> *Id.* at 1123–27.

<sup>15</sup> True, corporations often must pay civil and administrative penalties when rogue employees, acting within the scope of their authority, cause harm to others. But civil and administrative penalties will often pale in comparison to the reputation and collateral costs of a federal criminal indictment. See Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1062–63 (2008) (citing collateral costs of corporate indictment).

papers and evening news are not mere “rogue employee” cases. Rather, multiple actors appear to bear varying levels of culpability for indirect encouragement or lax oversight of violations of law.

—*Don’t punish us. We are just shareholders.* The second contention is that whatever the culpability of the corporation’s employees and officers, criminal corporate liability imposes improper burdens on diffuse and largely innocent shareholders. This argument is most applicable to publicly held corporations whose managers have engaged in some variety of corporate fraud. The “shareholders will be harmed” argument contends that rather than hurting some abstract entity, criminal penalties hurt the corporation’s very (human) shareholders, who usually have had nothing to do with the underlying wrongdoing and indeed may have been the primary victims of wrongdoing.<sup>16</sup>

As a legal matter, neither claim is relevant within the federal system. Corporate criminal liability attaches regardless of whether the employee has violated explicit company rules,<sup>17</sup> or whether the company’s shareholders shared in the corporate employee’s ill-begotten profits.<sup>18</sup>

As a practical matter, however, the issue is more complex.

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<sup>16</sup> See Donald C. Langevoort, *On Leaving Corporate Executives “Naked, Homeless and Without Wheels:” Corporate Fraud, Equitable Remedies and the Debate over Entity Versus Individual Liability*, 42 WAKE FOREST L. REV. 627, 632 (2007). For a similar argument in the securities class action context, see John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1537 (2006) (observing that securities class action penalty “falls perversely on the victim”).

<sup>17</sup> See OFFICE OF PUBLIC AFFAIRS, U.S. DEP’T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTIONS OF BUSINESS ORGANIZATIONS, UNITED STATES ATTORNEYS MANUAL, TITLE 9, CHAPTER 9-28.000 15, available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf> (citing, e.g., *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) (holding that a corporation can be held criminally responsible even when its employee’s conduct was “against corporate policy or express instructions”)).

<sup>18</sup> *Id.* at 2–3 (citing authority for the principle that agent must only act with partial intent to benefit corporation and that actual benefit is not necessary for imposition of criminal liability).

Prosecutors clearly *do* take into account the extent to which the employee appears to be “just a rogue,” or in fact a member of an institution whose culture demands increased profits at all costs.<sup>19</sup> Moreover, prosecutors and regulators clearly *do* take into account the extent to which the company’s shareholders were themselves the victims of a corporate crime, and whether they would suffer additionally from the entity’s criminal prosecution.<sup>20</sup> Because prosecutors are known to make these screening decisions, companies retain incentives to employ strong oversight mechanisms (or at least mechanisms most likely to please prosecutors),<sup>21</sup> and to argue that prosecution is undesirable where shareholders are most likely to shoulder the costs of a criminal indictment.

When the government does take these arguments into account, it does not necessarily decline prosecution and call it a day. Instead, it may enter a deferred or non-prosecution agreement, whereby the company agrees to pay extensive fines, cease certain activities, agree to an outside monitor, and engage in additional reforms set out by the relevant prosecutor.<sup>22</sup>

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<sup>19</sup> *Id.* at 4 (directing prosecutors to consider, among other factors, “the pervasiveness of wrongdoing within the corporation”).

<sup>20</sup> *Id.* (directing prosecutors to consider, among other factors, “collateral consequences [of prosecuting], including whether there is disproportionate harm to shareholders [and other constituents] and others not proven personally culpable”). The SEC also has indicated its unwillingness to bring corporate-wide enforcement actions that would disproportionately harm shareholders. *See* Sec. & Exch. Comm’n, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS, SEC. & EXCH. COMM’N, RELEASE NO. 44969, 76 SEC DOCKET 296 (Oct. 23, 2001) (more commonly known as the “Seaboard Report”), available at [http://www.sec.gov/litigation/investreport/34-44969.htm#P16\\_499](http://www.sec.gov/litigation/investreport/34-44969.htm#P16_499) (“[T]he paramount issue in every enforcement judgment is, and must be, what best protects investors.”). The SEC and Department of Justice have potentially conflicting interests insofar as the SEC sees its mission as the protection of investors whereas the Department of Justice serves the general public.

<sup>21</sup> *See* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 990–92 (2009) [hereinafter Baer, *Governing Corporate Compliance*].

<sup>22</sup> For a discussion of deferred prosecution agreements and the manner by which they are negotiated, see generally Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45 (2006); Brandon



Thus, we see an interesting divergence between the legal and practical implications of the communitarian view of corporate wrongdoing; the federal law ignores arguments such as prevalence of wrongdoing and damage to shareholders, but prosecutors may credit them.<sup>23</sup> The problem, however, is that the government's response is entirely discretionary.<sup>24</sup> Government prosecutors *may* take these issues into account, but they have no legal obligation to do so.<sup>25</sup> Moreover, when they do take these arguments into account, government actors are relatively unbound by legal institutions—administrative or legal—that ensure transparency, accountability, and uniformity.<sup>26</sup> Indeed, they may be making

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L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007) (describing nature of deferred and non-prosecution agreements); Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1 (2006).

<sup>23</sup> “[I]n 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 . . . .” Buell, *supra* note 1, at 476. State laws are more constrained in their definition of corporate criminal liability. See Alschuler, *supra* note 10, at 1364, 1364 n.35 (citing Model Penal Code and state codes).

<sup>24</sup> Prosecutorial discretion has been more broadly criticized in Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009), declaring in the opening sentence: “No government official has as much unreviewable power or discretion as the prosecutor.” *Id.* at 959. Professor Pamela Bucy, a former federal prosecutor, has commented that the three aspects of the job that surprised her were the solemnity of the courtroom, the amount of resources available for investigation and prosecution, and “the amount of power [she] and every prosecutor had.” Pamela H. Bucy, *Moral Messengers: Delegating Prosecutorial Power*, 59 SMU L. REV. 321, 321 (2006).

<sup>25</sup> Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 86–87 (2007).

No amount of supplication, therefore, can overcome the mercilessness of the applicable legal doctrines; so long as there is a hint of criminality by even a single lowly employee, the corporation’s counsel has no leverage and no bargaining power. Only the prosecutor can be merciful, and for his mercy the corporation rationally chooses to cooperate in any way demanded.

*Id.*

<sup>26</sup> Prosecutorial discretion of this type is subject neither to judicial

decisions for which they have little expertise or competence.<sup>27</sup>

It should come as no surprise, then, that unbound government actors sometimes incur agency costs.<sup>28</sup> Since government actors have no obligation to recognize rogue employee or shareholder-victim arguments, they can extract personally and politically valuable compensation for doing so.<sup>29</sup> Ordinarily, the required payment is the company's willingness to cooperate in the prosecution of individual employees, as well as its commitment to enact certain reforms and policies.<sup>30</sup> To the extent these reforms

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oversight nor to the administrative restraints set forth in the Administrative Procedure Act. See Baer, *Governing Corporate Compliance*, *supra* note 21, at 976–79 (describing breadth of prosecutorial discretion).

<sup>27</sup> Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT, (Anthony S. Barkow & Rachel Barkow eds., forthcoming NYU Press 2011) (“Prosecutors rarely have sufficient experience working in any business, much less adequate industry-specific expertise, to make these decisions reliably.”) (manuscript on file with Brooklyn Journal of Law & Policy).

<sup>28</sup> “Agency costs” are the costs incurred when the principal’s interest diverges with those of the agent. To eliminate the agent’s bad conduct, the principal must expend resources monitoring and bonding the agent. In the corporate crime context, prosecutors in some instances were accused of taking actions for their benefit and not for the benefit of shareholders or even society at large. For example, when the United States Attorney for New Jersey signed a Deferred Prosecution Agreement with Bristol Myers Squibb that required Squibb to donate money to Seton Hall Law School (the United States Attorney’s alma mater), the payment was denounced as nothing more than a coercive wealth transfer with no real value for shareholders or the community. See Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14 (criticizing DPA’s requirement that Bristol Myers Squibb endow a chair in business ethics). This behavior also is an example of “rent seeking” in that the prosecutor allegedly used his power to extract transfer from one party (Squibb) to another (Seton Hall), rather than securing reforms that would increase wealth or at least compensate victims. For more on agency costs and rent-seeking behavior, see WARD FARNSWORTH, *THE LEGAL ANALYST* 66–69, 87–93 (2007).

<sup>29</sup> For additional examples of the principal-agent problem as it relates to prosecutors, see Bibas, *supra* note 24, at 963 (discussing principal-agent problem with regard to plea bargaining and charging decisions).

<sup>30</sup> For examples of deferred prosecution agreements, see authorities cited *supra* note 22.

accelerate the identification and prosecution of individuals who have transgressed criminal law, corporate criminal liability provides useful benefits, some of which Professor Henning rightly refers to in his Essay.<sup>31</sup>

There is, however, a negative side to corporate criminal liability, which, concededly, corporate defenders may be a bit too eager to point out.<sup>32</sup> Sometimes the government's proposed rehabilitation has little to do with eliminating criminal conduct at the individual level, but instead seeks the implementation of questionable governance provisions<sup>33</sup> or, even worse, requires the corporate defendant to make questionable payments to non-victim third parties,<sup>34</sup> or hand lucrative contracts to government-chosen outside monitors.<sup>35</sup>

The point here is not that corporate criminal liability is impossibly flawed.<sup>36</sup> Putting aside the practical and theoretical implications of punishing an organization for being "crimogenic," one could at least imagine a plausible legal regime that takes into

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<sup>31</sup> Peter J. Henning, *Should the Perception of Corporate Punishment Matter?*, 19 J.L. & POL'Y (forthcoming Fall 2010).

<sup>32</sup> Cf. Samuel Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1615 & nn.3-4 (2007) (contending that public debate of corporate prosecutions has been, at times, "shallow and even shrill").

<sup>33</sup> See Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 AM. CRIM. L. REV. 1481, 1500-01 (2007) (describing governance obligations imposed by prosecutors on Computer Associates and other corporations).

<sup>34</sup> See discussion *supra* note 28.

<sup>35</sup> See Alschuler, *supra* note 10, at 1384 (describing John Ashcroft's lucrative deal to monitor a corporation that was the subject of a deferred prosecution agreement in New Jersey). Negative publicity generated by the choices and costs of several deferred prosecution-induced monitors drove the Department of Justice to issue a set of guidelines for prosecutors in choosing monitors. See Steven R. Peikin, *New Guidelines for Corporate Monitors*, 1696 PLI/CORP 681, 683 (2008).

<sup>36</sup> Nevertheless, some would say just that. See Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 321-22 (1996) (contending that where corporations are concerned, criminal liability always is less efficient than civil liability). For a response that corporate criminal liability offers unique retributive and expressive advantages, see generally Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J. L. & PUB. POL'Y 833 (2000).

account the extent of the entity's employee malfeasance and its group dynamics, issues that Professor Fanto contends are important to consider.<sup>37</sup> One could also imagine a transparent and consistent system of corporate rehabilitation, the benefits of which Professor Henning discusses in his Essay.<sup>38</sup> But *respondeat superior* liability does not perform either of these functions. Instead, it leaves corporations entirely dependent on unaccountable, highly powerful government actors who have their own personal and institutional interests.<sup>39</sup> It is this very lack of accountability that creates the possibility for waste and abuse, the costs of which ultimately fall upon corporate shareholders.<sup>40</sup>

## II. A QUESTION OF CORPORATE GOVERNANCE

If we assume that the root cause of corporate misconduct is that managers and officers cannot achieve previously set performance goals without resorting to some variety of fraud or intentional wrongdoing, then the problem is one of corporate governance, which in turn boils down to a reassessment of how we allocate power between the owners and managers of the corporate firm.<sup>41</sup>

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<sup>37</sup> James Fanto, *Organizational Liability*, 19 J. L. & POL'Y (forthcoming 2010).

<sup>38</sup> Peter J. Henning, *Should the Perception of Corporate Punishment Matter?*, 19 J. L. & POL'Y (forthcoming 2010).

<sup>39</sup> For arguments that prosecutors are themselves imperfect agents, see Bibas, *supra* note 24, at 963. I also have argued that prosecutors may seek reforms that are designed primarily to aid in the identification and prosecution of individuals, rather than to cure structural or cultural governance problems. See Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn from Hewlett-Packard's Pretexting Scandal?*, 77 U. CIN. L. REV. 523, 526–28 (2008) (arguing that internal policing mechanisms may conflict with corporate governance norms such as openness and loyalty).

<sup>40</sup> These costs fall not only on those shareholders whose companies become the subject of criminal investigations and prosecutions, but *all* shareholders insofar as all companies take unnecessary or costly measures to avoid the imposition of corporate criminal liability.

<sup>41</sup> Jennifer Arlen and William Carney long ago theorized that corporate fraud results from management's attempt to hide corporate underperformance and thereby protect their jobs. Jennifer Arlen & William Carney, *Vicarious Liability for Fraud in Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 694 (1992). But one need not stop at fraud; rational corporate

As has been observed in multiple venues, shareholders have little control over the daily affairs of the corporation. For example, in Delaware—the state of incorporation for a majority of publicly held corporations—the board of directors retains the legal power to run the corporation.<sup>42</sup> Shareholders retain the power to elect directors, amend the corporate charter and bylaws, and approve structural changes such as mergers and sales of substantially all of the corporation’s assets.<sup>43</sup> Beyond these rights, shareholders remain limited, practically and legally, in what they can do with regard to the company’s internal affairs. “Management” controls the corporation’s information flow, access to its treasury, and in many respects, access to the corporation’s proxy statement.<sup>44</sup> Thus, it is no overstatement when Steven Bainbridge observes that shareholders, “who are said to ‘own’ the firm, have virtually no power to control either its day-to-day operation or its long term

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managers seeking to attain previously set performance goals may, when sanctions and probability of detection are low, choose other forms of legal noncompliance to the extent noncompliance is cheaper.

<sup>42</sup> See DEL. CODE ANN., tit. 8, § 141(West 2010a). This structure is replicated in all other states. See STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 34–35 & n.25 (2008) (observing that “[i]n all states, the corporation code provides for a system of nearly absolute delegation of power to the board of directors”).

<sup>43</sup> ARTHUR R. PINTO & DOUGLAS M. BRANSON, *UNDERSTANDING CORPORATE LAW* 93 (Matthew Bender & Co. Inc. 1999). Under the SEC’s shareholder proposal provision, shareholders also may propose and vote on certain proposals, provided they are “precatory” or non-binding. See *id.* at 157; Securities Exchange Act of 1934, 17 C.F.R. § 240.14a-8 (West 2010).

<sup>44</sup> The “proxy” is the statement that enables shareholders to vote on corporate matters without attending the company’s annual meeting. See generally Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 *IND. L.J.* 1259 (2009). In 2009, Delaware amended its code to permit shareholders to enact bylaws that required the inclusion of certain shareholder nominations on the corporate proxy, as well as the reimbursement of shareholders following a successful election. See DEL. CODE ANN. tit. 8, §§ 112, 113. In August 2010, the SEC increased shareholder access by enacting Rule 14a-11, which mandates inclusion in the proxy materials of director nominees of shareholders who meet minimum requirements set forth in the Rule. See 17 C.F.R. § 240.14a-11 and the SEC’s discussion of adoption of final rule, *Facilitating Shareholder Director Nominations*, SEC. & EXCH. COMM’N (Aug. 25, 2010), available at <http://www.sec.gov/rules/final/2010/33-9136.pdf>.

policies.”<sup>45</sup>

In an ideal world, the market for corporate control would render shareholder democracy unnecessary. This market, however, has been severely hampered by state anti-takeover statutes and judicially accepted defense mechanisms such as the poison pill.<sup>46</sup> Corporate management thus finds itself with a substantial degree of latitude.

Some contend that this is the optimal structure for promoting business in a complex economy;<sup>47</sup> others lament that it is a recipe for fleecing dispersed and powerless owners.<sup>48</sup> This debate is far from resolved by the numerous corporate scholars who have addressed it, and yet it tends to be ignored by those who populate the criminal justice world. Federal prosecutors, however hard they try, cannot begin to address these issues, much less remedy them.

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<sup>45</sup> BAINBRIDGE, *supra* note 42, at 3. Moreover, at least prior to the adoption of Rule 14a-11, shareholders have had little practical ability to unseat the directors of publicly held companies. “[F]or directors of public companies, the incidence of replacement by a rival slate seeking to manage the company better as a stand-alone entity is negligible.” Lucian Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 677 (2007). For analyses of whether this inability will change in light of newly enacted Rule 14a-11, see *Proxy-Access Forum*, THE CONGLOMERATE (Aug. 26-30, 2010), <http://www.theconglomerate.org/forum-proxy-access/>.

<sup>46</sup> See generally JONATHAN MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 118 (2008) (observing that “as the scientific evidence about the importance of the market for corporate control became so overwhelming as to be incontrovertible, regulations impeding the market for corporate control became ubiquitous”). For an explanation of poison pills as well as a description of other takeover defenses, see generally PINTO & BRANSON, *supra* note 43, at 313–16.

<sup>47</sup> BAINBRIDGE, *supra* note 42, at 233.

The chief economic virtue of the public corporation is not that it permits the aggregation of large capital pools, but rather that it provides a hierarchical decision-making structure well-suited to the problem of operating a large business enterprise with numerous employees, managers, shareholders, creditors, and other inputs. In such a firm, someone must be in charge . . . .

*Id.*

<sup>48</sup> Lucian Bebchuk’s scholarship presents the strongest case for increasing shareholder power. See, e.g., Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).

Rather, the proper allocation of corporate power is a question for state legislatures, state courts, and to an increasing degree, Congress and federal agencies such as the Securities and Exchange Commission (“SEC”).<sup>49</sup> Until the engines of corporate law better address the governance issues that lurk behind fraud and misconduct, a number of corporate agents will continue to shirk and transgress the law, and do their very utmost to hide such shirking and transgressions. Perhaps criminal law can do some good on the margins, but its benefits must be viewed against its costs. If we want deeper and longer lasting change, then we should probably look beyond the confines of corporate criminal liability, to corporate law itself.

#### CONCLUSION

In this Essay, I have pointed out some of the inherent shortcomings of *respondeat superior* liability, as well as some of the underlying tensions between criminal and corporate law. If we are serious about improving organizational dynamics, or rehabilitating corporate culture, we must take a look at complex questions of corporate form and governance and consider the extent to which those forms increase or decrease the risk of criminal conduct. If we truly want to inspire long term changes in corporate culture, then we need to think carefully about how we might overhaul corporate and securities laws. Such an overhaul, in turn, would require us to give much greater thought as to how we can best regulate the corporate firm, our capital markets, and the economy in general. On the other hand, it might allow prosecutors to go back to doing what they do best: prosecuting individuals.

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<sup>49</sup> For the argument that state law responds in large part to federal law’s view of corporate governance, see generally Mark Roe, *Delaware and Washington as Corporate Lawmakers*, 34 DEL. J. CORP. L. 1 (2009).