

# THE DEVELOPMENT AND EVOLUTION OF THE U.S. LAW OF CORPORATE CRIMINAL LIABILITY AND THE YATES MEMO

Sara Sun Beale\*

## I. INTRODUCTION

In the United States, both the initial development of the doctrine of corporate criminal liability and the evolution of its use reflect a utilitarian and pragmatic view of criminal law. Corporate criminal liability developed in response to the Industrial Revolution and the rise of the scope and importance of corporate activities. In the federal system, the formative period for the doctrine of corporate criminal liability was the early twentieth century.<sup>1</sup> During this period, Congress responded to the unprecedented concentration of economic power in corporations by dramatically expanding the reach of federal law.<sup>2</sup> This expansion also addressed business concerns as well as new hazards to public health and safety.<sup>3</sup> Criminal liability for corporations, in addition to individual liability, was deemed necessary to make critical new regulatory schemes effective.<sup>4</sup>

Prosecutorial policies and corporate sentencing guidelines have reshaped the implementation of the law. The United States Department of Justice (DOJ) and the United States Sentencing Commission (Sentencing Commission) have taken a pragmatic and utilitarian approach in developing prosecutorial policies and sentencing guidelines for corporations. These prosecutorial and sentencing practices seek to reduce or eliminate the negative effects of imposing criminal liability while exploiting the law's power to deter criminal

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\* © 2016, Sara Sun Beale. All rights reserved. Charles L. B. Lowndes Professor of Law, Duke Law School. J.D., magna cum laude, University of Michigan; B.A., summa cum laude, University of Michigan. An earlier version of some of these ideas appears in Sara Sun Beale, *Entwicklung des US-amerikanischen Rechts der strafrechtlichen Verantwortlichkeit von Unternehmen*, 126 *Zeitschrift für die gesamte Strafrechtswissenschaft* 27, 27–54 (2014).

1. *Infra* Part II.

2. *Id.*

3. *Id.*

4. *Id.*

behavior, improve corporate citizenship, and bring about beneficial structural reforms.<sup>5</sup> Both the prosecutorial policies and the sentencing guidelines focus on corporate culpability.<sup>6</sup> This blunts the force of criticisms that *respondeat superior* liability is unrelated to true culpability. This focus on culpability in charging and sentencing also creates incentives for changes in corporate conduct. Corporations now 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 most recent chapter in the development of corporate criminal liability reflects not only a pragmatic attempt to craft procedures adapted to the special challenges of investigating and prosecuting corporate wrongdoing, but also the influence of public opinion. In 2015, the DOJ announced a new policy on individual accountability for corporate wrongdoing—articulated in a Memorandum from Deputy Attorney General Sally Yates—which reiterated the importance of prosecuting individuals, as well as corporations, and announced changes in prosecutorial practices.<sup>7</sup> Many saw the Yates Memo as a response to criticism that the DOJ had failed to prosecute individual wrongdoing in the corporate setting.<sup>8</sup> The DOJ's explanation of the Yates Memo included not only utilitarian and pragmatic justifications, but also multiple references to both the public's confidence in the system and the need for equal justice.<sup>9</sup> Most of the commentary has assessed the Yates Memo in pragmatic terms, considering the practical problems it may pose as well as the more fundamental questions of whether it will deter more corporate misconduct and change corporate culture.<sup>10</sup> These are critical issues, but the references to public opinion

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5. *Infra* Part III.

6. *Id.*

7. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, To Heads of Dep't Components & All U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), available at <https://www.justice.gov/dag/file/769036/download> [hereinafter *Yates Memo*]. The Yates Memo has now been incorporated into the United States Attorneys' Manual. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL at 9-27.220, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrn.htm#9-27.220](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm#9-27.220) [hereinafter USAM]; see *infra* Part II(A) (discussing the USAM).

8. See *infra* Part IV(A) (discussing the public demand for individual accountability).

9. See *infra* Part IV(B) (discussing the need for deterrence and reform of corporate wrongdoing and the influence of public policy concerns about a fair system and equal justice).

10. See, e.g., Gary G. Grindler & Laura K. Bennett, *True Cooperation: DOJ's "Reshaped Conversation" and Its Consequences*, CRIM. JUST., Summer 2015, at 32, 33, 37–41 (explaining why

and equal justice raise another intriguing question: how much should prosecutorial policy reflect public opinion in a democratic system?

This Article puts the Yates Memo into its historic context, arguing that it carries forward the pragmatic and utilitarian approach that has characterized the development and implementation of corporate criminal liability, but also adds something new. The new element is acknowledgement that individual accountability serves two functions. First, in tandem with corporate responsibility, individual accountability serves utilitarian functions. But regardless of any deterrent effect or stimulus for reform of corporate practices, the Yates Memo also recognizes the public demand for individual accountability and prosecutorial policies that give no preferential treatment to white-collar offenders. This Article concludes with brief comments on the relationship between prosecutorial policies and public opinion.

## II. THE PRAGMATIC AND UTILITARIAN ORIGINS OF CORPORATE CRIMINAL LIABILITY

The seminal case in the development of federal criminal law is *New York Central & Hudson River Railroad Co. v. United States*,<sup>11</sup> decided in 1909. The 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, “Given 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

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requiring companies to build cases against individual can be problematic, especially when relevant evidence is located in foreign jurisdictions where privacy or labor laws limit a corporation’s ability to disclose employees’ names or provide certain evidence); Elizabeth E. Joh & Thomas W. Joo, *The Corporation as Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 VA. L. REV. ONLINE 51, 53 (2015) (expressing concern that the Yates Memo may not increase individual charges because “harmful conduct is often caused by the acts of multiple agents who lack criminal intent and are unaware of each other’s acts”); Katelyn Polantz, *DOJ’s ‘Yates Memo’ Goes Too Far, Former Deputy AG Says*, NAT’L L.J. (2015), <http://www.nationallawjournal.com/id=1202743031700?keywords=Polantz&publication=National+Law+Journal> (stating former Deputy Attorney General James Cole’s view that the Yates Memo’s “all-or-nothing approach . . . will prove to be impractical”).

11. 212 U.S. 481 (1909).

for public enforcement and the need for corporate liability.”<sup>12</sup> This period saw the enactment of the Interstate Commerce Act of 1887,<sup>13</sup> the Elkins Act of 1903,<sup>14</sup> and the Sherman Antitrust Act of 1890,<sup>15</sup> which was the first federal statute to limit cartels and monopolies.<sup>16</sup> Like the Elkins Act, the Sherman Antitrust Act applied to both natural and corporate persons.<sup>17</sup>

The Elkins Act was Congress’ response to the Interstate Commerce Commission’s (ICC) claim that the absence of corporate criminal sanctions was a fatal flaw in critical regulatory legislation.<sup>18</sup> The ICC argued that allowing the imposition of criminal fines directly on the railroads was critically important for several reasons.<sup>19</sup> First, when the violations benefitted only the railroad, but not its officers and agents, the public—including possible jurors—was likely to disfavor convicting individual defendants regardless of the strength of the evidence.<sup>20</sup> 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.”<sup>21</sup> Finally, in some cases, individual

12. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1486 (1996) (footnotes omitted). 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.”).

13. Interstate Commerce Act of 1887, 24 Stat. 379 (repealed, see 49 U.S.C. §§ 501–507, 522, 523, 525, 526, 20102, 20502–20505, 20902, 21302, 21304, 31505–31504).

14. Elkins Act, ch. 708, 32 Stat. 847 (1903).

15. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as 15 U.S.C. §§ 1–7 (2004)).

16. There is considerable scholarly debate about the precise concerns that motivated Congress to pass the Sherman Antitrust Act; some scholars identified 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.” HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 58–61 (4th ed. 2011).

17. See Sherman Antitrust Act § 8 (defining “person” to include U.S. corporations and associations (this definition now appears in 15 U.S.C. § 7)). 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. *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 five-thousand dollars and imprisonment of one year. As amended, Section 1 now provides for punishment by a fine not exceeding one hundred million dollars for a corporation, and imprisonment for up to ten years and a fine not exceeding one million dollars for an individual. *Id.*

18. Elkins Act, ch. 708, 32 Stat. 847 (1903). As early as 1891, the ICC urged Congress to provide for corporate criminal liability. INTERSTATE COMMERCE COMM’N, FIFTH ANNUAL REPORT, S. MISC. DOC. NO. 52-31, at 16 (1st Session) (1892). Noting that the federal courts had held that corporations could not be prosecuted for criminal violations under the Interstate Commerce Act, the ICC argued that it was “defective at an important point” requiring immediate correction. *Id.*

19. S. MISC. DOC. NO. 52-31, at 16.

20. *Id.*

21. *Id.*

prosecutions were infeasible because of the difficulty of identifying any particular employee who was responsible.<sup>22</sup> In response to these calls for stronger legislation, Congress enacted the Elkins Act, which created corporate criminal liability for railroads under the Interstate Commerce Act.<sup>23</sup>

The facts that came before the Supreme Court vividly illustrated the problems described in the ICC's 1891 report. The prosecution involved the payment of illegal rebates in violation of the requirement that railroads charge all shippers at the same published rate.<sup>24</sup> New York Central's manager and assistant traffic manager agreed to an illegal rebate of five cents off the published price (twenty-three cents per one hundred pounds) in a contract to ship large amounts of sugar from New York to Detroit.<sup>25</sup> The Supreme Court noted that without the rebate the sugar might have been sent by boat, and the lower price helped the railroad respond to "severe competition with other shippers and dealers."<sup>26</sup> The managers were acting for the benefit of the railroad, not their own personal benefit, in granting the rebates.<sup>27</sup> 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.<sup>28</sup> 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 in this

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22. *Id.* at 16–17.

23. The Elkins Act 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.

. . .

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.

Elkins Act, ch. 708, 32 Stat. 847 (1903).

24. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 490–91 (1909).

25. *Id.* at 490.

26. *Id.* at 490–91.

27. *Id.*

28. *Id.* at 490.

case would have threatened the legitimacy and public respect for the law.<sup>29</sup> In contrast, under the Elkins Act it was possible to prosecute both the railroad and the employees;<sup>30</sup> the railroad's penalty was \$18,000 per violation, which added up to a total of \$108,000.<sup>31</sup> Adjusted for inflation, this penalty is equivalent to more than \$2.7 million in 2016,<sup>32</sup> a sum that would have been much more likely to get the attention of New York Central and its competitors.

The Supreme Court unanimously rejected New York Central's claim that the imposition of criminal liability was unconstitutional, and the Court established the federal standard for corporate criminal liability, extending the tort concept of *respondeat superior*.<sup>33</sup> As in tort law, the corporation may be held responsible for acts of the agent<sup>34</sup> in the course of his or her employment when the act is done, in whole or in part, for the benefit of the principal—here, the corporation.<sup>35</sup> Rather than construing an agent's powers strictly, the Court reasoned that a corporation may be held responsible for acts an agent has "assumed to perform for the corporation when employing the corporate powers actually authorized."<sup>36</sup> "[M]aking and fixing rates was within the scope of the authority" of the general freight manager and the assistant freight managers, and New York Central was properly held liable for their acts.<sup>37</sup> The Court explained 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."<sup>38</sup>

29. INTERSTATE COMMERCE COMM'N, FIFTH ANNUAL REPORT, S. MISC. DOC. NO. 52-31, at 16 (1st Session) (1892).

30. Elkins Act, ch. 708, 32 Stat. 847 (1903) (Acts, omissions, and failures of officers and employees "shall in every case be *also deemed* to be the act, omission, or failure of such carrier as well as *that of the person*." (emphasis added)).

31. *N.Y. Cent.*, 212 U.S. at 490.

32. *Inflation Calculator*, IN2013DOLLARS.COM, <http://www.in2013dollars.com/1909-dollars-in-2016?amount=108000> (last visited Nov. 14, 2016) (calculating \$108,000 in 1909 to be equivalent to \$2,730,381.79 in 2016).

33. *See N.Y. Cent.*, 212 U.S. at 494–99 (reasoning that public policy required corporations be held punishable with fines based on the knowledge and intent of the corporation's agents, who have been granted authority to act on the corporation's behalf).

34. *Id.* at 493 (citing *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 109, 111 (1893)).

35. *Id.* (citing *Lothrop v. Adams*, 133 Mass. 471, 471 (1882)).

36. *Id.* at 493–94 (citing *Wash. Gas-Light Co. v. Lansden*, 172 U.S. 534, 544 (1899)).

37. *Id.* at 494.

38. *Id.*

Acknowledging an early statement by Blackstone that a corporation cannot commit a crime,<sup>39</sup> the Court commented that “modern authority” accepted corporate criminal liability. The Court 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, 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.<sup>40</sup>

The Court determined that the imposition of corporate criminal liability was critical to the success of the regulation of interstate shipping rates, and it rejected the idea that there was any impediment to this important legislation.<sup>41</sup> 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.”<sup>42</sup> 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.<sup>43</sup> The Court also made it clear that it was not illegal—rather it was good public policy—to hold a corporation responsible for the actions of agents the corporation authorized to set rates, especially when those actions resulted in a profit for the corporation.<sup>44</sup> 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, based on 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

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39. *Id.* at 492 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*476).

40. *Id.* at 492–93 (quoting JOEL PRENTISS BISHOP, NEW COMMENTS ON THE CRIM. LAW UPON A NEW SYS. OF LEGAL EXPOS. § 417, 255–56 (1892)). Bishop has been called “the foremost law writer of the age.” Stephen A. Siegel, *Bishop, Joel Prentiss*, in YALE BIOGRAPHICAL DICT. OF AM. L. 47 (Roger K. Newman ed., 2009).

41. *N.Y. Cent.*, 212 U.S. at 496.

42. *Id.* at 495.

43. *Id.* at 495–96.

44. *Id.* at 495.

the abuses aimed at.”<sup>45</sup> Since Congress’ 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 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 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.<sup>46</sup> Although he did not write the opinion in *New York Central*, Oliver Wendell Holmes, Jr. was a member of the Court when it heard and decided the case.<sup>47</sup> 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 unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the 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.<sup>48</sup>

*New York Central* was also consistent with other Supreme Court decisions giving full effect to different critical aspects of the federal antitrust legislation adopted during this period.<sup>49</sup> 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.<sup>50</sup> President Theodore 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.<sup>51</sup> Although the Supreme Court’s

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45. *Id.* at 495–96.

46. *Id.* at 496.

47. Oliver Wendell Holmes, Jr. was appointed to the Supreme Judicial Court of Massachusetts in 1882. Maria C. Royle, *Climbing the Beanstalk: Justice Holmes and the Search for Reconciliation*, 22 VT. L. REV. 559, 583 (1998). He served there until his appointment to the United States Supreme Court in 1902. *Id.*

48. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

49. *See, e.g.*, *United States v. Joint-Traffic Ass’n*, 171 U.S. 505, 573 (1898) (rejecting the argument that Congress’ antitrust legislation unconstitutionally intruded on individuals’ right to contract); *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 326–27 (1897) (broadly construing the Sherman Act to govern railroads).

50. HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 560–61 (1954).

51. *Id.*

first decision gave the Sherman Antitrust Act a narrow reading that threatened its effectiveness, the Court subsequently issued a series of decisions between 1897 and 1911 that upheld lower court decisions preventing mergers, and it broke up the Standard Oil and American Tobacco trusts.<sup>52</sup> 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.

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.<sup>53</sup>

Although the only question presented in *New York Central* was whether the imposition of corporate criminal liability under the Elkins Act would violate due process,<sup>54</sup> the Supreme Court's opinion was written far more broadly. The holding in *New York Central* 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.<sup>55</sup> 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.<sup>56</sup>

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52. See *id.* at 445–77, 561–63 (discussing the series of antitrust cases decided between 1897 and 1911).

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

54. N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 492 (1909).

55. Laufer, *supra* note 53, at 1363–64.

56. See, e.g., *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 310 (2d Cir. 2009) (explaining that both the district and appellate courts rejected this argument made by a high level group of amici seeking to use the prosecution as a test case for reform).

### III. THE EVOLVING ENFORCEMENT OF CORPORATE CRIMINAL LIABILITY

Over the past three decades, the DOJ and the Sentencing Commission have reshaped the implementation of corporate criminal liability in the federal system. The new policies respond to various critiques of corporate criminal liability founded on *respondeat superior*. Standards guiding the decision whether to prosecute and guidelines determining what sanctions to impose on corporations that have been convicted now focus on corporate culpability. These standards and guidelines also seek to prevent future wrongdoing, advance other social goals (such as restitution to victims), and minimize undesirable social costs. These practices have substantially narrowed the real scope of corporate criminal responsibility and reduced the pressure for doctrinal change.

#### A. The Administrative Standards Governing Prosecutorial Discretion

The *United States Attorneys' Manual* (USAM) provides both general standards for the exercise of federal prosecutors' charging discretion applicable to all cases, and specific provisions governing the prosecution of corporations and other business entities.<sup>57</sup> *The Principles of Federal Prosecution of Business Organizations (Principles of Prosecution)*<sup>58</sup> makes it clear that federal prosecutors should not bring criminal charges merely because a case can be made on the basis of

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57. Compare U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL at 9-27.220 to 9-27.230 (stating general standards), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrn.htm#9-27.220](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm#9-27.220) [hereinafter "USAM"], with the standards for corporate prosecutions that are described below. The general standard 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. *Id.* 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.

*Id.* at 9-27.230.

58. *Id.* at 9-28.000.

*respondeat superior*.<sup>59</sup> 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*.<sup>60</sup> The *Principles of Prosecution* seems to mimic or adopt the moral culpability analysis recommended by many scholars.<sup>61</sup> The *Principles of Prosecution* states:

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 willingness to cooperate in the investigation of its agents;
5. the existence and effectiveness of the corporation's pre-existing compliance program;

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59. *Id.* at 9-28.300(A), 9-28.1300(A).

60. *Id.*

61. *E.g.*, 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). Although corporate criminal liability has been criticized on many grounds, “the sharpest and the most consistent criticism” is the claim “that it is both unwise and fundamentally unfair” to use *respondeat superior*—which requires no proof of corporate fault—as the basis for criminal liability. Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1513 (2009). For summaries of this critique and others, see Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481 (2009) (describing critiques based on the overbreadth of federal criminal law, the imposition of criminal liability without fault, excessive penalties, excessive prosecutorial power); Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89 (2004) (describing retributive and utilitarian critiques; the latter include law and economic and public choice perspectives).

6. the corporation's timely and voluntary disclosure of wrongdoing;
7. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
8. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
9. the adequacy of remedies such as civil or regulatory enforcement actions; and
10. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.<sup>62</sup>

Several of these factors address key aspects of corporate culpability that are not relevant to the bare test of *respondeat superior*, including 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 preexisting compliance program.

Indeed, the USAM expressly states that 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."<sup>63</sup> 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."<sup>64</sup> These factors bring federal

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62. USAM at 9-28.300(A) (internal cross-references omitted).

63. *Id.* at 9-28.500(A) (emphasis in original).

64. *Id.* at 9-28.500(B) (comment).

practice close to the standards proposed by many critics of *respondeat superior*.<sup>65</sup>

The *Principles of Prosecution* also requires prosecutors to give weight to another factor deemed critical by commentators:<sup>66</sup> the existence of a corporate compliance program.<sup>67</sup> 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.<sup>68</sup> 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.”<sup>69</sup> 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 Prosecution* also addresses 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 noncriminal alternatives, such as civil or regulatory enforcement actions, “would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct.”<sup>70</sup> This evaluation requires a case-by-case consideration of the need for criminal sanctions, including in part, an evaluation of the other sanctions that are available, the likelihood that an effective sanction will be imposed, and the strength of the regulatory authority’s interest.<sup>71</sup>

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65. See, e.g., Dervan, *supra* note 61 (describing the moral culpability analysis that critics suggest is necessary when determining corporate criminal liability).

66. See, e.g., Ellen S. Podgor, *Educating Compliance*, 46 AM. CRIM. L. REV. 1523, 1529 n.39 (2009) (collecting authorities advocating a good faith defense encompassing compliance).

67. *USAM* at 9-28.800(B) (comment) (noting, however, that a compliance program “that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability”).

68. *Id.*

69. *Id.*

70. *Id.* at 9-28.1200(A).

71. *Id.* at 9-28.1200.

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.<sup>72</sup>

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.<sup>73</sup>

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 has taken other remedial actions.<sup>74</sup> The *Principles of Prosecution* treats 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 awareness among employees that criminal conduct will not be tolerated.<sup>75</sup>

As a result, prosecutors consider the integrity and credibility of the corporation’s remedial and disciplinary procedures, and whether the corporation appropriately disciplined wrongdoers once they were identified.<sup>76</sup> 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

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72. *Id.* at 9-28.1100.

73. *Id.*

74. *Id.* at 9-28.700 to 9-28.760 (discussing the value of cooperation, attorney-client/work product protections, and obstruction); *id.* at 9-28.1000 (examining the weight afforded to restitution).

75. *Id.* at 9-28.1000(B). *But see* Dervan, *supra* note 61, at 15-17 (arguing that post offense conduct is not relevant to culpability in the commission of the offense).

76. *USAM* at 9-28.1000(B).

government's investigation.<sup>77</sup> It is often difficult for outside investigators to determine which individuals took action on behalf of the corporation and to 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 executives."<sup>78</sup> This cooperation may be especially beneficial to both the Government and the corporation, because without the corporation's assistance there might be a protracted investigation that would disrupt the corporation's business operations.

Finally, the *Principles of Prosecution* recognizes 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. 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.<sup>79</sup>

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

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77. *Id.* at 9-28.300(A), 9-28.900.

78. *Id.* at 9-28.700.

79. *Id.* at 9-28.1100(B) (comment) (footnote omitted).

## B. The Impact of the Administrative Standards Governing Federal Prosecutions

Although *respondeat superior* seems to permit a corporate prosecution whenever a rogue employee has violated the law, the discretionary approach under the *Principles of Prosecution* has substantially narrowed the effective reach of corporate liability. For example, between 2007 and 2015, fewer than two hundred corporations have been convicted per year in the federal courts.<sup>80</sup>

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 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 Prosecution* treats corporate cooperation as a substantial factor weighing against prosecution,<sup>81</sup> 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.<sup>82</sup> If an 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.<sup>83</sup>

Settlements take several forms. In many cases, corporations avoid criminal liability but accept civil liability and pay significant fines.<sup>84</sup> In other cases, negotiated guilty pleas also settle civil and administrative

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80. This figure is based on the Sentencing Commission's yearly reports of corporate convictions. See, e.g., *2015 Sourcebook of Federal Sentencing Statistics—Table 51*, U.S. SENTENCING COMMISSION, available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table51.pdf> (last visited Nov. 14, 2016) (detailing by category of crime the organizations that were convicted and showing what type(s) of punishment each bore).

81. *USAM* at 9-28.900 (covering voluntary disclosures); *id.* at 9-28.700 to 9-28.750 (discussing cooperation).

82. See Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and the Work Product Doctrine? A Preliminary "No,"* 45 AM. CRIM. L. REV. 1237, 1259 (2008) (noting that internal investigations have "become the standard of care whenever credible allegations of significant misconduct are raised in organizational settings" and "[i]ncreasingly . . . large-scale or particularly sensitive investigations are conducted by outside counsel from a law firm expert in such inquiries").

83. *USAM* at 9-28.900.

84. 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> (discussing the Bank of America case resulting from its role in the recent Recession and touching upon other financial institution cases of a similar nature).

charges. In 2009, for example, Pfizer Inc. and a subsidiary agreed to pay \$2.3 billion, which was “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.”<sup>85</sup> The settlement included a criminal fine of \$1.195 billion and forfeiture of \$105 million, along with a payment of \$1 billion to resolve the allegations under the civil False Claims Act and \$102 million to provide to civil claimants.<sup>86</sup> Some federal settlements also resolve state charges.<sup>87</sup>

Alternatively, the DOJ and a corporation may settle criminal, civil, and administrative charges by entering into a DPA or NPA. Unlike an NPA, a DPA requires judicial approval; information charging the offense and the DPA are filed with, and must be approved by, a federal district court.<sup>88</sup> Since 2000, the DOJ has entered into 404 publicly disclosed DPAs and NPAs, and it is thought that there have been others that were not publicized.<sup>89</sup>

These agreements frequently include provisions that the court could not require without the defendant’s agreement. For example, British Petroleum’s guilty plea agreement, arising from the Deepwater Horizon oil spill in the Gulf of Mexico, included a fine of \$4 billion,<sup>90</sup> which consisted of \$2.4 billion dedicated to acquiring, restoring, preserving, and conserving the marine and coastal environments, ecosystems, and bird and wildlife habitats; \$350 million to fund research, development, education, and training to be conducted by the

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85. *Justice Department Announces Largest Health Care Fraud Settlement in Its History*, U.S. DEPT OF JUSTICE (Sept. 2, 2009), <http://www.justice.gov/opa/pr/2009/September/09-civ-900.html>.

86. *Id.*

87. 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, 202 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (discussing how multijurisdictional cases with cooperation between the federal government and state governments, where the federal government takes the lead, can lead to state charges being dropped as part of the federal settlement agreement).

88. *Id.*

89. See *2015 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON, DUNN & CRUTCHER LLP (Jan. 5, 2016), [http://www.gibsondunn.com/publications/Pages/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx#\\_ftnref2](http://www.gibsondunn.com/publications/Pages/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx#_ftnref2) (showing figures based on the yearly totals in chart 1, excluding eight DPAs entered into by the SEC). For the years 2001–2012, Brandon Garrett has identified 255 DPAs and NPAs. Brandon L. Garrett, *The Corporate Criminal As Scapegoat*, 101 VA. L. REV. 1790, 1800 (2015).

90. Guilty Plea Agreement at 4, *United States v. BP Exploration & Prod., Inc.*, Docket No. 2:12-cr-00292-SSV-DEK, (E.D. La. Jan. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/43320121115143613990027.pdf>.

National Academy of Sciences; and the appointment of process safety and ethics monitors.<sup>91</sup>

Employing DPAs and NPAs, the DOJ has brought “structural reform prosecutions” aimed at the adoption of sweeping internal corporate reforms.<sup>92</sup> Using these techniques, the DOJ obtained demanding settlements from corporations such as “AIG, America Online, Boeing, Bristol-Myers Squibb Co., Computer Associates, HealthSouth, KPMG, MCI, Merrill Lynch & Co., and Monsanto,” and also various public entities.<sup>93</sup>

### C. Corporate Sentencing

The advisory Sentencing Guidelines (Guidelines) provide comprehensive recommendations for organizational sentencing in the federal courts,<sup>94</sup> including not only fines but also remedial measures and probation. The Guidelines tailor the fines to corporate culpability (not bare criminality), and they provide for other non-punitive remedial measures as well as measures intended to reform the corporation and decrease the likelihood of future offenses.<sup>95</sup> 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.”<sup>96</sup>

#### 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),<sup>97</sup> the Guidelines

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91. *Id.* at 4, Exhibit B, Exhibit B-1.

92. *See generally* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 854 (2007) (empirically analyzing the use of structural reform prosecutions).

93. *Id.* at 855.

94. U.S. SENTENCING GUIDELINES MANUAL § 8B introductory cmt. (2012). In *United States v. Booker*, 543 U.S. 220, 259–60, 266 (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. *Id.* In *Southern Union v. United States*, 132 S. Ct. 2344, 2348–49 (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.

95. U.S. SENTENCING GUIDELINES MANUAL § 8 introductory cmt.

96. *Id.*

97. *Id.*

provide that “the fine range . . . should be based on the seriousness of the offense and the culpability of the organization.”<sup>98</sup> To determine culpability, the Guidelines assign a numerical score, based on specified aggravating and mitigating factors, which allows courts to calculate a recommended fine range. 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.<sup>99</sup>

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.<sup>100</sup> The Guidelines also provide for a lesser fine if “necessary to avoid substantially jeopardizing the continued viability of the organization.”<sup>101</sup>

Upward or downward departures and variances from the Guidelines range are permitted in individual cases on the basis of factors that may also reflect lesser or greater culpability or harm.<sup>102</sup> The Guidelines identify factors “not . . . adequately taken into consideration by the guidelines” that might warrant upward or downward departure from the recommended range on an individual basis.<sup>103</sup> An upward departure may be warranted if the organization is exceptionally culpable or if the offense involved official corruption; it

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98. *Id.*

99. *Id.*

100. *Id.* §§ 8C2.8(a)(1)–(7).

101. *Id.* § 8C3.3(b).

102. *See generally id.* §§ 8C4.1–4.11 (listing a series of factors that may grant a departure from fines established within the guidelines).

103. *Id.* § 8C4 introductory cmt.

caused a risk of death or bodily injury; or it caused a threat to national security, the environment, or a market.<sup>104</sup> A downward departure may be warranted if the organization provides substantial assistance to authorities in the prosecution of other offenders; the organization is a public entity; the victims of the crime were members or beneficiaries of the organization; or the organization has agreed to pay remedial costs that greatly exceed the organization's criminal gain.<sup>105</sup>

## 2. Compliance Programs

Although efforts to prevent the offense are not a defense to liability based on *respondeat superior*, under the Guidelines an "Effective Compliance and Ethics Program" in place at the time of the offense generally reduces a corporation's culpability score.<sup>106</sup> This reduction does not apply, however, if the organization "unreasonably delayed reporting the offense,"<sup>107</sup> or if high-level corporate officials "participated in, condoned, or [were] willfully ignorant of the offense."<sup>108</sup> 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 offense.<sup>109</sup>

## 3. Probation

Probation provides a mechanism for supervision following conviction to encourage rehabilitation and minimize the chances of reoffending.<sup>110</sup> In felony cases, the Guidelines provide for one to five years of corporate probation.<sup>111</sup> In all other cases, probation of up to five years is appropriate,<sup>112</sup> 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

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104. *Id.* § 8C4.11 (exceptional culpability); § 8C4.6 (official corruption); § 8C4.2 (risk of death or bodily injury); § 8C4.3 (threat to national security); § 8C4.4 (threat to the environment); § 8C4.5 (threat to a market).

105. *Id.* § 8C4.1 (substantial assistance); § 8C4.7 (public entity); § 8C4.8 (victims were members of the organization); § 8C4.9 (agreement to pay remedial costs that exceed organization's gain).

106. *Id.* § 8C2.5(f)(1).

107. *Id.* § 8C2.5(f)(2).

108. *Id.* § 8C2.5(f)(3)(A).

109. *Id.* § 8C2.8(a)(11) (stating the factors the court should consider).

110. *Id.* § 8 introductory cmt.

111. *Id.* § 8D1.2(a)(1).

112. *Id.* § 8D1.2(a)(2).

conduct.”<sup>113</sup> 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.<sup>114</sup> In the fiscal year 2015, 76.8% of convicted organizational offenders were placed on probation.<sup>115</sup>

#### 4. Remedial Measures

The Guidelines provide that, whenever possible, corporate sentencing should include non-punitive remedial measures aimed at making the victims whole.<sup>116</sup> Courts may order organizations to give notice to victims<sup>117</sup> and to make monetary or in-kind restitution.<sup>118</sup> Organizations may be subject to remedial orders such as product recalls and environmental clean-up orders.<sup>119</sup> They may be ordered to perform community service if they are “uniquely” competent to repair the harm caused.<sup>120</sup> Community service requirements must be “reasonably designed to repair the harm caused by the offense.”<sup>121</sup> 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.<sup>122</sup> In fiscal year 2015, compliance programs were ordered in 28.2% of all corporate crime cases.<sup>123</sup>

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113. *Id.* § 8 introductory cmt.

114. *Id.* § 8D1.4 cmt. n.1.

115. *2015 Sourcebook of Federal Sentencing Statistics—Table 53*, U.S. SENTENCING COMM’N, available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table53.pdf> (last visited Nov. 14, 2016).

116. U.S. SENTENCING GUIDELINES MANUAL § 8 introductory cmt.

117. *Id.* § 8B1.4.

118. *Id.* § 8B1.1. Data from Fiscal Year 2015 shows that restitution orders are less frequent than one might expect. In 2015, only 16.6 % of corporations were sentenced to both fines and restitution, 14.4 % received restitution only and in 48.1% of cases the court only imposed a fine. *2015 Sourcebook of Federal Sentencing Statistics—Table 51*, *supra* note 80 (explaining the punishments imposed on convicted corporations). The median restitution amount imposed in fiscal year 2015 was \$407,541, while the mean amount was \$19,471,980. *2015 Sourcebook of Federal Sentencing Statistics—Table 52*, U.S. SENTENCING COMMISSION, available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table52.pdf> (last visited Nov. 14, 2016).

119. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B1.2 cmt. (explaining that the guidelines specify that remedial orders are potentially duplicative of administrative penalties and “should be coordinated with any administrative or civil actions”).

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

121. *Id.* § 8B1.3.

122. *Id.* §§ 8B2.1(a)(1), 8D1.4(b)(1).

123. *2015 Sourcebook of Federal Sentencing Statistics—Table 53*, *supra* note 115.

#### IV. CRITICISM OF THE DOJ'S PROSECUTORIAL PRACTICES AND THE YATES MEMO

Despite the efforts of the DOJ and the Sentencing Commission 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 widely criticized, especially in the wake of the 2008 financial crisis. The intense criticism of the DOJ's conduct during the tenure of Attorney General Eric Holder set the stage for the Yates Memo.

##### A. Criticism of the DOJ's Prosecutorial Practices in Corporate Cases

Scholars, judges, and members of Congress have questioned the propriety and effectiveness of the Government's use of charging and sentencing discretion to create incentives for corporate cooperation in identifying culpable individual conduct.<sup>124</sup> Although they agree that the DOJ's practices are flawed, critics do not all identify the same problems.

Some critics charge that broad entity liability under *respondeat superior* imposes undue pressure on corporations and undermines fundamental rights, including the right to counsel.<sup>125</sup> They say corporations have been forced to become part of the prosecutorial team.<sup>126</sup> This line of argument suggests that the DOJ has been too aggressive in compelling corporations to assist in the pursuit of individuals.

But other critics charge that the Government too seldom employs the fruits of corporate cooperation to bring individual prosecutions, even when a corporation's own admissions have made it clear that there were culpable individuals.<sup>127</sup> The DOJ has been widely criticized

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124. See generally, e.g., Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23, 32-58, 59-96 (2010) (tracing the development of the role of the corporation as a branch office of the prosecutor and describing the negative effects of this change).

125. See, e.g., *id.* at 53-57 (explaining that the DOJ routinely demanded the entity under investigation waive attorney-client privilege and not advance their employees' legal fee, resulting in inadequate legal representation).

126. *Id.* at 28.

127. The most prominent scholarly critic is Brandon Garrett. See generally Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1790, 1794-96, 1830 (2015) (arguing that individuals are seldom prosecuted when corporate crimes are investigated and proposing several reforms). The most prominent Congressional critic is Senator Elizabeth Warren. See, e.g., Peter Schroeder, *Sens. Warren, Shelby: Criminal Bank Execs Should Face Arrest*, HILL (Sept. 9, 2014, 12:49 PM EDT), <http://thehill.com/policy/finance/217110-warren-shelby-agree-on-need-to-prosecute-bank-exec>s (describing Senator Warren as "a longtime advocate for harsher penalties

for failing to be sufficiently aggressive in prosecuting employees for misconduct in connection with the financial crisis of 2008.<sup>128</sup> According to this view, the practice of seeking corporate cooperation and structural reforms has displaced efforts to prosecute individuals and has undermined, rather than enhanced, deterrence. Judge Jed Rakoff stated the argument this way:

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, 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.<sup>129</sup>

## B. The Yates Memo

The widespread criticism of the Holder Administration's response to the 2008 financial crisis set the stage for the reassessment of prosecutorial policies and practices that took place after the confirmation of Attorney General Loretta Lynch and Deputy Attorney General Sally Yates.<sup>130</sup>

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for individual executives" and noting her "concern that actions tied to the financial collapse have resulted in fines and settlements but not arrests").

128. See generally Robert Quigley, *The Impulse Towards Individual Criminal Punishment After the Financial Crisis*, 22 VA. J. SOC. POL'Y & L. 103, 128–37 (2015) (noting the popular criticism of Judge Rakoff and numerous polls finding that many Americans felt that banks and their employees were not prosecuted accordingly, leading to "a sense of unpunished criminality").

129. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, 61 N.Y. REV. BOOKS (Jan. 9, 2014), available at <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/>. On the other hand, there has also been criticism of the DOJ's failure to prosecute any banks for their role in the financial crisis. E.g., David M. Uhlmann, Op-Ed., *Prosecution Deferred, Justice Denied*, N.Y. TIMES (Dec. 13, 2013), at A23, available at <http://www.nytimes.com/2013/12/14/opinion/prosecution-deferred-justice-denied.html>.

130. Deputy Attorney General Yates has said that when she and Attorney General Lynch arrived at the DOJ to take up their new responsibilities, both had the public's concerns about Departmental policies in corporate fraud cases foremost in their minds. *Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing*, U.S. DEP'T OF JUSTICE (Sept. 10, 2015), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers->

The Yates Memo restates the DOJ's view of criminal law and prosecutorial discretion as utilitarian tools that should be used pragmatically to protect the public, but it also emphasizes a new element: the public demand for individual accountability. The bulk of the Yates Memo makes pragmatic adjustments in departmental practices to overcome the special problems of pursuing individuals for misconduct in the corporate setting.<sup>131</sup> These procedural adjustments are intended to implement the policy decision to "strengthen [the] pursuit of individual corporate wrongdoing."<sup>132</sup> This policy decision, rather than the procedures that implement it, is the heart of the Yates Memo.

In the formal memorandum announcing the policy, Deputy Attorney General Yates began by identifying the overarching goal of corporate enforcement in purely utilitarian terms: "protect[ing] our financial system and, by extension, all our citizens."<sup>133</sup> But in explaining the reemphasis on individual liability, Yates did not rest solely on utilitarian reasoning:

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for

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remarks-new-york-university-school [hereinafter *Yates Remarks Sept. 10, 2015*]. Accordingly, they convened "a group of experienced lawyers from all across the department and the U.S. Attorney community" to examine how the DOJ approaches corporate investigations. *Id.*

131. Ms. Yates described the challenges:

[T]hese cases do have a special set of challenges, challenges that can impede our ability to identify the responsible parties and to bring them to justice. It is not easy to disentangle who did what within a huge corporate structure—to discern whether anyone had the requisite knowledge and intent. Blurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme. There are often massive numbers of electronic documents and for corporations that operate worldwide, there are restrictive foreign data privacy laws and a limited ability to compel the testimony of witnesses abroad.

Justice News, *Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference*, U.S. DEP'T OF JUSTICE (May 10, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association> [hereinafter *Yates Remarks May 10, 2016*].

132. *Yates Memo*, *supra* note 7, at 2–3.

133. *Id.* at 1.

their actions, and it promotes the public's confidence in our justice system.<sup>134</sup>

Deterrence and preventing future misconduct by changing corporate behavior are utilitarian goals. But Yates' separate emphasis on holding the proper parties "responsible" seems to strike a retributive note, and it is difficult to connect her final comment about public confidence in the justice system with any of the standard theories of punishment.

On at least two occasions, Yates has restated the DOJ's concern with public opinion. Speaking the day after the release of her memo, Yates seemed to acknowledge that public criticism of the DOJ's failure to bring individual prosecutions was one of the factors motivating the new policy:

[R]egardless of how challenging it may be to make a case against individuals in a corporate fraud case, it's our responsibility at the Department of Justice to overcome these challenges and do everything we can to develop the evidence and bring these cases. The public expects and demands this accountability. Americans should never believe, even incorrectly, that one's criminal activity will go unpunished simply because it was committed on behalf of a corporation. We could be doing a bang-up job in every facet of the department's operations—we could be bringing all the right cases and making all the right decisions. But if the citizens of this country don't have confidence that the criminal justice system operates fairly and applies equally—regardless of who commits the crime or where it is committed—then we're in trouble.<sup>135</sup>

Eight months later, Yates restated the rationale for the policy announced in the Yates Memo, again emphasizing both utilitarian grounds—deterrence and changing corporate culture—and the need for prosecutorial policies that are perceived to be fair.<sup>136</sup>

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134. *Id.*

135. *Yates Remarks Sept. 10, 2015, supra* note 130.

136. Speaking at the White Collar Crime Conference in 2016, Yates stated:

The bad acts of individuals have grave consequences, from the loss of jobs to the corruption of government officials, from the foreclosure of homes to the destruction of financial security and economic confidence. So holding accountable the people who committed the wrongdoing is essential if we are truly going to deter corporate misdeeds, have a real impact on corporate culture and ensure that the public has confidence in our justice system. We cannot have a different system of justice—or the perception of a different system of justice—for corporate executives than we do for everyone else.

*Yates Remarks May 10, 2016, supra* note 131.

What should we make of this emphasis on public opinion and the public demand for individual accountability? In context, it seems to be a clear reference to criticism of the failure to prosecute individuals responsible for the corporate wrongdoing in the financial crisis of 2008. Many knowledgeable observers faulted the DOJ for emphasizing corporate settlements and failing to pursue individual liability,<sup>137</sup> and the Yates Memo may be a desirable course correction in response to well-founded critiques by experts as well as the general public. Yates' utilitarian arguments linking individual liability to deterrence and changes in corporate culture are consistent with many of the expert critiques, and the Yates Memo was the product of a working group of DOJ lawyers convened to consider how to improve the DOJ's approach to corporate misconduct.<sup>138</sup> According to this view, the Memo adopted (at least in part) a better approach to achieve widely shared utilitarian goals, supplemented by pragmatic procedural policies.

It is noteworthy that Deputy Attorney General Yates did not mention these expert arguments; instead she spoke of public opinion that may "incorrectly" condemn the DOJ, even when it is doing "a bang-up job."<sup>139</sup> Public opinion polls consistently showed broad support for more prosecutions after the 2008 financial crisis.<sup>140</sup> The majority of the public—seventy-nine percent in one survey—wanted prosecutors to find the people who were responsible for the financial crash and send them to jail.<sup>141</sup>

There are two problems with a shift in public policy to address the public's demand for more individual liability. First, as Yates—and many critics of the DOJ—have noted, even when criminal conduct has occurred in the corporate setting, it is difficult to bring successful

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137. See, e.g., Garrett, *supra* note 127, at 1793 (discussing Judge Rakoff's view that "prosecutors are too quick to settle corporate cases on lenient terms after hasty investigations," and that "prosecuting individuals would be more effective than 'imposing internal compliance measures that are often little more than window-dressing'").

138. Yates Remarks May 10, 2016, *supra* note 131.

139. Yates Remarks Sept. 10, 2015, *supra* note 130.

140. See Will Dobbs-Allsopp, 'Too Big to Jail' on Trial in Court of Public Opinion, MORNING CONSULT (Apr. 6, 2015), <https://morningconsult.com/2015/04/too-big-to-jail-on-trial-in-court-of-public-opinion/> (reporting that "[f]ifty-eight percent of voters surveyed said sending [more executives] to jail would deter Wall Street firms from committing financial crimes" and forty-four percent said fines would be ineffective); Quigley, *supra* note 128, at 128–29 (noting several polls).

141. Quigley, *supra* note 128, at 128–29 n.148. Many press accounts quote members of the public expressing these views. See, e.g., Charles Gasparino, *Why Nobody Went to Jail*, N.Y. POST (Mar. 1, 2011, 5:00 AM), <http://nypost.com/2011/03/01/why-nobody-went-to-jail/> (describing the public desire to identify the villains and put people in jail). One interesting poll found that respondents earning more than \$100,000 per year had the highest level of support for sending high-level employees to jail. Dobbs-Allsopp, *supra* note 140.

prosecutions against individuals.<sup>142</sup> Second, it is questionable how much of the conduct that led to the 2008 crisis can be properly called criminal, rather than actionable solely under civil law theories. A recent case provides a good example of the difficulty of proving even *civil* liability on the part of individuals for conduct during the financial crisis. The Second Circuit reversed Judge Jed Rakoff's decision imposing civil penalties over \$1.2 billion on Countrywide Home Loans, Bank of America, and Rebecca Mairone.<sup>143</sup>

The appellate decision is significant for two reasons. First, the decision interprets the mail and wire fraud statutes restrictively, holding that as a matter of law it is insufficient for the Government to prove that the defendants sold mortgages "they knew were not of the quality promised in their contracts."<sup>144</sup> The court held that it is necessary to demonstrate "contemporaneous fraudulent intent" to "prove a scheme to defraud through contractual promises."<sup>145</sup> Under this interpretation, a wider range of conduct constitutes merely a breach of contract, not fraud, on the part of either corporate entities or individuals. Second, the decision reversed one of the very few cases in which an individual had been liable—even civilly—for faulty loans.<sup>146</sup> Recall that Judge Rakoff, whose decision was reversed, has been a sharp critic of the DOJ's failure to prosecute individuals.<sup>147</sup> The reversal of his decision to impose even civil liability—if it stands—demonstrates just how hard it might be to impose criminal liability. These difficulties are not something the public is likely to understand.<sup>148</sup>

This raises an intriguing question: in a democratic system, how much should prosecutorial policy reflect public opinion? In the United States, prosecution is an executive function and, as a structural matter, it is subject to direct or indirect political accountability.<sup>149</sup> What are the

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142. *Yates Remarks May 10, 2016*, *supra* note 131. *See also* Garrett, *supra* note 127, at 1823–38 (discussing the obstacles in prosecuting individuals for corporate crimes).

143. *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 652–53 (2d. Cir. 2016).

144. *Id.*

145. *Id.* at 653, 660–62.

146. *Id.* at 653.

147. *See* Rakoff, *supra* note 129 (discussing the failure of federal prosecutors to prosecute high-level executives).

148. *See generally* SAMUEL W. BUELL, *CAPITAL CRIMES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE* (2016) (explaining that business crime is seldom black and white and attempting to fill gap in American's understanding).

149. In the States, the accountability is generally direct, through prosecutorial elections. In the federal system, it is indirect: the leadership of the DOJ, including the U.S. Attorneys, is made up of political appointees nominated by the President and confirmed by the Senate. For a discussion of

limits of that accountability? What if there is strong public support for some policies that the criminal justice experts believe to be unjustified and perhaps counterproductive?<sup>150</sup> Most people get their information about the criminal justice system from the news media—which provides a distorted view<sup>151</sup>—thus public opinion about criminal justice policies may be based on misunderstanding and lack of knowledge.<sup>152</sup> Members of the public might shift their views if they had more information. In an experimental setting, when subjects were provided with additional information, many changed their views on criminal justice issues.<sup>153</sup> In the absence of such information, how much weight should the public's views be given?

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political accountability for prosecutorial discretion in the U.S. system, and a comparison to the French and German systems, see Sara Sun Beale, *Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control*, in *DISCRETIONARY CRIMINAL JUSTICE IN A COMPARATIVE CONTEXT* ch. 3 (Michele Caianiello & Jacqueline S. Hodgson, eds., 2015) (comparing and contrasting the functions of a prosecutor's role and the distinctive hiring practices and training of prosecutors in the three countries that lead to the varying differences in the amount of political accountability and prosecutorial discretion).

150. One example is the divergence between expert and lay opinion on the efficacy of increasing punishment to increase deterrence and reduce crime. Although members of the public generally assume that more punishment will translate into reduction in crime rates, in reviewing the available studies, the National Academy of Sciences concluded that the deterrent effect is limited and diminishes sharply as punishments increase. See generally COMMITTEE ON LAW AND JUSTICE, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 155 (Jeremy Travis, Bruce Western & F. Stevens Redburn eds., 2014) (concluding that “the evidence base demonstrates that lengthy prison sentences are ineffective as a crime control measure,” and “the incremental deterrent effect of increases in lengthy prison sentences is modest at best”). For a discussion of the differences between the lay public and expert views of criminal justice policy and the role that cognitive errors may play in shaping lay views, see Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 *BUFF. CRIM. L. REV.* 23, 47–51, 57–64 (1997) (discussing research finding manner in which media frames news can increase fear of crime and its salience to the public, and describing cognitive errors that distort public's views of crime).

151. See generally Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 *WM. & MARY L. REV.* 397 (2006) (describing the variance between the increasing rate of media coverage of violent crimes versus the declining number of murder rates and how media distorted the public's opinion).

152. See, e.g., Barry Mitchell & Julian V. Roberts, *Sentencing for Murder: Exploring Public Knowledge and Public Opinion in England and Wales*, 52 *BRIT. J. CRIMINOLOGY* 141, 145–55 (2011) (describing a survey finding public misunderstanding and lack of knowledge about murder sentencing).

153. Julian V. Roberts & Anthony N. Doob, *News Media Influence on Public Views of Sentencing*, 14 *LAW & HUM. BEHAV.* 451, 560–64 (1990). See also Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 *OHIO ST. J. CRIM. L.* 133, 176–77 (2011) (describing research finding participants in deliberative polling moved toward greater leniency after small group discussions).

*V. CONCLUSION*

As noted above, Justice Holmes famously stated that the life of the law is experience rather than logic, and it must respond to the “felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious.”<sup>154</sup> The Yates Memo attempts to adapt the DOJ’s utilitarian and pragmatic approach to corporate criminal liability in light of our contemporary experience and the “felt necessities of the time,” while also responding to the public’s “intuitions” of public policy.

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154. *Supra* text accompanying note 48.