# THE CASE FOR MORE RATIONAL CORPORATE CRIMINAL LIABILITY: WHERE DO WE GO FROM HERE?

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## *I. THINKING ABOUT CORPORATE CRIMINAL LIABILITY*

Can a corporation truly commit a crime? The answer depends on the reader's view of the relative "personhood" of companies and entities.[1] Commentators and academics have been pondering this point for many years.[2] The law, however, has evolved over time,

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1. *See* David Graver, Student Author, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. Chi. L. Sch. Roundtable 235, 242–247 (1999) (arguing that a theory of corporate personhood is necessary to determine the extent of constitutional protection to which a corporation is entitled); David Lazarus, *Nike: Just like You and Me*, S.F. Chron. I-1 (Sept. 14, 2003) (available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/09/14/BU260183.DTL) (discussing corporate First Amendment rights); William Quigley, *Catholic Social Thought and the Amorality of Large Corporations: Time to Abolish Corporate Personhood*, 5 Loyola J. Pub. Interest L. 109, 125–134 (2004) (arguing that corporations should be regulated in accordance with Catholic social thought, which would allow corporations to act ethically, but insisting that corporate personhood should be abolished because corporations cannot act ethically under current law); Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 Fordham J. Corp. & Fin. & L. 97, 119–124, 130 (2009) (detailing several critics' theories against corporate personhood and advocating for corporate moral personhood that is distinct from individual moral personhood); E.R. Shipp, *Can a Corporation Commit Murder?* N.Y. Times § 4, 2 (May 19, 1985) (available at http://www.nytimes.com/1985/05/19/weekinreview/can-a-corporation-commit-murder.html) (discussing the change in corporate criminal liability and noting a possible shift from civil to criminal liability for murder caused by a corporation); Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 Seattle U. L. Rev. 863, 863–867 (2007) (explaining that corporate personhood is not the basis used to shape corporate speech rights).

2. *See e.g.* John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 Am. Crim. L. Rev. 1329, 1330–1333 (2009) (arguing that there

and the ability to charge corporations with crimes is now firmly established in American jurisprudence.[3] With this ability established, what factors come into play when thinking about charging a corporation with a crime? Professor Pamela Bucy discusses some factors to consider when thinking about corporate criminal liability. In an article on this topic, she asserts, among other things, that it should be possible to hold corporations criminally liable because they can "harm lots of people" and because group dynamics pose unique opportunities for illegality.[4] On the other hand, she states that the drawbacks of criminally prosecuting companies include disruption to business and to the companies' innocent constituencies.[5] Professor Bucy further notes that "the comparative aggressiveness of criminal prosecution in the United States and its unpredictability . . . may discourage foreign companies from operating in the United States . . . [and] render American companies, which are subject to such liability, less competitive in the global economy."[6]

Excessive litigation generally operates as a tax on business.[7] The impact of the aggressive United States civil litigation system

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is no theoretical justification for corporate criminal liability); *see also* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687, 718–735 (1997) (describing and evaluating different mixed-liability regimes that are commonly applied when assessing corporate criminal liability); Pamela H. Bucy, *Corporate Criminal Liability: When Does It Make Sense?* 46 Am. Crim. L. Rev. 1437, 1442 (2009) (proposing an affirmative defense as a solution to the problems with the current standard of corporate criminal liability); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. Leg. Stud. 319, 321 (1996) (insisting that "the civil[-] liability system is better suited to calculate appropriate fines and penalties for organizational defendants"); V.S. Khanna, Student Author, *Corporate Criminal Liability: What Purpose Does It Serve?* 109 Harv. L. Rev. 1477, 1479 (1996) (arguing that corporate civil liability should replace corporate criminal liability).

3. *See* Jerold H. Israel, Ellen S. Podgor, Paul D. Borman & Peter J. Henning, *White Collar Crime: Law and Practice* 53 (3d ed., West 2009) (summarizing the evolution of corporate criminal liability).

4. Bucy, *supra* n. 2, at 1437–1438; *see also* Peter A. French, *The Corporation as a Moral Person*, 16 Am. Phil. Q. 207, 211 (1979) (available at http://www.sci.brooklyn.cuny.edu/~schopra/Persons/French.pdf) (arguing that a "[c]orporation's [i]nternal [d]ecision [s]tructure," rather than the biological persons who comprise the organization, is what enables corporate intent).

5. Bucy, *supra* n. 2, at 1440.

6. *Id.*

7. D. Brian Hufford, *Deterring Fraud vs. Avoiding the "Strike Suit": Reaching an Appropriate Balance*, 61 Brook. L. Rev. 593, 634 (1995); Larry E. Ribstein, Dabit, *Preemption and Choice of Law*, 2006 Cato Sup. Ct. Rev. 141, 144 (citing Sen. Comm. on Banking, Hous., & Urb. Affairs, *Private Securities Litigation Reform Act of 1995*, Sen. Rpt. 104-98 at 9 (June 19, 1995)) (discussing evidence presented to Congress that "litigation represented

on both domestic and foreign businesses has been fairly well documented.[8] For example, a 2007 survey of 334 companies based in the United States, the United Kingdom, Germany, France, India, China, and Japan that had "either gone public, seriously considered listing in the United States, or de-listed from a [United States] Exchange since . . . 2002" found, among other things, that twenty-eight percent of United States public companies reported that improving the United States' litigation environment is the most important thing the country could do to make its markets more competitive.[9] This survey further found that "[o]ne out of three companies . . . that considered going public in the United States rated litigation as an 'extremely important' factor in [its] decision."[10] It seems clear that companies have even greater concerns about potential criminal litigation or criminal charges.

What does all of this mean in the context of imposing corporate criminal liability? Concerns about how potential criminal liability impacts business are relevant if the reader believes that it is appropriate to consider ancillary harm, the harm caused to others because a company is not truly one person, when deciding how criminal liability should be applied to corporate entities. The broad impact of corporate criminal liability and the diversity of actors in and related to a corporation differentiate corporate criminal liability from individual criminal liability. Put more simply, are the innocent unjustly or inappropriately harmed when a corporation is charged with a crime?

Certainly, charging a company for the actions of one or more persons, in some circumstances, will directly harm innocent participants, such as shareholders or even important end-users of products.[11] For instance, many have accepted the notion that in-

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a 'litigation tax' on business, particularly for smaller companies").

8. *See e.g.* Sen. Comm. on Commerce, Sci., & Transp., *Product Liability Reform Act of 1997*, Sen. Rpt. 105-032 at 2–6 (June 19, 1997) (describing the increase in products liability cases in the United States and how these cases are affecting both domestic and foreign businesses); Thomas J. Campbell et al., *The Causes and Effects of Liability Reform: Some Empirical Evidence* 1–2 (Nat'l Bureau of Econ. Research Working Paper No. 4989, 1995) (empirical study finding that liability-reducing reforms positively correlate with measures of political conservatism and increases in productivity and employment).

9. The Financial Services Forum, *2007 Global Capital Markets Survey* 3, 7 (Fin. Servs. Forum 2007) (available at http://crapo.senate.gov/documents/FINAL2007ForumIPOStudy.pdf).

10. *Id*. at 8.

11. Albert W. Alschuler, *Two Ways to Think about the Punishment of Corporations*, 46

dicting Arthur Andersen's entire accounting firm for obstruction of justice in 2002[12] was a mistake.[13] Thousands of employees lost their jobs, and it led to the entire firm's collapse, eliminating an important player in the world of corporate accounting.[14]

This Article posits that the business impact and related fairness arguments that accompany charging companies with crimes are noteworthy. Companies are not exactly like "real people," and there are important ancillary costs to charging them that tie into notions of fairness and justice and the broader impact on the business climate and the economy. The assertion that companies are the same as "real people" generally seems untenable as a core principle.

This Article, however, does not argue that there are no circumstances under which an entire company should be subject to criminal liability or that shielding corporations from responsibility for all wrongdoing is appropriate. Instead, it contends that a corporation, as a conglomeration of people represented by officers, directors, managers, employees, and shareholders, is in fact different from an actual person. Lawmakers should at least consider the costs to all corporate players when deciding whether to impose criminal liability on an entity and whether the circumstances warrant such strong action, given the almost certain

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Am. Crim. L. Rev. 1359, 1367 (2009). "Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too. The embarrassment of corporate criminal liability is that it punishes the innocent along with the guilty." *Id.*

12. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 702 (2005).

13. *See e.g.* Dan Ackman, *Was Arthur Andersen a Mistake?* Forbes (June 1, 2005) (available at http://www.forbes.com/2005/06/01/cx_da_0601topnews.html) (discussing the impact of the indictment of Arthur Andersen LLP); James Kelly, *The Power of an Indictment and the Demise of Arthur Andersen*, 48 S. Tex. L. Rev. 509, 521–523 (2006) (describing the fall of Arthur Andersen LLP due to the criminal indictment when in reality the punishment far outweighed the crime); Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 Am. Crim. L. Rev. 1537, 1543 (2007) (discussing the devastating fallout from the Arthur Andersen case and the subsequent need for a "good faith" affirmative defense to protect innocent parties).

14. *See* Kelly, *supra* n. 13, at 510 (asserting that it was Arthur Andersen's indictment, rather than its conviction that led to the firm's collapse); The Financial Express, *What Happened to Arthur Andersen?* http://www.financialexpress.com/news/what-happened-to-arthur-andersen/407910 (posted Jan. 8, 2009) (explaining that Arthur Andersen was essentially eliminated as a player in the corporate accounting world). Ultimately, the Supreme Court overturned the conviction in a unanimous 2005 decision due to errors in the jury instructions. *Arthur Andersen LLP*, 544 U.S. at 698.

harm to those who are innocent players or participants in the corporate structure.

So should basic fairness considerations then come into play when deciding whether or how to charge a corporation with a crime? Fairness, and thus justice, is a factor in decisions regarding who to charge with a crime and what to charge in a particular circumstance.[15] In fact, United States Attorneys are obligated to ensure that justice is served.[16] Consequently, society should consider whether it is fair to charge a company with a crime under a variety of circumstances.[17] For example, is it fair to charge a company with a crime when a low-level employee committed the crime, without assistance, in violation of company policy? Is it fair to charge a company with a crime that a mid-level employee committed to achieve personal gain when that crime also had the unintended effect of benefiting the company? Is it fair to charge a company with a crime when a high-level officer commits an illegal act that clearly violates the company's compliance program but was difficult to discover? Right now there is a general one-size-fits-all policy in this area: "The present legal framework, which is applied almost universally in the federal courts, holds that corporations are liable for the criminal acts of their employees so long as they are done within the scope of employment and with at least the partial intent to benefit the employer."[18]

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15. *See* Larry Thompson, *The Blameless Corporation*, 46 Am. Crim. L. Rev. 1323, 1324–1325 (2009) (expressing the inherent unfairness in prosecuting a corporation because respondeat superior creates strict liability, and therefore the company will surely lose if a rogue employee breaks the law).

16. Dep't of Just., *Our Mission Statement*, http://www.justice.gov/02organizations/about.html (accessed Sept. 18, 2011). The Department of Justice's stated mission is: "To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans." *Id.*; *see also* Dep't of Just., *United States Attorneys' Manual*, § 9-27.110(B) (available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm) (acknowledging that federal prosecutors' broad discretion "should be read in the broader context of the basic responsibilities of [f]ederal attorneys: making certain that the general purposes of the criminal law . . . are adequately met, while making certain also that the rights of individuals are scrupulously protected").

17. Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation*, 44 Am. Crim. L. Rev. 1343, 1364 (2007) (suggesting that "fault-based criminal liability for complicit corporations avoids the negative aspects of respondeat superior liability, which includes unfairness to some firms").

18. Andrew Weissmann et al., *Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior* 3 (U.S. Chamber Inst. for L. Reform 2008) (available at

One of the basic tenets of criminal law is deterrence. Criminal law exists, in part, to deter bad behavior.[19] But companies, especially large companies, often put corporate compliance programs in place that outline what their employees can say and do.[20] Are compliance programs and related training the primary concrete ways to deter bad behavior? If so, shouldn't a well-functioning compliance program and training mitigate culpability? Nonetheless:

> Such programs are the corporation's efforts to deter and prevent crime and other improper behavior. Under the current rules, they receive insufficient weight because they are not recognized as a full or even partial defense to criminal allegations. Currently, corporate compliance programs only help the corporation's cause at sentencing—far too late to be meaningful—or in the discretionary decision by the government whether to charge a company.[21]

Is there a more appropriate way to make the current corporate criminal liability regime fit with the realities of corporate structure and corporate practices? If so, what is the path to change?

Part II of this Article will discuss the legal standards for charging a corporation with a crime. Under this broad discussion, Part A argues that reconsidering strict vicarious liability is appropriate because the current standard reduces responsible corporations' incentives to implement compliance programs. Part B examines the questionable history of corporate criminal liability

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http://www.instituteforlegalreform.com/get_ilr_doc.php?id=1218).

19. *See e.g.* Richard S. Gruner, *Corporate Crime and Sentencing* § 2.3.6 n. 121 (Michie Co. 1994) (stating that, as a general matter, "[f]ederal law identifies offender reform and the specific deterrence of offenders as primary goals of criminal sentences for offenders including corporations"); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 Utah L. Rev. 205, 209 (explaining that "[g]eneral deterrence suggests that punishing a particular criminal will serve as a poignant example to potential offenders, affecting their assessment of the advantages and disadvantages of illicit behavior and persuading them against committing crime in the future").

20. *See* Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability*, 8 Buff. Crim. L. Rev. 89, 99 (2004) (arguing that "[b]ecause criminal sanctions are so potent, they tend to overdeter, inducing enterprises to spend more resources on monitoring and compliance than is socially useful").

21. Weissmann et al., *supra* n. 18, at 17.

and proposes that corporate criminal liability's foundation is a misreading of Supreme Court precedent from over a hundred years ago. Part C discusses the criticism that the current standard of corporate criminal liability faces from academics and practitioners. Part D argues that recent developments signify a change in the traditional view and advocates for a standard that gives corporations incentives to take compliance seriously.

## *II. THE LEGAL STANDARDS FOR CHARGING A CORPORATION*

As noted above, under the prevailing legal rule in federal court, corporations can be held criminally responsible for any act committed by an employee as long as that act is committed within the scope of employment and with some intent to benefit the employer.[22] Neither the employee's level within the company nor the organization's size matters.[23]

> In practice, this rule means that a corporation has little legal defense against prosecution when a single rogue employee commits a crime, even if the crime is committed in violation of every rule in the employee handbook and in the face of a strict and well-functioning compliance program.[24]

This defenseless posture must be considered in a practical context. For many corporations, a criminal indictment would effectively end the corporation; thus, these corporations cannot risk indictment, even with an otherwise viable defense.

Should this standard be changed? Many critics argue that it should.[25] "Few people dispute that a corporation should be *civilly* liable . . . if one of its employees commits a fraud."[26] Even when the wrongdoer is inaccessible, corporate civil liability guarantees

22. See *supra* n. 18 and accompanying text.

23. Weissmann et al., *supra* n. 18, at 3 (explaining that while some approaches put weight on the corporation's use of preventative measures, the current approach accounts for neither the size of the company nor the position and tenure of the employee).

24. *Id.* at 2.

25. *E.g.* Kevin B. Huff, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 Colum. L. Rev. 1252, 1253–1254 (1996); Khanna, *supra* n. 2, at 1479; Weissmann et al., *supra* n. 18, at 7.

26. Weissmann et al., *supra* n. 18, at 2 (emphasis added).

a remedy to the victim.[27] But, as noted above, holding "corporations *criminally* liable for the acts of [rogue] employees . . . implicates a wholly different set of concerns."[28] Further, criminal conviction connotes moral blameworthiness and should be reserved for those instances in which the government can point to a substantive wrong in the corporation's compliance practices, leadership, culture, or internal controls. When employees act contrary to corporate policy and disregard the instructions of senior managers, the guilty *individuals* should be criminally prosecuted. But the current standard leaves unanswered questions. How does prosecuting the *corporation* advance the public interest in deterring crime? Does blameworthy conduct exist under the current standard? What result do fairness principles mandate? And ultimately, has a corporation that has taken all reasonable actions to detect and deter fraudulent activity by its employees done something worthy of *criminal* sanction?

Vicarious corporate criminal liability has been around for decades, despite questions about its origins.[29] Recent developments suggest that academics, lawmakers, and practitioners are beginning to question the basic tenets of vicarious corporate criminal liability. In light of the serious conceptual and practical problems with the strict imposition of corporate liability, the many workable, alternative proposals may gain influence and support.

### A. Strict Vicarious Criminal Liability Should Be Reconsidered

From a policy standpoint, the current corporate criminal liability standard[30] is problematic because it does not distinguish between responsible corporations and those that fail to establish

27. *See id.* (pointing out how civil liability plays a remedial role in the corporate context).

28. *Id.* (emphasis in original); *see supra* pt. I. (discussing the impact of corporate criminal liability upon innocent shareholders, global business participation, and basic fairness considerations).

29. Fischel & Sykes, *supra* n. 2, at 320 (outlining the period when the Supreme Court overruled the idea that corporations could not face criminal conviction); Weissmann et al., *supra* n. 18, at 2 (explaining vicarious corporate criminal liability's controversial path since its inception with the ruling in *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909)).

30. Bucy, *supra* n. 2, at 1440; Weissmann et al., *supra* n. 18, at 3.

effective compliance programs.[31] "The current standard actually reduces the incentives for corporate deterrence" by genuinely responsible corporations.[32] The United States has faced dramatically increased financial failures and the specter of additional white collar prosecutions in this environment.[33] Yet the current system of corporate criminal liability does not adequately serve the purposes of detection and deterrence because it subjects a corporation to criminal liability—with dire consequences—no matter how diligent that corporation may have been in putting in place strong internal controls and creating a culture of compliance.[34] Because of the profound impact of an indictment and the lack of a defense to vicarious liability, the mere threat of criminal sanctions based on the actions of an individual employee has been enough to compel corporations to settle non-meritorious claims and has forced shareholders to bear the burden of penalties never approved by a judge or a jury.[35]

### B. The Dubious Legal History of Corporate Criminal Liability

The current federal rule derives from the common law—which is not generally the basis for imposing criminal liability.[36] Indeed, neither an act of Congress nor Supreme Court precedent created the current doctrine—despite assumptions to the contrary.[37] No federal criminal statute mandates the general application of strict vicarious criminal liability.[38] Unlike other criminal laws, which are embodied in statutes approved by Congress, the cur-

31. Weissmann et al., *supra* n. 18, at 2.

32. *Id.*; *see also* Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 Stan. L. Rev. 271, 273–274 (2008) (arguing that "subjecting business entities to criminal liability carrying severe collateral consequences might, in fact, undermine deterrence"); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 Vand. L. Rev. 1343, 1348 (1999) (discussing the strong incentives for corporations to transfer liability to lower-level employees under the current standard).

33. Weissmann et al., *supra* n. 18, at 2 (questioning the current standard of corporate criminal liability and its far-reaching effects).

34. *See id.* at 6 (explaining how the current system does not serve the purpose of deterrence because the corporation has no way to mitigate liability).

35. *See* Kelly, *supra* n. 13, at 524 (demonstrating the effect and power an indictment has upon a corporation).

36. *See* Weissmann et al., *supra* n. 18, at 4–5 (providing a brief overview of the Supreme Court's decision in *N.Y. Central*).

37. *Id.* at 2.

38. *See id.* at 4–5 (explaining the background of the current corporate criminal liability doctrine).

rent doctrine has not been dictated by Congress but was instead created by lower courts through the common law. The current doctrine derived from a fundamental misreading of *New York Central and Hudson River Railroad Co. v. United States*,[39] the only directly related Supreme Court precedent that addressed a similar issue one hundred years ago.[40]

Lower courts have applied the *New York Central* decision as if it mandated a strict respondeat superior rule in all corporate criminal cases.[41] But *New York Central* did not mandate such action. Instead, the Court considered whether it was constitutional for Congress to impose strict respondeat superior liability in a particular statute, the Elkins Act.[42] The Act imposed vicarious criminal liability by providing that "the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission, or failure of such carrier."[43] The Court determined that Congress could choose to impose such liability, but was silent as to whether federal common law itself required such a result.[44] Arguably, the case therefore has no bearing on the vast majority of criminal laws, which are silent about imposing vicarious criminal liability.[45]

More relevant to the issue of applying corporate criminal liability are recent Supreme Court decisions that have appropriately limited even *civil* liability to actions of management-level employees and allowed corporations a defense based on their compliance measures.[46] Such civil-liability cases have arisen in contexts as far-ranging as punitive damages and hostile-workplace claims under Title VII of the Civil Rights Act of 1964.[47]

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39. 212 U.S. 481 (1909).

40. *Id.* at 4.

41. *Id.*

42. *N.Y. Central*, 212 U.S. at 491 (citing the Elkins Act, Pub. L. No. 57-103, 32 Stat. 847 (1903)); Weissmann et al., *supra* n. 18, at 4.

43. *N.Y. Central*, 212 U.S. at 491–492 (quoting Pub. L. No. 57-103, 32 Stat. 847); Weissmann et al., *supra* n. 18, at 4.

44. *See N.Y. Central*, 212 U.S. at 496 (holding that because Congress unquestioningly may regulate interstate commerce, it would be a digression to hold that Congress cannot regulate those that control interstate commerce by holding employers accountable for their agents' actions).

45. Weissmann et al., *supra* n. 18, at 5.

46. *Id.* at 7.

47. *See e.g. Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544 (1999) (concluding that the common law limitations on vicarious liability for punitive damages do not justify holding

For example, in *Kolstad v. American Dental Association*,[48] a Title VII discrimination case, the Supreme Court undermined the notion that strict vicarious-liability principles should be applied to organizations.[49] The Court held that punitive damages were not available in Title VII cases when the offending employee's actions were taken "contrary to the employer's 'good-faith efforts to com-ply with Title VII.'"[50] The Court voiced its concern that holding corporations liable for the conduct of employees in instances where the corporation had tried to comply with the law "would reduce the incentive for employers to implement antidiscrimination programs . . . [and] likely exacerbate concerns among employers that . . . [the] standard penalizes those employers who educate themselves and their employees on Title VII's prohibitions."[51] The *Kolstad* Court recognized the dilemma that attempts by employers to inform their employees about Title VII's requirements could be used against their companies.[52] That is, even an employer who makes every effort to comply with Title VII would be held liable for the discriminatory acts of agents acting in a managerial capacity.[53]

*Kolstad* confirms the trend that began in the Supreme Court's decisions in *Faragher v. City of Boca Raton*[54] and *Burlington Industries, Inc. v. Ellerth*.[55] In *Faragher* and *Ellerth*, both hostile-workplace cases under Title VII, the Court narrowed the scope of vicarious corporate liability, rejecting the usual rule in civil cases that vicarious liability arises from all acts of employees acting within the scope of their employment.[56] Collectively, the reasoning in these cases strongly suggests that the Supreme

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an employer liable when it attempted good-faith compliance with Title VII).

48. 527 U.S. 526 (1999).

49. *Id.*

50. *Id.* at 545 (quoting *Kolstad v. Am. Dental Ass'n*, 139 F.3d 958, 974 (D.C. Cir. 1997) (Tatel, J., dissenting)).

51. *Id.* at 544.

52. *Id.*

53. *Id.* at 545.

54. 524 U.S. 775 (1998).

55. 524 U.S. 742 (1998).

56. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Both cases were decided on the same day under a rule stating that an employer in a Title VII case can assert an affirmative defense consisting of two elements: (1) the employer "exercised reasonable care" to prevent the harassment; and (2) the plaintiff unreasonably failed to avoid harm. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

Court may be skeptical that respondeat superior should apply by default in criminal cases.[57]

### C. Academic and Practitioner Criticism of Corporate Criminal Liability

These criticisms of vicarious criminal liability are widely expressed in the academy, the bench, and the bar. Numerous judges, current and former federal prosecutors, and legislative counsel have criticized the current system, among them Judge Lewis Kaplan of the Southern District of New York; former Attorney Generals Dick Thornburgh and Edwin Meese; former Deputy Attorney General George Terwilliger; and prominent corporate law scholars such as John Coffee of Columbia Law School and Preet Bharara, the recently named United States Attorney for the Southern District of New York.[58] These critics generally have

57. *See* Br. of Ass'n of Corp. Counsel, U.S. Chamber of Com., Nat'l Ass'n of Crim. Def. Laws., Nat'l Ass'n of Mfrs., N.Y. St. Ass'n of Crim. Def. Laws., & Washington Leg. Found. as Amicus Curiae in Support of Respt., *United States v. Ionia Mgt.*, http://www.nacdl.org/public.nsf/newsissues/amicus_attachments/$FILE/Ionia_Mgmt_Amicus.pdf at 9–10 (No. 07-5801-CR, 555 F.3d 303 (2d Cir. 2009)) (discussing the Court's limitation of respondeat superior liability for corporate defendants in *Faragher* and *Ellerth*). This argument was advanced in an amicus brief filed by Jenner & Block LLP with the Second Circuit on behalf of the Chamber of Commerce and a diverse group of institutions and associations representing the interests of "corporate counsel, criminal defense lawyers in private and public practice, legal academics with expertise in corporate criminal liability, and association members dedicated to corporate compliance and responsibility." *Id.* at 1, 9–10 The *Ionia* opinion regarded the issue as foreclosed by prior Second Circuit precedent. 555 F.3d 303, 309–310 (2d Cir. 2009).

58. *See* Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 Am. Crim. L. Rev. 53, 57–60 (2007) (arguing that the current system of corporate criminal liability is overly broad); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 195–196 (1991) (arguing that the application of criminal liability to corporations ignores the costs associated with compliance); Edwin Meese III, *Closing Commentary on Corporate Criminality: Legal, Ethical, and Managerial Implications*, 44 Am. Crim. L. Rev. 1545, 1545–1546 (2007) (arguing that corporate criminality discourages economically and socially beneficial behavior); George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 Am. Crim. L. Rev. 1417, 1417–1418 (2007) (arguing that punishing corporations criminally for regulatory violations discourages economic risk-taking); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 Am. Crim. L. Rev. 1279, 1281 (2007) (suggesting that corporate criminal liability "erode[s] all traditional notions of criminal law"); Hon. Lewis A. Kaplan, Speech, *Should We Reconsider Corporate Criminal Liability?* (Com. & Fed. Litig. Sec. of the N.Y. St. B. Ass'n Jan. 24, 2007) (transcript available at http://nysbar.com/blogs/comfed/2007/06/should_we

supported many alternative solutions, including the standard proposed by the Model Penal Code (MPC),[59] which is used by a significant minority of states.[60]

### D. Recent Developments Suggest a Promising Trend

Recent legal developments suggest that a change in views may be underway. First, the MPC adheres to the view that penalties for a corporation should be limited to situations in which a high managerial agent has not made appropriate efforts to prevent illegal conduct.[61] Further, regarding corporate criminal liability, MPC Section 2.07(5) provides a "due diligence" defense to the corporation based upon proof by a preponderance of the evidence that a "high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission."[62]

The MPC offers a blueprint for corporate criminal liability upon which courts and legislatures can rely. Section 2.07 limits corporate criminal liability to the following circumstances:

> (a) [T]he offense . . . is defined by a statute other than the [MPC] in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting [o]n behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply[.][63]

But regarding the above circumstances:

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_reconsider_corporate.html) (arguing that under the current system of corporate criminal liability, the costs of defending against prosecution force corporations to cooperate with prosecutors, even if the corporations are not guilty).

59. Model Penal Code § 2.07 (ALI 1985).

60. Roland Hefendehla, *Corporate Criminal Liability: Model Penal Code Section 2.07 and the Development in Western Legal Systems*, 4 Buff. Crim. L. Rev. 283, 293 (2000).

61. Model Penal Code § 2.07(1)(c).

62. *Id.* at § 2.07(5).

63. *Id.* at § 2.07(1)(a).

> [I]t shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. This paragraph shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.[64]

Section 2.07 of the MPC further provides for corporate liability when:

> (b) [T]he offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or
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> (c) [T]he 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.[65]

The MPC was developed by the American Law Institute with help from some of the country's leading practitioners and academics.[66] A growing number of states, including Illinois, Montana, New Jersey, Ohio, and Pennsylvania, have incorporated the due diligence defense contained in MPC Section 2.07(5) into their state laws.[67]

Second, the so-called due diligence approach is gaining support. This approach, put forward by various academics and practitioners,[68] creates an obligation for prosecutors (not the

64. *Id.* at § 2.07(5).

65. *Id.* at § 2.07 (1)(b)–(c) (emphasis added).

66. *See generally* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 New Crim. L. Rev. 319 (2007) (discussing the history and formation of the MPC).

67. *E.g.* 720 Ill. Comp. Stat. 5/5-4(b) (2010); Mont. Code Ann. § 45-2-311 (2009); N.J. Stat. Ann. § 2C:2-7 (West 2010); Ohio Rev. Code Ann. § 2901.23 (West 2010); 18 Pa. Consol. Stat. § 307 (2010); Ten. Code Ann. § 39-11-406 (Lexis 2010); Tex. Penal Code Ann. § 7.24 (Vernon 2009).

68. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 Minn. L. Rev. 1095, 1162 (1991); *see e.g.* Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 Am. Crim. L. Rev. 1537, 1537–1538 (2007) (explaining how the due diligence standard "properly reward[s] law-abiding corporations"); Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 Ind. L.J. 411, 440 (2007) (noting that the due diligence standard "redounds to

defense) to demonstrate that a given corporation has not taken all reasonable measures to prevent employee crime.[69] Adopting this proposal would require the government to prove the corporation's failure to prevent a crime before imputing "the employee's conduct to the corporation."[70]

Third, the United Kingdom recently passed a comprehensive bribery act—The Bribery Act 2010 (UK Bribery Act)—that reforms Britain's centuries-old laws and imposes sweeping new forms of liability for all companies operating in the United Kingdom.[71] The law is akin to the United States Foreign Corrupt Practices Act (FCPA),[72] with various differences. Notably, it uses a new standard to define which employee actions should be legally imputed to the corporation: as a check against prosecutorial overreaching, the UK Bribery Act provides an affirmative defense whenever a corporation has "adequate procedures" in place to prevent bribery.[73] This serves to soften the "strict liability" regime of United States law and recognizes that a company cannot control the actions of its employees, but can only control its systems to detect and deter employee conduct.

The United Kingdom's legislation empowers the Secretary of State to promulgate guidance at a future date to flesh out the contours of what will constitute "adequate procedures."[74] Many organizations hope that United Kingdom authorities will promulgate reasonable principles that balance flexibility for companies with concrete guidance on which companies can rely as a defense to liability.[75] If successfully implemented, the UK Bribery Act will

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the benefit of both the government and corporations").

69. Bucy, *supra* n. 68, at 1164; Weissmann & Newman, *supra* n. 68, at 449.

70. Weissmann & Newman, *supra* n. 68, at 450.

71. Bribery Act 2010 (UK) (available at http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf).

72. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to 78dd-3 (2006). The FCPA was enacted by Congress after SEC investigations in the 1970s revealed that foreign governments and political parties were receiving illegal, or at least questionable, payments from more than four hundred United States corporations. U.S. Dept. of Just., Foreign Corrupt Practices Act: Lay-Person's Guide (available at http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf). Thus, the goal of the FCPA was "to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system." *Id.*

73. BA 2010, s 7(2).

74. *Id.* at s 9(1).

75. *See generally e.g.* Peter Wilkinson, *The 2010 UK Bribery Act Adequate Procedures: Guidance on Good Practice Procedures for Corporate Anti-Bribery Programmes* (Robert

be a positive step in recognizing companies that demonstrate appropriate efforts to implement strong compliance programs, in contrast to its United States counterpart, the FCPA, which affords no similar defense.[76]

Fourth, the United States Sentencing Commission recently passed a proposal to amend the Guidelines that apply to corporations and other entities.[77] Part of the amendment alters Section 8C2.5(f)(3) of the Guidelines, which went into effect in November 2010.[78] This amendment expands the availability of a mitigation reduction—which leads to a reduced sentencing range—for organizations that have a certain type of compliance program: namely, one in which the compliance officer has the authority to report directly to the board of directors.[79] The reduction is available even if high-level personnel were involved in the offense, so long as (among other things) the organization's compliance program gives the operational compliance officer the authority to report directly to the organization's board of directors or other governing body.[80]

The proposal is a positive step forward because it elevates the importance of compliance structures and systems above the wrongful actions of any individual employee.[81] It recognizes the

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Barrington et al. eds., Transparency Int'l UK 2010) (available at http://www.transparency.org.uk/attachments/138_adequate-procedures.pdf) (compiling a variety of policies and procedures to help corporations comply with the new law).

76. *Compare* BA 2010, s 7(2) (providing an affirmative defense of "adequate procedures") *with* 15 U.S.C. § 78dd-1(c) (omitting the existence of a compliance program as an affirmative defense). Implementation of the 2010 UK Bribery Act has been delayed due to pressure from the business community. James Boxell & Elizabeth Rigby, *Exports Warning as Bribery Law Is Delayed*, http://www.ft.com/cms/s/0/07b244dc-2d3e-11e0-9b0f-00144feab49a.html (last updated Jan. 31, 2011, 10:05 a.m. BST).

77. U.S. Senten. Comm'n, *Proposed Amendments to the Sentencing Guidelines* 43–50 (Jan. 21, 2010) (available at http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20100121_RFP_Amendments.pdf). For an official copy of the proposed amendments, see 75 Fed. Reg. 3525-01 (Jan. 21, 2010).

78. *U.S. Sentencing Guidelines Manual* § 8C2.5(f)(1) (2010) (reducing an organization's culpability score by three points if the organization has an effective compliance and ethics program in place).

79. *Id.* at § 8C2.5 cmt. 11.

80. *Id.* at § 8C2.5(f)(3)(C)(i). For the definition of "effective compliance and ethics program," see *id.* at § 8B2.1.

81. The proposal drew media attention for the increased emphasis it would place on the role and structure of well-functioning corporate compliance programs in organizational sentencing. *See e.g.* Melissa Klein Aguilar, *Proposals for Sentencing Guidelines Back Stronger CCO*, (Feb. 9, 2010) (available at http://www.complianceweek.com/proposals-for-sentencing-guidelines-back-stronger-cco/article/186631) (discussing the proposal's potential impact on corporate compliance programs); Gary Fields, *Plan Would Soften White-Collar Fines*, Wall St. J. (Jan. 29, 2010) (available at http://online.wsj.com/article/

lower culpability of an organization that has an effective compliance program and refutes the notion that the full force of every employee action should be imputed to the corporation, regardless of what it did to deter the employee's conduct.

Finally, the practical and legal problems with "punishing" corporations using strict liability were highlighted by the recent Supreme Court decision in *Exxon Shipping Co. v. Baker*,[82] which addressed arguments for limiting punitive damages. There were two important rulings in *Exxon*. The more widely commented upon was about the scope of punitive damages in maritime cases.[83] On that question, the Court imposed a 1:1 ratio between punitive-damage awards and compensatory awards.[84] The other important, though less highlighted ruling was the Court's four-to-four split on whether punitive damages for the acts of managers were available *at all* in maritime cases.[85]

Justice Souter, writing for an equally divided court, addressed the issue of the availability (as opposed to the scope) of punitive damages against corporations for the actions of their managerial agents in maritime cases.[86] Justice Souter laid out the arguments presented by both sides, noted the four-to-four division on this question, and specifically recognized Exxon's argument that even if two Supreme Court cases from the 1800s did not bar punitive damages in this case:

> [T]he Court [should] fall back to a modern-day variant adopted in the context of Title VII of the Civil Rights Act of 1964 in *Kolstad v. American Dental Assn.* . . . that employers are not subject to punitive damages for discriminatory conduct by their managerial employees if they can show that

SB10001424052748704194504575031603625356536.html) (reporting that the proposal would allow for reduced penalties for corporations meeting certain compliance standards).

82. 554 U.S. 471 (2008).

83. *See e.g.* Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 Geo. Wash. L. Rev. 774, 790–793, 817–818 (2010) (arguing that requiring morally reprehensible or intentional conduct as a condition to imposing punitive damages does not make economic sense, especially under maritime law, which bars compensation for many elements of actual harm).

84. *Exxon*, 554 U.S. at 513.

85. *Id.* at 484.

86. *Id.* at 482–484.

> they maintained and enforced good-faith antidiscrimination policies.[87]

Thus, *Kolstad* again took center stage in issues involving corporate liability and the role of compliance.

Justice Souter also reinforced the analogy between the goals of punitive damages and criminal law, citing several sources for the proposition that "'[p]unitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law.'"[88] His opinion noted that "[t]he points of similarity are obvious" and favorably cited a case declaring that the purposes of punitive damages and fines upon criminal conviction were the same.[89] The Court's discussion of the similarities between punitive damages and criminal law makes the reasoning of *Kolstad* and other Title VII cases increasingly salient in curbing the application of strict corporate criminal liability principles.

## *III. CONCLUSION*

The time is long overdue for Congress and the courts to reexamine whether the expansive corporate criminal liability regime that exists under federal law is an appropriate feature of criminal law. Alternatives—most notably the MPC approach and its "due diligence" defense—better align a corporation's compliance incentives with the goals of criminal law, while at the same time allowing a potentially viable defense to a corporation that has an otherwise well-functioning compliance program but has been harmed by a non-compliant or rogue employee. In an era when the number of government investigations and prosecutions of entities is on the rise,[90] almost any major corporation can come under scrutiny for possible violations. This suggests a need for reforms that would differentiate between a responsible and an

87. *Id.* at 483–484.

88. *Id.* at 504 (footnote omitted) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989)) (citing 18 U.S.C. § 3553(a)(2); *U.S. Sentencing Guidelines Manual* § 1A1.1 (2007), *Restatement (Second) of Torts* § 908 cmt. a (1977)).

89. *Id.*

90. *See generally* George Ellard, *Making the Silent Speak and the Informed Wary*, 42 Am. Crim. L. Rev. 985 (2005) (discussing the impact a memorandum containing prosecution guidelines issued by Deputy United States Attorney General Larry Thompson has had on federal prosecutions of corporations).

irresponsible corporation. That these same limits on entity liability have already been incorporated workably into civil-liability regimes such as Title VII underscores the doctrinal and practical case for their inclusion in criminal law. As noted above, basic considerations of the proper role of criminal law and principles of fairness also lead to this result.