OF BAD APPLES AND BAD TREES: CONSIDERING FAULT-BASED LIABILITY FOR THE COMPLICIT CORPORATION

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Corporate crime is not new. For over 100 years, individual officers and employees of business firms and occasionally firms themselves have been charged and convicted of crimes. Nonetheless, corporate crime entered the public consciousness in a new way after Enron, and unfolding corporate and business scandals have kept it there. Another new element is that business entities, executives, and employees are now caught in the cross hairs of recently emerging trends that make it easier to convict.[1] Adding to the pressure, those injured by recent corporate malfeasance face significant hurdles in pursuing civil remedies[2] and they, along with regulators, legislators, and executive branch officials, have turned to the criminal system for redress.

In response to corporate malfeasance, federal authorities sought to restore investor confidence, largely by using criminal laws to go after the "bad apples."[3] Congress wove heightened penalties and new crimes into the regulatory reforms of

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1. The federal criminal code now provides broad statutes that are readily applied to conduct once confined to civil suits. *See, e.g.*, 18 U.S.C. §§ 1343, 1346 (2007) (criminal statute for mail fraud). The code also provides multiple iterations of offenses that expose actors to layered charges based on a single course of conduct. *See, e.g.*, United States v. Stewart, 433 F.3d 273 (2d Cir. 2006) (upholding conviction for false statements, obstruction, and defendant Bacanovic's perjury). Corporate defendants, whether individuals or corporate bodies, now face a well-developed, sophisticated sentencing scheme. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 8 (2005).

2. *See* Christine Hurt, *The Undercivilization of Corporate Law*, U. of Il. Law & Econ. Res. Paper No. LE07-005 (2007), http://ssrn.com/abstract=965871 (discussing why civil remedies may be more appropriate than criminal prosecutions for corporate misconduct); Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 969-71 (2003) [hereinafter Moohr, *An Enron Lesson*].

3. *See* DEPARTMENT OF JUSTICE, FACT SHEET: CORPORATE FRAUD TASK FORCE (August 9, 2006) http://www.usdoj.gov/opa/pr/2005/August/05_opa_434.htm (citing restoring confidence to the marketplace as one of the Bush Administration's Corporate Fraud Task Force's main goals) [hereinafter FACT SHEET]; President's Remarks on Signing the Sarbanes-Oxley Act of 2002, 2 PUB. PAPERS 1319 (July 30, 2002) ("This law says to every dishonest corporate leader: you will be exposed and punished; the era of low standards and false profits is over; no boardroom in America is above or beyond the law."). Following the savings and loan scandals of the 1980s, President George H.W. Bush similarly pursued the bad apple strategy. *See* Mary Kay Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 953 n.115 (2005) ("We will not rest until the cheats and chiselers and the charlatans spend a large chunk of their lives behind the bars of a federal prison." (quoting President George H.W. Bush)).

the Sarbanes-Oxley Act,[4] and the executive branch instituted an aggressive enforcement strategy.[5] As a result, hundreds of officers and employees of well-known, generally respected business firms have been charged and convicted.[6] Many of those individuals, executives, and employees were bad apples who had acted for personal monetary gain.[7] These cases illustrate the classic conundrum of corporate law that the corporation, which can act only through human agents, can fall victim to those agents. But some corporations were also implicated in criminal conduct, indicating the presence of bad trees. Between 2003 and 2006, federal prosecutors found sufficient criminal evidence to indict thirty-one "bad trees," although none was prosecuted.[8] Such enforcement efforts against corporations and the prosecution of Arthur Andersen have given new urgency to the long-standing debate about punishing corporate entities. These cases indicate that the prosecutorial focus might profitably include not only the "bad apples" but also the "bad trees."

This essay does not revisit the question of *whether* to hold corporations liable for the crimes of their agents, but addresses when and how it is appropriate to do so. I suggest that when a corporation encourages or induces criminal conduct, the firm should be held criminally liable. How might corporations be held criminally liable? Although the much critiqued doctrine of respondeat superior could be used, this essay explores the mechanism of accomplice liability, a long-standing doctrine of criminal law. The analysis is developed in three parts.

Part I briefly traces the current enforcement effort to show how it has focused largely on individual bad apples. It goes without saying that agents who commit an offense should be held responsible and face punishment. But a review of the forces exerted on executives and employees in the corporate setting reveals that the story is not so straightforward. Bad trees produce bad apples. Characteristics of a

4. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); Moohr, *An Enron Lesson*, *supra* note 2, at 940-51(reviewing criminal provisions of the Sarbanes-Oxley Act).

5. *See generally* Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221 (2004) (summarizing Department of Justice response to the corporate fraud crisis, which included task forces, real-time enforcement, and reliance on cooperating witnesses).

6. *See* Kathleen F. Brickey, *Major Corporate Fraud Prosecutions, March 2002–December 2005* (unpublished manuscript on file with author) (listing fifty-two firms that had major corporate fraud prosecutions filed against them between 2002 and 2005). These prosecutions involve crimes that require proof of culpability, most usually based on some type of fraud. *See generally id.*

7. *See, e.g.*, David Lieberman & Michel McCarthy, *Adelphia Founder, Son Are Convicted*, USA TODAY, July 9, 2004, at B1 (reporting prosecutors' allegations John and Timothy Rigas defrauded shareholders of $3.2 billion); Floyd Norris, *Tyco to Pay $3 Billion in Settlement*, N.Y. TIMES, May 16, 2007, at C1 (stating that the Tyco case became synonymous with corporate excess because CEO Kozlowski used corporate funds to support a lavish lifestyle). More mundane examples of employees acting for personal monetary gain include embezzlement by employees and commercial bribery.

8. *See* Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP., FIN. & COM. L. 45, 57 (2006) (finding federal prosecutors agreed to defer or not to prosecute thirty-one firms between 2003 and 2006, when heightened enforcement began). Business firms faced indictment for securities fraud, mail and wire fraud, and tax fraud, as well as for obstruction and false statements. *Id.* at 52 n.41.

complicit corporate tree are identified through a recent Fifth Circuit case, *United States v. Brown*.[9] The facts of *Brown* illustrate how executives and employees can be encouraged, even induced, to engage in unlawful conduct by firm policies and executive directives.

Part II considers how basic principles and elements of accomplice liability apply to corporate firms. Applying the standards of accomplice liability and the traditional offense of aiding and abetting, a firm is complicit in a crime when its policies and directives encourage, induce, or otherwise aid the commission of a crime by an executive or employee.

The final discussion in Part III evaluates fault-based liability of corporate bodies, assessing the benefits of using accomplice liability and identifying issues that might constrain its use. That discussion indicates that the interests of fairness, deterrence, and the problems associated with respondeat superior criminal liability support using accomplice liability doctrine to hold a firm criminally liable for fault-based conduct that encourages corporate crime.

This proposal may satisfy no one. Those who advocate criminal penalties for corporations will note that this proposal limits the number of possible corporate defendants. Those who advocate against criminal penalties for corporations will note that it provides a firm doctrinal basis with which to evaluate blame and assign responsibility. Even so this paper may begin a long-overdue discussion of alternate ways of dealing with deviant corporations.

I. THE CURRENT ENFORCEMENT EFFORT—A SEARCH FOR BAD APPLES

As of May 2004, the current enforcement effort had resulted in over 1000 convictions, almost all of them individuals.[10] Defendants included chief executives, chief financial officers, and those who founded and led their companies. Although some escaped with light penalties because of plea bargains and cooperation agreements, other executives and employees received unprecedented penalties for non-violent first-offenses. In one case, prosecutors recommended an eighty-five year sentence for a chief financial officer who had not disclosed fraudulent conduct that occurred under another executive.[11] Others were sentenced to serve what amounted to life sentences.[12] Yet by definition a corporate crime

9. 459 F.3d 509 (5th Cir. 2006).

10. From the inception of the Corporate Task Force in 2002 to May 31, 2004, prosecutors have secured over 1000 corporate fraud convictions, including convictions of over 100 CEOs and presidents in 600 filed cases, more than thirty CFOs and 100 vice-presidents, and charged more than 1300 defendants. *See* FACT SHEET, *supra* note 3.

11. *See* United States v. Adelson, 441 F. Supp. 2d 506, 507 (S.D.N.Y. 2006).

12. Bernie Ebbers of Worldcom received a sentence of twenty-five years, Jeffrey Skilling of Enron received twenty-four years, John Rigas of Adelphia and Stuart Wolff, of Homestore.com, Inc. received fifteen years, and Sanjay Kumar of Computer Associates received twelve years. *See* United States v. Ebbers, 458 F.3d 110, 129-130 (2006) (upholding the reasonableness of Ebbers' twenty-five-year sentence); Peter Henning, *White Collar Crime Sentences after Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 MCGEORGE L. REV. 757, 762 (2006); Alexi Barrionuevo, *Skilling Sentenced to 24 Years*, N.Y. TIMES, Oct. 24, 2006 at C1; *Ex-Chief Gets 15*

"takes two," the individual agent who commits the crime and the corporate entity.

In contrast to the recent past, even when the putative target of an investigation is a firm, prosecutors now seem more interested in individuals.[13] Between 2003 and 2006, thirty-one firms avoided prosecution, and in slightly over half of those cases individuals were indicted.[14] A former prosecutor put it bluntly: firms now help convict their ex-employees.[15] Under Department of Justice policy, firms can avoid prosecution by cooperating with investigators, which means turning over documents and results of in-house investigations that inevitably implicate those who worked on the matter under investigation. In response to significant criticism, the policy has recently been adjusted.[16] It remains to be seen whether the tacit understanding that a firm can avoid indictment and/or prosecution by fully cooperating with investigators, providing privileged material, and incriminating former executives and employees can be reversed.[17]

One reason for targeting individuals rather than firms is the view that corporate crime is a simple manifestation of the principal-agent problem that is inherent in corporate governance.[18] Under this view, executives and employees invariably act in their own self-interest, and their pursuit of individual goals is the primary reason for corporate crime. The firm's obligation is thus to monitor its agents to prevent executives and employees from pursuing their own goals. The corporation is rather

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Years, N.Y. TIMES, Oct. 13, 2006 at C9; Michael J. de la Merced, *Ex-Leader of Computer Associates Gets 12-year Sentence and Fine*, N.Y. TIMES, Nov. 3, 2006 at C3.

13. *Compare* Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 19-20 (2002) (discussing how employees may be more likely to escape indictment than firms) *with* Orland, *supra* note 8, at 45 (stating that the routine disposal of corporate misconduct through deferred or no prosecution agreements constitute a "sea change" in the way the federal government responds to serious corporate misconduct).

14. *See* Orland, *supra* note 8, at 86-87 (illustrating that since 2003, individuals at eighteen firms were indicted).

15. *See* Larry Ribstein, *A Former Prosecutor Shares His Secrets*, IDEOBLOG, April 21, 2006, http://busmovie.typepad.com/ideoblog/2006/04/a_former_prosec.html (quoting former prosecutor David Anders).

16. DOJ policy, based on the Thompson Memorandum, practically required firms to waive work-product and attorney client privilege. The policy was vigorously criticized by courts, commentators, and Congress. *See* United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); JOHN HASNAS, TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW 51-55 (2006); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 350-352 (2007); William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 648 (2002) (noting trend toward "reverse whistleblowing" by corporations who identify employees and offer evidence against them in return for leniency for the corporation). Congress considered legislation that would limit this practice. *See* Attorney Client Privileges Protection Act of 2006. S. 30 109th Cong. § 3014(b) (2006). In response, the Justice Department issued new guidelines in December, 2006. Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and U.S. Attorneys on Principles of Federal Prosecution of Business Organizations, at 16 (2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/mcnulty_memo.pdf.

17. *See* Lynnley Browning, *Some Lawyers Urge More Safeguards on Rights in Corporate Fraud Cases*, N.Y. TIMES, March 8, 2007, at C3 (reporting that former prosecutors criticized the McNulty memorandum).

18. *See* RICHARD A POSNER, ECONOMIC ANALYSIS OF THE LAW § 12.1-12.4 (1972); Richard S. Saver, *Medical Research Oversight from the Corporate Governance Perspective: Comparing Institutional Review Boards and Corporate Boards*, 46 WM. & MARY L. REV. 619 (2004) (summarizing principal/agent problem and risks of managerial opportunism).

helpless, engaged in the Sisyphean task of controlling the conduct of its agents. When corporate crime occurs, the corporation's fault rests on an omission, a failure to control its agents who have agendas of their own.[19] This conception of corporate crime essentially excuses the corporate entity. If the offense is primarily that of a deviant employee, the corporation bears less responsibility, suffers little moral opprobrium, and is not blameworthy. Thus it is not entirely appropriate to charge the corporation with the offense.

While powerful, the assumption that corporate crime begins and ends with the ethical and moral lapses of executives and employees is not completely or always accurate.[20] Moral content can be found in the ethos of an organization,[21] and corporate policies can manifest fault and the deservedness of corporate punishment.[22] In many instances of corporate crime, the interests of the firm and the individual are aligned, and agents act, however misguidedly, for the benefit of the firm as well as for themselves. In these cases, the principal-agent conception tends to obscure the corporation's responsibility for the offense. The following discussion shows that the reality of corporate crime differs from assumptions about the ultimate responsibility of individual bad apples. Individuals commit criminal acts even when the interests of principals and agents converge, and firms can encourage unlawful conduct through executive directives and corporate policies.

A. *The Bad Apples—Executives and Employees*

A close look at the employment relationship and the institutional workplace setting complicates the story about bad apples. Generally speaking, the corporate context and its mandate to generate income for shareholders tend to constrain independent thinking, and institutional forces present in organizations and specific firm policies tend to influence the values and behavior of executives and employees.[23]

More specifically, personal characteristics of business executives and employ-

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19. *See* Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 597-98 (2005) (suggesting that current law over-relies on the principal-agent model of organizational misconduct); Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315, 319 (1991) (stating that corporate actors engage in criminal activity to advance their careers).

20. *See* David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 GEO. L.J. 61, 97 (2003) (concluding that the conventional morality tale, "bad people at the top stole the company while good people were not watching" does not adequately explain Enron's collapse).

21. *See generally* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 *passim* (1991) [hereinafter Bucy, *Corporate Ethos*].

22. *See generally* PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY (1984).

23. *See* LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 43-44 (2001) (stating that individuals working for a corporate entity are animated by the corporation which "takes away their individual capacitates for self-determination") [hereinafter MITCHELL, CORPORATE IRRESPONSIBILITY]. I have surveyed personal and institutional factors that serve as barriers to effective deterrence in a recent article. *See* Geraldine Szott Moohr, *The Prospects of Deterring Corporate Crime*, 2 J. BUS. & TECH. L. 25 (2007).

ees can also contribute to misconduct within a firm. Optimistic, independent, risk-taking individuals are highly valued by business firms that seek people with these traits. But even positive characteristics can mutate into an excessive self-regard when firms reward bold, decisive management styles that, ironically, lead to arrogant over-confidence that can eventually harm the firm.[24] Otherwise law-abiding executives and employees often do not perceive that they are embarking on criminal conduct because they conceive themselves as ethical actors.[25] Yet another personal trait is the human tendency to interpret rules sympathetically, which can evolve into more pernicious conduct.[26]

An institutional environment can also exert forces that undercut personal values and subvert law-abiding instincts. For instance, work that involves a team effort can lead an individual to unquestioningly support the group and never to develop a sense of personal responsibility for decisions made by the group. A law-abiding individual who sees a colleague or superior engage in unethical or wrongful conduct will experience cognitive dissonance. Although the discomfort could be alleviated by challenging the conduct, in a group setting it is more likely for the person to adjust his or her own standards to match those of the colleague and the group.[27]

Moreover, the obligation to obey the law at work may conflict with a competing social goal, the legal and ethical obligation of loyalty to one's employer. Loyalty is a strong cultural value that has long been enforced through common law and more recently through contract.[28] The strength of the obligation is illustrated by the

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24. *See* John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1103, 1105-06 (1977) (identifying a "recurring management style—overzealous, action-oriented, and characterized by a remarkably low level of risk aversion"). Commentators seek to explain this tendency by applying the insights of behavioral economics. *See, e.g.*, Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PENN. L. REV. 101, 139-40 (1997) (explaining cognitive bias of over-optimism that under-emphasizes downside risk and over-emphasizes probability of gain and individual ability); *see also* Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 19-21 (2002).

25. *See* John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL'Y 189, 200 (2005).

26. *See id.* at 199 (describing how bending the rules once can "establish a pattern of rule bending that makes it harder to resist bending the rules in the future").

27. *See* Nancy Rapoport, *Enron, Titanic, and the Perfect Storm*, *in* ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 927, 942 (Nancy Rapoport & Bala G. Dharan eds., 2004) (arguing in a corporate atmosphere there is enormous "peer pressure on the unbelieving minority to conform to the wrong-headed thinking of the majority").

28. *See* RESTATEMENT (SECOND) OF AGENCY § 387 (1958) ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."); MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 1005-1030 (6th ed. 2007) (presenting post employment obligations of employees based on common law duty of loyalty); Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL'Y J. 321, 321 (1999) ("[T]he law of individual employment in the United States grew out of the English law of master and servant, a law of a domestic relationship in which many of the respective obligations were legally imposed."). *See also generally*, Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 519 (2001) ("The U.S. system of labor and employment law that originated in the New Deal period is built upon the assumption of long-term attachment between employer and

community's ambivalence about whistle blowers, even when their value is obvious.[29] The duty of loyalty is also reflected in the obligations of fiduciaries and is the genesis of the federal crime of honest services fraud.[30] As a social value, the duty of loyalty encourages employees to develop significant bonds with their workgroup and supervisors, who have authority over pay and termination, rather than to remote shareholders. As a result, executives and employees view the group to whom they have formed loyalty bonds as the object of their obligations.[31] Thus they substitute the interests of their department or their conception of the firm for the interests of shareholders.

Finally, specific policies of a firm can influence a person's conduct and even form patterns of behaving. Salary structures and bonus policies that emphasize performance goals—rather than how the goal is achieved—provide incentives to achieve company objectives with no counter-weight for consideration of ethical implications or legality.[32] Surveys indicate that unethical conduct is likely to occur when the corporation pushes for profits too aggressively.[33] Generous salaries and awards of stock options align the interests of executives and shareholders and encourage aggressive tactics designed to increase the value of the company's stock.[34] Studies also show that the behavior of superiors at a firm influences those

employee."); Michelle Jacobs, *Loyalty's Reward—A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 FORDHAM. URB. L.J. 843 (2006).

29. *See* Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1051 (2004) ("[N]ot only has the law been generally unsympathetic to whistleblowers, but so have co-workers and others outside the organization who do not support a decision to report wrongdoing."); *id.* at 1052 (noting the "extreme societal disapproval" of whistleblowers).

30. 18 U.S.C. § 1346 (2007).

31. It is not always clear to whom executives and employees are obligated. In the classic principal-agent view of corporate governance, shareholder interests are primary and the board's obligation is to maximize shareholder interests by monitoring management. Thus, executives and employees are also obligated to serve the interests of shareholders. *See* Alan J. Meese, *The Team Production Theory of Corporate Law: A Critical Assessment*, 43 WM. & MARY L. REV. 1629, 1631 (2002). At the other end of the spectrum, stakeholder models view the corporation's purpose as serving not only the interests of shareholders but also other constituents of the firm such as bondholders and employees. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 549 (2003). Meanwhile, other alternative theories suggest that the board, in running the corporation, acts not as the mere agent of shareholders but as a mediating hierarch among the firm's factors of production, *see* Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board* 79 WASH. U. L.Q. 403 (2001), or as a Platonic guardian serving as the nexus of contracts for the corporation; thus, although contractually obligated to maximize wealth for shareholders, the board nonetheless has considerable discretion in running the firm and deciding which interests to favor in day-to-day governance. *See* Bainbridge, *supra*, at 552-574.

32. *See* Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 RUTGERS L.J. 1, 34-35 (2003) (presenting research showing that compensation based on outcomes, like reaching profit goals, is inimical to ethical decision making).

33. *See* MARSHALL B. CLINARD, CORPORATE ETHICS AND CRIME 69-70 (1983).

34. *See* William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1326-32 (2002) (detailing relation between corporate compensation and risk taking behavior as one cause of Enron failure); *see also* MITCHELL, CORPORATE IRRESPONSIBILITY *supra* note 23, at 4-11 (stating that the link between executive salaries and stock price creates serious risks to the firm and the community).

who work for them, even far down the corporate ladder.[35]

Although none of the insights catalogued in this discussion excuses criminal conduct, they do add to our understanding of corporate crime. The symbiotic relation between the values of a firm and the values of those who work within it can lead to misguided notions about "doing the right thing."[36] That understanding about the influence of the corporate setting and a firm's specific policies challenges the bad-apple theory. Simply stated, bad apples are sometimes the fruit of bad trees.

B. The Corporate Entity as a Bad Tree

Bad apples, in fact, are not always rogue employees off on a frolic of their own. One of Enron's infamous transactions, as related in *United States v. Brown*,[37] provides a useful illustration.[38] The Fifth Circuit decision is an important contribution to the debate about honest services fraud and for that reason merits attention.[39] It is presented here, however, to illustrate the role played by a corporate entity in the unlawful acts of its agents.

The appellants in *Brown* were Merrill Lynch employees[40] who had worked with Enron executives to execute the sale to Merrill Lynch of three power-generating barges that were moored off the coast of Nigeria.[41] The transaction was not,

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35. *See* CLINARD, *supra* note 33, at 132 (discussing how research indicates that behavior and philosophy of top management was identified as the primary reason for illegal conduct of employees).

36. *See* Coffee, *supra* note 24, at 1105-06 (characterizing employee motives to benefit the firm as "benevolent misconduct"); Kurt Eichenwald, *Even if Heads Roll, Mistrust Will Live On*, N.Y. TIMES, Oct. 6, 2002, § 3, at 1 (expressing view of Professor John Darley that "fairly decent people" should not be put under such hidden pressures).

37. *See* United States v. Brown, 459 F.3d 509 (5th Cir. 2006) (vacating convictions of four Merrill Lynch employees for conspiracy to commit wire fraud and two substantive wire fraud counts). *See also* KURT EICHENWALD, CONSPIRACY OF FOOLS 292-96 (2005) (discussing the transaction).

38. Similar conditions existed at other firms, engendering similar behavior. *See* Alex Berenson, *CA Says its Founder Aided Fraud*, N.Y. TIMES, Apr. 14, 2007, at C1 (reporting on corporate culture at Computer Associates); Floyd Norris & Diana B. Henriques, *3 Admit Guilt in Falsifying CUC's Books*, N.Y. TIMES, June 15, 2000, at C1 (explaining that fraud at Cendant was a result of "a culture that had been developing over many years" that was ingrained in employees by superiors); *see also* BARBARA LEY TOFFLER & JENNIFER REINGOLD, FINAL ACCOUNTING: AMBITION, GREED AND THE FALL OF ARTHUR ANDERSEN (2003); Leslie Griffin, *Whistleblowing in the Business World* in CORPORATE FIASCOS AND THEIR IMPLICATIONS 209, 218 (Nancy Rapoport & Bala G. Dharan, eds., 2004) (recounting similar situation at WorldCom).

39. The decision joins the long litany of federal court decisions that have struggled with honest services fraud. *See, e.g.*, United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003) (en banc); United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) (en banc). The *Brown* decision has already had ramifications on convictions within the Fifth Circuit. *See* United States v. Howard, 471 F. Supp. 2d 772 (S.D. Tex. 2007) (relying on reasoning of Brown to vacate conviction of Kevin Howard, former Chief Financial Officer of Enron Broadband Services). Jeffrey Skilling relied on *Brown* to argue against incarceration pending his appeal. *See* United States v. Skilling, Cr. No. H-04-025-02, 2006 WL 3030721 (S.D. Tex. Oct. 23, 2006) (denying motion for bond).

40. The four Merrill employees who appealed had been tried with two Enron employees. Sheila Kahnek, the Senior Director in Enron's APACHI energy division was acquitted and Daniel Boyle, Enron Vice-President of Global Finance, was convicted and did not appeal. *Brown*, 459 F.3d at 517.

41. *Id.* at 514.

however, a bona fide sale; instead, Enron had successfully parked an unproductive asset. When Enron posted the transaction as a sale, rather than the loan it was, it inflated its annual earnings by twelve million dollars, enabling the firm to meet the earnings goal that it had forecast for the year.[42] The government charged that the Merrill defendants conspired to cause Enron employees to breach their duty to provide honest services to Enron; the breach occurred when the Enron employees did not disclose the full truth about the transaction.[43] The court held that the alleged scheme fell outside the scope of honest services fraud because the Enron employees had not deprived the firm of their honest services.[44] Indeed, the Enron employees had behaved exactly as the company wished.[45]

As the court put it, "however benighted that understanding . . . all were driven by the concern that Enron would suffer absent the scheme."[46] Although they were paid bonuses for completing the deal,[47] the Enron employees had not otherwise personally benefited; the purpose of their work on the barge transaction was to benefit Enron and not to surreptitiously enrich them.[48] The employees were not bad apples; they had performed in the interest of the firm, and their interests—in advancement and pay—were aligned with those of the firm.

It is worthwhile to consider further the *Brown* illustration. High-level officers of the firm were intimately involved in the deceptive transaction and the earnings

42. Recording the transaction as a sale inflated earnings because Enron had not really divested itself of the barges; it had promised that it would buy the barges back from Merrill, which it did. Merrill made $775,000 on its investment, a fifteen percent return on the $7 million it paid for the barges and a $250,000 advisory fee. The defendants were also charged with violating the securities laws, 15 U.S.C. §78m(b)(2), (b)(5) and 78ff, and 17 C.F.R. § 240.13b2-1. *Id.* at 516.

43. It is worth noting the attenuated nature of the charges. The Merrill defendants did not owe Enron or its shareholders a duty to provide honest services, so they could not be charged directly with honest services fraud. *Id.* at 534-35 (DeMoss, J., concurring in part and dissenting in part) (registering concern about coupling conspiracy with honest services fraud).

44. *Id.* at 522. Because the jury had returned a general verdict that did not distinguish between property fraud and honest services fraud, the court vacated the conviction. *Id.* at 523. Thus the court did not address the government's second argument, that the firm had been defrauded of property—the loss of fees and bonuses. This question will apparently be taken up in the planned retrial of the defendants. *See* Kristen Hays, *Judge Orders Retrials in Enron Barge Case*, HOUS. CHRON., Apr. 4, 2007, at D1 (reporting intention of prosecutors to retry the *Brown* defendants).

45. *See Brown*, 459 F.3d at 522 (defendants' dishonest conduct was "associated with and concomitant to the employer's immediate interest").

46. *Id.*

47. *Id.* (noting that increased personal bonus was "a promise of the corporation" and thus did not create a conflict of interest between the employees and the firm).

48. The court carefully delineated its holding:

> [W]here an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefiting him and his employer, and where the employee's conduct is consistent with that perception of mutual interest, such conduct is beyond the reach of the honest services fraud theory of fraud as it has hitherto been applied.

United States v. Brown, 459 F.3d 509, 522 (5th Cir. 2006).

misstatement. They planned the deal and directed managers to execute it, and the Chief Financial Officer finalized the agreement in a long conference call.[49] An imprimatur by senior executives encouraged employees to engage in the deception. Policies of the firm also contributed to the wrongful conduct.[50] In addition to generous salaries, the firm routinely awarded bonuses based on performance and contributions to corporate profits and apparently was not overly concerned with long-term effects of the deals.[51] In addition to this carrot, the firm wielded a heavy stick in its "rank and yank" evaluation system. The evaluations compared the performance of employees against one another, listing them from top to bottom; those who landed in the bottom fifteen percent were dismissed.[52] Evaluating employees so they know even colleagues who are performing well will be terminated encourages them to follow unquestioningly the directives of superiors. Finally, Enron's corporate culture was driven by an emphasis on bold, risky deals that brought high returns, but implicitly fostered behavior that skirted the line of legality.[53]

Consummation of the phantom sale of the barges, from initiating the transaction to preparing the annual financial statement, involved several Enron departments and, presumably, many employees at different levels of responsibility. Moreover, the firm embraced the deal, using it for its benefit. The transaction was apparently valuable enough that Enron paid Merrill an advisory fee in addition to the promised interest on their investment.[54]

Neither the Fifth Circuit's decision[55] nor this analysis condones or justifies the unethical conduct of individuals in devising and consummating a sham transaction that misstated earnings. In a more perfect world, one would expect mid-level managers to refuse to participate in a course of conduct they knew was deceptive.

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49. *Id.* at 514-15 (relating that senior officer Jeff McMahon, Enron's then-Treasurer, initiated the transaction at Andrew Fastow's request and Vice-President Daniel Boyle worked with Merrill to complete the deal).

50. Enron's corporate culture and its specific policies are now well documented. *See generally* BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2003); ROBERT BRYCE, PIPE DREAMS: GREED, EGO, AND THE DEATH OF ENRON (2002); KURT EICHENWALD, CONSPIRACY OF FOOLS (2005); PETER C. FUSARO & ROSS M. MILLER, WHAT WENT WRONG AT ENRON (2002); MIMI SWARTZ & SHERRON WATKINS, POWER FAILURE: THE INSIDE STORY OF THE COLLAPSE OF ENRON (2003).

51. *See* Tom Fowler et al., *The Fall of Enron: A Year Ago, Enron's Crumbling Foundation was Revealed to All When the Company Reported its Disastrous Third-Quarter Numbers. Its Growth-at-Any-Cost Culture Led it to Bankruptcy—and Ignominy: The Pride and the Fall*, HOUS. CHRON., Oct. 20, 2002, at A1 (noting how bonuses were based on the total value of the deal, rather than actual income the deal produced).

52. *See* Greg Hassell, *The Fall of Enron: The Culture: Pressure Cooker Finally Exploded*, HOUS. CHRON., Dec. 9, 2001, at A1 (reporting that fellow employees judged others' performance); *see also* Moohr, *An Enron Lesson*, *supra* note 2, at 966 (providing commentary on this system).

53. *See* Nancy B. Rapoport, *Enron and the New Disinterestedness—The Foxes Are Guarding the Henhouse*, 13 AM. BANKR. INS. L. REV. 521, 532 (2005) (providing an example of top executives tolerating fraudulent deals).

54. *See* United States v. Brown, 459 F.3d 509, 516 (5th Cir. 2006) (noting payment of an advisory fee of $250,000 and a fifteen percent profit of $550,000).

55. *See id.* at 522 ("We do not presume that it is in a corporation's legitimate interests ever to misstate earnings—it is not.").

Given the dynamics of the Enron workplace, however, it is not surprising that executives and employees would engage in conduct that benefits the firm and themselves. In these circumstances, "the fact that the scapegoats may not be completely innocent does not mean they cannot be scapegoats."[56]

II. THE FIRM AS A COMPLICIT ACTOR

A firm that engages in conduct described in *Brown* does more than merely fail to counteract the natural tendencies of agents who are subject to pressures of the organizational setting. In this case, it is not difficult to identify proactive corporate conduct. Corporate policies constructed incentives that aligned the interests of executives, employees, and the firm. Officers of the firm instigated and finalized the unlawful course of conduct, and corporate policies rewarded employees for engaging in it. What implications flow from a firm's involvement in the crime of an agent? The doctrine of accomplice liability provides a reference point.

A. *Accomplice Liability*

The doctrine of accomplice liability and the crime of aiding and abetting rest on the moral intuition that those who participate in the commission of a crime are as blameworthy as those who commit the offense and are as deserving of punishment. Accomplice liability has an ancient origin that attests to the soundness of its grounding in moral intuitions about blame.[57] Thus, accomplice liability simply "rounds out" or completes the definitions of criminal offenses.[58] The crime of aiding and abetting applies generally to a criminal code, so all offenses include both primary actors and accomplices.[59]

Unlike conspiracy,[60] accomplice liability is not a crime in itself; rather it is a

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56. *See* Westbrook, *supra* note 20, at 92.

57. *See* United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (noting in an opinion written by Learned Hand that the theory was used in homicides in the fourteenth century and in treason, robbery and arson in the sixteenth). Perhaps because of this long pedigree, and because the doctrine comports with intuitions of justice, its specific rationale is not well-documented. Yet, it is unlikely accomplice liability would have survived were it inconsistent with societal objectives. *See* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 329 (1985) (arguing that "[a]ttributing blame is a pervasive human phenomenon").

58. *See* GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 8.6 (1978) (noting that every crime has built into it a penumbral orbit of liability for those who aid in committing an offense).

59. The federal statute simply states that a person who "aids, abets, counsels, commands, induces, or procures" the commission of an offense "is a principal." *See* 18 U.S.C. § 2 (2007). The federal offense of aiding and abetting was formulated in 1901 to avoid the complexities of the common law categories of accessories. *See* F.W. Standefer v. United States, 447 U.S. 10, 15-16 (1980) (recounting historical antecedents of the aiding and abetting statute). 18 U.S.C. § 2 also applies to criminal provisions that appear in other sections of the federal code. *See* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 190 (1994) (holding that "an aider and abettor of a criminal violation of any provision of the 1934 Act, including §10(b), violates 18 U.S.C. §2").

60. Accomplice liability is somewhat similar to a conspiracy that ends with successful completion of the target offense. Both crimes are concerned with the danger of group criminality and, under the *Pinkerton* rule, both rely

method for holding an actor responsible for a substantive offense.[61] Criminal liability of the accomplice thus is dependent on or derives from a crime committed by another person. The person who helps another individual, referred to as the primary party, commit fraud is also guilty of fraud, and is punished as if he or she had committed the target offense.[62] Holding an individual guilty for a crime actually committed by somebody else would seem to offend principles of criminal law. Note however, that liability is neither strict nor vicarious; the accused must have engaged in conduct—some act of encouragement or assistance, with a culpable state of mind—a desire that the criminal act succeed.[63]

As to conduct, the accomplice need not physically participate in actual commission of the crime, as long as the accomplice provided some type of aid. The common denominator of various kinds of possible aid is encouraging the primary actor.[64] Blame attaches because without such aid, the primary party might not have chosen to engage in the conduct or might have abandoned it.[65] Culpability of the accomplice is found in the intention to help—to encourage or influence or otherwise assist—the primary actor who engaged in the criminal conduct.[66] In sum, although liability of the accomplice for the target offense is dependent on another, fault and blame are justified by the accomplice's personal conduct and culpability.

B. The Corporation As an Accomplice

Corporate criminal liability on this theory has a familiar ring.[67] Like corporate law and the doctrine of respondeat superior, accomplice liability rests on a

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on a rough theory of agency. *But see* FLETCHER, *supra* note 58, § 8.5.4(B) (noting the "neighboring concept" of conspiracy is "sharply distinguished" from accomplice liability).

61. *See* United States v. Petty, 132 F.3d 373, 377 (7th Cir. 1997) ("In a sense, the essential elements of aiding and abetting serve as a substitute for the defendant's actual physical participation in the crime.").

62. Concern has been registered about treating the accomplice and the primary party as subject to equal punishment and about holding all accomplices to the same standard, no matter how minimal their aid. *See* Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85 (2005). That critique is of less concern, however, when the accomplice is the party that induced or led the course of conduct. *See* Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L. J. 91, 114 (1985) (critiquing agency idea and formulating alternate explanation based on causation).

63. The elements of the offense are: (1) knowledge of the illegal activity that is being aided and abetted, (2) a desire to help that activity succeed, and (3) some act of helping. *See* United States v. Irwin, 149 F.3d 565, 570 (7th Cir. 1998).

64. *See* Kadish, *supra* note 57, at 345 (noting that this element requires that the secondary party is aware of the accomplice's assistance).

65. *See id.* at 345-346 (noting also that courts have found the accomplice guilty even when the primary party was unaware of the assistance).

66. *See id.* at 346-49 (noting the distinction between the accomplice's intent and the mens rea of the target crime).

67. Aiding and abetting is no stranger to corporate liability. *See* Cent. Bank of Denver N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994) (holding that a private plaintiff may not maintain an aiding and abetting suit under § 10(b)). The aiding and abetting statute may be applied to criminal violations of § 10(b). *Id.* at

relationship between parties, between principal and agent.[68] Under the respondeat superior standard, the individual employee or executive plays the role of agent; the firm is the principal.[69] When the agent acts on behalf of the principal within the scope of his or her authority, the principal is responsible, under civil and criminal law, for those acts and their consequences. Accomplice liability is based on the same premise: the acts of one person can, in certain circumstances, redound to another person. For this purpose, the principal is the person who actually committed the crime. Thus, the corporation plays the role of the "agent" who acts for the principal, the executive or employee who engages in criminal conduct.[70] The roles of the corporation and employee/executive are the reverse of roles played in the business world and for fixing responsibility under respondeat superior doctrine. Nevertheless, accomplice liability is consistent with an underlying characteristic of corporate crime, the involvement of two separate parties.

To paraphrase Learned Hand, the firm in *Brown* acted as an accomplice because it associated itself with the venture, participated in it as in something that it wished to bring about, and sought by that action to make it succeed.[71] Liability flows from the elements of the crime of aiding and abetting: the government must establish an actus reas, conduct that encourages the primary party to commit the offense, and a mens rea, a desire, purpose, or intention that the primary party acts.

The actus reas of accomplice liability is broad and encompasses almost any act that helps, encourages, or induces another person to commit a crime. The corporation encourages, aids, or assists in the criminal act when an executive officer, who speaks for and embodies the firm, directs a subordinate to commit the crime.[72] It is not always possible to identify a managerial agent who is authorized to speak for the firm, and a second means of acting fills that gap. As Professors

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190. The Private Securities Litigation Reform Act restored aiding and abetting liability in SEC enforcement actions. *See* Private Securities Litigation Reform Act of 1995 § 104(f), 15 U.S.C. § 78t (2003).

68. Professor Kadish suggests that intentional aiding and abetting is based on the notion of agreement or consent, which makes the principal liable for the acts of another person. *See* Kadish, *supra* note 57, at 355; *see also* Dressler, *supra* note 62, at 111 (critiquing agency idea and formulating alternate explanation based on causation); Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 222-31 (2000) (surveying justifications for accomplice liability).

69. *See infra* text accompanying notes 90-94 (discussing operation of respondeat superior theory in criminal law).

70. *Cf.* Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (presenting circumstance of an agent of the firm aiding and abetting the criminal conduct of corporation).

71. *See* United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (noting that "[a]ll the words used—even the most colorless, 'abet'—carry an implication of purposive attitude toward it").

72. *Cf.* Model Penal Code §2.07(1)(c) (Proposed Official Draft 1962). The Model Penal Code drafters rejected the respondeat superior approach and substituted conduct by the board or high managerial agents because it is "reasonable to assume that their acts are in some substantial sense reflective of the policy of the corporate board." *See id.* § 2.07 cmt. at 339-40; *see also* Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107 (2006) (recommending that federal courts draft a jury instruction based on the Model Penal Code standard).

Bucy and French have argued, a firm can also act through self-executing policies.[73] Corporate criminal liability may be based on its affirmative policies and on failure to adopt preventive policies after misconduct has occurred.[74] Of the seven factors Professor Bucy identified as indicating a problematic corporate ethos, two are especially useful here.[75] They may be restated as (1) corporate goals that value profits and ignore the means by which they are achieved; and (2) a reward structure that creates an incentive for criminal conduct.

The rationale for including the reward structure applies also to other corporate policies. Compensation schemes are self-executing policies that upon adoption operate without human intervention, aside from those actions necessary to apply it.[76] Other policies, such as evaluation systems, similarly apply automatically and similarly can motivate criminal conduct. It seems reasonable to consider such self-executing policies as actions of the firm, and the firm as responsible for their consequences.[77] Corporate policy regarding profit maximization, as noted earlier, also affects executives and employees, and in effect justifies and ratifies questionable acts. Again, it is not unreasonable to consider such policies as acts that encourage and abet the individual in the commission of the offense.

Accomplice liability is not premised on strict liability. The actor must have provided help or encouragement with the intention to or desire that the target offense occur. In theory, the intention element is the heightened mens rea of specific intent, that the accomplice provided aid with the purpose of facilitating the crime.[78] In practice, the standard is less rigorous, because fact finders may infer intent from the accomplice's conduct.[79] Thus, the conduct—in this case the

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73. *See* Bucy, *Corporate Ethos*, *supra* note 21; FRENCH, *supra* note 22.

74. Professors Fisse and Braithwaite are associated with the view that the firm's failure to prevent crime or to adopt policies after a crime has occurred are indicators of corporate fault. *See generally* BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS CRIME AND ACCOUNTABILITY 113 (1993) (stating that corporate responsibility may be based on corporate intentionality reflected in corporate policies); Brent Fisse, *Corporate Criminal Responsibility*, 15 CRIM. L. J. 166, 173-74 (1991); Brent Fisse, *Restructuring Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141 (1983); *see also* William S. Laufer, *Corporate Bodies and Guilty Minds*, 79 EMORY L. J. 647, 665-68 (1994) (summarizing approaches to finding corporate culpability) [hereinafter Laufer, *Corporate Bodies*].

75. *See* Bucy, *Corporate Ethos*, *supra*, note 21, at 1146. The remaining five indicators of a suspect corporate ethos addressed the failure of the firm to prevent individuals from committing crimes, *id.*, and are similar to those identified by Professor Fisse. *See supra* note 74. Professor Laufer has persuasively argued that a firm's failure to prevent or rectify criminal conduct fails to address criminal culpability at the time of the illegal act. *See* Laufer, *Corporate Bodies*, *supra*, note 74 at 669 (including corporate ethos theory in this observation).

76. *See* FRENCH, *supra* note 22, at 58 (discussing corporate policies as broad, general principles rather than detailed statements of methods).

77. *See id.* at 44 ("[W]hen a corporate act is consistent with an instantiation or implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentionality.").

78. *See* United States v. Raper, 676 F. 2d 841 (D.C. Cir. 1982) (upholding defendant's conviction for aiding and abetting because of his intent to aid his co-defendant).

79. *See* United States v. Irwin, 149 F. 3d 565, 571 (7th Cir. 1998). The court noted that conduct and intentionality are "intertwined," and when the natural consequence of aid is to further the crime and help it

policies of the firm—is assessed to determine if it provides indicia of intent.

In sum, a plausible argument can be made that under the longstanding criminal doctrine of accomplice liability, corporations may be charged with substantive criminal offenses. The following discussion begins the consideration of whether there are reasons for doing so.

III. CONSIDERING FAULT-BASED LIABILITY FOR COMPLICIT CORPORATIONS

Corporate criminal liability involves two legal doctrines, corporate governance and criminal law theory, and each field presents significant barriers to imposing punishment on a corporate entity.[80] Notwithstanding the merits of that theoretical debate, controlling the behavior of powerful corporate entities seems as imperative today as it was in 1909 when the Supreme Court adopted respondeat superior criminal liability for corporations.[81] Despite advances in regulatory systems, the threat of punishment remains a necessary back-up to regulatory enforcement.[82] Thus, rather than revisit the debate over whether to hold corporations criminally liable, this discussion begins from where we are. A rough societal consensus appears to view criminal penalties for corporate misconduct as appropriate, evidenced by the longstanding respondeat superior doctrine and by public support

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succeed, the jury is entitled to infer that the defendant intended by his assistance to further the crime. *Id.*; *see also Raper*, 676 F.2d at 849 (intent established if the defendant knowingly participated in the offense "in a manner that indicated he intended to make it succeed").

80. There is a rich commentary on the issue, in addition to the articles cited in the previous footnotes. For a review of these issues, see H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of their Employees and their Agents*, 41 LOY. L. REV. 279 (1995). For comprehensive treatments, see WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS; THE FAILURE OF CORPORATE CRIMINAL LIABILITY (2006); KIP SCHLEGEL, JUST DESSERTS FOR CORPORATE CRIMINALS (1990); CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY (2d ed. 2001).

Several other recent articles, published since Enron burst upon the scene, present valuable perspectives. *See* Patricia S. Abril & Ann Morales Olazabal, *The Locus of Corporate Scienter*, 2006 COLUM. BUS. L. REV. 81 (2006); David Hess, et al., *The 2004 Amendments to the Federal Sentencing Guidelines and Their Implicit Call for a Symbiotic Integration of Business Ethics*, 11 FORDHAM J. CORP. & FIN L. 725 (2006); Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals about Self-Deception, Deceiving Others and the Design for Internal Controls*, 93 GEO. L.J. 285 (2004).

For commentary from the utilitarian perspective of law and economics, see Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); V.S. Khanna, Corporate Criminal Liability: What purpose Does it Serve?, 109 HARV. L. REV. 1477 (1996).

For retributive approaches, see Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. Pol'y 833 (2000) (concluding that expressive function of criminal law justifies corporate criminal liability); Andrew Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483 (2006) (utilizing retributive view of corporate criminal liability in context of police departments).

81. New York Cent. & Hudson River R.R. Co, v. United States, 212 U.S. 481, 495-96 (1909).

82. *See* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW § 11.4 (1998) (noting the pragmatic utility of using criminal sanctions to influence social behavior of corporations).

for aggressive prosecution policies.[83] Yet current white collar enforcement efforts are marked by an absence of corporate prosecutions. This is somewhat surprising because corporations may be readily convicted under the doctrine of respondeat superior for offenses committed by executives and employees.

The following analysis considers an alternate method of holding corporations responsible when a crime is committed by an individual who is not a rogue agent, but who has acted in the interest of the firm as well as in his or her own interest. In that circumstance, a corporation that encourages or induces criminal conduct because it wants it to occur is complicit in the crime. The following discussion considers two justifications for fault-based corporate liability: intuitions about just desserts from criminal law theory, and deficiencies of respondeat superior liability.

A. *Criminal Law Theory*

The most compelling reason for punishing complicit corporations echoes the justification for punishing accomplices: an accomplice is worthy of blame. Accomplice liability, although it derives from the crime of an agent, is based on the conduct and culpability of the corporate actor.[84] The corporation acts through its policies and executive directives and is culpable because of its own intentionality regarding the commission of the offense. Properly applied, accomplice liability is congruent with criminal law theory, which premises guilt on the choice to engage in prohibited conduct.

As the discussion so far has shown, a corporate culture can encourage agents to act unlawfully. Specific firm policies, such as compensation schemes, can induce criminal behavior when they provide incentives that motivate criminal conduct. Moreover, when supervisors "encourage their subordinates to meet targets by any means necessary," they abet; when a firm "provide[s] assistance and resources, it aids."[85] An obvious way to deter firms from aiding and abetting fraud and other criminal acts of their executives and employees is to exact criminal penalties.

In addition, failing to punish a complicit actor who has induced another to act seems less than fair.[86] The harsh penalties for convicted white collar offenders, especially those who do not plead or cooperate, make the failure especially troubling. Make no mistake, aid and encouragement by the corporation does not excuse individual executives and employees; it may, however, indicate that a firm has contributed to a corporate crime. In these circumstances, just as it is fair to hold

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83. As reaction to the Andersen indictment indicated, some part of the business community is undoubtedly less sanguine about the prospect of corporate liability. *See generally* Kathleen F. Brickey, *Andersen's Fall From Grace*, 81 WASH. U. L. Q. 917 (2003).

84. *See* Laufer, *Corporate Bodies*, *supra* note 74, at 665-73 (critiquing various methods of identifying genuine corporate culpability).

85. *See* David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 964 (1999).

86. *See* Coffee, *supra* note 24, at 1106 (suggesting that "basic concepts of fairness argue for some limits on the degree to which corporate officials seeking to benefit (and perhaps actually benefiting) the corporation should be held liable in order to deter others").

an accomplice liable, it is fair to hold the corporation criminally liable.

When all responsible parties are not fairly charged, a sense of disquiet arises in the specific community affected by criminal acts and enforcement efforts. Sound criminal enforcement principles counsel against creating perceptions of unfairness in those who work in the corporate world. Unfairness breeds resentment and cynicism that can undercut the goal of encouraging law-abiding conduct and impede effective enforcement.[87] People are also more likely to informally enforce the law among their peers when they view the law and its enforcement as fair, an important tool in preventing future misconduct.[88] Furthermore, individuals and corporate entities who respect the criminal justice system are more likely to obey the law even when they do not completely share the particular societal norm about the issue.[89]

Accomplice liability also meets utilitarian goals of deterrence and prevention in a more direct way. A person who offers encouragement and incentives for another to engage in a crime makes it more likely that the harm the law seeks to avoid will occur. Encouragement given by a second party makes it less likely that the primary actor will change his or her mind and abandon the endeavor. Even-handed enforcement that includes all guilty parties provides a more just and effective deterrence mechanism.

B. Respondeat Superior Doctrine

A second set of factors that support fault-based criminal liability relate to problematic issues raised by use of the respondeat superior doctrine. The respondeat superior theory of strict and vicarious liability provides a powerful method of imposing punishment on a corporate body.[90] Under this doctrine, a corporation is guilty of the criminal act of an agent if the agent acted within the scope of his or her authority and for the benefit of the firm. Had the individual agents in *Brown* been found guilty, the firm could have been convicted. Even if prosecutors were to have used the more restrictive Model Penal Code formulation of respondeat superior,

87. *See* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY & BLAME 157 (1995) (noting that some obey the law because they generally respect it); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 44-46 (1997) (noting that criminal enforcement impacts the law-abiding, rather than the criminal, community); Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities Into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 708 (2000).

88. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468 (1997) (stating that when the criminal justice system is viewed as morally credible and legitimate, individuals are likely to defer to the authority of the law—even in the absence of a strong internalized norm and in marginal situations where conduct is ambiguous or of borderline criminality).

89. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 104-09 (1990) (drawing a relation between fair procedures and a respect for the law).

90. *See* New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495-96 (1909) (arguing that without a respondeat superior theory of liability "many offenses might go unpunished and acts be committed in violation of law"); *see also* United States v. Union Supply Co., 215 U.S. 50, 55 (1909) (stating that corporations are "as capable of a 'willful' breach of the law" as are individuals) (citation omitted).

the corporation in *Brown* would face conviction.[91] Given this ready remedy, moving to a fault-based system may seem rather counter-intuitive.

Respondeat superior, however, is an infirm theory on which to base criminal punishment. Its fatal flaw is its inconsistency with a basic requirement of criminal law: the accused must engage in conduct with appropriate culpability, and these elements must concur in time.[92] This basic flaw of respondeat superior criminal liability is evidenced by current federal policies that soften its full effect. The Department of Justice considers compliance programs and other preventive actions in deciding whether to indict; and the Sentencing Guidelines consider such factors when devising punishment. Both policies take into account the efforts firms had made to ensure their executives and employees acted in accordance with the law.[93] As Professor Laufer has noted, the two policies reflect a basic antipathy toward use of respondeat superior criminal liability.[94] In practice, the policies have also shifted the risk of indictment to the executives and employees and away from the firm.

Using the doctrine of accomplice liability rather than respondeat superior increases the burden of establishing corporate guilt, making it more difficult to convict a corporation. The elements of aiding and abetting—assistance, encouragement, inducement, undertaken with a desire that the crime occur—must be proved beyond a reasonable doubt. Only those firms that had engaged in such conduct would be "eligible" for criminal treatment, thus reducing the chance of indictment.[95] A proposal that would reduce the pool of corporate defendants may cause one to wonder why fault-based criminal liability is preferable to respondeat superior liability.[96] As it turns out, several considerations support that preference.

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91. *See* MODEL PENAL CODE § 2.07 (1)(c) (Proposed Official Draft 1962)). A corporation may be convicted of the commission of an offense if the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment. *Id.*

92. *See* Laufer, *Corporate Bodies*, *supra* note 74, at 668-673 (critiquing other models of assigning criminal liability to corporations for failing to meet this requirement).

93. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 8; (outlining the charging guidelines for organizations). Similarly, the Model Penal Code offers an affirmative defense if a corporate officer employed due diligence to prevent the crime. *See* MODEL PENAL CODE § 2.07(5) (Proposed Official Draft 1962). Proposals for a good faith defense are in the same vein. *See generally* Ellen S. Podgor, *A New Corporate World Mandates a "Good faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537 (2007).

94. *See* William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability* 37 AM. CRIM. L. REV. 1285, 1302-03 (2000) (stating that the federal charging guidelines indicate the DOJ has renunciated criminal liability under the respondeat superior doctrine) [hereinafter Laufer & Strudler, *Corporate Intentionality*].

95. Lowering the chance of indictment could have the unintended consequence of removing the incentive to monitor and control executives and employees, now provided by respondeat superior liability. However, the Sentencing Guidelines, which reduce punishment of firms that have effective compliance programs, would continue to provide an incentive to monitor employees. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)

96. Although not the purpose of the proposal, a fault-based system also reduces the power of prosecutors to leverage cooperation and plea agreements from firms. *See supra* text accompanying notes 13-17. Conversely, it may expose those corporations that are indicted to harsher collateral consequences because an indictment on this theory presupposes crime by the corporate entity, not just responsibility for the crime of an agent.

C. A Preference for Fault-Based Corporate Criminal Liability

Accomplice liability, unlike respondeat superior, is based on fault. One reason for preferring it is that a fault-based conviction is more credible than the strict and vicarious liability of respondeat superior. Evidence must indicate that the organization encouraged and induced commission of a crime with the desire that the offense be committed. Proof of accomplice liability shows why the organization deserves punishment. This kind of conviction cannot be readily dismissed as due to the bad luck of catching a prosecutor's attention.[97] Fault-based criminal liability, which punishes the obviously guilty, thus provides another reason for the preference; it would enhance the moral force of white collar criminal law.[98]

The clarity of the legal standard—aiding in the commission of a crime is a crime—also has the positive effect of educating the business public, an effect that is not possible under respondeat superior. As trials and appellate decisions provide examples of conduct that constitutes aiding and abetting, firms will learn what to avoid and how to adjust policies so they do not encourage or induce criminal acts. The improved clarity of the standard can bring more effective deterrence; when corporate actors know the rules and understand the conduct to be avoided, it is easier for them to avoid breaking the law.

In contrast to a particularly unfair aspect of respondeat superior liability, a fault-based system is not over-inclusive. Under the theory of strict and vicarious liability, a firm can be liable even when its policies forbade the conduct at issue, and convictions have been upheld even when the firm's benefit was dubious.[99] Firms may be liable when the crime was not tolerated or ratified by an officer, when the organization made good efforts to monitor, and when the firm had not been complicit. The patent unfairness of strict and vicarious liability is striking and can be counterproductive.[100] Fault-based liability removes this arbitrary aspect of vicarious and strict liability. In addition, a clear, transparent standard for criminal liability produces a more efficient deterrent mechanism. The threat of liability in these circumstances can cause firms to engage in cumbersome oversight protocols, or over-deterrence. When firms know what type of conduct is likely to expose

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97. *See* Brickey, *supra* note 83 at 942-45 (recounting accounting firm's reaction and public relations campaign to pressure the government not to prosecute). Many of the deferred and no-prosecution agreements include provisions that prohibit the firm from asserting innocence by making contradictory comments about the agreement. *See* Orland, *supra* note 8, at 72, 86-87.

98. Professor Robinson notes that using respondeat superior, which is devoid of moral force, may have the long-term effect of reducing the moral condemnation in cases against individuals. *See* PAUL H. ROBINSON, CRIMINAL LAW § 7.2 (1997) (stating that "[e]very conviction is made slightly less condemnable when a conviction is imposed without personal blame").

99. *See* e.g., United States v. Hilton Hotel, 467 F.2d 1000, 1004 (9th Cir. 1972) ("[A] corporation is liable for acts of its agents within the scope of their authority even when done against company orders."); United States v. Sun-Diamond Growers of Cal., 138 F.3d 961 (D.C. Cir. 1998) (affirming conviction of firm even though it was defrauded by its agent's bribery scheme).

100. *See* Laufer & Strudler, *Corporate Intentionality*, *supra* note 94, at 1312 (stating that "no rational person would respect a system that is fundamentally unfair; a system that metes out undeserved punishment is unfair").

them to criminal liability, wasteful efforts may be reduced.

Basing corporate criminal liability on fault-based accomplice liability does not solve all the problems associated with corporate criminal liability under respondeat superior. For instance, the respondeat superior standard is underinclusive because it requires that an identifiable agent committed a crime. Fault-based liability under accomplice liability doctrine does not address this aspect of respondeat superior because aiding and abetting, like respondeat superior, also requires the commission of an underlying offense by a human agent.[101] A more exhaustive analysis of accomplice liability and the crime of aiding and abetting may reveal infirmities in that doctrine that make it less suitable in the circumstances outlined here. Finally, fault-based liability also does not address another serious issue, the legitimacy of the underlying criminal offense. As in *Brown*,[102] broad and vague criminal fraud statutes can result in treating civil wrongs as crimes.[103]

In the end, the benefits of fault-based convictions will depend on the context in which they are used. For instance, in some types of crimes, such as those that threaten public health and safety, respondeat superior may be a more appropriate basis of conviction than fault-based liability.[104] Nor does this proposal impinge on the ability of enforcers to charge a firm directly.[105]

101. *See supra* text accompanying notes 57-66 (discussing offense). Courts have addressed the problem of underinclusivity through the collective knowledge doctrine. *See* United States v. Bank of New Eng., 821 F.2d 844, 856 (1st Cir. 1987) ("Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation."); United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738-39 (W.D. Va. 1962) ("[K]nowledge acquired by employees within the scope of their employment is imputed to the corporation."); *see also* Luban, *supra* note 85, at 963 (stating that collective knowledge doctrine "teeters on the brink of quack metaphysics or mystical science fiction").

102. United States v. Brown, 459 F.3d 509 (5th Cir. 2006)

103. *See* sources cited *supra* note 39 (noting recent case law); *see also* John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 3 (1983) ("[T]he reach of the statute continues to be extended further into sensitive areas not previously thought to be subject to the criminal law of fraud."); Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435 (1995); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 156 (1994); Julie R. O'Sullivan, *The Federal Criminal Code Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 660-65 (2006); Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223 (1992).

104. Public welfare offenses merit strict and vicarious liability because of the imperative to protect the public from harm in those situations in which it cannot protect itself. Usually these situations involve highly regulated industries such as food and drugs. As *malum prohibitum* crimes, they are punished lightly and do not stigmatize the entity as a deviant felon. *See* Morissette v. United States, 342 U.S. 246 (1952) (reviewing the need to protect the public from the dangers of unregulated industries and noting the light penalties of regulatory violations).

105. For instance, federal prosecutors recently announced a plea bargain with Purdue Pharma, Inc. for the felony offense of intentional fraud and misbranding drugs under which the company will pay fines of $600 million. Although three executives were charged with misdemeanors, no human agent was charged with the felony. *See* Barry Meier, *Narcotic Maker Guilty of Deceit Over Marketing*, N.Y. TIMES, May 11, 2007, at A1.

The case is also interesting because the United States Attorney in charge of the case indicated in an interview that the action was justified in part by the firm's "corporate culture." *See* Interview with John L. Brownlee, United

A final consideration bears remark. Failing to address the bad tree of corporate complicity and continuing to target only individual bad apples can create a false impression among the public. Trials, plea bargains, and accompanying headlines about arrested and convicted executives and employees may generate the perception that misconduct at business firms is an exceptional occurrence, committed only by deviant persons. As we now know, serious misconduct at firms is not confined to the first-wave scandals at Enron, WorldCom, and Adelphia.[106] The continuing litany of scandals indicates that causes of misconduct are more likely to be systemic and ongoing.[107] For the executive branch, with the cooperation of the judiciary, to give the impression that convicting individual executives and employees will eliminate the risk of criminal conduct borders on deception.

The egregious facts in *Brown*, which included directives from a chief financial officer and unlawful posting of the sham transaction, make it an easy case in which to charge the firm. Accomplice liability is not, however, limited to cases in which the firm engaged in an illegal act because the conduct of aiding and abetting need not be unlawful in itself. Accomplice liability could be used when corporate conduct, in the guise of policies, encourages criminal behavior. This liability is not as broad as it might appear. There is a natural limit to liability because conviction also requires proof of culpability, an intention that the crime occur.

On the practical front, implementing change to the status-quo may not be possible. Change requires courts and enforcers to maneuver around public outrage about corporate crime,[108] the comfort corporations find in deferred prosecution agreements, and the efforts of the business community to avoid criminal responsi-

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States Attorney for the Western District of Virginia and Dr. Sidney Wolfe, director of health research at Public Citizen, *The NewsHour with Jim Lehrer* (Public Broadcasting System broadcast May 11, 2007) *available at* http://www.pbs.org/newshour/bb/health/jan-june07/oxycontin_05-11.html.

106. In the weeks before this conference convened, newspapers reported yet more criminal conduct at large firms. *See* Loren Steffy, *Haven't We Learned Anything?*, HOUS. CHRON., Feb. 9, 2007, at D1 (reporting the backdating of stock option awards); Jenny Anderson, *S.E.C. Is Looking at Stock Trading*, N.Y. TIMES, Feb. 6, 2007, at A1 (examining the investigation into advance tips to clients); Jenny Anderson & Michael J. de la Merced, *13 Accused of Trading As Insiders*, N.Y. TIMES, March 2, 2007, at C1 (outlining an insider trading scheme). For academic treatment of problems in the securities industry, see Vincent Di Lorenzo, *Does the Law Encourage Unethical Conduct in the Securities Industry?*, 11 FORDHAM J. CORP. & FIN. L. 765, 772-73 & nn.21-25 (2006) (listing unethical business practices in the securities industry).

107. *See generally* MITCHELL, CORPORATE IRRESPONSIBILITY *supra* note 23 (detailing the growth of American corporate criminality); *see also* Bratton, *supra* note 34, at 1283 (noting that criminal prosecutions of rogue employees deflects attention from problematic business practices); Westbrook, *supra* note 20, at 92 (noting that punishing the bad apples is "something of a distraction"); *see generally* Jill E. Fisch & Ken Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003).

108. *See* Henry Allen, *Ken Lay's Last Evasion: To Some, CEO is Cheating Them One Last Time*, WASH. POST, July 6, 2006, at C1 (detailing public reaction to Lay's death and suggesting it shows a "frustrated craving for revenge"); Carrie Johnson & Brooke A. Masters, *Cook the Books, Get Life in Prison: Is Justice Served?*, WASH. POST, Sept. 25, 2006, at A1 (noting that death of convicted Enron founder Ken Lay induced profanity-laden outrage from shareholders who felt cheated because Lay escaped punishment); *see also* Fischel & Sykes, *supra* note 80, at 346 ("The sentencing guidelines, like the broader phenomenon of corporate criminal liability, cannot be reconciled with any rational policy of the criminal law or of optimal penalties.").

bility.[109] Nevertheless, recent developments indicate that it is time to think about a theory that bases corporate criminal liability on the actual conduct and culpability of a firm and that would create a fairer, more effective, and more complete response to corporate crime.

CONCLUSION

The relationship between a collective body, such as a corporation, and the individuals who comprise it raises difficult questions about respective responsibility. The Nuremberg Charter established that individual actors should not escape responsibility for crimes committed on behalf of the state, another kind of collective body. On the other hand, shielding the corporation from responsibility for acts of its executives and employees that were encouraged by the firm is also problematic. Fairness to both the firm and individual agents requires that a corporation should neither escape criminal liability nor be held criminally responsible simply because it is a collective body.

Holding a corporation responsible for its complicit conduct in encouraging commission of an offense meets the demand of just deserts. It also is consistent with deterrence goals; if the corporation is not held responsible for its complicity in crime, unlawful conduct is likely to continue, albeit with a different set of individual actors. Further, fault-based criminal liability for complicit corporations avoids the negative aspects of respondeat superior liability, which includes unfairness to some firms. Credible and transparent convictions of corporations through fault-based liability will enhance the moral force of criminal law and respect for the criminal justice system. Given these considerations, failing to hold the corporation criminally responsible when it has aided and encouraged a criminal act is misguided.

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109. *See e.g.*, Carrie Johnson, *Plan Unveiled to Scrap A Sarbanes-Oxley Rule*, WASH. POST, Dec. 20, 2006, at D1; Carrie Johnson, *Accounting for the Future*, WASH. POST, Mar. 9, 2007, at D1 (four accounting firms press for relief from regulatory oversight); Stephen Labaton, *Officials Reject More Oversight of Hedge Funds*, N.Y. TIMES, Feb. 23, 2007, at A1; Floyd Norris, *Winds Blow for Rollback of Regulation*, N.Y. TIMES, Dec. 1, 2006, at C1. A day before this conference was convened, high-level executives and government officials met to discuss the report of a blue ribbon panel convened to consider the effect of Sarbanes-Oxley. *See* Carrie Johnson, *Wall Street, Washington Huddle on U.S. Markets*, WASH. POST, Mar. 14, 2007, at D1.