The Real Danger of the Responsibility Surplus

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ABSTRACT

The Responsible Corporate Officer doctrine permits the criminal punishment of an executive who neither participated in nor was aware of a criminal offense committed by a subordinate in limited circumstances. Some theorists argue for expanding the scope of the doctrine as a means of discouraging corporate wrongdoing. In this article I argue that this is mistaken as a matter of fact. Extending such vicarious criminal liability would not only fail to reduce corporate crime, it would be likely to both increase it and retard efforts to create non-criminogenic corporate cultures.

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INTRODUCTION

I recently published an essay entitled, *The Phantom Menace of the Responsibility Deficit*.[1] In that essay, I took issue with the claim advanced by advocates of corporate moral responsibility that unless corporations are liable to punishment as collective entities, there will be cases of wrongdoing for which no one can be held responsible.[2] This claim derived from the observation that "collections of agents may act in a way that predictably brings about bad results, without the members of the collection being individually or distributively culpable,"[3] which leaves "a deficit in the accounting books"[4] that can be remedied only by "allow[ing] for the corporate responsibility of the group in the name of which they act."[5] Advocates argued that counteracting this responsibility deficit was essential because failure to do so would "expose individuals to a perverse incentive . . . to incorporate, so as to achieve a certain bad and self-serving effect, while arranging things so that none of them can be held fully responsible for what is done."[6]

In my essay, I argued that the responsibility deficit poses no danger because corporations are subject to civil liability, administrative sanctions, and "metaphorical" responsibility—the public's tendency to ascribe employee wrongdoing to the corporation. I argued that the resulting damage payments, fines, and reputational damage are more than sufficient to ensure that individuals could not "incorporate, so as to achieve a certain bad and self-serving effect, while arranging things so that none of them can be held fully responsible for what is done."[7]

I also argued that corporate criminal liability should be eschewed as unjust collective punishment. Because corporate criminal punishment is necessarily financial in nature, the punishment is borne by either the corporation's customers in the form of increased prices, its employees in the form of lost jobs or reduced

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1. John Hasnas, *The Phantom Menace of the Responsibility Deficit*, *in* THE MORAL RESPONSIBILITY OF FIRMS 89 (Eric W. Orts and N. Craig Smith, eds.) (2017).

2. *Id.*

3. Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171, 195 (2007).

4. *Id.* at 194.

5. *Id.* Although I cite Philip Pettit for this argument, he was far from the first to advance it. *See, e.g.*, Patricia H. Werhane, *Corporate and Individual Moral Responsibility: A Reply to Jan Garrett*, 8 J. BUS. ETHICS 821, 821–22 (1989) ("My aim is to account for moral responsibility when it is not redistributable to the collection of individuals who cause an action, create a policy, or develop a practice. One needs to ascribe moral responsibility and thus moral liability to corporations as well as individuals, particularly when an action or practice is no longer traceable to its creators. Otherwise corporations, and in particular, their practices and policies, are let off the 'moral hook'. . . .").

6. Pettit, *supra* note 3, at 196.

7. *See* Hasnas, *supra* note 1, at 92–97. I also pointed out that the only thing that ascribing moral responsibility to corporations could add to this incentive structure was liability for criminal punishment, which, in the case of corporations, consists of financial penalties that are usually an order of magnitude smaller than civil damage awards. But "[i]t is unreasonable to believe that the absence of a relatively small criminal fine in the presence of a massively large civil damage award constitutes a situation in which the corporation is 'freed from the burden of being held responsible' such that 'no one is held responsible for actions that are manifestly matters of agential responsibility.'" *Id.* at 97 (quoting Pettit, *supra* note 3, at 197).

compensation, or its shareholders in the form of reduced dividends or stock value. But the characteristic common to all these individuals is that they are innocent of personal wrongdoing. Hence, corporate punishment necessarily punishes the innocent for the wrongdoing of the guilty, and is therefore inherently unjust.[8]

But imagine that I am partially wrong about the latter point. Imagine that, under certain circumstances, those who have not engaged in personal wrongdoing can nevertheless be blameworthy—specifically, that corporate executives can justly be blamed for the wrongdoing of other corporate employees in which they played no part.[9] This would mean that when corporate employees engage in wrongdoing, not only 1) would those employees be subject to punishment as individuals and 2) the corporation be subject to civil liability, administrative sanction, and metaphorical responsibility as a collective entity, but also 3) the relevant executives would be subject to punishment as individuals.

This is not idle speculation; there are scholars who make precisely this claim and advocate for this additional layer of punishment.[10] For purposes of this article, I will refer to this extra dollop of culpability for executives who are not personally involved in wrongdoing as the "responsibility surplus." The purpose of this article is to demonstrate that in contrast with the harmless responsibility deficit, the responsibility surplus poses a real and significant danger.

My argument for this conclusion will parallel the argument I made in *Phantom Menace*.[11] There I argued that it was not necessary to resolve the question of whether it is philosophically coherent to punish corporations as collective entities because, even if it were, we should not do so.[12] Similarly, in the present article, I will argue that it does not matter whether it is philosophically coherent to ascribe blame to faultless individuals because, even if it were, there are overpowering reasons why we should not do so. For not only is there no practical benefit from affixing punishment to this form of vicarious blame, the attempt to do so is likely to result in both more corporate wrongdoing and reduced efforts to create an ethical corporate culture.

To show this, I proceed as follows. In Section I, I describe the nature of the responsibility surplus. First, I show the limited way in which the surplus presently

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8. *See* Hasnas, *supra* note 1, at 97–102.

9. Although this article focuses on corporate executives, the argument being examined is not always so limited. Its logic is also frequently applied to corporate shareholders to claim that they are blameworthy for corporate wrongdoing despite having neither participated in it nor been aware of it.

10. *See, e.g.*, Kimberly Kessler Ferzan, *Probing the Depths of the Responsible Corporate Officer's Duty*, 12 CRIM. L. & PHIL. 455, 469 (2018); Christina M. Schuck, *A New Use for the Responsible Corporate Officer Doctrine: Prosecuting Industry Insiders for Mortgage Fraud*, 14 LEWIS & CLARK L. REV. 371 (2010); Kathleen M. Boozang, *Responsible Corporate Officer Doctrine: When Is Falling Down on the Job a Crime?*, 6 ST. LOUIS U. J. HEALTH L. & POL'Y 77 (2012); Noël Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases*, 21 STAN. ENVTL. L.J. 283 (2002); Amiad Kushner, *Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context*, 93 J. CRIM. L. & CRIMINOLOGY 681 (2003).

11. *See* Hasnas, *supra* note 1.

12. *Id.*

exists in the form of the Responsible Corporate Officer doctrine. I then describe the argument for expanding the surplus to encompass a wider range of corporate executives. In Section II, I show that the advocates' belief that the responsibility surplus will reduce corporate wrongdoing is mistaken. In fact, the responsibility surplus creates a perverse incentive structure that gives unscrupulous executives a competitive advantage over more conscientious ones, which, in turn, leads to more, not less, corporate crime. Finally, I conclude.

I. THE RESPONSIBILITY SURPLUS

A. *The Responsible Corporate Officer Doctrine*

To some extent, the responsibility surplus already exists. It is enshrined in law as the Responsible Corporate Officer doctrine (RCO). The RCO permits the criminal punishment of an executive who neither participated in nor was aware of a criminal offense committed by a subordinate as long as the executive had the authority required to prevent the offense.

The RCO originated in the case of *United States v. Dotterweich*, in which Joseph Dotterweich, the general manager of Buffalo Pharmacal, was convicted of violating the Federal Food, Drug, and Cosmetic Act by shipping misbranded drugs across state lines, even though he neither shipped the drugs himself nor knew of the misbranding.[13] In upholding the conviction, the Supreme Court explained that Dotterweich had been convicted under a statute that "dispenses with the conventional requirement for criminal conduct–awareness of some wrongdoing [, and i]n the interest of the larger good[,] . . . puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[14]

Recognizing that "[h]ardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting,"[15] the Court nevertheless found that in "[b]alancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."[16] Thus, it held that the offense is committed by all who have "a responsible share in the furtherance of the transaction which the statute outlaws."[17]

In subsequent cases, the Court clarified (slightly) what it meant for an executive to stand in a "responsible relation to a public danger" or to "have a responsible share in the furtherance of the transaction which the statute outlaws."[18] In

13. United States v. Dotterweich, 320 U.S. 277 (1943).
14. *Id.* at 280–81.
15. *Id.* at 285.
16. *Id.*
17. *Id.* at 284.
18. *Id.*

Morrisette v. United States, the Court explained that an individual stands in a responsible relation to a public danger if he or she "is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his [or her] responsibilities."[19] Then, in *United States v. Park*, the Court further explained that to have a responsible share in the furtherance of the transaction that the statute outlaws, it is enough that "by virtue of the relationship he bore to the corporation, the agent had the power to prevent the act complained of."[20] Thus, "those corporate agents vested with the responsibility, and power commensurate with that responsibility, to devise whatever measures are necessary to ensure compliance with the Act bear a 'responsible relationship' to, or have a 'responsible share' in, violations."[21]

In sum, the RCO holds that "a corporate official with authority and responsibility for supervising subordinates may be held criminally liable—without a showing of affirmative wrongful action or intent—for a subordinate's violation of a public welfare statute."[22]

Under current law, the RCO has a limited, but significant and potentially growing range of application. To date, it has been applied only to regulatory offenses.[23] The majority of these are "public welfare offenses," crimes that require no *mens rea* and for which "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation."[24] However, even within this class of offense, the significance of the RCO has increased as Congress has increased the penalties for violations. Thus, two executives were recently sentenced to three months imprisonment and $100,000 fines under the RCO.[25] Further, Congress has been expanding the scope of the doctrine by writing it into violations that do not fit into the category of public welfare offenses. For example, Congress amended the Clean Water Act to include responsible corporate officers within the class of persons who can be prosecuted for negligent and knowing violations that carry significant penalties.[26] Thus, in *United States v. Brittain*,[27] the court stated:

> We interpret the addition of "responsible corporate officers" as an expansion of liability under the Act. . . . The plain language of the statute, after all, states that "responsible corporate officers" are liable "*in addition to* the definition [of persons] contained in section 1362(5). . . ." Under this interpretation, a "responsible corporate officer," to be held criminally liable, would not have to

19. Morrisette v. United States, 342 U.S. 246, 256 (1952)
20. United States v. Park, 421 U.S. 658, 671. (19750
21. *Id*. at 672.
22. Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 LOY. U. CHI. L.J. 169, 176 (1994).
23. *Morrisette*, 342 U.S. at 256.
24. *Id*.
25. United States v. DeCoster, 828 F.3d 626 (8th Cir. 2016).
26. 33 U.S.C.A. § 1319(c)(6) (West Supp. 2000).
27. United States v. Brittain, 931 F.2d 1413 (1991).

> "willfully or negligently" cause a permit violation. Instead, the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility.[28]

Indeed, under this provision, an executive was convicted of negligently violating the Clean Water Act as a responsible corporate officer and sentenced to three years imprisonment and a $1.3 million fine.[29]

B. The Justification for the Responsible Corporate Officer Doctrine

The RCO permits the criminal punishment of those who are without personal fault. The courts have offered little normative justification for this. To the extent that they have offered any justification, it amounts to "Congress made us do it." In *Dottterweich*, the Court claimed merely to be applying the Federal Food, Drug, and Cosmetic Act as Congress intended; a conclusion it declared to be mandated by "the history of the present Act, its purposes, its terms, and extended practical construction . . . once we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule.[30] Thirty-two years later, in *Park*, the Court merely repeated this justification.[31] Expansions of the doctrine are similarly based on the claim that such is the will of Congress. Thus, the court in *Brittain* interprets Congress's amendment of the Clean Water Act to include responsible corporate officers among the persons who can violate the Act as an "expansion of liability under the Act."[32]

Legal commentators have done little better. Most decry the doctrine.[33] Those who defend it do so on explicitly utilitarian grounds, limiting the doctrine to the small class of regulatory offenses where (they claim) the importance of advancing social welfare justifies punishing the innocent.[34] Others simply deny that the RCO really is strict vicarious liability, interpreting it as a disguised and rigorous form of negligence liability.[35]

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28. *Id.* at 1419.

29. United States v. Ming Hong, 242 F.3d 528 (4th Cir. 2001).

30. *Dotterweich*, 320 U.S. at 283.

31. *Park*, 421 U.S. 658 at 671 ("The rationale of the interpretation given [in] the Act in Dotterweich, as holding criminally accountable the persons whose failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of, has been confirmed in our subsequent cases.").

32. *Brittain*, 931 F.2d at 1419.

33. *See, e.g.*, Martin Petrin, *Circumscribing the Prosecutor's Ticket to Tag the Elite - A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283 (2012).

34. *See* Amiad Kushner, *Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context*, 93 J. CRIM. L. & CRIMINOLOGY 681, 692 (2003) (describing how the RCO doctrine is linked with a public welfare rationale creating an exception to the normal rules of liability). *See also* Christina M. Schuck, *A New Use for the Responsible Corporate Officer Doctrine: Prosecuting Industry Insiders for Mortgage Fraud*, 14 LEWIS & CLARK L. REV. 371, 385–86 (2010) (describing the public welfare rationale for the RCO doctrine).

35. *See, e.g.*, Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses–A Comment on* Dotterweich *and* Park, 28 U.C.L.A. L. REV. 463 (1981). *See also* Mark Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of Mullaney v.*

In contrast, ethicist Amy Sepinwall has recently advanced arguments designed to show that the RCO is normatively well-grounded.[36] Sepinwall argues that one may be blameworthy not only when one is personally at fault, but also when one stands in the proper relationship to a group in which wrongdoing has occurred—that there are both fault-based and relationship-based conceptions of blame. Specifically, she argues that when one is engaged in a team enterprise, both the praise and the blame for true team activities are properly attributable to the team members as individuals. Thus, all members of a four-person relay race team would receive medals if the team wins regardless of how fast each individual runs, and all members would lose their medals if one racer took illegal performance-enhancing drugs, whether the others knew of it or not.[37]

Sepinwall argues that corporations are also teams in the sense that "praise and reward are bestowed . . . on the basis of the performance of the [corporation], not merely the performance of the individual member."[38] For this reason, when there is a wrong that can be properly attributed to the corporation,

> [i]t will not do for the executive to disclaim responsibility by insisting that she did not participate in, or even know about the wrong, at the time of its occurrence. . . . [S]he must, as a matter of fulfilling the obligations of team-spiritedness that her role demands of her, accept blame for it, and whatever consequences blame entails.[39]

Thus, in the corporate context, a properly placed executive "deserves to bear responsibility for the corporation's acts because . . . as is true of all team contexts, desert need not turn on one's individual contribution to success or failure, or laudable or reproachable corporate conduct. Instead, it is sufficient that one was a team member at the time of the conduct."[40] This relationship-based conception of blame provides the normative grounding for the RCO.[41]

Wilbur, 55 B.U. L. REV. 775, 795 (1975) (discussing how the *Park* court turned the *Dotterweich* holding on strict liability into a holding on negligence).

36. Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371 (2014).

37. *Id*. at 399–401.

38. *Id*. at 402.

39. *Id*.

40. *Id*.

41. *Id*. Sepinwall pointedly does not argue that any corporate executive may properly be punished for any crime committed by others within the corporate context. She provides three guidelines designed to cabin the application of the RCO: (1) there must have been a crime that is properly attributed to the corporation, *id*. at 413; (2) the defendant must be one who it is appropriate to credit when the corporation does well and blame when the corporation does wrong, *id*. at 414, and; (3) the severity of the sanctions applied must correspond to the magnitude of the blame it is appropriate to assign to the defendant, *id*. at 416.

C. Expanding the Responsibility Surplus Beyond the Responsible Corporate Officer Doctrine

Note that the supporting rationale Sepinwall offers does not stop at the limits of the present RCO. If consistently applied, her relationship-based conception of blame would authorize (and positively recommend) the punishment of corporate executives who are not personally at fault in many situations in which there has been wrongdoing within a corporation. And, in fact, in subsequent work, Sepinwall argues for precisely this conclusion.[42]

Sepinwall has recently advanced a sophisticated account of shared responsibility to explain when participation in "team" activities generates relationship-based blame. This account begins with the contention that "corporate officers are *causally* responsible for corporate crime because they sustain the corporation's capacity to act, or its *agency*. Their contributions to the corporation's agency thereby provide a necessary causal link between these officers and the corporation's crime that exists independent of their participation in that crime."[43] But, of course, causal responsibility cannot by itself ground moral responsibility. Sepinwall claims that the missing element necessary to move from causal responsibility to moral responsibility is supplied by the executives' "commitment" to their corporations.

Sepinwall explains that a "corporation's executives . . . do not enjoy the purely self-regarding stance that other employees might rightfully occupy," but owe a duty of loyalty to the corporation.[44] This duty of loyalty

> explains and motivates the attitudes the executive might adopt, and be expected to adopt, in pursuing his tasks and responsibilities–assiduousness, attention to the company's welfare even at a cost to his own, a willingness to view himself as a part of an enterprise larger than him and to conduct himself accordingly.[45]

This "loyalty and the attitudes to which it should give rise"[46] constitute the executive's commitment to the corporation.

Executives' commitment to the corporation grounds the praise they receive for corporate successes in which they play no causal role. Sepinwall explains that

> [w]e praise or reward the executive when his corporation does well . . . because it is the right way to acknowledge his commitment to the corporation. . . .

42. It may be noted that in this article, I focus almost exclusively on Amy Sepinwall's work. I do this not to pick on her, but because she has provided the strongest and most sophisticated argument for relationship-based blame that I can find in the literature.

43. Amy J. Sepinwall, *Crossing the Fault Line in Corporate Criminal Law*, 40 J. CORP. L. REV. 439, 460 (2015) [hereinafter Sepinwall, *Fault Line*].

44. *Id*. at 466.

45. *Id*.

46. *Id*.

> Rewarding him when the company does well solidifies the sense that his and the company's fortunes go hand-in-hand, and acknowledges that he has internalized this sense of shared fate through his commitment.[47]

But, she claims, this is equally true when it comes to assigning blame for corporate wrongdoing.

> With this understanding of the ground of *praise and reward* in hand, we are now in a position to identify the ground of *shared blame*: The corporation has committed a crime, and it is time to assign responsibility for it. The crime's individual perpetrators are, of course, the most likely and deserving candidates. But just as the executive need not have proximately caused the corporation's success to justly earn his bonus, neither must he have proximately caused the corporation's crime to justly earn our censure. . . . We blame the executive, independent of whether he is culpable for the crime, as a way of honoring and affirming his commitment. And, if he is suitably loyal, he should see himself as implicated in all of the corporation's acts, and so should recognize that we treat him justly when we see him in this way too.[48]

On the basis of this argument, Sepinwall claims that corporate executives deserve prosecution and punishment in a wide array of situations beyond those presently covered by the RCO.[49] She contends that under her account of relationship-based blame, "it makes no difference that [the executive] could not have prevented the offense even if she had sought to do so . . . [and that] no principled reason exists to refrain from extending RCO liability . . . to any kind of corporate criminal offense."[50] Indeed, Sepinwall contends that an executive "need not even have been in [the corporation's] employ at the time when the crime occurred" to be subject to prosecution.[51]

The apparent virtue of this inflation of the responsibility surplus is that it could prevent a reoccurrence of the widespread public cynicism that resulted from the lack of individual prosecutions in the wake of the financial crisis of 2008. In the years following the crisis, the press excoriated the Department of Justice for failing to indict the executives of the banks and financial institutions whose actions precipitated the crisis.[52] The Department defended itself against this criticism by declaring that it was unable to develop the evidence necessary to prove the guilt

47. *Id.* at 466–67.
48. *Id.* at 467 (emphasis in original).
49. *Id.* at 481
50. *Id.*
51. *Id.*
52. *See* Gretchen Morgenson & Louise Story, *In Financial Crisis, No Prosecutions of Top Figures*, THE NEW YORK TIMES (Apr. 14, 2011), https://www.nytimes.com/2011/04/14/business/14prosecute.html [https://perma.cc/MGW7-8PLG]; *see also* Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, THE NEW YORK REVIEW (January 9, 2014), https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/ [https://perma.cc/RLP6-QAHS]; Ted Kaufman, *Why DOJ Deemed Bank Execs Too Big To Jail*, FORBES (July 29, 2013, 9:30am), https://www.

of individual executives beyond a reasonable doubt—that in the corporate context, it is simply too difficult to establish individual fault.[53]

Enlarging the responsibility surplus could assuage the public demand for individual punishment should a similar situation arise in the future. As Sepinwall herself points out, "[r]elative to punishing the corporation itself, which, famously has 'no soul to be damned, and no body to be kicked,' punishing the CEO would provide a far more meaningful and satisfying target for the anger that the corporate crime has elicited."[54]

II. THE MENACE OF THE RESPONSIBILITY SURPLUS

There are grounds on which to challenge Professor Sepinwall's argument for the existence of relationship-based blame.[55] However, as interesting as the exploration of those grounds may be, it will have to wait for another day. For purposes of this article, I will assume that Professor Sepinwall's argument is entirely sound. My argument is that even if it is normatively permissible to punish corporate executives for crimes committed by other employees, we should not do so. For such punishment would not only fail to reduce corporate crime, but would

forbes.com/sites/tedkaufman/2013/07/29/why-doj-deemed-bank-execs-too-big-to-jail/#4729b6e37035 [https://perma.cc/R7HV-BEK9].

53. *See* Eric Holder, U.S. Att'y Gen., Remarks on Financial Fraud Prosecutions at New York University School of Law (Sep. 17, 2014); *see also* Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, THE NEW YORK TIMES (September 9, 2015), https://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html ("Justice Department officials have defended their record fighting corporate crime, saying that it can be nearly impossible to charge top executives who insulate themselves from direct involvement in wrongdoing.") [https://perma.cc/97CD-DQST].

54. Amy J. Sepinwall, *Faultless Guilt: Toward a Relationship Based Account of Criminal Liability*, 54 AM. CRIM. L. REV. 521, 569–70 (2017) [hereinafter Sepinwall, *Faultless Guilt*]. It is important to note that Sepinwall never suggests that corporate executives prosecuted under the RCO should be punished as harshly as the employees who actually commit the offense. In fact, she recommends only very mild penalties. *See* Sepinwall, *Fault Line, supra* note 43, at 479–80. However, there is nothing about her relationship-based conception of blame that entails such mild penalties. Given the recent trend toward increasing the punishment imposed on responsible corporate officers, there is reason to fear that her recommended maximum punishments would be exceeded.

55. There are several questions that would be interesting to explore in the future. Why is vicarious punishment limited to executives? The actions of all corporate employees, not just executives, are necessary to sustain corporate agency. This means that all corporate employees are causally responsible for the corporation's actions, and hence, its wrongdoing. Doesn't this imply that all corporate employees who make a commitment to the corporation–who loyally and assiduously give "attention to the company's welfare even at a cost to his own," and view themselves "as a part of an enterprise larger than" themselves are liable to punishment?

Making the commitment to the corporation required by the duty of loyalty may justify the distribution of gain from the success of the corporation to individual corporate executives and, by parity of reasoning, the claw back of any such gain generated by corporate wrongdoing, but how does it justify bestowing moral praise or blame on the executives? Entering into a fiduciary relationship requires one to place others' interests ahead of one's own, but this does not imply that the others' interests become one's own interests.

It is certainly the case that individuals who are associated with team activities *feel* worthy of praise for team successes and blameworthy for team failures, but feeling blameworthy is not the same thing as being blameworthy. What transforms the feeling into the fact?

likely increase it, while retarding efforts to create non-criminogenic corporate cultures.

Professor Sepinwall believes that it is a good idea to punish executives who are without personal fault because doing so would reduce corporate wrongdoing. She contends that if corporate executives are subject to punishment whenever there is crime within their corporation, they "will have a greater incentive to monitor the corporation, by supporting those initiatives that look likely to lead to its success and stymying those that look likely to get it into trouble," thus "promoting corporate activity that is good and deterring that which is bad."[56] Or, expressed somewhat more concisely, "[d]eterrence grounds exist for straying from the fault principle. Seeing an executive's head roll might well get corporate America's C-suites to clean up their acts."[57]

Unfortunately, despite this line of reasoning's intuitive appeal, it is wrong as a matter of empirical fact. This is because holding executives strictly liable for the crimes of others does not incentivize them to exercise greater care to suppress wrongdoing within the corporation. Rather, it discourages them from making the commitment that would render them liable to prosecution as responsible corporate officers in the first place. Although Professor Sepinwall is correct when she states that "[p]rosecuting and punishing CEOs would have undeniable deterrent effects,"[58] the actual effects are not the ones that she contemplates.

To see why requires a brief excursion through tort law to review the purposes served by the legal regimes of negligence and strict liability.

A. Negligence vs. Strict Liability: An Excursion Through Tort Law

Indiana Harbor Belt R.R. v. American Cyanamid is included in almost every first year Torts casebook for its clear description of the distinct purposes of negligence and strict liability.[59] In that case, American Cyanamid, a chemical manufacturer, shipped 20,000 gallons of liquid acrylonitrile, a flammable and highly toxic chemical, to market by train.[60] While the train was stopped at a switching line in Chicago, the lid on an outlet valve of the tank car containing the acrylonitrile broke, spilling a large amount of the chemical into the local environment.[61] The switching line bore nearly a million dollars in environmental clean-up costs, and subsequently sued American Cyanamid to recover those costs alleging that American Cyanamid was strictly liable for any damage that resulted from shipping the chemical.[62] American Cyanamid argued that strict liability did not apply to the activity of shipping the chemical, and that it could be held liable

56. Sepinwall *Fault Line*, *supra* note 43, at 467.
57. *Id*. at 442–43.
58. Sepinwall, *Faultless Guilt*, *supra* note 54, at 569.
59. *American Cyanamid*, 916 F. 2d 1174 (7th Cir. 1990).
60. *Id*.
61. *Id*.
62. *Id*.

for the damage only if Indiana Harbor Belt could establish that it had been negligent.[63]

To resolve the question, the court had to consider the purposes served by the torts of negligence and strict liability respectively. In doing so, it pointed out that the purpose of negligence is to give people an incentive to conduct their activities with care. Therefore, negligence is the proper legal regime for cases in which people are engaging in productive, socially beneficial activities that pose the type of risks to others that can be reduced by being careful. In contrast, the purpose of strict liability is to discourage people from engaging in certain types of activities. Therefore, strict liability is the proper legal regime for cases in which people are engaging in either socially detrimental activities or beneficial activities that pose risks to others that cannot be effectively reduced by being careful. As the court explained:

> The baseline common law regime of tort liability is negligence. When it is a workable regime, because the hazards of an activity can be avoided by being careful (which is to say, nonnegligent), there is no need to switch to strict liability. Sometimes, however, a particular type of accident cannot be prevented by taking care but can be avoided, or its consequences minimized, by shifting the activity in which the accident occurs to another locale, where the risk or harm of an accident will be less . . . , or by reducing the scale of the activity in order to minimize the number of accidents caused by it. . . . By making the actor strictly liable–by denying him in other words an excuse based on his inability to avoid accidents by being more careful–we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident.[64]

Because strict liability has the effect of discouraging the activity to which it attaches, the common law restricted its application to what the Restatement of Torts calls "abnormally dangerous activities"[65]—activities that pose such a great a risk of harm relative to the benefits they produce that society would be better off with less of them. Thus, in contrast with negligence liability, whose purpose is to encourage individuals to exercise greater care, the purpose of strict liability is to reduce the level of activities that present too high a risk of harm to others to justify the private benefits they generate when that risk cannot be reduced by incentivizing those engaged in the activities to be more careful.[66]

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63. *Id.*
64. *Id.* at 1177.
65. RESTATEMENT (SECOND) OF TORTS § 519 (1977).
66. *See, e.g.*, Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 17–79 (1992).

B. Application to the Responsibility Surplus

What type of activities are corporate executives engaged in? Are they engaging in socially beneficial activities that we want to encourage as long as they exercise care to avoid foreseeable harmful side effects? Or are they engaging in a type of activity that we want to discourage, either because it is socially harmful or because it poses such extraordinary risks of harm that we want them to search for alternative ways of accomplishing their ends?

Corporate executives make myriad decisions that determine how their corporations act and, ultimately, whether they succeed. For example, executives determine what goods and services to produce, how to manufacture them, where and how to market them, what prices to charge, whether to engage in corporate philanthropy or to undertake other socially beneficial expenditures, how much to reinvest in the company and how much to pay out to shareholders, when to add and when to lay off workers, and how much to invest in efforts to ensure the safety of the firm's employees and customers. Corporate executives make the policy decisions by which corporations supply consumers with the goods and services they desire at prices they can afford.

This sounds like the type of socially beneficial activity that we wish to encourage, as long as the executives exercise care to ensure that their decisions do not harm employees, customers, or other third parties. It does not sound like the type of activity that we want to discourage, either because it is socially detrimental or because it poses such uncontrollable risks of harm that we want to encourage a different form of commercial activity. In other words, this sounds like the type of activity that should be governed by a negligence regime rather than a strict liability regime.

Corporate executives face two imperatives that are always in tension. The first is to make decisions that advance the goal of the corporate enterprise; in the case of a for-profit corporation, to increase its return on investment. The second is to make decisions that ensure that the corporation does not subject third parties to unreasonable risks of harm in its pursuit of profit; that the corporation does not market unreasonably dangerous products, exploit its employees, engage in unethical deception, or otherwise violate the law.[67]

Serving the first imperative redounds to executives' personal benefit. Executives earn additional compensation and advance their careers by improving corporate performance. In contrast, serving the second imperative does not promote executives' personal interests. Ensuring that the corporation behaves ethically and legally takes time and energy that cannot be spent in pursuit of the first imperative. Hence, the opportunity cost of serving the second imperative is the effort that cannot be spent on activities that result in personal advancement. This

67. This is limited to cases in which the law is legitimately designed to protect innocent parties. There is no duty to obey unjust laws such as those that require racial segregation or other oppressive or discriminatory practices.

means that the second imperative imposes a personal cost on the executive that he or she bears for the sake of the corporation's well-being.

If we think of the first imperative as the "business" imperative and the second as the "legal" imperative, the question arises of how much attention we want executives to devote to each. Craig Lerner and Moin Yaha distinguish between two types of executives that they call "ideal entrepreneurs" and "swashbucklers."[68] Ideal entrepreneurs are risk-*neutral* with regard to business risk—they are willing to take financial risks in pursuit of profit opportunities. However, they are risk-*averse* with regard to legal risk—they adhere to a hard and fast rule against violating the law in pursuit of profit.[69] In contrast, swashbucklers are business executives who are risk-neutral with regard to both business risk and legal risk—they are willing to incur financial risks and the risk associated with legal violations in the effort to increase profits.[70] Ideal entrepreneurs regard avoiding illegality as a matter of principle whereas swashbucklers view the risk of legal sanctions as just another cost of doing business. Ideally, we want a legal regime that encourages executives to function as ideal entrepreneurs rather than swashbucklers.[71]

This is precisely what a fault-based negligence regime[72] does. Under a negligence regime, corporate executives may be punished if they do not exercise reasonable care to protect others from foreseeable harm, but they are not subject to punishment if they exercise such care. The knowledge that they can avoid punishment by exercising reasonable care creates an incentive for them to do so. Beyond this, refusing to punish executives who exercise reasonable care also honors the executives' commitment to the corporation. Recall that the time and energy that an executive expends on the legal imperative comes at the expense of his or her own personal advancement. This represents the executive's demonstration of his or her loyalty to the corporation—in Sepinwall's words, of his or her "assiduousness, attention to the company's welfare even at a cost to his own, [and] . . . willingness to view himself as a part of an enterprise larger than him and to conduct himself accordingly."[73] Not punishing executives who thus fulfill their commitment to the corporation seems like the least that can be done to honor that commitment.

The case is quite different under a strict liability regime in which a relationship-based conception of blame allows for the punishment of executives even if they exercise reasonable care. In the first place, such a regime undermines executives' incentive to pursue the legal imperative. If they are subject to punishment, whether they exercise reasonable care to ensure legal compliance or not, then

68. *See* Craig S. Lerner & Moin A. Yahya, *"Left Behind" after Sarbanes-Oxley*, 44 AM. CRIM. L. REV. 1383, 1385 (2007).

69. *Id.*

70. *Id.*

71. *Id.*

72. That is, a legal regime that requires *at least* negligence for punishment. Obviously, one who intentionally or recklessly violates the law would also be subject to punishment.

73. Sepinwall, *Fault Line, supra* note 43, at 466.

why divert the time and energy it requires away from the pursuit of the business imperative that advances their careers? Executives know that there is no such thing as the perfect policing of the corporate environment. No amount of effort on their part can guarantee that there will be no rogue, negligent, or incompetent employees who intentionally or inadvertently violate the law. If exercising reasonable care to prevent such occurrences does not protect them from punishment, then their incentive changes from trying to reduce employee wrongdoing to ensuring that any such wrongdoing that occurs is not revealed to the authorities. Further, consider the situation of those executives who voluntarily undertake personally costly efforts to reduce employee wrongdoing within the corporation. What could more dishonor such executives' demonstrated commitment to the corporation than to punish them whenever their efforts are not successful?

Courts and commentators often attempt to justify the imposition of strict liability on the ground that it causes individuals to exercise "extraordinary" or "utmost" care. What can this possibly mean? Reasonable care is the amount of care that a reasonable person would exercise exercise in the circumstances. This requires one to be more careful when engaged in activities that pose a risk of great harm or a higher likelihood of harm than when one is engaged in less dangerous activities. As Kenneth Simons explains, "even under an ordinary negligence test, more extensive precautions are required in order to avoid unusually great risks of harm. In this sense, an actor is often required to take 'extraordinary care' even under the 'ordinary care' standard."[74] Exercising greater than reasonable care is, by definition, exercising an *unreasonable* amount of care. To the extent that it is intelligible to say that a strict liability regime requires the exercise of greater than reasonable care, it can only mean that it requires the expenditure of resources on precautions that do not produce worthwhile increases in safety.

Indeed, there is good reason to believe that holding corporate executives strictly liable for the crimes of others within the firm can lead to more corporate wrongdoing, not less. Recall that the purpose of strict liability is not to increase the exercise of care, but rather to discourage the underlying activity. Because of their commitment to the legal imperative, ideal entrepreneurs will be more susceptible to this disincentive than will swashbucklers, and thus will be more likely to seek other forms of employment.

To see why, consider that the fault-based conception of blame embodied in the criminal law's *mens rea* requirement—the requirement that one either intentionally, recklessly, or negligently violate the law to be subject to punishment—is essential to the ideal entrepreneurs' ability to ensure that they abide by the law. Under a negligence regime, "[t]he law-abiding could demonstrate their good intentions by pointing to the precautions they had incurred; even if some bad result had come to pass, no penalties would attach. Law-abiding individuals could

74. Kenneth W. Simons, *Can Strict Liability for Responsible Corporate Officers Be Justified by the Duty to Use Extraordinary Care?*, 12 CRIM. L. & PHIL 439, 444 (2018).

thus continue to engage in the regulated activity."[75] Thus, requiring *mens rea* for criminal conviction helps "sort those determined to comply with the law (the ideal entrepreneurs) from those indifferent to the strictures of the criminal law (the swashbucklers)."[76]

In contrast, moving to a relationship-based strict liability regime undermines the ability of conscientious executives to distinguish themselves from legal adventurers. "[W]hen the criminal law regulating certain spheres of activity is stripped of a mens rea requirement, law-abiding ideal entrepreneurs will no longer be able to signal their intent to comply with the law."[77] And because the ideal entrepreneurs are averse to violating the law on principle, "[s]ome may respond by exiting the regulated activity altogether."[78] Thus, "when the law regulating corporate crime is stripped of a *mens rea* requirement and becomes one of strict liability[,] . . . a form of adverse selection is apt to occur–a variation of Gresham's law in which those reckless of the criminal law (swashbucklers) will drive away those respectful of the law (the ideal entrepreneurs)."[79]

This is not a particularly new insight. Stephen Schulhofer pointed out more than four decades ago that under a strict liability regime,

> [t]hose who continue to engage in the activity may be those who believe they can be careful enough, but there is no guarantee that these will be the ones who are in fact the most careful. Indeed, there is some reason to suspect that those who are most confident of their ability to avoid causing harm may be just the ones who are most likely to be especially careless. Thus, the strict liability crime may exclude a few accident-prone people from the activity, but it may well fail to select out most of those about whom the law should be most concerned. At the same time, it may exclude from the activity many others who could play a valuable social role but are unwilling to face the risk of suffering criminal penalties for reasons beyond their control. Indeed, if the penalties are serious, those who are careful and make provision for risks may be the most likely to take the sensible precaution of not engaging in this activity at all. . . . [Thus,] the dynamic effect, under plausible assumptions about human behavior, could be to increase the total harm caused by increasing the proportion of those engaged in the activity who are relatively careless.[80]

As the ideal entrepreneurs exit the field, the swashbucklers who are "left behind"[81] exercise more and more control over corporate policy. This results in less and less expenditure on the legal imperative. To paraphrase Garrett Hardin in

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75. Lerner & Yahya, *supra* note 68, at 1396.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1587 (1974).
81. Lerner & Yahya, *supra* note 68, at 1396.

The Tragedy of the Commons, under a strict liability, relationship-based blame regime, executive conscience is self-eliminating.[82]

In sum, imposing strict vicarious liability on corporate executives for the wrongdoing of corporate employees provides no practical benefit and carries the potential to do significant harm. It provides no benefit because a fault-based negligence regime already incentivizes executives to use all reasonable care to prevent corporate employees from violating the law. To the extent that executives exercise more care than this—to the extent that they exercise an unreasonable amount of care—they merely waste corporate resources without appreciably reducing the risk of corporate wrongdoing. It does harm by encouraging executives who avoid legal violations as a matter of principle to exit the market in greater numbers than those who view the risk of violating the law as a cost of doing business. To the extent that this results in more corporations being run by swashbucklers rather than ideal entrepreneurs, it means that less will be invested in efforts to reduce corporate wrongdoing and create non-criminogenic corporate cultures.

CONCLUSION

In this article, I argue against adopting a relationship-based conception of blame to ground the criminal punishment of corporate executives who are not personally at fault. Nevertheless, I confess that permitting such punishment does serve one purpose. As Professor Sepinwall points out, "punishing the CEO would provide a far more meaningful and satisfying target for the anger that the corporate crime has elicited."[83]

However, using the criminal law to satisfy public anger over crimes is a dangerous path to tread. We have a long and unfortunate history with such expressive use of the criminal sanction. Jews, African-Americans, and other minorities have had fairly negative experiences with the concept of relationship-based blame for the crimes of members of groups with which they identify and to which they are loyally committed. Independent of any argument offered in this article, history provides us with good reason to be wary of punishment based on this form of blame.

Professor Sepinwall's proposal for relationship-based blame clearly would not authorize such abusive punishment. She carefully restricts relationship-based punishment to cases in which the crime is properly attributed to the relevant group and the defendant occupies a position for which it is appropriate to assign praise when the group does well and blame when the group does wrong.[84] However, in the world in which we must all live, the criminal justice system is not administered by omniscient individuals functioning with machine-like impartiality, but rather by actual human beings subject to political pressures and

82. Garrat Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1246 (1968).
83. Sepinwall, *Faultless Guilt, supra* note 54, at 570.
84. *See* Sepinwall, *Responsible Shares*, *supra* note 36.

personal biases. In this age of the politicization of anti-immigrant biases, it should not be necessary to conjure up memories of the House Un-American Activities Committee and the McCarthy hearings to suggest that the possibility of criminal punishment for relationship-based blame is a door better left unopened. In my judgment, the criminal law's rejection of punishment without proof of personal wrongdoing beyond a reasonable doubt is not a flaw, but the glory of the system.

In *Phantom Menace*, I argued that regardless of whether the argument for corporate moral agency was sound, corporations should not be subject to punishment as collective entities because any such punishment necessarily fell upon those who were innocent of wrongdoing. In the present article, I argue that regardless of whether the argument for relationship-based blame is sound, corporate executives should not be subject to punishment as individuals for the crimes of other corporate employees in which they are not complicit. In sum, I argue for what in the contemporary academic milieu is, oddly enough, the radical proposition that only criminals should be subject to criminal punishment.