CORPORATE CRIMINAL LIABILITY, MORAL CULPABILITY, AND THE YATES MEMO

Lucian E. Dervan*

One of the most fascinating aspects of corporate criminal liability is the extreme ease with which it can attach. Under current law in most jurisdictions, a corporation may be held criminally liable for the actions of an employee or agent upon mere satisfaction of the *respondeat superior* standard.[1] The standard requires only that the "employee's or agent's actions (a) are within the scope of his or her duties and (b) are intended, even if only in part, to benefit the corporation."[2] Part of the explanation for the ease with which the *respondeat superior* standard may be satisfied is the fact that the doctrine was not originally crafted in criminal law jurisprudence.[3] Rather, the concept was lifted from tort law after the U.S. Supreme Court ruled that corporations may be held criminally liable in the seminal 1909 case *New York Central & Hudson River Railroad Co. v. United States*.[4]

In *New York Central*, the government alleged that an assistant traffic manager for the railroad company had offered customers rebates in violation of the Elkins Act.[5] The government criminally

 Associate Professor of Law and Director of Faculty Development, Southern Illinois University School of Law. J.D., Emory University School of Law, 2002; B.A., Davidson College, 1998. My deepest thanks to Professor Ellen Podgor for including me in this remarkable event.

1. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1364 (2009) (discussing how most states approve of corporations being criminally liable).

2. Lucian E. Dervan, *ReEvaluating Corporate Criminal Liability: The DOJ's Internal Moral Culpability Standard for Corporate Criminal Liability*, 41 STETSON L. REV. 7, 8 (2011); *see* Standard Oil Co. of Tex. v. United States, 307 F.2d 120, 127–28 (5th Cir. 1962) ("And again the rationale is couched in the familiar concepts of civil tort law of (1) a purpose to benefit the corporation and (2) an act by an agent in line of his duties."); *see also In re* Hellenic, Inc., 252 F.3d 391, 395 (5th Cir. 2001) (discussing the *respondeat superior* standard); United States v. 7326 Highway 45 N., 965 F.2d 311, 316 (7th Cir. 1992) (discussing the *respondeat superior* standard).

3. *See Standard Oil Co.*, 307 F.2d at 127 (discussing how corporate criminal liability evolved from tort law).

4. 212 U.S. 481, 493–95 (1909); *see also* ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL & NANCY J. KING, WHITE COLLAR CRIME: HORNBOOK SERIES, 23–24 (West 2013) (discussing the *respondeat superior* standard).

5. 212 U.S. at 489–90 (identifying the corporation's employee as the perpetrator of the crime).

charged both the employee and railroad company.[6] Though the notion of corporate criminal liability was novel at the time, such charges were contemplated by the statute, which stated the following:

> That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce, and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation.[7]

On appeal, the corporation challenged the authority of Congress to create corporate criminal liability. The U.S. Supreme Court, however, rejected this assertion:

> We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.[8]

The Court went on to state "that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises."[9]

---

6. *Id.* at 489.

7. *Id.* at 491 (citing Elkins Act, ch. 708, 32 Stat. 847 (discussing the part of the Elkin's Act that's pertinent to corporations)).

8. *Id.* at 495–96.

9. *Id.* at 494 (explaining the Supreme Court's reasoning for the allowance of corporate criminal liability); *see also* Alschuler, *supra* note 1, at 1363 (discussing the imposition of corporate criminal liability after *New York Central*).

As described above, tort law's *respondeat superior* test was selected as the vehicle to determine when the acts of an employee or agent may properly be "imputed" to the corporation, as envisioned in *New York Central*. As caselaw regarding this concept evolved during the twentieth century, the *de minimis* nature of the standard became evident. During this time, for example, courts held that corporate criminal liability could attach to a corporation:

> [E]ven if (a) the criminal behavior was perpetrated by a low-level, rogue employee without upper-level management's knowledge; (b) the perpetrator was explicitly instructed by the corporation not to engage in the conduct and was directly violating established company policy; and (c) the company had an established and effective compliance program in place at the time of the offense and the conduct came to light because of such compliance program.[10]

When one thinks of the fundamental tenets of criminal liability, the notion of moral culpability is often at the forefront of his or her mind.[11] One must engage in conduct "deserving of punishment" before the power of the state is unleashed upon them.[12] In the context of corporate criminal liability, however, the *respondeat superior* test contains no such requirement.[13] Quite to the contrary, *respondeat superior* enables the government to prosecute a corporation that is wholly underserving of punishment. Therefore, given the ease with

---

10. Dervan, *supra* note 2, at 8; *see also* Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 64–65 (2007) (describing situations in which a corporation is criminally liable); Pamela H. Bucy, *Corporate Criminal Liability: When Does It Make Sense?*, 46 AM. CRIM. L. REV. 1437, 1441 (2009) (observing situations in which a corporation may be held criminally liable).

11. *See* Dervan, *supra* note 2, at 9 (depicting a fundamental difference between civil and criminal law).

12. John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1330 (2009); William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1289 (2000).

13. *See* Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & All U.S. Attorneys at 3–4 (Dec. 12, 2006), *available at* https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf (discussing the *respondeat superior* standard) [hereinafter McNulty Memo].

> Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions ([i]) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation.

Id. at 2.

which liability may attach, it is little wonder that results are inconsistent and unjust.

For example, consider the moral distinctions between a corporation whose board of directors encourages employees to engage in illegal behavior versus a corporation that, through the utilization of an effective compliance program, discovers and punishes a rogue employee who acted against direct corporate and managerial instructions to the contrary. Should each of these corporations be viewed as equally liable as a matter of law? Corporation A should be and, presumably, would be prosecuted. What about corporation B? Because the *respondeat superior* standard is so easily satisfied and the corporation's good works have no bearing on its liability as a matter of law, its fate is uncertain and rests mainly on decisions regarding the exercise of discretion by the government. If corporation B cooperates, it will likely escape prosecution. But if it refuses to assist the government, despite its earlier effective efforts to prevent and detect misconduct in its ranks, corporation B will likely be prosecuted as well.

Just as one should be concerned by a criminal statute written so broadly as to capture large groups of individuals who could then rely only on the exercise of prosecutorial discretion for relief, one should also be concerned by a corporate criminal liability standard that places all of the discretion for determining whether a corporation is morally blameworthy in the hands of enforcement authorities.[14] The assertion that the determination of corporate moral culpability lies in the hands of the government is not merely supported by the language and low bar of the *respondeat superior* test; it is also supported by the Department of Justice's (DOJ) own policies.[15] In particular, consider the language and focus of the DOJ's *Principles of Federal Prosecution of Business Organizations* (*Principles of Prosecution*), which are contained in the United States Attorney's Manual.[16]

---

14. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (describing the dangers of vague criminal laws). In *Morales*, the Court stated:

> Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

Id.

15. *Principles of Federal Prosecution of Business Organizations*, United States Attorney's Manual at 9-28.000 et al., *available at* https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations (last visited Nov. 4, 2016) [hereinafter Principles of Prosecution].

16. *See id.* at 9-28.300 (describing the factors the DOJ should consider prior to bringing charges against a corporation).

The *Principles of Prosecution* contains tens factors to be considered by the government in determining how to exercise its prosecutorial discretion:

> 1. [T]he nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
>
> 2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
>
> 3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
>
> 4. the corporation's willingness to cooperate in the investigation of its agents;
>
> 5. the existence and effectiveness of the corporation's pre-existing compliance program;
>
> 6. the corporation's timely and voluntary disclosure of wrongdoing;
>
> 7. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
>
> 8. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
>
> 9. the adequacy of remedies such as civil or regulatory enforcement actions; and
>
> 10. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.[17]

17. *Id.* (citations omitted). Interestingly, the *Principles of Prosecution* closely tracks the factors for establishing the "ethos" of a corporation proposed in Professor Pamela Bucy's article entitled

The factors contained in the *Principles of Prosecution* represent an attempt by the DOJ to create a moral culpability test for use in combination with *respondeat superior* precisely because the common law standard for corporate criminal liability is too easily satisfied to be the end of the inquiry.[18]

While the DOJ should be applauded for introducing the idea of moral culpability into its discretionary analysis of corporate criminal prosecutions, the *Principles of Prosecution* does not adequately correct for the deficiencies in the *respondeat superior* test.[19] First, the *Principles of Prosecution* does not create a legal right for the defendant corporation. Rather, the *Principles of Prosecution* serves as mere guidance to prosecutors when making charging decisions. At the end of the U.S. Attorney's Manual, the DOJ states that "[the Manual is] not intended to, do[es] not, and may not be relied upon to create any rights."[20] As a result, interpretation and application of the DOJ's factors are discretionary and subject to change; the *Principles of Prosecution* is consequently unenforceable by a defendant in a legal proceeding. Second, the inclusion in the moral culpability analysis of the *Principles*

Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 MINN. L. REV. 1095 (1991). Professor Bucy proposed the following factors:

> (1) Was the corporation organized in a manner that encouraged the criminal conduct?
> (2) Were goals set by the corporation that encouraged illegal behavior?
> (3) Were corporate employees educated about legal requirements?
> (4) Were legal requirements monitored?
> (5) Who was involved in the criminal conduct and was it "recklessly tolerated" by higher echelon officials?
> (6) How did the corporation react to past violations of the law and individual violators?
> (7) Were there compensation incentives for legally inappropriate behavior?
> (8) Are there indemnification practices that encourage criminal conduct?

Id. at 1127–40; *see also* Dervan, *supra* note 2, at 11 (discussing Prof. Bucy's factors).

18. *See* Dervan, *supra* note 2, at 13–14 (explaining how the DOJ has attempted to create a moral culpability test).

19. *See id.* (discussing the DOJ's culpability standard):

> The Department of Justice is not concerned with the lack of moral culpability in the common law corporate criminal liability standard because it has implemented a moral-culpability element on its own and requires that it be considered before bringing any criminal charges. Maybe corporations should be satisfied that despite the reluctance of the courts to revise the standard established in *New York Central* over [one hundred] years ago to incorporate a moral culpability element, the Department of Justice has seen fit to implement a new standard on its own volition. There are, however, two fundamental flaws with allowing the status quo to suffice.

Id.

20. Principles of Prosecution, *supra* note 15, at 9-28.00.

of Prosecution of factors that focus on conduct occurring *after* the criminal behavior under scrutiny is a significant flaw.

As discussed more fully in my 2011 article entitled *ReEvaluating Corporate Criminal Liability*,[21] the *Principles of Prosecution* contains elements addressing pre-offense conduct, offense specific conduct, and post-offense conduct.[22]

Pre-Offense and Offense Specific Conduct

- Nature and Seriousness of the Offense
- Pervasiveness of the Wrongdoing
- Corporation's Past History
- Existence and Adequacy of the Pre-Existing Compliance Program

Post-Offense Conduct

- Corporation's Willingness to Cooperate in the Investigation of its Agents
- Timely and Voluntary Disclosure
- Remedial Actions
- Collateral Consequences of Prosecution
- Adequacy of Civil or Regulatory Enforcement
- Adequacy of Prosecution of Individuals

Pre-offense and offense-specific conduct by the corporation clearly speaks to the entity's moral culpability. As examples, the *Principles of Prosecution* asks about the nature and seriousness of the offense, the pervasiveness of the wrongdoing, the corporation's past history of misconduct, and the existence and adequacy of pre-existing compliance programs. Each of these inquires speak directly to the issues of whether there was corporate involvement or acquiescence in the offense and whether, therefore, the corporation is morally culpable for the employee's or agent's conduct. But the *Principles of Prosecution*

21. Dervan, *supra* note 2, at 15.
22. *Id.*

also considers post-offense conduct as part of its moral culpability analysis, considering factors such as disclosure, remedial actions, and the collateral consequences of prosecution. As argued in my 2011 article, the actions of a corporation after the discovery of misconduct are ineffective indicia of the true corporate ethos at the time of the offense and, therefore, are not appropriately contained within a moral culpability analysis.[23] This is not to say that post-offense considerations have no place. These factors are extremely important in the exercise of prosecutorial discretion as to whether a corporation should be prosecuted where corporate criminal liability properly attaches.[24]

As an example of these concerns, consider the role of similar information in determining whether an individual is guilty of fraud. Consideration of whether the victim received restitution is not a factor in the legal analysis of the elements of the offense. The legal inquiry would instead focus on satisfying the elements of the offense at the time the allegedly illegal behavior occurred. Remedial measures, by comparison, would be relevant when the prosecution considered how it should exercise its prosecutorial discretion and whether to move forward with a formal prosecution or some other alternative resolution. In a similar fashion, the analysis of post-offense conduct by corporations, such as cooperation, should be relegated to the government's exercise of prosecutorial discretion and not permitted to serve as the effective determiner of corporate criminal liability.

While amending the *Principles of Prosecution* to more squarely focus on factors that pertain to the moral culpability of the corporation at the time of the offense would be a step in the right direction, more is required. As mentioned earlier, even if the *Principles of Prosecution* was amended in such a way, corporations would still have no legal right to a true moral culpability analysis because of the non-binding nature of the

---

23. *See id.* at 15–16 (explaining how only those factors listed in the pre-offense or offense-specific conduct category are considered when determining corporate moral culpability because they provide a more reliable analysis).

> [T]he actions taken by the corporation after the discovery of wrongdoing do not offer reliable insight into the true ethos of the corporation at the time of the underlying offense. For instance, a corporation that was not morally culpable at the time a rogue employee committed a criminal act may later attempt to obstruct justice to prevent detection of the conduct. While this might properly result in a corporate conviction for obstruction of justice, the organization should not also be held accountable for the previous acts of the employee.

Id.

24. *Id.* at 17 ("To be clear, the remaining five post-offense conduct factors from the *Principles of Prosecution* are not irrelevant because they remain exceedingly important in determining whether an organization should—not may—be prosecuted.").

United States Attorney's Manual. For these reasons, one must look to other potential mechanisms for addressing the inadequacies of the *respondeat superior* system.

Currently, there are several paths towards reform. In my 2011 article, I proposed adding a moral culpability element focusing on pre-offense and offense-specific conduct into the common law *respondeat superior* test.[25] As we have seen, even the DOJ believes that an examination of moral culpability is important and lacking from the current standard for corporate criminal liability.[26] By incorporating a new and binding element into the law, corporate defendants would be placed in a more just position. Further, such a reform would allow the corporation to initiate a case by asking whether the entity engaged in behavior leading to criminal liability, rather than focusing on how it might conduct itself in the future to convince the government to favorably exercise its broad discretion regarding past conduct. Incorporating this proposal, the *respondeat superior* test would look as follows:

> A corporation shall be criminally liable for the criminal acts of its employees or agents when:
>
> (1)The employee's or agent's criminal acts:
>
> a. Were within the scope of their duties; and
>
> b. Were intended to benefit the corporation;
>
> And,
>
> (2)The corporation is morally culpable for encouraging the above-described criminal acts of its employees or agents based on an analysis of the following four factors:
>
> a. The nature and seriousness of the offense, including the risk of harm to the public;

25. *See* Dervan, *supra* note 2, at 18 ("Such a revised standard increases the burden on the prosecution to establish a criminal violation, incorporates a moral-culpability element into the traditional respondeat superior test, and focuses the analysis of whether the corporation is morally culpable on a refined and appropriately limited group of pre-offense and offense-specific factors.").

26. *Supra* notes 12–15 and accompanying text.

> b. The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
>
> c. The corporation's history of similar con-duct, including prior criminal, civil, and regulatory enforcement actions against it; and
>
> d. The existence and adequacy of the corporation's pre-existing compliance program.

Through such an expansion of the *respondeat superior* test, the law might better define the types of behavior and conduct for which corporate criminal liability should properly attach.

Another prominent proposal to correct the deficiencies of the current *respondeat superior* standard is found in the American Law Institute (ALI) Model Penal Code (MPC). The MPC would retain the *respondeat superior* test as it currently exists, but add a requirement that "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 [o]n behalf of the corporation within the scope of his office or employment."[27] While the MPC proposal does not contain as detailed a moral culpability element as that proposed above, the ALI reform does offer a limited version of a moral culpability test by focusing on the involvement of those leading the corporation.[28]

Interestingly, a version of the MPC approach is found in other common law jurisdictions, including the United Kingdom (U.K.). In the U.K., crimes that include a *mens rea* element require the satisfaction of the "identification principle" for corporate criminal liability to attach.[29]

---

27. MODEL PENAL CODE § 2.07(1)(c) (ALI Proposed Draft 1962).

28. *See generally* Roland Hefendehl, *Corporate Criminal Liability: Model Penal Code Section 2.07 and the Development in Western Legal Systems*, 4 BUFF. CRIM. L. REV. 283 (2000) (discussing the MPC approach when compared to other jurisdictional approaches).

> This restriction goes in the right direction: A corporation cannot be responsible for the wrongful act of every single one of its perhaps thousands of members if there is no mistake or negligence of management involved. Any other solution would create purely coincidental liability for which there would be no possible penal purpose. If there is, for example, an unavoidable incident in an optimally organized corporation with an optimally working board of directors, the problem concerns why exactly the shareholders (who are affected by penalties for corporations in the end) should be fined for something they had nothing to do with—and especially for something they could not have influenced at all.

Id. at 295.

29. *See* Jonathan Grimes, Rebecca Niblock & Lorna Madder, *Corporate Criminal Liability in the UK: The Introduction of Deferred Prosecution Agreements, Proposals for Further Change, and the*

This principle requires that the criminal conduct in question be attributable to the "directing mind and will of the company."[30] This has been interpreted to include some level of involvement in the criminal undertaking by the "board of directors, the managing director, and perhaps other superior officers of the company who carry out functions of management and speak and act as the company."[31] As might be expected, this standard has made the imposition of corporate criminal liability in the U.K. extremely difficult as compared to the standard currently applied in the United States.[32]

The difficulty in bringing corporate prosecutions in the U.K. under the very focused "identification principle" moral culpability analysis led to the inclusion of a strict liability offense in the U.K. Bribery Act of 2010.[33] This provision was intended as a mechanism for more

---

Consequences for Officers and Senior Managers, MULTI-JURISDICTIONAL GUIDE 2013/14 at 5, Association of Corporate Counsel, *available at* global.practicallaw.com/4-547-9466 (last visited Nov. 4, 2016).

30. *Id.*

31. *Id.* (quoting Tesco Supermarkets Ltd. v. Nattrass, AC 153 (1971)). Under the U.K. Crown Prosecution Service's Guidance on "Corporate Prosecutions," the identification principles are described as follows:

> 17. As noted at 2 above, companies are legal persons. They may also be criminally responsible for offences requiring mens rea by application of the identification principle. This is where 'the acts and state of mind' of those who represent the directing mind . . . will be imputed to the company, Lennards Carrying Co and Asiatic Petroleum [1915] AC 705, Bolton Engineering Co v Graham [1957] 1 QB 159 (per Denning LJ) and R v Andrews Weatherfoil 56 C App R 31 CA.
>
> 18. The leading case of Tesco Supermarkets Ltd v Nattrass [1972] AC 153 restricts the application of this principle to the actions of the Board of Directors, the Managing Director and perhaps other superior officers who carry out functions of management and speak and act as the company.
>
> 19. This identification principle acknowledges the existence of corporate officers who are the embodiment of the company when acting in its business. Their acts and states of mind are deemed to be those of the company and they are deemed to be 'controlling officers' of the company. Criminal acts by such officers will not only be offences for which they can be prosecuted as individuals, but also offences for which the company can be prosecuted because of their status within the company. A company may be liable for the act of its servant even though that act was done in fraud of the company itself, Moore v I. Bressler Ltd [1944] 2 All ER 515.

Corporate Prosecution, THE CROWN PROSECUTION SERVICE, *available at* http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/ (last visited Nov. 4, 2016).

32. *See* Hannah Laming & Nicholas Querée, *A Sea Change in the Prosecution of Corporate Economic Crime?*, FINANCIER WORLDWIDE (April 2014), *available at* http://www.financierworldwide.com/a-sea-change-in-the-prosecution-of-corporate-economic-crime/#.VzT2lfkrIdU ("A key difficulty in the successful prosecution of corporations in the UK is the requirement to establish corporate criminal liability by applying the 'identification doctrine.'").

33. *Deterring and Punishing Corporate Bribery*, Policy Paper Series Number One – An Evaluation of UK Corporate Plea Agreements and Civil Recovery in Overseas Bribery Cases, TRANSPARENCY INTERNATIONAL UK, at 16 (May 2012), *available at* https://issuu.com/

aggressively prosecuting corporations in corruption cases.[34] "Under the Bribery Act, corporations are strictly liable for failing to prevent bribery by associated persons."[35]

> (1) A relevant commercial [organization] ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
>
> (a) to obtain or retain business for C, or
>
> (b) to obtain or retain an advantage in the conduct of business for C.[36]

This provision appears to create a legal paradigm similar to the United States' *respondeat superior* standard in the context of bribery offenses by employees. However, in passing this law, the U.K. recognized that corporations should be provided with incentives and opportunities to avoid criminal liability where the entity is not morally culpable for the actions of an employee or group of employees. The Bribery Act, therefore, includes the following language:

> (2) But it is a [defense] for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.[37]

Through the inclusion of this affirmative defense, the U.K. added a mechanism by which to test the moral culpability of the corporation and, where the corporation is found to have been without fault, provides the entity a complete defense even when charged with this strict liability offense.

The idea of using an affirmative defense focused on whether the corporation had an effective compliance program at the time of the

---

transparencyuk/docs/policy_paper_series_1_-_deterring__ ("The SFO acknowledges the difficulties associated with prosecuting corporate bodies on the basis of the common law identification principle, but believes that the problem may have been lessened by the creation of the new Section 7 corporate offence of a failure to prevent bribery under the Bribery Act 2010.").

34. *See* U.K. Bribery Act (2010), *available at* http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf (describing bases on which corporations can be held liable for bribery committed by a person associated with the corporation and legal standards for "association" between persons and corporations).

35. *See* Richard C. Rosalez, Weston C. Loegering & Harriet Territt, *The UK's Bribery Act and the FCPA Compared*, 25 J. COMMITTEE ON CORP. COUNS. 12, 15 (2010).

36. BRIBERY ACT OF 2010, U.K. C. 23 § 7(1)(a)–(b), *available at* http://www.legislation.gov.uk/ukpga/2010/23/contents (last visited Nov. 4, 2016).

37. *Id.* § 7(2).

alleged conduct as a mechanism for testing corporate moral culpability is not unique to the U.K. Bribery Act. In her 2007 article entitled *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, Professor Ellen Podgor argued for the creation of a "corporate compliance" affirmative defense as a mechanism for reforming the current *respondeat superior* test in the United States.[38] Under Professor Podgor's proposal, corporations that "have taken all reasonable steps to discourage illegal corporate acts and encourage compliance of the law" would be afforded a defense.[39] In concluding her proposal, Professor Podgor wrote:

> Compliance with the law is an important goal for all of society. New demands and burdens placed on corporations necessitate new considerations for corporate compliance. Providing a "good faith" affirmative defense to corporations that have acted in accordance with the law in structuring, overseeing, and maintaining their compliance programs will offer an additional incentive to corporations to promote these programs. As a "good faith" defense exists for corporations on the civil side of the law, it can easily be applied in criminal matters. Rewarding compliance efforts will also reduce the ramifications that can be suffered by innocent parties when a rogue actor undermines sincere corporate efforts to abide by the law.[40]

As is true of the U.K. Bribery Act, Professor Podgor's mechanism for reform adds a moral culpability element to the legal corporate criminal liability inquiry, rather than simply leaving such determinations to the discretion of the government.

Andrew Weissmann proposed a final option for reforming the *respondeat superior* standard. Under Mr. Weissmann's approach, corporate criminal liability would attach only if "a company reasonably should have taken steps to detect and deter the criminal action of its employee."[41] In this way, Mr. Weissmann's proposal flips the burden from the corporate defendant, as would be the case with an affirmative defense, and places the burden on the government to demonstrate an

38. *See* Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1538 (2007) (arguing that a corporation's "increased exposure to criminal liability" creates the need for a corporate compliance affirmative defense).

39. *See id.* ("To properly reward law-abiding corporations, an affirmative defense should be offered to those who present 'good faith' efforts to achieve compliance with the law as demonstrated in their corporate compliance program.").

40. *Id.* at 1543.

41. Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV 1319, 1335 (2007).

additional element for corporate criminal liability to attach. In explaining the reasoning for his proposed limitation, Mr. Weissmann writes:

> A carefully constructed limitation of criminal corporate liability to those situations where a company reasonably should have taken steps to detect and deter the criminal action of its employee should inure to the benefit of the government, the public, and the corporation itself. The rationale for altering the law is strong. Corporate criminal law—indeed, law in general—is a creation of the state, and not immutable; thus we should seek the thinnest integument between the requirements of the law and outcomes that are just and rational.[42]

Mr. Weissmann argues that creating such a system will provide companies with greater incentives to implement effective compliance programs, thus furthering the goals of criminal laws.[43]

While each of the above proposals has a different focus, they all share the goal of creating some means of testing a potential corporate defendant's moral culpability in a legal sense before imposing criminal liability for the actions of employees and agents. Reform efforts should be embraced because they are consistent with our long held beliefs about what types of behavior should be the focus of our criminal laws. Reform is also necessary because of the significant negative consequences that stem from the current ease with which corporate criminal liability may attach. These negative consequences are particularly evident when one examines the Yates Memo and its reliance on both the lack of a moral culpability element in the *respondeat superior* test and the *Principles of Prosecution*'s use of post-offense conduct.

---

42. *Id.*

43. *Id.*

> Far from furthering the goals of criminal law, the current system of strict corporate vicarious liability removes an important incentive for corporations to implement effective compliance programs. Such programs serve both to thwart crime and detect it if it occurs. Under the parameters of criminal corporate liability articulated in this article, an effective compliance program can act as a sword in preventing criminal conduct by employees as well as a shield against corporate criminal prosecution if such criminal conduct by an employee nevertheless occurs. Under the current legal regime, a corporation is given no benefit at all under the law for even the best internal compliance program if such crime nevertheless occurs.

Id.

Issued on September 9, 2015, the Yates Memo amends certain DOJ policies to "fully leverage [DOJ] resources to identify culpable individuals at all levels in corporate cases."[44] According to the Memo, one of the mechanisms for achieving this end is to require that "for a company to receive *any* consideration for cooperation under the *Principles of Prosecution*, the company must completely disclose to the Department all relevant facts about individual misconduct."[45] Most people imagine that the Yates Memo will lead to a further deterioration of the relationship between corporations and employees as entities under investigation seek to satisfy the DOJ and avoid indictment in a world where such post-offense conduct is one of the most important "elements" of the crime.[46] Imagine, however, if the *respondeat superior* test were amended to contain a true moral culpability element, a higher standard for conduct to be imputed to the entity, or, at least, an affirmative defense for effective compliance programs. Corporations would then have a real choice regarding how to proceed, without concern that such post-offense conduct could effectively create criminal liability where no moral culpability existed at the time of the alleged criminal behavior by the agent.

The benefits of reforms to the *respondeat superior* standard would go well beyond simply the creation of a system of corporate criminal liability more consistent with our fundamental tenets of criminal law. If through one of the above proposed reforms, corporations actually received credit for effective compliance programs as a matter of law, entities might be even more likely to implement them. If corporations

---

44. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, To Heads of Dep't Components & All U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), *available at* https://www.justice.gov/dag/file/769036/download [hereinafter Yates Memo].

45. *Id.* at 3 (emphasis in original).

46. *See* Joseph W. Martini & Robert S. Hoff, *Individuals Face New Challenges Following Yates Memo*, N.Y. L.J., at 1 (April 25, 2016), *available at* http://www.newyorklawjournal.com/id=1202755653648/Individuals-Face-New-Challenges-Following-Yates-Memo?slreturn=20160413114219 ("Because of the Yates Memo's focus on individuals, employees of companies may be reluctant to cooperate in civil lawsuits and internal investigations for fear—justified or not—that what they say will be disclosed by their employer to the DOJ in an attempt to garner cooperation credit."); Paul Monnin & Eric D. Stolze, *Why the Yates Memo is Constitutionally Suspect*, CORP. COUNS. (Jan. 11, 2016) ("It is thus far from difficult to imagine that companies will threaten the livelihood of employees who refuse to incriminate themselves in connection with corporate inquiries that, in effect, are being run by criminal authorities."); *see also Paul Hastings Partner Paul Monnin on the Constitutionality of the Yates Memo*, CORP. CRIME REP. (Mar. 2, 2016), http://www.corporatecrimereporter.com/news/200/paul-hastings-partner-paul-monnin-on-the-constitutionality-of-the-yates-memo/ ("'The potential for constitutional abuse presented by the Yates Memo is substantial—particularly when companies happen to disagree with the government, yet are pressured to coerce employees to speak about alleged 'wrongdoing' to preserve their employers' existence.'" (internal citation omitted)).

could self-report the actions of rogue employees without concern that the only thing preventing the organization from being indicted for the same conduct is the discretion of a prosecutor, organizations might self-disclose more. The exact bounds of the benefits that might result are unclear, but it is not the case that bringing the law regarding corporate criminal liability into conformity with our general criminal law standards would inevitably lead to more corporate crime. On the contrary, such reforms might actually assist in efforts to prevent and detect white-collar crime because corporations would have new, legally enforceable incentives to structure themselves and run their operations in a manner that makes their corporate ethos of compliance clear. For those corporations, on the other hand, that choose to encourage, tolerate, or turn a blind eye to illegal behavior in their ranks, even after such reforms, their choices would remain limited and the consequences of their actions would remain just as grave.