The Development and Evolution of the U.S. Law of Corporate Criminal Liability

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In the United States, corporate criminal liability developed in response to the industrial revolution and the rise in the scope and importance of corporate activities. This article focuses principally on federal law, which bases corporate criminal liability on the respondeat superior doctrine developed in tort law. Federal law dominates the principal fields in which corporate prosecutions arise, and federal prosecutions are much more numerous and significant than state prosecutions. In the federal system, the formative period for the doctrine of corporate criminal liability was the early Twentieth Century, when Congress dramatically expanded the reach of federal law, responding to the unprecedented concentration of economic power in corporations and combinations of business concerns as well as new hazards to public health and safety. Both the initial development of the doctrine and the evolution in its use reflect a utilitarian and pragmatic view of criminal law.

For many years there has been widespread criticism of the general principle of corporate crime, and most scholars agree that the respondeat superior standard is overbroad. Although the doctrine has remained unchanged, administrative responses by the Department of Justice and the U.S. Sentencing Commission have reshaped the practice in ways that respond to the critiques and restrict the effective reach of corporate liability. As a result of this evolution in the enforcement of corporate criminal liability, only a very small number of corporations are convicted, and the penalties imposed on those that are convicted are adjusted to reflect corporate culpability. Nevertheless, the broad potential for criminal liability has significant consequences for a wide range of corporate behavior. Corporations have powerful incentives to perform internal investigations, cooperate with both regulators and prosecutors, and actively pursue settlement of claims of misconduct. To avoid criminal liability, corporations also enter into deferred prosecution agreements that often require changes in corporate business practices and governance as well as monitoring to ensure compliance. The purpose of these administrative responses attempt is to reduce or eliminate the negative effects of imposing criminal liability while exploiting the law's power to deter criminal behavior, improve corporate citizenship, and bring about beneficial structural reforms. These developments also reflect general trends, in

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which Sentencing Guidelines and the regulation of prosecutorial discretion served as indirect substitutes for more comprehensive reforms of the federal criminal code.

The first section describes the Supreme Court's initial recognition of corporate criminal liability and the judicial development of the standards for liability; it also describes an alternative standard proposed by the American Law Institute and adopted in some states. The second section explores critiques of the federal reliance on corporate criminal liability, alternative justifications for the doctrine and proposals for reform. The third section describes the development of enforcement and sentencing practices that significantly restrict the reach of entity liability and base penalties on corporate culpability, while also allowing corporate prosecutions to serve as a spur for significant internal corporate reforms.

I. The Development of Corporate Criminal Liability

The spread of industrialization in England and the United States spurred the development of corporate criminal liability. English courts permitted the prosecution of corporate non-feasance as early as the mid-Nineteenth Century, and by the Twentieth Century the English courts developed a doctrine of identification under which corporations could be prosecuted for crimes of intent.[1] In the United States, although some earlier state cases recognized corporate criminal liability, the seminal case in the development of federal criminal law was *New York Central & Hudson River Railroad Co. v. United States*, decided in 1909.[2]

A. The New York Central case

The *New York Central* case arose under legislation enacted during an era when Congress dramatically enlarged the reach of federal law.[3] Before the Civil War, there were very few federal crimes and little overlap between federal and state criminal jurisdiction. The United States Constitution created a federal government with only limited delegated powers, and federal authority was confined to matters granted to the central government. The Constitution explicitly authorized the federal government to prosecute only four kinds of offenses: treason, counterfeiting, crimes against the law of nations, and crimes on the high seas, such as piracy. Additionally, the Constitution authorized Congress to pass laws it found to be "necessary and proper" to effectuate other delegated powers. Because the federal government's programs and activities were relatively few, the laws that rested on this authority were correspondingly narrow. In contrast, general police powers (including the bulk of criminal law) were reserved to the states.

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[1]For an excellent overview of the history and development of corporate criminal liability, as well as critiques of the doctrine, see Pamela H. Bucy, *Corporate Criminal Responsibility*, *in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 259, 259 (Joshua Dressler et al. eds., 2d ed. 2002).

[2]212 U.S. 481 (1909).

[3]For an overview of the history of federal criminal jurisdiction and its relationship to state law, see Sara Sun Beale, *Federal Criminal Jurisdiction, in* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 694 (Joshua Dressler et al. eds., 2d ed. 2002).

After the Civil War, Congress significantly expanded the scope of federal criminal law.[4] Although other factors also played a role, the most significant impetus for the expansion of federal authority was the dramatic postwar economic expansion and the growth in interstate commerce fueled by the development of a national rail system. The growth in interstate transportation and commerce created new problems that were beyond the reach of individual states. Employing its authority under the Commerce Clause, Congress responded. The earliest federal statutes were quite narrow. For example, Congress made it a federal crime to transport explosives and cattle with contagious diseases in interstate commerce. At the end of the Nineteenth Century, however, Congress employed its authority to enact sweeping legislation aimed at monopolistic activity that interfered with interstate commerce. The Interstate Commerce Commission Act of 1887,[5] the first federal law to regulate private industry, regulated the railroad industry and required that railroad rates be "reasonable and just."[6] It prohibited price discrimination against smaller markets, such as farmers, and it created the Interstate Commerce Commission (ICC). In 1890, Congress enacted the Sherman Act, which outlawed attempts to monopolize and conspiracies to restrain commerce.[7]

Both the ICC and President Theodore Roosevelt called upon Congress to enact additional legislation to strengthen the restrictions on the railroads and other industries. As early as 1891, the ICC asked Congress to supplement the law that authorized criminal liability for individuals with corporate criminal liability. Noting that the federal courts had held that corporations could not be prosecuted for criminal violations under the 1887 Act, the ICC argued that the 1887 Act was "defective at an important point" requiring immediate correction.[8] The Commission argued that allowing the imposition of criminal fines directly on the railroads was desirable for several reasons.[9] First, when the violations benefitted only the railroad, but not its officers and agents, the public–and jurors–were likely to disfavor convicting individual defendants regardless of the strength of the evidence. Second, when the corporation, the real beneficiary of a criminal violation "not only goes unpunished, but is adjudged incapable of criminal wrongdoing, the law is effectively nullified and brought into "general discredit." Finally, in some cases individual prosecutions were infeasible because of the difficulty of identifying any particular employee who was responsible. President Roosevelt, who took office in 1901, immediately urged Congress to adopt new laws regulating corporations engaging in interstate commerce[10] and became known as a "trust buster" for his aggressive efforts to curb the power of corporate trusts.

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[4] *Id*. at 695-96.

[5] Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379.

[6] *Id.* § 1.

[7] Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209, codified as 15 U.S.C. §§ 1-7 (2006).

[8] INTERSTATE COMMERCE COMM'N, FIFTH ANNUAL REPORT, Dec. 1, 1891, S. MISC. DOC. NO. 52-31 at 16 (1892).

[9] Id. at 16–17.

[10] Theodore Roosevelt, First Annual Message to Congress (Dec. 3, 1901), *available* at http://www.presidency.ucsb.edu/ws/?pid=29542 .

In response to these calls for stronger legislation, Congress enacted the Elkins Act of 1903,[11] which created corporate criminal liability for railroads under the Interstate Commerce Commission Act. It provided:

> 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, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act, with reference to such persons, except as such penalties are herein changed.
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> In construing and enforcing the provisions of this section 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 as well as that of the person.[12]

The prosecution that gave rise to the *New York Central* case involved the payment of illegal rebates in violation of the requirement that railroads charge all shippers the same published rate. New York Central's manager and assistant traffic manager agreed to an illegal rebate of 5 cents off the published price of 23 cents per 100 pounds to ship large amounts of sugar from New York to Detroit. The Supreme Court noted that without the rebate the sugar might have been sent by boat, and the lower price helped the shipper respond to "severe competition with other shippers and dealers."[13]

The Supreme Court unanimously rejected New York Central's claim that the imposition of criminal liability was unconstitutional because it punished innocent shareholders without due process, and its opinion endorsed corporate criminal liability and provided a standard for the imposition of such liability. Acknowledging an early statement by Blackstone that a corporation cannot commit a crime, the Court commented that "modern authority" accepted corporate criminal liability, and it quoted with approval the following passage from an American criminal law treatise:

> Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys,

[11]Act of Feb. 19, 1903, ch. 708, 32 Stat. 847.
[12]*Id.* § 1.
[13]N. Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 490–91 (1909).

> lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.[14]

The Court stated that the imposition of corporate criminal liability was critical to the success of the regulation of rates, and it rejected the idea that there was any impediment to this important legislation. The opinion noted that the Elkins Act was adopted after the ICC published multiple reports stating that "statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions inured to the benefit of the corporations of which the individuals were but the instruments."[15] In reaching this result, the Court focused on the public policy benefit inherent in securing equal rights to interstate transportation with one generally accessible legal rate. The Court also made it plain that it was not illegal–and was good public policy–to hold a corporation that had profited from a transaction responsible for the acts of the agents to whom it had entrusted the authority to act in connection with the setting of rates. Since the great majority of business transactions and almost all interstate commerce were in the hands of corporations, giving the corporations immunity from criminal punishment because of what the Court characterized as "the old and exploded doctrine that a corporation cannot commit a crime" would effectively "take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."[16] Since Congress's power to regulate interstate commerce to prevent favoritism was well established, it would be a distinct step backwards to accept the railroad's arguments.

The opinion also established the federal standard for corporate criminal liability, extending the tort concept of respondeat superior. As in tort law, the corporation may be held responsible for acts of the agent in the course of his employment when the act is done in whole or part for the benefit of the principal, here the corporation. Rather than construing an agent's powers strictly, the Court stated that a corporation is held responsible for acts an agent has "assumed to perform for the corporation when employing the corporate powers actually authorized."[17] Under this standard, making and fixing rates was within the scope of authority of the general freight manager and the assistant freight managers, and New York Central was properly held liable for their acts. The Court stated it was going "only a step farther" than the tort cases in holding 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."[18]

B. The Historical and Utilitarian Roots of Corporate Criminal Liability

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[14] *Id.* at 492–93 (quoting BISHOP'S NEW CRIMINAL LAW § 417). Bishop has been called ""the foremost law writer of the age." Stephen A. Seigel, "Bishop, Joel Prentiss," in the YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 47 (Roger K. Newman ed. 2009).

[15] N. Y. Cent. & Hudson River R.R., 212 U.S. at 495.

[16] *Id.* at 496.

[17] *Id.* at 493–94.

[18] *Id.* at 494.

The *New York Central* case reflects a utilitarian and pragmatic employment of criminal law by both Congress and the Supreme Court during a period of major social and economic change. The unprecedented concentration of economic power in corporations and combinations of business concerns (called "trusts") that developed after the Civil War produced a demand for new laws–including criminal laws–to respond effectively to increasingly powerful corporate entities. As one scholar noted, "[g]iven the absence of widespread public civil enforcement prior to the early 1900s, corporate criminal liability appears to have been the only available option that met both the need for public enforcement and the need for corporate liability."[19] The 1887 Interstate Commerce Commission Act and the Elkins Act were enacted during the same period as the Sherman Act,[20] the first federal statute to limit cartels and monopolies. Like the Elkins Act, the Sherman Act applied to both natural and corporate persons;[21] section 1 expressly provided for the imposition of felony penalties on a corporation for entering into combinations, trusts, or other conspiracies in restraint of trade.[22]

The Elkins Act was a response to the ICC's claim that the absence of corporate criminal sanctions was a fatal flaw in critical regulatory legislation. The facts of the prosecution that came before the Supreme Court vividly illustrated the problems described in the Commission's 1891 report. The managers were acting for the benefit of the railroad, not their personal benefit, in granting the rebates. It seems unlikely that the fine imposed upon the manager, $1,000 per violation, would have been an effective deterrent to similar actions by New York Central or its competitors. Moreover, if only the employees had been prosecuted, the jurors might have balked at convicting them of a regulatory offense that benefitted only their corporate employer. And, as the ICC feared, failure to hold the railroad responsible here would have threatened the legitimacy of the law and public respect for it. In contrast, under the Elkins Act it was possible to prosecute both the railroad and the employees, and the railroad's penalty was $18,000 for each violation,

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[19]V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1486 (1996). *See also* Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 353 (2003) ("[B]y the early 1900s, legislators and judges realized that the criminal law required modification to properly account for wrongs committed by increasingly powerful and prevalent corporate collectives.").

[20]Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209, codified as 15 U.S.C. §§ 1-7 (2006). There is considerable scholarly debate about the precise concerns that motivated Congress to pass the Sherman Act; some scholars identifying the principal concern as arresting the transfer of wealth from consumers to price fixers and monopolists or protecting non-consumer interest groups such as small firms and farmers. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 58–61 (4th ed. 2011).

[21] Sherman Antitrust Act § 8 (defining "person" to include U.S. corporations and associations).

[22]*Id.* § 1. (establishing that contracts, trusts, or conspiracies in restraint of trade were felonies). The original act set the maximum punishment at a fine not exceeding $5,000 and imprisonment of one year. As amended, § 1 now provides for punishment by a fine not exceeding $100 million for a corporation, and imprisonment for up to three years and a fine not exceeding $350,000 for an individual).

for a total of $108,000. Adjusted for inflation, this would be more than $4.5 million in 2012, a sum sufficient to get the attention of New York Central and its competitors.

New York Central was consistent with other Supreme Court decisions giving full effect to other critical aspects of the federal antitrust legislation adopted during this period. Historians have noted that both public opinion and federal policy seem to have reached a turning point in the years immediately preceding the *New York Central* decision. President Roosevelt took great interest in the enforcement of the antitrust laws, and Congress appropriated special funds for enforcement and provided for expedited appeal of antitrust cases to the Supreme Court.[23] Although the Supreme Court's first decision gave the Sherman Act a narrow reading that threatened its effectiveness, the Court then issued a series of decisions between 1897 and 1911 upholding lower court decisions preventing mergers and breaking up the Standard Oil and American Tobacco trusts.[24] The opinion in *New York Central* endorsed another critical aspect of the new legislative framework:

> Given the prominence of corporations in interstate commerce, their immense potential to do wrong, and the absence of other regulatory mechanisms, a powerful deterrent would have been lost by restricting criminal liability to agents. Individuals and organizations, it seemed, had few incentives without the prospect of vicarious liability. With joint and several liability, however, both the principal and its agents have a distinct risk of liability and, from this, a reciprocal incentive for law abidance.
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> The simple-minded public policy that emerged in [*New York Central*] seemed ideal in its shared allocation of risks to both principal and agent. Corporate liability deters crime; it moves the risk of loss away from risk averse officers and directors toward the firm; it efficiently distributes liability risk between the firm and employees. Without significant entity liability or even shared liability, some argued, incentives would be seen as too weak to ensure an organizational commitment to law abidance.[25]

The Supreme Court's extended discussion of public policy and its critical reference to "the old and exploded doctrine that a corporation cannot commit a crime" are also consistent with a view of law that rejects legal formalism and allows criminal as well as civil law to develop to meet the needs of the time. Although he did not write the opinion in *New York Central*, Oliver Wendell Holmes, Jr. was a member of the Court (and had been a member of the Massachusetts Supreme Judicial Court when it decided the principal state case cited in *New York Central*). Holmes is, of course, famous for the following statement:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or

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[23]HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION at 560-61 (1954).

[24]For a discussion of these cases, see *id*. at 445–77, 561–63.

[25]William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1363–64 (1999) (footnotes omitted).

> unconscious, and even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[26]

Holmes did not limit his analysis to civil law. To the contrary, he argued that "the general principles of criminal and civil liability are the same."[27] He also stated that "prevention ... would seem to be the chief and only universal purpose of punishment," and he urged that criminal law should abandon its traditional focus on mental culpability.[28] The Court's opinion in *New York Central* seems to follow these recommendations, basing corporate criminal liability on the same standard as civil tort liability, without any separate analysis of mens rea.

C. The Current Scope of Corporate Liability Under Federal Law

In general, federal criminal laws are applicable to corporations. Some, like the Elkins Act, refer explicitly to corporations. But other criminal statutes that make no reference to entity liability are governed by the definitional provisions of the United States Code, which state "unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies as well as individuals."[29]

Although the only question presented in *New York Central* case was whether the imposition of corporate criminal liability under the Elkins Act would violate due process, the Supreme Court's opinion was written far more broadly. It has been understood to be a strong endorsement of corporate criminal liability and the respondeat superior test, which is now applied to other federal offenses in all federal courts. Despite scholarly criticism, the federal courts have declined to narrow the standard of liability by requiring the government to prove that the corporation lacked effective policies and procedures to deter and detect criminal actions by its employees.[30]

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[26] OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

[27] *See* ALBERT W. ALSCHULER, LAW WITHOUT VALUES 176 (2000) (quoting THE COMMON LAW at 38).

[28] *Id.* at 107 (quoting THE COMMON LAW at 46, 49–50).

[29] 1 U.S.C. § 1. Pursuant to this definition, courts applying individual statutes generally hold corporations liable unless (1) to do so would be inconsistent with the statutory scheme and (2) limiting corporate liability will not otherwise frustrate the statutory purpose. Rowland v. Cal. Men's Colony, 506 U.S. 194, 199–200, 210–11 (1993).

[30] Both the district and appellate courts in *United States v. Ionia Management S.A.*, 555 F.3d 303, 310 (2d Cir. 2009), rejected this argument, which was made by a high level group of amici seeking to use the prosecution as a test case for reform.

Additionally, collective knowledge and action is sometimes invoked to impose corporate liability even when no individual has committed an offense.[31] Under this theory, the knowledge and conduct of multiple employees is imputed, in the aggregate, to the corporate actor.[32] For example, a corporation may be found to have knowledge of a particular fact when "one part of the corporation has half the information making up the item, and another part of the entity has the other half."[33] This doctrine allows the imposition of corporate criminal liability even when no individual employee or agent had the necessary mens rea. The leading decision involved a bank's failure to file U.S. Treasury reports on multiple transactions over $10,000.[34] The customer in question made more than 30 withdrawals of amounts in excess of $10,000 in cash by simultaneous presenting a single teller with multiple checks that totaled more than $10,000. The bank argued that no one employee had the necessary willful intent to violate the reporting requirements, because the tellers who conducted the transactions were unaware that the law required the reports to be filed, and the employees who knew of the reporting requirements did not know of the transactions. Noting that corporations frequently compartmentalize information in smaller units, the court concluded that the aggregate of those components should be treated as the corporation's knowledge of a particular operation, regardless whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation. The court refused to allow the bank to escape liability by pleading ignorance when its organizational structure prevented any one employee from comprehending the full import of the transactions.

In *New York Central* the Supreme Court did state in dicta that there are "some crimes which, in their nature, cannot be committed by corporations,"[35] but there have been no federal decisions identifying such offenses. To the contrary, corporate liability has been imposed for a very wide variety of federal offenses, including offenses–like the currency reporting prosecution noted above–that require specific intent.[36]

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[31]United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987), *cert. denied* 108 S. Ct. 328 (1987).

[32]*Id.* ("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. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.").

[33]In re WorldCom, Inc. Securities Litigation, 352 F. Supp. 2d 472, 497 (S.D.N.Y. 2005) (citation and internal quotation marks omitted).

[34]Bank of New England, 821 F.2d at 847.

[35]N. Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494 (1909).

[36]KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY: A TREATISE ON THE CRIMINAL LIABILITY OF CORPORATIONS, THEIR OFFICERS AND AGENTS § 2.09 (2d ed. 1992) (describing extension of corporate criminal liability to a variety of specific intent crimes including contempt of court and various forms of conspiracy, including conspiring to violate state and federal antitrust laws). Brickey's three volume treatise explores corporate criminal liability for conspiracy, racketeering, various forms of fraud, foreign corrupt practices, violations

D. The Model Penal Code Alternative

Although it has not been adopted by Congress, several states have implemented a more limited form of corporate criminal liability based on the American Law Institute's Model Penal Code (MPC).[37] With limited exceptions, the American Law Institute rejected respondeat superior but preserved a more limited role for corporate criminal liability.[38] The MPC permits imposition of corporate criminal liability when "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 in behalf of the corporation within the scope of his office or employment."[39] These actors' role in the entity "make[s] it reasonable to assume their acts are in some substantial sense reflective of the policy of the corporate body,"[40] and shareholders are likely to be in a position to bring pressure to bear to avoid liability. The MPC also provides for a defense that the high managerial agent having supervisory authority "employed due diligence to prevent its commission.[41] Since the purpose of a corporate fine is to encourage diligent supervision, where that diligence can be shown the entity should be exculpated absent a contrary legislative purpose.[42]

II. Criticism of *New York Central*, Respondeat Superior, and Corporate Criminal Liability

The legal literature in the United States is generally critical of the decision in *New York Central*. Some critics argue that the Court erred in endorsing corporate criminal liability, while others argue that such liability is justified, but only on a more limited basis.

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of the election laws, bribery, tax offenses, currency reporting offenses, money laundering, obstruction of justice, perjury, and false statements.

[37]Model Penal Code § 2.07 cmt. 2(a) nn.6 & 7 lists state laws that adopt various features of the proposed Code or are similar to the proposed code. The research reflected in the Commentary ended in 1979.

[38]The Code permits the imposition of liability on the basis of respondeat superior if the offense is one outside the Model Code and "a legislative purpose to impose liability on corporations plainly appears." Model Penal Code § 2.07(1)(a). Liability may also be imposed whenever "offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law." *Id.* § 2.07(1)(b).

The Commentary reveals that the Institute had little enthusiasm for corporate criminal liability, concluding that there are only a few situations in which criminal liability would add to the deterrence that flows from the potential for individual liability: juries had been reluctant to convict individual corporate agents for regulatory offenses, especially where the violation may have been produced by general pressure created, even unintentionally, by management, and in some cases entities were unjustly enriched as a result of offenses committed by their agents. Model Penal Code § 2.07 cmt. 2(c) at 336-39.

[39]Model Penal Code § 2.07(1)(c).

[40]Id., § 2.07 cmt. 2(c) at 339.

[41]Id., § 2.07(5).

[42]Id., § 2.07 cmt. 6.

A. General Critiques of Corporate Criminal Liability

Many U.S. scholars and commentators have argued that U.S. law should abandon corporate criminal liability.

The most fundamental objection is that corporate criminal liability is inconsistent with the basic premises of criminal law.[43] According to this view, the traditional forms and functions of criminal law are not applicable to artificial persons because they cannot in any meaningful sense have mens rea or be "guilty" of a criminal offense. Moral responsibility is reserved for persons who possess certain capabilities, which are a prerequisite of moral desert and criminal punishment.[44] Since corporations do not possess these capabilities, they are not proper subjects of criminal liability. It is improper to convict a legal entity that has no free will or character, and thus "no soul to damn and no body to kick."[45] Additionally, corporations act only through their officers and employees, and holding an entity vicariously liable for the conduct of its agents and employees is inconsistent with the principle that an actor is responsible only for his own conduct and intent. Imprisonment–a defining characteristic of criminal law–cannot be imposed on a corporation. In reality, criminal penalties are imposed on innocent shareholders, and criminal liability also imposes unjustified costs on innocent employees, suppliers, and the community. Finally, employing the criminal law in this fashion is dangerous, because it obscures and dilutes the moral content of criminal law.[46]

Scholars have noted that the Supreme Court failed to acknowledge that the function of tort law–the compensation of individuals–is very different than the function of criminal law.[47] Indeed, the Supreme Court did not consider alternatives, such as imposing civil or administrative sanctions on the corporation, or prosecuting the individual corporate officers and employees. The Court, they have suggested, posed a false choice of criminal liability or no enforcement.

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[43] Adam Safwat and I have described this argument elsewhere as a "retributive critique." Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFFALO CRIM. L. REV. 89, 97–98 (2004).

[44] *See* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 596–617 (1997) (stating that the capacities necessary for moral personhood include rationality, autonomy, and emotionality, including the capacity to choose and cause the realization of one's choice and mental states such as joy, fear, and anger).

[45] *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981).

[46] Paul H. Robinson, *The Virtues of Restorative Process, the Vices of "Restorative Justice,"* 2003 UTAH L. REV. 375, 384-85 (2003) (commenting that extending criminal liability to corporations "risks obscuring the moral content of criminal liability").

[47] *See, e.g.*, Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1114–20 (1992).

More recently, law and economics scholars have developed a second line of attack on corporate criminal liability, arguing that criminal sanctions are not an efficient response to corporate misconduct. According to this view, the combination of corporate civil liability and individual criminal liability are sufficient so there is no need for corporate criminal liability, which is less efficient. Society must bear higher sanctioning costs for stigma penalties as well as increased costs for the procedural protections of criminal law.[48] The potential for both civil and criminal penalties may over deter ex ante and result in excessive litigation costs ex post.[49] Other scholars have taken the economic analysis one step further, arguing a regime of strict respondeat superior liability can present corporations with perverse and potentially conflicting incentives.[50] Specifically, the costs of enforcement combined with the possibility of heavy criminal penalties may encourage corporations to cover up illegal activity. Although a simple economic approach suggests that higher sanctions will lead directly to lower corporate crime, it fails to take account of the corporation enforcement expenditures in detecting and investigating crimes committed by its employees and agents. Successful detection and investigation exposes the corporation to the potential of heavy criminal penalties intended to deter crime. [52]

B. New Justifications for Corporate Criminal Liability and Proposals for Reform

Many U.S. scholars now accept the legitimacy of some form of corporate criminal liability, but argue that respondeat superior is overbroad. This scholarship first identifies a variety of functions served by corporate criminal liability, and then proposes standards for liability that incorporate those functions.

1. New justifications for corporate liability

The modern scholarship defending corporate criminal liability–like the *New York Central* decision–rests first on a recognition of the dangers posed by the enormous power now wielded by corporations and the potential for harm to the U.S. economy and the health and safety of its citizens. Both U.S. corporations and foreign corporations conducting business in the United States have been implicated in wide range of serious misconduct.

> Modern corporations not only wield virtually unprecedented power, but they do so in a fashion that often causes serious harm to both individuals and to society as a whole. In

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[48] *See, e.g.*, V. S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996) (examining the reputational and procedural costs in the corporate context).

[49] Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 321 (1996).

[50] Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 836 (1994).

[52] This analysis, however, leaves open the door for some forms of corporate criminal liability. For a discussion that compares various regimes of corporate criminal liability, see generally Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997).

> some recent cases, corporate misconduct and malfeasance destabilized the stock market and led to the loss of billions in shareholder equity and the loss of tens (or perhaps even hundreds) of thousands of jobs. Enron was the seventh-most valuable company in the U.S., until the revelation of its use of deceptive accounting devices to shift debt off its books and hide corporate losses led to losses of more than $100 billion in shareholder equity before it filed for bankruptcy. But Enron was not alone in the use of fraudulent accounting practices. The revelation of similar misconduct by other corporations (including Dynergy, Adelphia Communications, WorldCom, and Global Crossing) also led to massive losses. Federal prosecutors have also uncovered widespread wrongdoing in other industries, though the nature of the violations has varied over time. In the past decade, virtually every major pharmaceutical company has pled guilty to or settled charges arising out of serious misconduct. In the previous decade, the 1990s, the most prominent cases concerned antitrust violations. The largest single fine imposed was $500 million for a worldwide scheme to fix the price of vitamins, and fines from the nine most serious antitrust cases of the decade totaled $1.2 billion.
>
> Because of their size, complexity, and control of vast resources, corporations have the ability to engage in misconduct that dwarfs that which could be accomplished by individuals. For example, Siemens, the German engineering giant, paid more than $1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East, and Latin America, using its slush funds to secure public works contracts around the world. . . . U.S. investigators found that the use of bribes and kickbacks were not anomalies, but the corporation's standard operating procedure and part of its business strategy.[53]

Modern scholars have articulated new theories of corporate culpability that can serve as a basis for criminal liability (though as noted below, not liability based on respondeat superior). This scholarship emphasizes two points. First, institutions have an enormous impact on individual behavior, and second, corporations vary significantly and produce very different institutional effects. Scholars have turned to research on topics such as organizational behavior[54] and social psychology[55] to demonstrate the profound impact organizations have on the behavior of individuals. The fundamental insight is that "institutions *do* produce wrongdoing."[56] Values from institutions and groups are internalized, and organizational processes can create a moral and intellectual setting that encourages unlawful behavior. A variety of psychological processes may contribute, including a diffused sense of responsibility, a desire to remain in harmony with others in a group setting, and the effects of cognitive dissonance. As one psychologist stated, many criminal acts are "essentially organizational products that result when complex social forces

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[53]Sara Sun Beale, A *Response to Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1483–84 (2009) (footnotes omitted).

[54]Bucy, *supra* note 47, at 1123-28.

[55]Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 494–497 (2006).

[56]*Id.* at 493 (emphasis in original).

interact to cause individuals to commit multiple acts of terrible harm."[57] Equally important, each corporation has a distinctive combination of formal and informal characteristics that can promote or discourage violations of the law.[58]

Because corporations are not merely the sites at which individual wrongdoing occurs, but may properly be said (at least in some cases) to have produced the wrongdoing, a corporation may itself be culpable, and properly subject to criminal sanctions. Indeed, some scholars argue that the imposition of criminal sanctions is critically important. They contend that the expressive function of criminal law requires that corporations be subject to criminal prosecution. Criminal sanctions condemn in order to reify (and sometimes shift) societal norms.[59] From the public's perspective, not prosecuting corporations is the equivalent of immunizing them. Immunizing corporations from criminal liability would violate strongly held societal norms, at a significant cost to the legitimacy of the legal system. Communication retributivism also requires that corporations be subject to criminal liability.[60] Because the breach of collective social norms sends a message that the offender's moral worth is greater than that of the victim, society must impose a penalty to send a corrective message and reinforce its moral norms. Both wronged individuals and other members of society seek retributive justice, which only criminal law can provide.[61] These principles apply to corporations, because evidence suggests most Americans understand them to have individual and unique corporate cultures embodied in their actions, practices, and words.[62]

The expressive function of the law can also be harnessed to provide deterrence. The established social practice of blaming institutions provides a basis for the imposition of corporate criminal liability.[63] This social practice reflects common beliefs about institutional responsibility that are well founded. Because the legal system has a monopoly on an important and strong form of normative expression, legal judgments of entity fault have a significant impact, conveying to the market that the corporation may be "flawed, unreliable, and apt to generate future harm"[64] Entity liability's powerful flow through effects on individuals can also help shape preferences and thereby deter criminality.

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[57] *Id.* at 495 (quoting John Darley, *How Organizations Socialize Individuals into Evildoing*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS, 13, 13–14 (David M. Messick & Ann E. Tenburnsel eds., 1996)).

[58] Bucy, *supra* note 47, 1123-33; see also Buell, *supra* note 55, at 529.

[59] Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L. J. 1, 49 (2012).

[60] Andrew E. Taslitz, *Reciprocity and the Criminal Responsibility of Corporations*, 41 STETSON L. REV. 73, 91–94 (2011).

[61] *Id.* at 94.

[62] *Id.* at 93.

[63] *See generally* Buell, *supra* note 55 (arguing that the blaming function of entity criminal liability is closely linked to the utility of corporate criminal law)

[64] *Id.* at 501.

Additionally, the application of the criminal law to corporations provides a basis for the rehabilitation or reform of corporations that are proper subjects of expressive punishment.[65] Focused on the future, rehabilitation seeks to ensure that the defendant becomes a law abiding members of society. Unlike a defense of due diligence (which can be satisfied by the presence of a compliance program at the time of the alleged offense), a focus on rehabilitation asks whether the organization needs to change now to prevent future violations. Focusing on rehabilitation may affect both the need for a prosecution and the types of sanctions that should be imposed in the case of conviction including, for example, corporate probation. [66] Indeed, the potential for corporate criminal liability may be a critical mechanism to bring about structural reform within individual corporations, and even more generally across whole industries.[67]

Other supporters of corporate criminal liability point to major shortcomings in the alternative methods of deterrence. For example, it might theoretically be more efficient to impose the same fines on a corporation in an administrative or civil proceeding. But these alternatives may be compromised or unavailable. Regulatory capture can undermine the potential for adequate administrative or civil enforcement.[68] Private litigation by investors is now disfavored under the federal securities law,[69] and corporate law now makes it very difficult to hold directors and officers personally liable for breaching their fiduciary duties.[70] Restrictions on class actions and punitive damages have a similar effect in reducing the avenues for civil redress. These restrictions on the availability of civil alternatives suggest a need for caution in eliminating or reducing the possibility of criminal liability.

Finally, commentators have recognized that the potential for corporate criminal liability may positively affect other enforcement mechanisms. As discussed in Section III, corporations facing the potential for criminal liability have significant incentives to assist with the investigation of individual wrong doing and settle civil claims.

2. Proposals for Reform

Although the new scholarship has identified justifications for corporate criminal liability generally, it also argues that these justifications require limitations on the scope of liability.

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[65]Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation,* 46 AM. CRIM. L. REV. 1417, 1428–30 (2009).

[66]*See infra* Section III.

[67]For more information on the development of structural reform prosecutions, see *infra* Part III.

[68]*See* Henning, *supra* note 64, at 1426. For a discussion of regulatory capture, see generally Sidney A. Shapior & Rena Setinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741 (2008).

[69]Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 379 (2008).

[70]Lisa M. Fairfax, *On the Sufficiency of Corporate Regulation as an Alternative to Corporate Criminal Liability*, 41 STETSON L. REV. 117, 117–18 (2011).

a. Restructuring the Standard for Liability to Address Corporate Intent and Vicarious Liability

Some scholars have attempted to define a standard of corporate liability based on the entity's own conduct and intent, aiming to align criminal responsibility with the features of corporations that induce or inhibit criminal conduct. One proposal based liability on "corporate ethos." Central to this approach is the assumption that an entity possesses a distinct and identifiable personality independent of specific individuals who control or work for the organization.[71] Under the corporate ethos standard, the government could convict a corporation only if it proved that the corporate ethos encouraged agents of the corporation to commit the criminal act. Another proposal based liability on "constructive corporate fault," focusing on whether "aspects of the organization, such as policies, goals, and practices, that reflect not merely the sum total of individual agents' intentions, but instead attributes and conditions of the corporation that make it possible for these agents to cooperate and collaborate in legally problematic ways."[72] Under this standard, the question is whether the primary act was "authored by" the corporation in a meaningful sense, such as whether the agent's acts can be fairly said to be the actions of the corporation based on objective factors such as the size, complexity, formality, functionality, decision making process, and structure of the corporate organization.

Like the MPC, these proposals seek to limit corporate liability to conduct that can be said to reflect the corporation's policies, but they do so by taking into account a much wider range of factors. The MPC limits liability to conduct that was authorized, performed, or recklessly tolerated by the board of directors or a high managerial agent. This standard would not permit liability encouraged by clear corporate policies absent direct participation by the board or a high managerial agent. Indeed, the MPC standard may create a perverse incentive for senior managers; it encourages ignorance rather than diligence because liability attaches only if the manager was aware of and recklessly tolerated the conduct.[73]

It is doubtful, however, whether these proposals are practical, and critics have questioned whether they effectively describe the functional relationship between the institution and the crimes of individuals.[74] They have not been adopted by U.S. courts or legislatures.

b. Creating a Defense of Due Diligence

Many critics who identify the absence of fault or desert as the critical defect in the respondeat superior standard of criminal liability agree with one aspect of the Model Penal Code: respondeat superior should be supplemented with a defense of good faith or due diligence.[75]

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[71]Bucy, *supra* note 47, at 1099.

[72]William S. Laufer, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1309 (2000).

[73]These problems and others are identified in Bucy, *supra* note 1, at 261, and Bucy, *supra* note 47, at 1104-05.

[74]For several critiques of these proposals, *see* Buell, *supra* note 55, at 527–28.

[75]*See generally* Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537 (2007); *see also* Ellen S. Podgor, *Educating*

Notions of desert, deterrence, and the expressive function of law may support these proposals. Proponents argue that such a defense is necessary to ensure that criminal liability is imposed only in cases of true corporate fault. Because a good faith defense imposes liability only when there is a basis to condemn the corporation as a whole, it prevents an expressive failure that would undermine the legitimacy of the criminal justice system.[76] Additionally, a defense of due diligence could provide a desirable incentive for corporations to monitor their agents and thus prevent wrongdoing. Alternatively, some critics of respondeat superior suggest shifting the burden of proof on this issue, requiring the government to prove the corporation did not have reasonable policies and procedures to prevent employee misconduct.[77]

Skeptics have noted, however, that there is little evidence that compliance programs are effective. They contend that a due diligence or compliance-based organizational liability regime could lead to two potential problems: first, an underdeterrence of organizational misconduct and, second, a proliferation of costly but ineffective internal compliance structures.[78]

c. Narrowing Respondeat Superior's Focusing on the Intent of the Agent

Another proposal also seeks to harness corporate criminal liability's expressive function by narrowing its reach to cases of true entity blameworthiness. Based on the conclusion that first-best solutions intended to directly measure corporate ethos or constructive corporate fault are not workable, this approach seeks a workable alternative that limits respondeat superior while not being unduly narrow.[79] The MPC focus on management fault is unsatisfactory, because lower level employees may cause serious harm because of institutional norms, and formal policies may not reflect institutional realities. Accordingly, criminal liability should be tailored to impose fault on the entity only if the agent acted *primarily* with intent to benefit the firm. By focusing on the agent's mental state toward the firm, this approach aims to better capture action influenced by the corporate institution.

III. The Evolving Enforcement of Corporate Criminal Liability

Although the doctrine of corporate criminal liability remains unaffected by the criticisms described in Section II, both the exercise of prosecutorial discretion and the standards for sentencing have been significantly modified to address these critiques. The principles that guide

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Compliance, 46 AM. CRIM. L. REV. 1523, 1529 n. 39 (2009) (collecting authorities advocating a good faith defense).

[76]*See* Gilchrist, *supra* note 59, at 45–46 (discussing the expressive aspect of criminal law).

[77]Andrew Weissmann & David Newman, *Rethinking Corporate Criminal Liability*, 82 IND. L. REV. 411, 433 (2007) (arguing that corporate criminal liability should be no broader than vicarious civil liability for punitive damages and certain claims under Title VII).

[78]*See generally* Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571 (2005); *see also* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

[79]Buell, *supra* note 55, at 526–33.

the decision whether to prosecute and the sanctions that are imposed on corporations that are convicted now focus on corporate culpability and seek to prevent future wrongdoing, advance other social goals (such as restitution to victims), and minimize undesirable social costs. These practices substantially narrow the real scope of corporate criminal responsibility and reduce the pressure for doctrinal change.

A. The Administrative Standards Governing Prosecutorial Discretion

The Principles of Federal Prosecution—set forth in the *U.S. Attorneys' Manual* (USAM)—provide guidance for the exercise of federal prosecutors' charging discretion. The USAM contains both general standards applicable to all cases, and specific provisions governing the prosecution of corporations and other business entities. The general standard, USAM § 9-27.220, states that federal prosecutors should recommend prosecution when they believe conduct constitutes a federal crime and the admissible evidence will be sufficient for conviction, unless no federal interest would be served by prosecution, the person is subject to effective prosecution in another district, or there are adequate non-criminal alternatives to prosecution.[80] Subsequent portions of the USAM state that in all cases federal prosecutors should consider:

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others; and
7. The probable sentence or other consequences if the person is convicted.[81]

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[80] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.220, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220 [hereinafter "USAM"].

[81] *Id.* § 9-27.230. The comments to this section discuss the concept of federal enforcement priorities:

> Federal law enforcement resources and Federal judicial resources are not sufficient to permit prosecution of every alleged offense over which Federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources so as to achieve an effective nationwide law enforcement program, from time to time the Department establishes national investigative and prosecutorial priorities. These priorities are designed to focus Federal law enforcement efforts on those matters within the Federal jurisdiction that are most deserving of Federal attention and are most likely to be handled effectively at the Federal level. In addition, individual United States Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance.

These general provisions have been supplemented with the Principles of Federal Prosecution of Business Organizations in the United States (Principles of Federal Prosecution).[82] The Principles of Federal Prosecution make it clear that federal prosecutors should not bring criminal charges merely because a case can be made on the basis of respondeat superior. Rather, prosecutors must consider a variety of factors that identify corporate blameworthiness and assess the adequacy of alternatives to federal prosecution, including those deemed most important by the critics of respondeat superior. The Principles of Federal Prosecution seem to mimic or adopt the moral culpability analysis recommended by scholars.[83]

The Principles of Federal Prosecution state:

> . . . In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:
>
> 1. the 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 timely and voluntary disclosure of wrongdoing and its 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 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;
>
> 7. 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;

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[82]USAM §§ 9-28.300(A), 9-28.1300(A), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.300 (last visited July 23, 2013).

[83]Lucian E. Dervan, *Reevaluating Corporate Criminal Liability: The DOJ's Internal Moral-Culpability Standard for Corporate Criminal Liability*, 41 STETSON L. REV. 7, 12-14 (2011).

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. the adequacy of remedies such as civil or regulatory enforcement actions.[84]

Several of these factors address key aspects of corporate culpability that are not relevant to the bare test of respondeat superior: the seriousness of the harm done, the pervasiveness of wrongdoing within the corporation (including the role of management), the history of similar misconduct, and the existence and effectiveness of any pre-existing compliance program.

The US Attorney manual states that the decision whether a corporation should be held criminally responsible does not turn solely on the application of respondeat superior, and "it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee."[85] The accompanying commentary also addresses the role and conduct of management, characterizing it as "the most important" of the factors because "a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged."[86] These factors bring federal practice close to the standards proposed by many critics of respondeat superior.

The Principles of Federal Prosecution require prosecutors to give weight to another factor deemed critical by commentators: the existence of a corporate compliance program.[87] The commentary recognizes that good faith efforts to comply with the law may show a lack of organizational culpability or alternatively, the compliance program may be no more than ineffective window dressing. Accordingly, prosecutors are instructed to consider "whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives."[88] In evaluating the adequacy of the program, prosecutors should consider the program's design, implementation, review, and revisions; whether there was a sufficient staff to audit and analyze the compliance efforts; and whether employees were adequately informed.

The Principles of Federal Prosecution also address the criticism that civil or administrative enforcement may be preferable to criminal prosecution, and that criminal sanctions may impose unwarranted penalties on innocent parties, including shareholders as well as members of the general public. Prosecutors are instructed to consider the adequacy of prosecuting only the responsible individuals and whether non-criminal alternatives, such as civil or regulatory enforcement actions, "would adequately deter, punish, and rehabilitate a corporation that has

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[84] USAM § 9-28.300(A).

[85] *Id.*, § 9-28.500(A) (emphasis in original).

[86] *Id.*, § 9-28.500(B).

[87] *Id.*, § 9-28.800(B) (noting, however, that a compliance program "that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability.").

[88] *Id.*

engaged in wrongful conduct."[89] This evaluation requires case by case consideration of the need for criminal sanctions, including an evaluation of the other sanctions that are available, the likelihood that an effective sanction will be imposed, and other factors such as the strength of the regulatory authority's interest.[90]

Prosecutors are also instructed to consider "collateral consequences" of a corporate criminal conviction, taking into account "the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it."[91] Because such factors will exist to some degree in every corporate prosecution, prosecutors are encouraged to weigh the collateral consequences in light of other relevant factors, such as the seriousness of the harm and pervasiveness of misconduct.[92]

Finally, prosecutors are instructed to consider several factors concerning post offense conduct including whether the corporation cooperated in the investigation and has made restitution or taken other remedial actions.[93] The Principles of Federal Prosecution treat these remedial actions as factors that help to measure corporate character or culpability, stating in the commentary that:

> A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated.[94]

As a result, prosecutors consider the integrity and credibility of the corporation's remedial and disciplinary procedures, and whether a corporation appropriately disciplined wrongdoers once they were been identified. Quick recognition of flaws in a compliance program and changes to that program are also relevant. A closely related mitigating factor affecting the decision to prosecute is a corporation's "timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation."[95] It is often difficult for outside investigators to determine which individuals took action on behalf of the corporation and find the relevant evidence, so the USAM gives weight to "the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior

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[89] *Id.*, § 9-28.1100.

[90] *Id.*

[91] *Id.*, § 9-28.1000(B).

[92] *Id.*

[93] *Id.*, §§ 9-28.700 –9-28.760 (discussing the value of cooperation, attorney-client/work product protections, and obstruction) & § 9-28.900 (examining the weight afforded to restitution).

[94] *Id.*, § 9-28.900(B). But see Dervan, *supra* note 83, at 15-17 (arguing that post offense conduct is not relevant to culpability in the commission of the offense).

[95] *Id.*, § 9-28.700(A).

executives."[96] This cooperation may be especially beneficial to both the government and the corporation, because without the corporation's assistance there may be a protracted investigation that would disrupt the corporation's business operations.

The Principles of Federal Prosecution also recognize that in some cases there is another option in corporate cases—a deferred prosecution or non-prosecution agreement—that avoids the necessity for a prosecutor to charge or not charge:

> . . . [W]here the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims. Ultimately, the appropriateness of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law.[97]

Deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) are discussed below.

B. The Impact of the Administrative Standards Governing Federal Prosecutions

Although respondeat superior seems to permit a corporate prosecution whenever a rogue employee violated the law, the discretionary approach under the Principles of Federal Prosecution has substantially narrowed the effective reach of corporate liability. From 2007 to 2012, fewer than 200 corporations were convicted per year in the federal courts.[98]

Though the number of corporate prosecutions is quite small, the potential for corporate criminal liability nonetheless has a dramatic effect on corporate conduct, providing a powerful

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[96] *Id.*, § 28-700(A).

[97] *Id.*, § 28-1000(B).

[98] This figure is based on the Sentencing Commission's yearly reports of corporate convictions. See, e.g., *2012 Sourcebook of Federal Sentencing Statistics – Table 51*, U.S. SENTENCING COMMISSION, (last visited Dec. 23, 2013), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table51.pdf .

incentive for corporate cooperation. Rather than oppose government investigations, corporations help build the case against individual wrongdoers and settle claims against the corporation itself. Because the Principles of Federal Prosecution treat corporate cooperation as a substantial factor weighing against prosecution, U.S. corporations that receive reports of suspicious activity generally bring in counsel to conduct a rigorous internal investigation and require their officers and employees to cooperate with the internal investigation. If the internal investigation uncovers wrongdoing, it is generally to the corporation's advantage to inform the government of the relevant information and negotiate a settlement that avoids or minimizes the entity's criminal liability.

Settlements take several forms. In many cases, corporations avoid criminal liability but accept civil liability and pay significant fines.[99] In other cases, negotiated guilty pleas also settle civil and administrative charges. In 2009, for example, Pfizer Inc. and a subsidiary agreed to pay $2.3 billion, the largest health care fraud settlement in the history of the Department of Justice, to resolve criminal and civil liability arising from the illegal promotion of certain pharmaceutical products.[100] The settlement included a criminal fine of $1.195 billion and forfeiture of $105 million, along with a payment of $1 billion to resolve allegations under the civil False Claims Act and provide $102 million to civil claimants.[101] Some federal settlements also resolve state charges.[102]

Alternatively, the Department of Justice and a corporation may settle criminal, civil, and administrative charges by entering into a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA). A DPA requires judicial approval. An information charging the offense and the DPA are filed with and must be approved by a federal district court. In contrast, NPAs do not require court approval and typically nothing is filed. Since 2000, the Department of Justice has entered into 257 publicly disclosed DPAs and NPAs, and it is thought that there have been others that were not publicized.[103]

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[99] *See, e.g.*, Matthew Goldstein, *Bank of America to Pay $131.8 Million Penalty in Mortgage Deals*, N.Y. TIMES (Dec. 12, 2013), *available* at http://dealbook.nytimes.com/2013/12/12/bank-of-america-to-pay-131-8-million-penalty-in-c-d-o-deals/?src=recg&_r=0.

[100] *Justice Department Announces Largest Health Care Fraud Settlement in Its History*, U.S. DEP'T OF JUSTICE (Sept. 2, 2009), http://www.justice.gov/opa/pr/2009/September/09-civ-900.html.

[101] *Id.*

[102] *See generally* Sara Sun Beale, *What Are the Rules If Everybody Wants to Play?: Multiple Federal and State Prosecutors Acting as Regulators, in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 202 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

[103] Gibson, Dunn Crutcher LLP, *2013 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)* (July 9, 2013), http://www.gibsondunn.com/publications/pages/2013-Mid-Year-Update-Corporate-Deferred-Prosecution-Agreements-and-Non-Prosecution-Agreements.aspx.

These agreements frequently include provisions that the court could not require without the defendant's agreement. For example, BP's guilty plea agreement[104] arising from the Deepwater Horizon oil spill in the Gulf of Mexico included a fine of $4 billion, including $2.4 billion dedicated to acquiring, restoring, preserving and conserving the marine and coastal environments, ecosystems and bird and wildlife habitat, and $350 million to fund research, development, education and training to be conducted by the National Academy of Sciences.[105] The agreement also included the appointment of process safety and ethics monitors.

Employing DPAs and NPAs, the Department of Justice has brought "structural reform prosecutions," aimed at the adoption of sweeping internal corporate reforms.[106] Using these techniques, the Department has obtained "demanding settlements" from corporations including AIG, American Online, Boeing, Bristol-Myers Squibb Co., Computer Associates, HealthSouth, KPMG, MCI, Merrill Lynch & Co, and Monsanto, as well as several public entities.[107]

Although the Principles of Federal Prosecution and the use of DPAs and NPAs seek to align corporate criminal liability with culpability and to employ criminal liability to promote a variety of social goals, the government's practices have been subject to a variety of criticisms. Some critics charge that broad entity liability under respondeat superior imposes undue pressure on corporations and undermines fundamental rights, including the right to counsel. Corporations, it is said, have been forced to become part of the prosecutorial team.[108] But other critics take the opposite view, arguing that the government has not been sufficiently aggressive in prosecuting either corporations or their employees for misconduct in connection with the financial crisis of 2008. One former federal prosecutor argues the practice of seeking corporate cooperation and structural reforms has displaced efforts to prosecute individuals and significantly undermined deterrence:

> Although it is supposedly justified because it prevents future crimes, I suggest that the future deterrent value of successfully prosecuting individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing. Just going after the company is also both technically and morally suspect. It is technically suspect because, under the law, you should not indict or threaten to indict a company unless you can prove beyond a reasonable doubt that some managerial agent of the company committed the alleged crime; and if you can prove that,

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[104] Guilty Plea Agreement, United States v. BP Exploration & Production, Inc., No. 2:12-cr-00292-SSV-DEK, (E.D. La. Jan. 29, 2013), *available at* http://www.justice.gov/iso/opa/resources/433201211151436139900 27.pdf.

[105] *Id.* at Exhibit B, Exhibit B-1.

[106] *See generally* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007) (empirically analyzing the use of structural reform prosecutions).

[107] *Id.* at 855.

[108] *See generally* Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23 (2010) (discussing the role of corporations in the prosecutorial process).

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> why not indict the manager? And from a moral standpoint, punishing a company and its many innocent employees and shareholders for the crimes committed by some unprosecuted individuals seems contrary to elementary notions of moral responsibility.[109]

On the other hand, there has also been criticism of the Department of Justice's failure to prosecute any banks for their role in the financial crisis.[110]

C. Corporate Sentencing

The advisory Sentencing Guidelines provide comprehensive recommendations for organizational sentencing in the federal courts,[111] including not only fines but also remedial measures, and probation. The Guidelines tailor the fines to corporate culpability (not bare criminality) and provide for other non-punitive remedial measures and measures intended to reform the corporation and decrease the likelihood of future offenses. The Guidelines were "designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."[112]

1. Fine determination

Under the Guidelines, fine amounts are largely a function of organizational culpability. Except in the rare case of a wholly criminal organization (which is to be divested of all its assets[113]), the Guidelines provide that "the fine range . . . should be based on the seriousness of the offense and the culpability of the organization."[114] To determine culpability, the Guidelines assign a numerical score, based on specified aggravating and mitigating factors, that allows

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[109] Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REVIEW OF BOOKS, Jan. 9, 2014, *available* at http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/?pagination=false&printpage=true .

[110] David M. Uhlmann, Op-Ed., *Prosecution Deferred, Justice Denied*, N.Y. TIMES (Dec. 13, 2013), *available* at http://www.nytimes.com/2013/12/14/opinion/prosecution-deferred-justice-denied.html.

[111] U.S. SENTENCING GUIDELINES MANUAL ch. 8 introductory cmt (2012), *available at* http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_HTML/8b1_1.htm. In *United States v. Booker*, 543 U.S. 220, 259–60 (2005), the Supreme Court held that mandatory guidelines based on facts found by a judge (and not a jury) would violate the defendant's Sixth Amendment right to trial by jury. In order to preserve the Guidelines system, the Court concluded that the Guidelines must be treated as advisory only. In *Southern Union v. United States*, 132 S.Ct. 2344 (2012), the Court held that the Sixth Amendment's jury-trial guarantee applies to the imposition of criminal fines as well as terms of imprisonment.

[112] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 111, at ch. 8, introductory cmt.

[113] *Id.*

[114] *Id.*

courts to calculate a recommended fine range.[115] The Guidelines instruct the courts to consider a range of factors:

> The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.[116]

When selecting a fine within the recommended range, courts are encouraged to weigh policy factors including the seriousness of the offense, the nature of the organization's involvement, the collateral consequences of conviction, the involvement of a vulnerable victim, whether the offense resulted in nonpecuniary damages, and whether the corporation or its high-level personnel have a history of civil or criminal misconduct.[117] The Guidelines also provide for a

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[115] *See id.* § 8C2.5.

[116] *Id. at §8A1 (introductory cmt.)*

[117] Specifically, policy considerations include:

> (1) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization; (2) the organization's role in the offense; (3) any collateral consequences of conviction, including civil obligations arising from the organization's conduct; (4) any nonpecuniary loss caused or threatened by the offense; (5) whether the offense involved a vulnerable victim; (6) any prior criminal record of an individual within high-level personnel of the organization or high-level personnel of a unit of the organization who participated in, condoned, or was willfully ignorant of the criminal conduct; (7) any prior civil or criminal misconduct by the organization other than that counted under §8C2.5(c); (8) any culpability score under §8C2.5 (Culpability Score) higher than 10 or lower than 0; (9) partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors set forth in §8C2.5 (Culpability Score); (10) any factor listed in 18 U.S.C. § 3572(a); and (11) whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program within the meaning of §8B2.1 (Effective Compliance and Ethics Program).

Id. § 8C2.8(a). The court may also consider "the relative importance of any factor used to determine the range, including the pecuniary loss caused by the offense, the pecuniary gain from the offense, any specific offense characteristic used to determine the offense level, and any aggravating or mitigating factor used to determine the culpability score." *Id.* § 8C2.8(b).

lesser fine if necessary to "avoid substantially jeopardizing the continued viability of the organization."[118]

Upward or downward departures and variances from the Guidelines range are permitted in individual cases.[119] The Guidelines identify factors "[not] adequately taken into consideration by the guidelines" which might warrant upward or downward departure from the recommended range on an individual basis.[120] An upward departure may be warranted if the organization is exceptionally culpable[121] or if the offense involved official corruption,[122] caused a risk of death or bodily injury,[123] or caused a threat to national security,[124] the environment,[125] or a market.[126]. A downward departure may be warranted if the organization provides substantial assistance to authorities in the prosecution of other offenders,[127] the organization is a public entity,[128] the victims of the crime were members or beneficiaries of the organization,[129] or the organization has agreed to pay remedial costs that greatly exceed the organization's criminal gain.[130]

2. Compliance Programs

Under the Guidelines, an "Effective Compliance and Ethics Program" in place at the time of the offence generally reduces a corporation's culpability score.[131] This reduction does not apply, however, if the organization "unreasonably delayed reporting the offense"[132] or if high-level corporate officials "participated in, condoned, or [were] willfully ignorant of the offense."[133] Additionally, in selecting a fine within the culpability range, courts are encouraged to select a higher fine if the organization failed to have such a program at the time of the offence.[134] Finally, an upward departure from the guidelines may be warranted to offset the corporation's score reduction under § 8C2.5(f) if the program was "implemented . . . in response to a court order or administrative order specifically directed at the organization."[135]

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[118] *Id.* § 8C3.3.
[119] *See generally id.* at Part C.
[120] *See id.* at Part C(1)(4).
[121] *Id.* § 8C4.11.
[122] *Id.* § 8C4.6.
[123] *Id.* § 8C4.2.
[124] *Id.* § 8C4.3.
[125] *Id.* § 8C4.4.
[126] *Id.* § 8C4.5.
[127] *Id.* § 8C4.1.
[128] *Id.* § 8C4.7.
[129] *Id.* § 8C4.8.
[130] *Id.* § 8C4.9.
[131] *Id.* § 8C2.5(f)(1).
[132] *Id.* § 8C2.5(f)(2).
[133] *Id.* § 8C2.5(f)(3).
[134] *Id.* § 8C2.8(11).
[135] *Id.* § 8C4.10.

3. Probation

In felony cases, the Guidelines provide for one to five years of corporate probation.[136] In all other cases, probation of up to five years is appropriate[137] where necessary "to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct."[138] In determining the conditions of probation, the Guidelines advise courts to "consider the views" of governmental regulatory bodies responsible for supervising the organization's conduct.[139] In Fiscal Year 2012, 72.2% of organizational offenders were placed on probation.[140]

In addition to criminal sanctions, administrative penalties are available for a variety of industry-specific offences. Sanctions may include civil monetary penalties, asset forfeiture,[141] loss of licenses or permits, and suspension/debarment from government contracts or nonprocurement programs.[142] For example, in the context of Medicare fraud, a Programs of All-Inclusive Care for the Elderly (PACE) beneficiary organization that furnishes false information in violation of § 460.40(f) may be subject to suspension of PACE enrollment, suspension of benefit payments, monetary penalties of $100,000 per falsification, a corrective action plan or termination of the PACE program agreement.[143] These sanctions may be imposed in addition to criminal sanctions for the same unlawful conduct.[144]

4. Remedial measures

The Guidelines provide that, whenever possible, corporate sentencing should include non-punitive, remedial measures aimed at making the victims whole.[145] Courts may order organizations to give notice to victims[146] and to make monetary or in-kind restitution.[147]

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[136] *Id.* § 8D1.2(a)(1).

[137] *Id.* § 8D1.2(a)(2).

[138] *Id.* § 8.1 (introductory cmt).

[139] *Id.* § 8D1.4 cmt.

[140] *2012 Sourcebook of Federal Sentencing Statistics*, *supra* note 98, at tbl. 53.

[141] *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1814 (1992).

[142] *See, e.g.*, 42 C.F.R. §§ *460.42–50* (discussing sanctions available for health care fraud).

[143] *See id.*

[144] *See, e.g.*, 18 U.S.C. § 287 (punishing with fines and imprisonment the presentation of "any claim upon or against the United States . . . knowing such claim to be false, fictitious, or fraudulent").

[145] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 111, at ch. 8, introductory cmt.

[146] *Id.* § 8B1.4.

[147] *Id.* § 8B1.1. Data from Fiscal Year 2012 shows that restitution orders are less frequent than one might expect. In 2012, only 13.9% of corporations were sentenced to both fines and restitution; 7.5% received restitution only. In 63.1% of cases, the court imposed only a fine. *See*

Organizations may be subject to remedial orders such as product recalls and environmental clean-up orders.[148] They may be ordered to perform community service if they are "uniquely" competent to repair the harm caused.[149] Community service requirements must be "reasonably designed to repair the harm caused by the offense."[150] Additionally, courts may require, as a condition to probation, an "effective compliance and ethics program" designed to "prevent and detect criminal conduct" and promote an ethical corporate culture.[151] In Fiscal Year 2012, compliance programs were ordered in 35.5% of all corporate crime cases.[152]

CONCLUSION

Despite the persistence of the doctrine of respondeat superior, federal criminal law does not impose crippling criminal penalties whenever a rogue employee engages in criminal conduct. The practice of corporate criminal liability has evolved in ways that address the principal critiques of respondeat superior. Prosecutorial discretion focuses on corporate culpability and cooperation, and these factors also guide organizational sentencing. However, as the federal system now operates, the breadth of potential liability generates significant pressure to cooperate at the investigative stage, and to settle when wrongdoing is uncovered. Accordingly, critics now call for procedural reforms as well as changes in the doctrine of corporate liability.

The persistence of the doctrine of respondeat-superior-based corporate criminal liability and its limitation in practice shed light on three key aspects federal criminal law. First, the Sentencing Guidelines have served as a more limited substitute for comprehensive criminal code reform. Second, the federal justice system lacks the resources to process the vast majority of cases falling under the criminal code, and prosecutorial discretion is relied upon to select a small fraction of cases for prosecution. Finally, like corporations, all defendants receive incentives for cooperation that may effectively compel them to plead guilty and/or assist in the investigation and prosecution of others.

Like corporate criminal liability, the entire federal criminal code has long been the subject of harsh criticism and calls for comprehensive code reform. Although the code reform efforts failed, they eventually gave birth to more limited sentencing reform. The federal code has been called "a mess"[153] and "a disgrace."[154] Indeed, virtually no one tries to defend the

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2012 Sourcebook of Federal Sentencing Statistics, supra note 98, at tbl. 51. The median restitution amount imposed in Fiscal Year 2012 was $138,802, while the mean amount was $447,440. *Id.* at tbl. 52.

[148]U.S. SENTENCING GUIDELINES MANUAL, *supra* note 111, at § 8B1.2. The guidelines specify that remedial orders are potentially duplicative of administrative penalties and "should be coordinated with any administrative or civil actions." *Id.* § 8B1.2, cmt.

[149]*Id.* § 8B1.3 cmt. Direct monetary sanctions are preferable to community service where the corporation is not uniquely qualified to remedy the harm. *Id.*

[150]*Id.* § 8B1.3.

[151]*Id.* § 8B2.1(a), 8D1.4(b)(1).

[152]*2012 Sourcebook of Federal Sentencing Statistics, supra* note 98, at Table 53.

[153]Robert H. Joost, *Federal Criminal Code Reform: Is it Possible*? 1 BUFF. CRIM. L. REV.

federal criminal code, which is actually a haphazard compilation (rather than a unified code) of offenses enacted over two hundred years. The unsystematic statutory penalties reflect the code's haphazard growth. The federal code is unquestionably overbroad in several respects: it includes duplicative and overlapping laws, laws that are not well defined, laws that encroach on matters better left to the states, and laws that criminalize conduct better left to civil law.[155] Indeed, no one knows exactly how many federal crimes there are, though it is likely more than 4,000.[156] Additionally, in many respects federal criminal law is not tailored to limit liability to cases of true fault or blameworthiness. The federal insanity defense, standards for federal accomplice liability, and definition of federal weapons and immigration offenses are all examples of doctrines that fail to tailor criminal liability to blameworthiness or moral guilt.[157]

Despite widespread recognition of these serious problems, Congress has been unable to pass comprehensive criminal code reform[158] and it has effectively abandoned the effort. In its place, Congress enacted the legislation authorizing the U.S. Sentencing Guidelines, which have served as a more limited substitute for reform of the code itself.[159] To bring about rational and proportionate sentencing, the Sentencing Commission adopted a modified "real offense" approach that gives significant weight to facts that are not elements of the offense charged but were considered to be relevant to the proper sentence.[160] The Guidelines applicable to individual defendants rely heavily on non-statutory factors such as the amount of loss, the number and type of victims, and whether a weapon was used. Similarly, the Organizational Sentencing Guidelines also employ non-statutory factors—such as the harm caused, the pervasiveness of wrongdoing within the organization, and whether there was an effective compliance program—to tailor punishment to culpability and harm.[161]

195, 195 (1997).

[154]Julie R. O'Sullivan, *The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006).

[155]*See generally* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederlization*, 54 AM. U. L. REV. 747 (2005).

[156]*Id*. at 753 (citation omitted).

[157]Sara Sun Beale, *Is Corporate Criminal Unique?*, 44 AM. CRIM. L. REV. 1503, 1513-16 (2007).

[158] For a description of the unsuccessful efforts, see Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45 (1998). *See also* Joost, *supra* note 153, at 2013-12.

[159]*See* Joost, *supra* note 153, at 210-12.

[160]Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 7-14 (1988). When this article was published, Breyer was a judge on the U.S. Court of Appeals for the First Circuit and a member of the Sentencing Commission. In 1994 he was appointed to the U.S. Supreme Court.

[161]The initial Guidelines became effective in 1987. The organizational sentencing guidelines became effective November 1, 1991, after several years of public hearings and analyses.

Similarly prosecutorial discretion, which plays a critical role in corporate cases, is equally important in cases involving individual defendants. Heavy reliance on prosecutorial discretion is a consequence of the dramatic mismatch between the very broad scope of federal criminal jurisdiction and the relatively small size of the Department of Justice and the federal judicial system.[162] Federal authorities have the resources to prosecute only a tiny fraction of the offenses that fall within the terms of many federal criminal statutes. As both the courts have recognized, absent action by Congress the only solution to imbalance between prosecutorial resources and possible defendants is the exercise of prosecutorial discretion. For example, the Supreme Court has stated that "Whether to prosecute and what charge to file . . . are decisions that generally rest in the prosecutor's discretion."[163] To preserve that discretion, the Court has erected substantial barriers to judicial review of prosecutorial decision making.[164]

As a leading commentator explained, the federal system's reliance on prosecutorial discretion has created an administrative criminal justice system that offers an alternative to full enforcement of a far narrower code:

> The public may also want a system in which, within broadly defined zones of anti-social conduct, law enforcement officials set priorities and move resources effectively from one area to another depending on social need. Full enforcement of all social norms, even if it were otherwise desirable, would be very expensive. Moreover, the social cost of aggregate violations of any particular statute is not a constant, but rises and falls depending on the frequency and seriousness of violations at any given time, and the relative importance attached to the norm at different times.
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> . . . .
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> [T]he limited resources of the criminal justice system represent a choice, not a necessity, and it is a choice made with the understanding that specialized agencies will, subject to political control, allocate priorities in a sensible way. As a consequence, prosecutorial decisions inevitably combine judgments of desert with judgments of resource allocation. In practice, moreover, these judgments are so intertwined that they cannot easily be separated. Where penalty tariffs are relatively uncontroversial, and there is a general consensus favoring full or nearly full enforcement, the prosecutorial judgments to be made in particular cases will be more narrowly adjudicatory: determining the strength of the evidence and the presence or absence of fairly specific and commonly-accepted mitigating or aggravating circumstances. But with crimes that are less serious or more controversial, social judgments about the importance of enforcement are more likely to fluctuate with available resources. The strength of the evidence in the case (the measure of the suspect's guilt or innocence) comes to be a function of the amount of effort society is willing to expend to investigate, as well as of the likelihood of guilt, and the degree of the offender's culpability begins to be measured not only by comparing his conduct with that of others who have been charged and convicted, but also by factoring in the moral

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[162] *See* Beale, *supra* note 157, at 1506-13.

[163] United States v. Batchelder, 442 U.S. 114, 124 (1979).

[164] *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) (stating that "the decision to prosecute is particularly ill-suited to judicial review").

> and policy consequences of our unwillingness to expend the resources to catch very many of those who offend.[165]

This system of administrative decision making by federal prosecutors affects all criminal cases, not just those involving corporate defendants.

Finally, the federal criminal justice system depends upon guilty pleas—and cooperation—by the vast majority of defendants. Corporations complain that they cannot afford to go to trial and are coerced into cooperating with the government to avoid crippling sanctions.[166] But the pressure to plead guilty and cooperate in building a case against others is another general feature of federal criminal law, and individual defendants are often subject to even more powerful pressures as they seek to avoid or limit extremely long mandatory prison sentences. It is quite true that the system depends upon most defendants waiving their rights, but this "culture of waiver" in the federal courts extends to all defendants, not just corporate defendants., and corporate defendants may be in a more favorable position than individuals facing harsh mandatory prison sentences unless they cooperate.[167]

[165] Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 Fordham L. Rev. 2117, 2138-40 (1998) (footnotes omitted).

[166] Beale, *supra* note 157, at 1523-25.

[167] See generally Beale, *supra* note 157, at 1525-29.