

# Retbinking Criminal Corporate Liability

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*Under current federal law, a corporation, no matter how large or small, is criminally liable if a member of the organization commits a crime within the scope of employment and at least in part with the intent to benefit the company. This Article challenges that doctrine and contends that where it seeks to charge a corporation criminally, the government should bear the burden of establishing as an additional criminal element that the corporation failed to have reasonable policies and procedures to prevent the employee's conduct. Narrowing the scope of criminal corporate liability is supported by the reasoning of a series of Supreme Court decisions that curtailed the application of civil corporate vicarious liability in the context of punitive damages and certain claims under Title VII. This Article applies the logic behind those cases to the criminal context and argues that a similar rethinking of criminal corporate liability is long overdue. Far from giving corporations a shield to commit fraud, a system that ties criminal liability to the lack of an effective compliance program will do what the practical limitations on a prosecutor's time and resources could never permit—incentivize boardrooms around the country to devise, implement, and monitor compliance measures. Indeed, this Article demonstrates, through an examination of post-Enron deferred prosecution agreements, that the government has increasingly used criminal corporate liability to encourage reforms to internal corporate compliance measures that can best prevent and detect the crimes engaged in by company employees. Those agreements, as well as the Sentencing Guidelines and other government guidelines, provide the measure of what the government views as appropriate corporate behavior and provide a template for corporations seeking to implement internal mechanisms that will satisfy law enforcement. Where a corporation has such policies and procedures to deter and detect criminal actions by its employees, none of the legitimate concerns animating criminal corporate liability is implicated.*

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## INTRODUCTION

Corporate law abounds with legal fictions, commencing with the notion of a corporation, which is itself a creation of the State. One legal construct that is commonplace in corporate law is that governing criminal corporate liability. Under current federal law, a corporation, no matter how large or small, is criminally liable if a member of that societal construct commits a crime within the scope of employment and at least in part with the motive to benefit the company. The theory that has evolved is simple and seemingly logical: a corporation, being merely a person in law only, and not a real one, can act only through its employees for whom it should be held responsible. Thus, if criminal corporate liability is to exist at all, then the corporation must be responsible for the actions of its employees through which it acts.

This Article challenges that doctrine. Wholesale adoption of vicarious liability agency principles flies in the face of the precepts that govern criminal liability. The legal system should not impose criminal liability, as distinct from civil liability, on a corporation anytime an employee commits a crime within the scope of employment that is intended by the employee to benefit the company in whole or in part. Such a system of strict liability for a corporation, while often warranted and in tune with the goals of civil liability, has no place in the criminal law. Strict liability is antithetical to the dual goals in the criminal law of deterrence and retribution. For such reason, criminal liability with respect to persons, as opposed to corporations, generally eschews the notion of strict liability in favor of imposition of liability only where the individual voluntarily participates in an act with the requisite personal state of mind, that is, the *actus reus* and *mens rea* to be guilty.

Where a corporation has effective policies and procedures to deter and detect criminal actions by its employees, none of the legitimate concerns animating criminal corporate liability is implicated. Neither specific nor general deterrence are furthered in such a situation since the company has already taken all the actions that the law, and the government, should or likely would impose upon conviction. In short, there is nothing to deter since the corporation is already doing exactly what society wants the corporation to do. With respect to retribution, unless one adopts the extreme view that merely employing a person who commits a crime is a “wrong” deserving of criminal punishment of the employer—a view that has never been a part of our shared values regarding criminal corporate law and has been rejected by law enforcement and regulatory agencies—there is no organizational conduct deserving of criminal sanction. Where a company has already employed all reasonable measures to thwart the criminal activity of the employee, the goals of the criminal law with respect to a corporation, as opposed to an individual, have been met.

Such a rethinking of criminal corporate law is supported by recent Supreme Court decisions in the civil arena. Remarkably, under current law, it now can be easier to impute the conduct of an employee to an employer in connection with a criminal violation than with a civil one. The Supreme Court has already curtailed the application of civil corporate vicarious liability in the context of punitive damages and certain claims under Title VII.<sup>1</sup> The Supreme Court has yet to address the reach of these civil decisions to criminal corporate vicarious liability, but this Article argues that the reasoning of these civil corporate liability decisions strongly supports the theory of criminal corporate liability advocated herein. Adoption of the rationale of the Court's civil decisions would lead to a complete sea change in the scope of criminal vicarious liability. Such a rethinking of criminal corporate liability is long overdue.

As shown herein, the government has itself provided evidence that such a system would adequately vindicate its concerns. The post-Enron era has seen a dramatic rise in the number of so-called deferred prosecution agreements with major corporations. A deferred prosecution agreement is, in essence, a form of probation which enables a corporation to avoid pleading guilty to a crime or even being indicted. Under such an agreement, the company commits to performing certain agreed-upon measures and refraining from criminal conduct for the duration of the agreement's term, at the end of which if the company has complied with all the terms, the government drops all charges.<sup>2</sup> An examination of those government corporate agreements reveals that the government has consistently sought corporate reforms regarding internal compliance measures that can best prevent and detect the crimes engaged in by company employees. Those agreements provide the measure of what the government views as appropriate corporate behavior, that is, adequate systems to thwart fraud, and thus a template for corporations seeking to implement internal mechanisms that will satisfy law enforcement. Where a corporation has in fact undertaken such reforms at the time of the criminal action of one of its employees, the goals of the criminal law, as interpreted by the lead agency tasked with pursuing those aims, are already satisfied.

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1. Title VII, 42 U.S.C. § 2000e (2000 & Supp. III 2003); *see also* discussion *infra* Part II.B.1.

2. For ease of reading, the term "deferred prosecution agreement" is used in this Article to encompass both deferred prosecution and non-prosecution agreements. The latter term is traditionally used in law enforcement to refer to agreements that are reached privately between the government and a defendant (be it a corporation or an individual) where there are no publicly filed charges and no court supervision of compliance with the agreement. The term "deferred prosecution agreement" typically refers to an agreement filed in court to settle criminal charges that have been instituted by the government and involves court approval and supervision of its terms. In both cases, if the corporation fully complies with the terms of the agreement, at the end of the agreement's term, the government either dismisses any pending charges (in the case of a deferred prosecution agreement) or agrees that no charges will be filed (in the case of a non-prosecution agreement). *See infra* text accompanying notes 46-47. *See generally* CORPORATE CRIME REPORTER, CRIME WITHOUT CONVICTION: THE RISE OF DEFERRED AND NON PROSECUTION AGREEMENTS (2005), <http://www.corporatecrimereporter.com/deferredreport.htm> [hereinafter CRIME WITHOUT CONVICTION] (summarizing post-Enron deferred and non-prosecution agreements); Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV 1863 (2005) (discussing recent deferred prosecution agreements).

This Article contends that where it seeks to charge a corporation as a defendant, the government should bear the burden of establishing as an additional element that the corporation failed to have reasonably effective policies and procedures to prevent the conduct. Locating the burden on the government is consonant with general criminal law precepts that place the burden of proof of each essential element of a crime squarely on the government. The general precept in civil law that burdens of proof be placed on the party with greater access to the information has no applicability to criminal cases. Further, unlike in civil cases, the government in criminal cases has broad pre-charging discovery mechanisms—by virtue of the grand jury—by which it can develop evidence, if it exists, in order to meet its burden.

Such a rethinking of the parameters of criminal corporate liability redounds to the benefit of both the government and corporations. Limiting corporate liability to those corporations that have not taken all reasonable measures to prevent criminality by their employees will spur corporate action in precisely the area that is of most interest to the government and public. Indeed, such reforms are the impetus for the government's bringing corporate criminal prosecutions in the first place. But the government can hardly set up and monitor compliance systems within all corporations. If criminal liability hinged on whether or not effective measures are in place, corporations would have a powerful new incentive to implement such policies and procedures and to monitor them assiduously as a shield from criminal exposure if an employee nevertheless commits a crime.

Rethinking the standard for criminal corporate liability will also serve to correct an imbalance in power between the government and a corporation facing possible prosecution for the action of an errant employee. In the post-Enron world, it is the rare corporation that will risk indictment by the Department of Justice (DOJ), let alone a trial. The financial risks are simply too great. Knowing this, the government has virtually unfettered discretion to exact a deferred prosecution agreement from a corporation that mandates fines and internal reforms. Contrary to the system of checks and balances that pervades our legal system, including the criminal law with respect to individuals, no *systemic* checks effectively restrict the government's power to go after blameless corporations. Grossly disproportionate power may be warranted in situations where the corporation failed to take the necessary steps to prevent the illegality of its employee, since it enables the government to bring a swift and righteous action. But for a corporation that has already put in place the controls that the government would seek to impose, the primary effect of the current system is to render the corporation unable to defend itself and thus powerless in its dealings with a prosecutor who may be misguided or worse.

For the responsible corporation the new standard will provide a systemic check on the power of the overly aggressive, ill-informed, or even unethical prosecutor. For instance, the Citigroup and JPMorgan Chase cases may be examples of situations where this new criminal standard may cause the altered balance of power to lead to more condign results. Both of these major financial institutions entered into settlements with state prosecutors after criminal charges were threatened in relation to the companies' "prepay" transactions with Enron.<sup>3</sup> At the announcement of the multi-

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3. The Enron Task Force, established in January 2002 by the DOJ to investigate all crimes relating to the collapse of Enron in the winter of 2001, has not been shy to pursue investigations

million dollar criminal and civil settlements, the state criminal prosecutor was reported to say that there was insufficient evidence of criminal conduct.<sup>4</sup> That admission was startling, given that criminal exposure is supposed to be a prerequisite for action by the criminal authorities and suggests that even institutions as powerful in the financial world as Citigroup and JPMorgan Chase can cave under pressure to settle to avoid an indictment, even an unjust one.<sup>5</sup>

Corporations like Enron and WorldCom, where fraud was rampant and engaged in by senior management, will never be able to demonstrate that they have taken the measures necessary to prevent and detect crime in their midst. Prosecutors under this proposed revision to criminal corporate liability standards will still wield an enormous stick in dealing with such companies. Since corporate management will be greatly incentivized to protect the corporation from criminal liability by creating a strong and effective compliance program, the proposed new vicarious liability standard will have the advantage of maximizing the chances that such criminality will not take root.

No new criminal standard will solve all ills, and the misinformed or rare corrupt prosecutor will still be able to wreak havoc. A standard of criminal liability that cabins government discretion to those cases in which the corporation in fact is guilty of not taking all reasonable action to prevent and detect crime by its employees will lead to more just determinations; it will channel government inquiry toward the relevant criteria for evaluating criminal corporate liability. Notably, because the legal standard for liability informs settlement discussions, where a corporation can effectively show the government that it had an effective compliance system in place at the time of a misdeed, the responsible or wary prosecutor will relent.

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against financial institutions that engaged in criminal transactions with Enron. Notably, it passed on the criminal pursuit of Citigroup and JPMorgan Chase, leaving the field open to state prosecutors. See, e.g., Kurt Eichenwald, *Merrill Reaches Deal with U.S. in Enron Affair*, N.Y. TIMES, Sept. 18, 2003, at A1; Kurt Eichenwald, *Canadian Bank Will Pay Fine and Drop Unit in Enron Accord*, N.Y. TIMES, Dec. 23, 2003, at C1.

4. See Editorial, *Enron's Friends in Need*, N.Y. TIMES, July 31, 2003, at A24 ("Robert Morgenthau, the Manhattan district attorney, said that he could not prove a criminal case because it would have been hard to demonstrate that any individual banker had acted with intent to commit fraud. Moreover, many of the transactions between the banks and Enron were technically legal."); Kurt Eichenwald & Riva D. Atlas, *2 Banks Settle Accusations They Aided in Enron Fraud*, N.Y. TIMES, July 29, 2003, at A1.

5. Examples of corporate acquiescence to terms that go well beyond what would appear to be justified by the alleged criminal conduct are starting to abound in the post-Enron era. For instance, in the deferred prosecution agreement between the government and the New York Racing Association, Inc. (NYRA), the government required NYRA to either install slot machines itself or make "commercially reasonable" efforts to subcontract the work. The slot machine revenues were expected to fund court-mandated improvements in public education. Thus, by conditioning dismissal of the indictment on installing slot machines, the agreement went beyond reforming NYRA and implemented state public policy. See CRIME WITHOUT CONVICTION, *supra* note 2 (summarizing NYRA deferred prosecution); Greenblum, *supra* note 2, at 1878 & nn.108-09, 1893-94. For examples of other deferred prosecution agreements, see generally CRIME WITHOUT CONVICTION, *supra* note 2 (summarizing Bristol-Myers Squibb's deferred prosecution); *Interview of David Pitofsky*, CORP. CRIME REP., Nov. 28, 2005, at 14-15 (reporting that Oklahoma WorldCom prosecutor sought additional jobs in exchange for deferred prosecution agreement); *Interview of Mary Jo White*, CORP. CRIME REP., Dec. 12, 2005, at 14-15 (reporting that prosecutor in Bristol-Myers Squibb case insisted on corporate sponsorship of endowed chair at his alma mater).

Part I.A of this Article sets forth a brief overview of the history of criminal corporate liability and the parameters of the vicarious criminal liability doctrine pursuant to which an employee's conduct can be imputed to an employer. Part I.B then addresses how the broad standard for vicarious criminal liability has played out in practice in light of the Enron debacle and the subsequent spate of corporate scandals. This Article focuses on the rise of deferred prosecution agreements and discusses the interplay between that development and the criminal standard for vicarious liability.

Part II.A evaluates a standard of criminal corporate vicarious liability that would require the government to establish a defendant corporation's failure to implement an effective compliance system. The new standard is examined in light of the principles currently governing the imposition of criminal sanctions, as well as the benefits and costs to society, the prosecution, and corporations from such a revised standard.

Part II.B addresses recent Supreme Court decisions that support the approach articulated herein. Currently, there exists an anomaly between the standards for civil and criminal vicarious liability. This Article charts the evolution of the civil standard in a series of Supreme Court decisions addressing civil claims under Title VII and for punitive damages. This Article contends that the Supreme Court's decisions in the civil arena should bode ill for the continued vitality of the current expansive scope of vicarious criminal liability for corporations. The criminal standard for vicarious liability should not result in making it easier to use employee conduct to establish a criminal corporate charge than a civil one, as it currently does.

Part III details the various current sources for defining an effective compliance system, focusing on the DOJ guidance, a review of recent deferred prosecution agreements that mandate compliance measures, the United States Sentencing Commission guidance, and Securities and Exchange Commission (SEC) pronouncements. This Article argues that these sources collectively impart various bases for providing a jury with guidance in determining whether a company had implemented a reasonably effective system.

Part IV addresses the appropriateness of requiring the government to prove the absence of an effective compliance program, as opposed to placing the burden on a corporate defendant to establish as a defense that it had such a program.<sup>6</sup>

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6. Over the years, a small number of legal commentators have questioned the scope of criminal corporate liability, and some have suggested a system that incorporates in some manner the corporation's compliance systems into an evaluation of the imposition of liability. Those generally insightful articles have so far received little traction in the courts or Congress. None of those articles has, however, addressed the issue in light of recent Supreme Court pronouncements regarding civil corporate liability. None has examined the DOJ's spate of deferred prosecution agreements and their import with respect to corporate liability. None proposed placing the burden on the government to establish the propriety of imputing liability. See Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (arguing strict corporate liability may deter effective corporate monitoring); Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593 (1988) [hereinafter Brickey, *Rethinking Corporate Liability*] (describing 1956 Model Penal Code proposal that corporate criminal liability be limited by a due diligence defense); H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279, 324 (1995) ("The fundamental flaw in limiting the benefit of a company's compliance efforts to mitigation of punishment is that . . . regardless of the resources that are directed to compliance efforts, the corporation cannot avoid vicarious

## I. CRIMINAL CORPORATE LIABILITY: HISTORY AND CURRENT PRACTICE

## A. History

The ensuing discussion of the history of criminal corporate liability provides a necessary backdrop to understanding the thesis of this Article. It is not intended to be a comprehensive history of the permutations in this area of the law. That history has been extensively documented elsewhere.<sup>7</sup> The discussion below gives the reader an understanding of the context of the doctrine of criminal corporate liability in order to understand the current doctrine, the recent Supreme Court civil corporate liability cases, and the limitations proposed herein for criminal corporate liability. Further, this discussion illustrates that the modern state of criminal corporate liability owes more to the historic contingencies that led to its creation, specifically the legal formalisms attendant to the corporation-as-person metaphor, and to the singular context of antitrust laws, than to a coherent theory of how organizational criminal liability ought to be conceptualized differently from individual criminal liability. In a field otherwise fraught with disagreements, even about the parameters of the debate, this is one proposition on which nearly all scholars agree.<sup>8</sup>

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liability.”); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Criminal Liability*, 75 MINN. L. REV. 1095, 1121 (1991) (proposing a corporate “ethos” standard of liability under which a corporation should be found criminally liable only when “its ethos encourages criminal conduct by agents of the corporation”); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 HARV. L. REV. 1227, 1241–58 (1979) [hereinafter *Developments*] (proposing a standard of liability under which a corporation would be liable under respondeat superior principles; however, the corporation could rebut the presumption of liability created by respondeat superior by proving that it exercised due diligence); Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468, 504–07 (1988) (proposing imposition of criminal liability on corporations that cover up criminal conduct); Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 J. CORP. L. 731, 749–65 (1996) (recommending, among other things, a due diligence defense to criminal corporate liability); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 689 (1995) (arguing for a “corporate consciousness” defense under which a corporation can establish by a preponderance that an employee’s conduct is inconsistent with the corporation’s “rational choice to do right or wrong” as reflected in its compliance program).

7. See generally Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393 (1982) [hereinafter Brickey, *Brief History*] (discussing the development of the law of corporate criminal liability in both England and America); 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 nn.2–3 (1981) (describing problems associated with corporate criminal liability).

8. See generally John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 196 (1991) (“The bottom line is that the criminal law seems to be expanding into a variety of areas where it is infeasible or even irrational to ignore the costs of law compliance.”); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320 (1996) (“The doctrine of corporate criminal liability has developed . . . without any theoretical justification.”); Lawrence Friedman, *Essay in Defense of Corporate Criminal Liability*, 23 HARV. J. L. & PUB. POL’Y 833,

The history of the development of criminal corporate liability is, at bottom, the story of a practice in search of a theory.<sup>9</sup> At critical junctures, the decision of whether and when to impose criminal liability on corporations was made not principally as the product of a reasoned policy choice but as a result of shifting trends in legal formalisms. Indeed, it is notable that nearly every scholarly article on this topic at some point makes a concession to the effect that “the doctrine of corporate criminal liability has developed . . . without any theoretical justification.”<sup>10</sup>

As several scholars have documented, the early enabler of criminal corporate liability, as well as its confounder, was judicial acceptance of the legal anthropomorphism of the corporate form.<sup>11</sup> Under the common law, corporations were treated as artificial persons, separate juridical entities distinct in their legal identity and property holdings from the shareholders who created them, but judges who were asked to apply a criminal law of natural persons to a corporate “person” often found the analogy to be strained. Was a corporation capable of the moral blameworthiness required for punishment? Could a corporation whose scope of activity was limited by law truly be said to have “acted” when its agents took steps that went beyond their authorized powers? Did adherence to the letter of criminal procedure, which gave the accused the right to be physically present at certain stages of trial, to confront his accuser, and to take the stand in his own defense, preclude deploying the criminal process against the corporate form? Such questions were deemed vexing not least because corporate liability, as a supplement to individual liability, was often thought to be unnecessary.<sup>12</sup> Corporations, after all, can act only through agents and there was never any question but that the errant corporation’s agents, once found, could be tried and punished for their crimes.<sup>13</sup>

The question of the applicability, or lack thereof, of the corporation-as-person metaphor was behind a series of practices that shaped early notions of corporate liability. An appropriate starting point in tracing the history of American criminal

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833 (conceding “there has been surprisingly little studied consideration by American jurists and legal commentators of the *raison d’être* for corporate criminal liability,” but defending the doctrine as serving society’s need for condemnation of wrongful acts) (emphasis omitted); Bruce Coleman, Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 Sw. L.J. 908, 908–14 (1975) (exploring the reasons for and necessity of criminal liability on corporations).

9. See Brickey, *Brief History*, *supra* note 7; Coffee, *supra* note 7, at 386.

10. Fischel & Sykes, *supra* note 8, at 320; see also Coffee, *supra* note 8, at 196 (“The bottom line is that the criminal law seems to be expanding into a variety of areas where it is infeasible or even irrational to ignore the costs of law compliance.”). *But see* Friedman, *supra* note 8, at 833.

11. See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1479 (1996) (“Eighteenth-century courts and legal thinkers approached corporate liability with an obsessive focus on theories of corporate personality; a more pragmatic approach was not developed until the twentieth century.”).

12. Such reasoning was presumably behind Lord Holt’s 1701 statement, preserved without fact pattern or analysis, that a “corporation is not indictable but the particular members of it are.” Anonymous Case (No. 935), 88 Eng. Rep. 1518, 1518 (K.B. 1701).

13. Indeed, several civil law countries historically took just this approach. To this day, criminal corporate liability remains a new idea in civil law countries. See Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 90 (2004) (“Europe does not have a long history of recognizing corporate criminal liability.”).



corporate liability is English common law.<sup>14</sup> In the seventeenth century, common law judges, lacking a theory of vicarious liability to impute actions of agents to the corporation, struggled with the question of whether a corporation, being a juridical entity without physical form, was capable of the requisite physical action to substantiate a prosecution for a writ of trespass among other crimes with an element of physical action. At least as far back as 1635, the settled approach was to subject the corporation to liability only for crimes of nonfeasance, such as the failure to make necessary repairs, but to render it immune from crimes requiring misfeasance.<sup>15</sup>

It was not until the late nineteenth century, following the assimilation of vicarious liability into tort law, that English courts began to hold corporations liable for the actions of their agents, having recognized that to cling to the nonfeasance/misfeasance distinction had led to “incongruous” results that could not be justified.<sup>16</sup> In the cases that followed this fundamental shift, however, English courts continued to be constrained by the limits of the corporation-as-person metaphor, finding that corporations could only be guilty of misfeasance in the context of crimes of strict liability and not crimes with a “moral dimension,” including rape and murder but also crimes such as trespass, which required a mens rea that the corporation was presumed to be incapable of manifesting.<sup>17</sup> Moreover, English courts in the nineteenth century consistently rejected the idea that respondeat superior applied in the criminal context.<sup>18</sup>

In the United States, where early corporations were predominantly established to serve public or quasi-public ends, some of the earliest cases to impose liability on a

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14. An even earlier instance of criticism of corporate liability occurred in 1250, when Pope Innocent IV became one of the earliest critics of expansive criminal corporate liability by forbidding the excommunication of corporations on the grounds that corporations are impervious to damnation (to say nothing of the practical point that assets of an excommunicated corporation would thereafter be outside church jurisdiction). See John C. Coffee, Jr., *Making the Punishment Fit the Corporation: The Problems of Finding an Optimal Corporation Criminal Sanction*, 1 N. ILL. U. L. REV. 3, 3 (1980).

15. Brickey, *Brief History*, *supra* note 7, at 401 & n.51. Brickey's earliest example of this is the *Case of Langforth Bridge*, 79 Eng. Rep. 919 (K.B. 1635).

16. See James R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 91–92 (1976).

17. Even today, criminal corporate liability would not normally extend to crimes such as rape and murder. In a legal formalist sense, such a prosecution might arguably go forward along a theory of vicarious liability, so long as the agents acted in the scope of employment and at least in part to benefit the organization. In practice, however, the former requirement would be unlikely to be met in the case of murder and the latter is almost inconceivable in the case of rape. See Khanna, *supra* note 11, at 1484 n.37 (“[T]he normal rules regarding imputation of agent behavior to the principal would probably not allow imputation when the conduct falls outside the agent's scope of employment.”); Patricia B. Rodella, *Corporate Criminal Liability for Homicide: Has the Fiction Been Extended Too Far?*, 4 J.L. & COM. 95, 105–09 (1984); John M. Hickey, Comment, *Corporate Criminal Liability for Homicide: The Controversy Flames Anew*, 17 CAL. W. L. REV. 465, 466–67 (1981).

18. See Brickey, *Brief History*, *supra* note 7, at 417 (“[R]espondeat superior was rejected during the eighteenth century . . . Rather, the liability of each [actor was] determined by the degree of his participation.”) (footnote omitted) (emphasis in original). The case classically cited for this proposition, including by Brickey, is *Regina v. Saunders*, 75 Eng. Rep. 706 (K.B. 1575).

corporation arose in the context of public nuisances.<sup>19</sup> As with English law, these early cases, in addition to making a public/private distinction, also focused on the distinction between misfeasance and nonfeasance,<sup>20</sup> but such a distinction proved to have less traction in American law. In contrast to Lord Holt's statement<sup>21</sup> that a corporation cannot be prosecuted, two state court cases<sup>22</sup> decided in the 1850s rejected such a distinction as unwarranted and untenable and began to formulate policy arguments in favor of criminal corporate liability. The more forceful of these was that the corporation, as the beneficiary of the illegal conduct, ought to be made to bear the costs of its criminal conduct (in essence a deserts theory of punishment), although courts also advanced a deterrence rationale, noting it was often easier for law enforcement to punish the corporation as a whole than to arrest and prosecute individual agents who could not be located or whose relative culpability was difficult to ascertain.

Yet like their nineteenth-century English counterparts, these and other state court decisions were carefully circumscribed and continued to stop short of holding corporations responsible for crimes requiring evil intent. Two main arguments were advanced in favor of this limitation: (1) courts opined that a corporation that "has no soul" could not have the "actual wicked intent" required by certain crimes;<sup>23</sup> (2) invoking the doctrine of ultra vires, courts refused to attribute certain actions to a corporation when such actions were plainly outside the scope of what the corporation was legally empowered to do. Some courts confined this reasoning to specific intent crimes and remained willing to find corporations liable when the charged violation was a general intent crime, the theory being that for such crimes, the act itself could evidence the requisite mental state.

These early state cases laid the foundation for the landmark Supreme Court opinion in *New York Central & Hudson River Railroad v. United States*,<sup>24</sup> an early twentieth-century case widely relied on to this day as endorsing an expansive theory of criminal corporate liability.<sup>25</sup> At issue in the case was whether Congress had acted

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19. For instance, one early court analyzed the issue: "If an individual whose horse had fallen through a decayed bridge on the road had brought an action on the case to recover damages against the Corporation, no one would probably have thought of objecting that his common law action was taken away . . ." *President & Dirs. of the Susquehanna & Bath Rd. Co. v. People*, 15 Wend. 267, 268 (N.Y. 1836). According to Brickey, the theory of such early cases appeared to be that "since the corporation had the power to abate the nuisance, there could be no question that it had a duty to exercise that power." Brickey, *Brief History*, *supra* note 7, at 406.

20. *See, e.g.*, *State v. Great Works Milling & Mfg. Co.*, 20 Me. 41, 43 (1841) (refusing to extend corporate criminal liability to acts of misfeasance because a corporation "can neither commit a crime or misdemeanor, by any positive or affirmative act, or incite others to do so, as a corporation.").

21. *See supra* note 12 and accompanying text.

22. *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. 339 (1854) (cited in Brickey, *Brief History*, *supra* note 7, at 409-10); *State v. Morris & Essex R.R.*, 23 N.J.L. 360 (1852).

23. *State v. First Nat'l Bank*, 2 S.D. 568, 571 (1892).

24. 212 U.S. 481 (1909).

25. Friedman, *supra* note 8, at 835 ("[T]he Supreme Court ushered in the modern age of corporate criminal liability in *New York Central & Hudson River Railroad Company v. United States*"); *see also* Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 407

constitutionally when, in passing the Elkins Act, it had provided that illegal rebates granted by agents and officers of a common carrier could automatically be imputed to create criminal liability for the carrier itself. The Court framed the issue as a question of whether Congress has the power to subject a corporation to criminal punishment solely on the basis of its agents' conduct, and it answered resoundingly in the affirmative. Justice Day's opinion, written for a unanimous court, reviewed and rejected many of the formalist obstacles that had previously checked the expansion of criminal law, concluding, "We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable . . . ."<sup>26</sup> Although the opinion pointedly noted that corporations were increasingly the crucial actors in interstate commerce,<sup>27</sup> at bottom, the logic of the case was about deference to Congress. Congressional intent in favor of vicarious liability for an Elkins Act violation was clear; thus, *New York Central* provided an unequivocal affirmation of Congress's power to criminalize corporate conduct, but was silent on when, as a policy matter, such conduct should be imputed automatically under common law.

*New York Central*, notwithstanding a potentially narrower reading, was a turning point in criminal corporate liability. In the decades that followed, federal courts routinely used theories of vicarious liability under civil agency doctrine borrowed from tort law to convict corporate entities. By the middle of the twentieth century, federal courts had accepted that, "[t]here is no longer any distinction in essence between the civil and criminal liability of corporations, based upon the element of intent or wrongful purpose."<sup>28</sup>

An important representative case is *Dollar S.S. Co. v. United States*,<sup>29</sup> in which a steamship corporation was convicted of violating a statute that barred dumping refuse in navigable waters. The conviction in *Dollar* was upheld by the Ninth Circuit in spite of the fact that the management of the corporation appeared to have undertaken extensive efforts to prevent its employees from engaging in the very conduct that served as the basis for prosecution. For example, the corporation had placed a lock on the relevant slop compartment, issued direct orders to the crew not to dump refuse into the water, and posted signs conspicuously announcing these rules. Without assessing whether the company's policies on the matter or management supervision met with industry standards, the court stated that the company could be liable simply because its officers "failed to prevent the commission of the forbidden act."<sup>30</sup>

Following *Dollar*, courts applying federal criminal law have upheld convictions based on vicarious criminal corporate liability even where the agent was acting

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(1998) ("*New York Central* was the beginning of the end of corporate immunity from criminal liability.").

26. *N.Y. Cent.*, 212 U.S. at 495. In spite of its willingness to discard many of the formalisms that impeded corporate liability, the Court, giving no examples, commented that "[T]here are some crimes, which in their nature cannot be committed by corporations." *Id.* at 494.

27. *Id.* (stating that the law "cannot shut its eyes to the fact that the great majority of business transactions . . . are conducted through these bodies . . .").

28. *Egan v. U.S. Union Elec. Co. of Mo.*, 137 F.2d 369, 379 (8th Cir. 1943).

29. 101 F.2d 638 (9th Cir. 1939).

30. *Id.* at 640.

contrary to express corporate policy<sup>31</sup> and where a bona fide compliance program<sup>32</sup> was found to be in effect. Many of these doctrines were developed in the context of antitrust law,<sup>33</sup> but have since been generalized, seemingly without analysis, to other contexts.

The current hornbook rule is that a corporation is liable for the actions of its agents whenever such agents act within the scope of their employment and at least in part to benefit the corporation.<sup>34</sup> As to the limitation that employees must be acting within the scope of their actual or apparent authority, this requirement has been interpreted so expansively that it is practically invisible in many contexts.<sup>35</sup> Similarly, the requirement that an employee act to benefit the company has likewise been relaxed by a permissive interpretation; under the current doctrine, it “is not necessary that the employee be primarily concerned with benefiting the corporation, because courts recognize that many employees act primarily for their own personal gain.”<sup>36</sup> Indeed, such is the state

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31. See *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) (“[A] corporation may be held criminally responsible for antitrust violations committed by its employees . . . even if, as in *Hilton Hotels* and *American Radiator*, such acts were against corporate policy or express instructions.”); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004–07 (9th Cir. 1972); *United States v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204–05 (3d Cir. 1970).

32. See, e.g., *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989) (“We agree with the District Court that Fox’s compliance program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law and the consent decree.”).

33. See, e.g., *Hilton Hotels*, 467 F.2d 1000; *American Radiator*, 433 F.2d 174.

34. See, e.g., *In re Hellenic, Inc.*, 252 F.3d 391, 395 (5th Cir. 2001) (“An agent’s knowledge is imputed to the corporation where the agent is acting within the scope of his authority and where the knowledge relates to matters within the scope of that authority.”); *United States v. 7326 Highway 45 N.*, 965 F.2d 311, 316 (7th Cir. 1992) (holding agent’s culpability and knowledge may only be imputed to the corporation where agent was “acting as authorized and motivated at least in part by an intent to benefit the corporation”) (citing *Zero v. United States*, 459 U.S. 991 (1982)).

35. In accordance with traditional agency law principles, the scope of employment is the agent’s apparent, not actual, authority within the corporation. See Joel M. Androphy, Richard G. Paxton & Keith A. Byers, *General Corporate Criminal Liability*, 60 TEX. B.J. 121, 121–22 (1997) (discussing role of apparent authority in corporate criminal prosecutions). Remarkably, this means that liability flows to the corporation for purposes of *criminal* law even if the corporation has not in fact authorized the agent, so long as a third party believed the agent had apparent authority. See, e.g., *Meyers v. Bennett Law Offices*, 238 F.3d 1068, 1073 (9th Cir. 2001) (upholding liability on the basis of apparent authority in the eyes of a third party); *United States v. Inv. Enters., Inc.*, 10 F.3d 263, 266 (5th Cir. 1993) (“[A] corporation is criminally liable for the unlawful acts of its agents, provided that the conduct is within the scope of the agent’s authority, whether actual or apparent.”); *United States v. Portac, Inc.*, 869 F.2d 1288, 1293 (9th Cir. 1989) (affirming conviction of company based upon illegal actions of agent told by supervisors not to violate the law).

36. Kendel Drew & Kyle A. Clark, *Corporate Criminal Liability*, 42 AM. CRIM. L. REV. 277, 282 (2005) (citing as examples *Cox v. Adm’r U.S. Steel & Carnegie*, 17 F.3d 1386, 1404 (11th Cir. 1994); *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985); and *United States v. Bainbridge Mgmt., L.P.*, Nos. 01 CR 469-1, 01 CR 469-6, 2002 WL 31006135 at \*4 (N.D. Ill. Sct. 5, 2002)).

of the modern doctrine of vicarious criminal corporate liability that under federal law, the corporation can be held liable for agents no matter what their place in the corporate hierarchy<sup>37</sup> and regardless of the efforts in place on the part of corporate managers to deter their conduct.<sup>38</sup>

In addition to the federal system, which is the primary subject of this Article, it is worth noting that several states have used this federal common law rationale to incorporate a broad theory of vicarious criminal corporate liability into state law.<sup>39</sup> Contrast this trend with the Model Penal Code, which since 1962, has limited vicarious criminal corporate liability to cases involving conduct by “high managerial agent[s]” acting at least in part to benefit the corporation and within the scope of their employment.<sup>40</sup> Some states, either by statute or judicial doctrine, have rejected the federal approach in favor of a distinction similar to that made by the Model Penal Code.<sup>41</sup>

### *B. Criminal Corporate Liability in Practice Post-Enron*

With the dramatic December 2001 implosion of Enron, then the seventh largest corporation in America, federal and state governments have stretched their resources to increase prosecution of white-collar crime, even though substantial resources were already being redirected toward the increased threat of terrorist activities. Enron and its brethren, such as WorldCom, Tyco, and HealthSouth, were a shock to the system of corporate America. Leaders in Congress and in governmental institutions tasked with pursuing securities and accounting violations, such as the DOJ and the Securities and Exchange Commission (SEC), took immediate note that greater enforcement was required to promote responsible corporate citizenship. As a result, substantially

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37. Corporate criminal liability has been predicated on the actions of low-level employees, including salespeople, manual laborers, truck drivers, and clerical workers. *E.g.*, *United States v. Dye Constr. Co.*, 510 F.2d 78, 82 (10th Cir. 1975) (superintendent, foreman, and backhoe operator); *Tex.-Okla. Express, Inc. v. United States*, 429 F.2d 100, 102 (10th Cir. 1970) (truck driver); *Riss & Co. v. United States*, 262 F.2d 245, 250 (8th Cir. 1958) (clerical worker); *United States v. George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir. 1946) (salesman).

38. *See, e.g., supra* notes 31, 33.

39. *E.g.*, *Commonwealth v. Beneficial Fin. Co.*, 275 N.E.2d 33, 80 (Mass. 1971); *see also State v. Zeta Chi Fraternity*, 696 A.2d 530, 534–35 (N.H. 1997) (“The criminal conduct need not have been ‘performed, authorized, ratified, adopted or tolerated by the corporation[’s] directors, officers or other high managerial agents’ in order to be chargeable to the corporation.” (quoting *Commonwealth v. L.A.L. Corp.*, 511 N.E.2d 599, 601 (Mass. 1987) (alteration in original) (internal quotation marks omitted))).

40. MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962). For commentary on how the Model Penal Code’s approach has translated in practice, see Brickey, *Rethinking Corporate Liability*, *supra* note 6.

41. *E.g.*, ARIZ. REV. STAT. ANN. § 13-305 (2004) (“[A]n enterprise commits an offense if . . . the offense is engaged in, authorized, solicited, commanded or recklessly tolerated . . . by a high managerial agent acting within the scope of employment . . .”); *Healthcare Ctrs. of Tex., Inc. v. Rigby*, 97 S.W.3d 610, 618–20 (Tex. App. 2002) (declining to impose liability on a nursing home on the basis of acts by an administrator found not to be a high managerial agent).

increased prosecutorial and FBI agent resources were allocated nationwide to white-collar investigations of corporations and their executives.<sup>42</sup>

One phenomenon that arose from the rubble of Enron is the proliferation of deferred prosecution agreements between the government and corporations, including some of the largest companies in the world. Since Enron's demise, the number of deferred prosecution agreements the federal government entered into with corporations is over twice the number of such agreements in the previous ten years.<sup>43</sup> The agreements, discussed in more detail below, have typically mandated robust compliance programs, frequently spelling out specific steps that must be undertaken by the corporation.

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42. In July 2002, the President created the President's Corporate Fraud Task Force, led by the Deputy Attorney General of the United States. Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002); *see also* AUDIT DIV., OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE EXTERNAL EFFECTS OF THE FEDERAL BUREAU OF INVESTIGATION'S REPRIORITIZATION EFFORTS, Audit Report 05-37 (September 2005), *available at* <http://www.usdoj.gov/oig/reports/FBI/a0537/final.pdf> (stating corporate crime is FBI's first financial crime priority; both number of agents assigned to corporate crime and referrals to prosecutors increased from 2000 to 2004; and although there was a major reduction in agents assigned to drug and violent crime investigations in order to augment terrorism-related work post 9/11, only a slight reduction in the general white-collar agent allotment was taken from 2000 to 2004); CORPORATE FRAUD TASK FORCE, SECOND YEAR REPORT TO THE PRESIDENT at iii (2004), *available at* [http://www.usdoj.gov/dag/cftf/2nd\\_yr\\_fraud\\_report.pdf](http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf) (reporting vastly increased prosecutions of corporate crime since its inception). In 2002, Congress promulgated the Sarbanes-Oxley Act, which mandated a series of new requirements on corporations to deter crime, and created new obstruction of justice crimes in response to the conduct of Enron's outside auditor Arthur Andersen. In addition, the bill required the U.S. Sentencing Commission to evaluate its organizational guidelines to further encourage responsible corporate citizenship and effective compliance mechanisms. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204; S. COMM. ON THE JUDICIARY, THE CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY ACT OF 2002, S. REP. NO. 107-146 (2002); *see also* Friedman, *supra* note 8, at 833 n.1 (surveying recent empirical studies and concluding that "the number of criminal prosecutions against corporations has in recent years increased dramatically"); CRIME WITHOUT CONVICTION, *supra* note 2, at 4; Joshua R. Hochberg, *The Costs, Benefits, and Risks of Deferred Prosecution Agreements*, WHITE COLLAR CRIME 2006, at 1-2 (The former Chief of DOJ Fraud Section states, "[I]n the aftermath of the collapse of Enron, the Department of Justice quickly shifted white-collar investigative resources and its enforcement focus to the investigation and prosecution of corporate accounting and securities fraud."); Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1573 (1990) (writing a decade earlier and stating, "The use of criminal sanctions against corporate defendants has expanded considerably in the last two decades.").

43. Post-Enron, deferred prosecution agreements have been entered into with the DOJ to settle accounting fraud investigations with a series of major corporations or their subsidiaries, including Merrill Lynch & Co., Inc., Canadian Imperial Bank of Commerce, AOL/Time Warner, PNC Financial Services Group, Inc., American International Group, KPMG LLP, Computer Associates International, Inc., and Bristol-Myers Squibb Company. In addition, deferred prosecution agreements resolved Foreign Corrupt Practices Act investigations involving InVision Technologies, Monsanto Company, and Micrus Corporation, among others. CRIME WITHOUT CONVICTION, *supra* note 2 (attaching copies of post-Enron deferred prosecution agreements).

Further, the corporation's compliance with the terms of the deferred prosecution agreement, including the new compliance measures, is overseen by monitors appointed pursuant to the agreement.<sup>44</sup> The monitors report to the DOJ regarding the company's adherence to the reforms implemented pursuant to the deferred prosecution agreement.<sup>45</sup>

The dramatic rise in the number of such agreements is due to two factors: the increased attention prosecutors are devoting to white-collar crime in the wake of Enron<sup>46</sup> and the increased willingness of corporations to agree to deferred prosecution agreements to avoid the dire collateral consequences of indictment. The willingness of corporations to enter into such deferred prosecution agreements is due in large measure to the vastly disproportionate power of the two sides. Prosecutors have enormous leverage due to the doctrine of vicarious liability. A single low-level employee's

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44. *E.g.*, Deferred Prosecution Agreement ¶¶ 7(b), 13, United States v. Am. Online, Inc., Criminal No. 1:04 M 1133 (E.D. Va. Dec. 2004), *available at* <http://www.corporatecrimereporter.com/documents/aol.pdf>; Deferred Prosecution Agreement ¶ 9, United States v. N.Y. Racing Ass'n, Inc., Cr. No. 03-1275 (E.D.N.Y. Dec. 11, 2003), *available at* <http://www.corporatecrimereporter.com/documents/nyra.pdf>; Agreement Between Symbol Technologies, Inc. and the U.S. Attorney's Office for the Eastern District of New York ¶ 11 (June 3, 2004), *available at* <http://www.corporatecrimereporter.com/documents/SymbolAgreement.FINALwpd.pdf>; Letter from Leslie R. Caldwell & Andrew Weissmann, Enron Task Force, Dep't of Justice to Robert S. Morvillo, Counsel to Merrill Lynch & Co. ¶ 9 (Sept. 17, 2003), *available at* <http://www.corporatecrimereporter.com/documents/merill2003.pdf> [hereinafter Merrill Lynch Letter]; Letter from Leslie R. Caldwell & Andrew Weissmann, Enron Task Force, Dep't of Justice to Gary Naftalis, Counsel to Canadian Imperial Bank of Commerce ¶ 10 (Dec. 22, 2003), *available at* <http://www.corporatecrimereporter.com/documents/cibc.pdf> [hereinafter CIBC Letter]; Letter from David N. Kelley, U.S. Attorney, S. Dist. of N.Y., to Robert S. Bennett, Attorney for KPMG LLP, Deferred Prosecution Agreement ¶ 18 (Aug. 26, 2005), *available at* [http://www.corporatecrimereporter.com/documents/kpmgdeferred\\_000.pdf](http://www.corporatecrimereporter.com/documents/kpmgdeferred_000.pdf); Letter from David N. Kelley, U.S. Attorney, S. Dist. of N.Y., to Alan Vinegrad, Attorney for Adelphia Comm'cns Corp. (Apr. 25, 2005), *available at* <http://www.corporatecrimereporter.com/documents/adelphia.pdf>.

45. With respect to non-prosecution agreements, monitors report exclusively to the DOJ, as the agreement is not part of a court proceeding and is consequently not overseen by a neutral and detached judicial officer. Deferred prosecution agreements, by contrast, involve publicly filed criminal charges and an agreement that is filed with the court between the government and the defendant deferring prosecution and waiving the Speedy Trial Act. It is unresolved whether the court can oversee, pursuant to the Speedy Trial Act waiver, which requires court approval, the deferred prosecution agreement. *See* Greenblum, *supra* note 2 (arguing that court oversight is advisable for deferred and non-prosecution agreements); *Interview of David Pitofsky, supra* note 5, at 8.

46. Prior to Enron, white-collar cases were largely the province of large U.S. Attorney's Offices and the DOJ Fraud Section, each of which was able to devote the resources required by such complex matters. Thus, prior to Enron, such cases were largely, though not exclusively, prosecuted out of New York or Main Justice. In the wake of Enron, the white-collar prosecution effort has gone national, with offices around the country, from Alabama, California, Michigan, Texas, Utah, and Virginia, among others, all prosecuting significant white-collar cases. *See* Greg Farrell, *New York No Longer Has Dibs on Securities Fraud*, USA TODAY, July 2, 2003, at 1B. To promote and coordinate this national effort the President created the Corporate Fraud Task Force.

criminal conduct can be sufficient to trigger criminal liability on the part of the corporation. Moreover, it may not even be necessary for the jury to agree unanimously upon the identity of the same criminal employee in order to find the employer guilty.<sup>47</sup> Where such potential liability exists, corporations as a practical matter can rarely afford to take criminal cases to trial because liability can be triggered by such minimal employee conduct.<sup>48</sup>

A criminal indictment can have devastating consequences for a corporation and risks the market imposing what is in effect a corporate death penalty. The willingness of companies post-Enron to agree to strict deferred prosecution agreements so as to avoid an indictment was greatly enhanced when Wall Street saw first hand the consequences of the decision by Arthur Andersen LLP to reject the government's offer of a deferred prosecution agreement in the winter of 2002. Although the company was at the time hemorrhaging clients and may have likely folded even absent prosecution, the company's decision to face indictment rather than enter into a deferred prosecution agreement was widely viewed as effectively extinguishing any hope of Andersen's continued viability absent an acquittal. Corporate America could see both the resolve of the government to prosecute even the largest of corporations, as well as the consequences that could ensue from a company's refusal to settle.<sup>49</sup> Accordingly, a corporation has little choice but to accede to the government's demands.<sup>50</sup> Indeed, it is now a commonplace position among the white-collar community post-Enron—amongst

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47. See *Andersen LLP v. United States*, No. H-02-121 (S.D. Tex. 2002) (instructing jury that it need not unanimously agree on the same Andersen employee having committed obstruction of justice so long as each juror agreed that an employee obstructed justice), *aff'd*, 374 F.3d 281, 291 n.8 (5th Cir. 2004), *rev'd on other grounds*, 544 U.S. 696 (2005); *United States v. Bank of New Eng., N.A.*, 821 F.2d 844, 856 (1st Cir. 1987) (applying collective knowledge to criminal corporate liability); *United States v. Shortt Accountancy Group Corp.*, 785 F.2d 1448, 1454 (9th Cir. 1986); *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 724 (5th Cir. 1963); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974). See generally Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1189–90 (1983); Stacey Neumann Vu, Note, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459 (2004) (arguing in favor of *Andersen* district court jury charge).

48. See *United States v. Stein*, 435 F. Supp. 2d 330, 381–82 (S.D.N.Y. 2006) (finding attorneys' fee provision of the DOJ Thompson Memorandum unconstitutional, noting enormous power of government to coerce KPMG to adopt policies advocated by the government to avoid prosecution).

49. Typically, commentators argue that the demise of Andersen led prosecutors to be more wary of charging corporations, thus leading to an increase in deferred prosecution agreements. See, e.g., Greenblum, *supra* note 2, at 1875 & n.86. That analysis is incomplete, however, because it ignores the fact that Andersen had been offered and rejected a deferred prosecution agreement. Although prosecutors may be less willing after *Andersen* to indict a large corporation due to perceived collateral consequences and attendant adverse publicity, the reason that corporations are willing to enter into deferred prosecution agreements is because of the belief that a prosecutor is willing to indict even the largest of companies, and the consequences that are believed by corporate management to flow from a corporate indictment.

50. See *Stein*, 435 F. Supp. 2d at 381–82.



both defense and prosecution—that corporate defense consists largely of being an arm of the prosecutor.<sup>51</sup>

Under current practice, apart from DOJ internal guidelines, there is little by way of *systemic* checks on the overly-aggressive, misinformed, or unethical prosecutor. Save for her personal integrity, a prosecutor may seek to charge for improper reasons, such as personal or political advancement, or exact sanctions that are unwarranted, such as fines disproportionate to the harm. The imbalance in power between the two sides places enormous weight on two things that are both in the exclusive discretion of the government. First, the system counts on the government attorney ethically wielding her power and not threatening indictment simply to coerce a favorable settlement. Second, even where the prosecutor believes she is acting ethically, the system places great weight on the prosecutor getting it right both in terms of the assessment of the facts and the legal consequences to the corporation that should result from those facts. There are few systemic checks, however, on those government determinations.

## II. RETHINKING CRIMINAL CORPORATE LIABILITY

Curtailing the current practice of imputing the acts and intent of an employee to the employer finds support in the traditional goals of the criminal law as well as in civil case law, which remarkably has already seen the scope of corporate vicarious liability narrowed further than in criminal cases.

### *A. Deterrence and Retribution in Criminal Corporate Liability*

None of the traditional goals of the criminal law or its basic concern for individual determinations of guilt support the application of agency principles of vicarious liability where a corporation has taken all reasonable measures to conform its employees' conduct to the law. Criminal law, after all, is reserved for conduct that we find so repugnant as to warrant the severest sanction. The goals of the criminal law are to deter and punish such conduct.<sup>52</sup> Where nothing more can be expected of a

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51. See, e.g., CORP. CRIME REP., Feb. 6, 2006, at 7 (arguing corporations are now deputized prosecutors); *Interview of David Pitofsky*, *supra* note 5 (former federal prosecutor in charge of the Computer Associates prosecution stating, "As of now, prosecutors have immense leverage because conviction can be a corporate death sentence, and they don't want to lose that leverage.") ("One of the problems with the process of negotiating a deferred prosecution agreement is that it is not really a negotiation. Any push back by the company on a provision that the government requests is not only going to be shot down, but the government may see it as a reflection that the company's claimed contrition is not genuine."); Hochberg, *supra* note 42, at 1–2 ("Recent deferred prosecution agreements reflect the government's improved bargaining strength in negotiating corporate settlements. In this era of intense scrutiny of corporate wrongdoing, the government has the ability to impose sometimes onerous settlement terms on companies seeking to avoid criminal prosecution.").

52. See generally *Developments*, *supra* note 6, at 1235 & n.16 (citing sources for proposition that deterrence is the "primary rationale" for criminal corporate liability); KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY ch. 2 (2d ed. 1992) (providing general background on the evolution of corporate criminal liability); RICHARD S. GRUNER, CORPORATE CRIME AND SENTENCING § 2.3.6, at 144 n.121 (1994) (stating that as a general matter, "Federal law identifies offender reform and the specific deterrence of offenders as primary goals of criminal

corporation than actions it has already undertaken, the goals of the criminal law are satisfied.<sup>53</sup>

Deterrence traditionally is broken down into two components, specific and general. Specific deterrence refers to incapacitating the criminal so that the crime cannot be repeated by that person. For a real person, that incapacitation comes usually in the form of imprisonment. It can also include restrictions on one's liberty and even employment during a period of supervised release.<sup>54</sup> Prison of course is not an option for a corporation. Specific deterrence could nevertheless take the form of causing the dissolution of the company (the equivalent of a corporate death penalty), barring the company either permanently or for a defined period of time from engaging in certain businesses, or subjecting the corporation, like an individual, to a probationary period during which its conduct is restricted and monitored by a court.<sup>55</sup>

General deterrence refers to the effect punishment of a specific person will have on other members of society who might be tempted to engage in similar conduct. Such deterrence is thought to work particularly well in connection with white-collar offenses and less well to deter crimes of passion, in which a criminal is thought likely to engage without much forethought to the punishment meted out to similarly-situated individuals. General deterrence is particularly apt with respect to corporate criminal conduct, which tends to be the antithesis of crimes of passion. Corporations—through boards, inside and outside counsel, and formal deliberative processes—generally pay particular attention to precedent in determining the risks and rewards of contemplated action.<sup>56</sup>

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sentences for offenders including corporations.”); Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 312 (1991) (positing retributive justification for corporate criminal liability).

Restitution to victims of crime has been identified as a purpose of criminal *sentencing*. Congressional statutes and the U.S. Sentencing Guidelines both provide for restitution. *See* 18 U.S.C. § 3553(a)(7) (2000) (listing restitution as one of seven factors with respect to determining a particular sentence); 18 U.S.C. § 3663A (2000 & Supp. 2006) (restitution provisions); U.S. SENTENCING GUIDELINES MANUAL §§ 5B1.3, 5D1.3 (2005) (specifying restitution as a mandatory condition of probation and supervised release). Restitution, of course, is a goal of sentencing only if there is a criminal violation. Disgorgement of funds that a corporation may have received from a criminal employee may be realized both by requiring an effective compliance program to require disgorgement as well as through civil damage suits by victims, as now occurs and is the gravamen of civil proceedings.

53. Commentators opposed to criminal corporate liability at times resort to theories within the framework of existing criminal law concepts, a practice that is not particularly useful and can be disingenuous. *See* Walsh & Pyrich, *supra* note 6, at 689 (arguing that criminal liability should involve an examination of the “corporate consciousness” to determine if the employee’s conduct is consistent with the corporation’s “rational choice to do right or wrong”). Rather than try to divine the “intent” of a corporation, which can be fraught with problems due to the difficulty of determining what statements and conduct “speak” for the company, a more useful analysis would focus on deterrence and retribution, the first principles of criminal law, to determine whether some aspect of the corporation’s past conduct justifies imposition of vicarious liability under the criminal law.

54. *See* 18 U.S.C. §§ 3551(b), 3554–3556, 3563, 3583, 3601 (2000 & Supp. 2006).

55. *See* 18 U.S.C. § 3551(c) (2000) (applying fine and probation sentencing provisions to organizations).

56. It is precisely for this reason that criminal laws can be enacted in order to regulate an industry, although this is not commonplace. In certain highly regulated industries, criminal laws

The criminal law also serves a retributive function by punishing the offender for transgressing society's starkest boundary between what it has determined to be "right and wrong" or "good and evil." It is perhaps this retributive attribute that is most elusive yet most significant to the public. What actions are deemed to be "criminal" is a judgment by society as to what is out of bounds of acceptable societal behavior. The transgression of that boundary is in and of itself a harm that society has determined warrants its harshest condemnation. The boundary is a societal construct as is the degree of punishment that is warranted for exceeding that boundary.

The corporation that transgresses that boundary can be as subject to retribution as an individual. Nevertheless, there is a difference between corporate and individual retribution. Individual criminality involves basic precepts involving an assessment of individual intent, action, and voluntariness. For a corporation, criminality is a harder construct. When a corporation is held *criminally* responsible for the criminal actions of an employee, retribution requires us to first determine what it is that the corporation did or did not do that warrants criminal sanction. Where an employee has been encouraged to engage in the crime by the corporation the analysis is simple. But what of the company that did everything it reasonably could to prevent such conduct? What then? Should civil damages suffice, or is there some action or inaction by the company that nevertheless is deserving of criminal condemnation?

Imposition of corporate liability where a corporation has taken all reasonable steps to deter and detect the criminal conduct of its employee furthers none of the goals of the criminal law. Such a corporation does not need to be specifically deterred. Indeed, by definition the company has already on its own instituted the programs and policies that the criminal justice system could properly seek in the event of conviction. By the same token, general deterrence would not be served. If anything, the conviction would send to corporations with effective compliance programs the opposite message, that no good deed on their part will go unpunished. In short, there is nothing to deter, generally or specifically. For much the same reasons, there is no valid retributive value in punishing a corporation in such circumstances. Where an individual corporate employee has transgressed, but done so in spite of all reasonable steps by the corporation to prevent such criminal conduct, the culpability of the corporation is non-existent.

Where, as in Enron or WorldCom, a corporation's senior management engages in crime that enables the company to generate artificial earnings to meet Wall Street expectations, or where an executive fudges the numbers in a quarter while management closes its eyes to what is occurring, the company has either actively encouraged crime or tolerated it since it redounded to the company's immediate economic benefit. In either situation, it is doubtful that the company had an effective compliance program, since the encouragement of criminality by senior management or willful blindness by them would be show-stoppers. In such cases, the company should be held responsible for the conduct of its employees because it has not taken the necessary steps to prevent and detect such crimes from occurring. By its corporate policies, or lack thereof, it demonstrates that it is willing to encourage or at least condone criminal conduct that redounds to the benefit of the corporation.

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serve as a means of regulation. *E.g.*, *United States v. Park*, 421 U.S. 658, 673 (1975) (holding FDA misdemeanor statute does not require traditional proof of wrongful conduct); *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943) (indicating FDA misdemeanor statute is an increasingly prevalent example of penalties being used to regulate).

Where, on the other hand, criminality within the corporation is not systemic or condoned, but actively discouraged, current law still allows criminal prosecution. Suppose, for example, in anticipation of an imminent grand jury subpoena, a lower-level executive and a few of her assistants at her direction destroy documents that the employees believe would hurt themselves and the company. Suppose also that the corporation has extensive programs and policies in place to prevent just such activity, but that the employees nevertheless committed the crime and were soon found out and turned over by the company to the government. The corporation has taken all reasonable measures to prevent and detect such criminal action by its employees, and nothing beneficial is gained by allowing criminal liability to attach. From a retributive perspective, the main thing that the corporation has done wrong is hiring someone who committed a crime. But it is hard to understand why the mere employment of one who commits a crime, absent unusual facts, would trigger the sanctions of the *criminal* law. Notably, the DOJ—which is charged with enforcement of the federal criminal laws—and the Sentencing Commission have not taken the Draconian view that mere employment is sufficient to warrant criminal prosecution.<sup>57</sup> Indeed, even the SEC in connection with mere civil actions and remedies has rejected such a severe position.<sup>58</sup> The DOJ and SEC positions make sense: if one cannot fathom what else a company could reasonably have done to prevent and detect the employee's criminal action, why is criminal liability—society's harshest sanction—appropriate?

A corporation is different than an individual in an important and overlooked respect that warrants limitations on the imposition of criminal liability for the actions of employees. Companies, unlike most individuals, cannot control absolutely the conduct of the people for whose conduct they can be criminally liable. It is commonplace that the criminal law's moral basis is called into question whenever individuals with no practical ability to comply with its obligations are punished for their actions. Indeed, this is one of the most basic tenets of modern theories of the insanity defense, and its logic is instructive in the corporate criminal context.

Many U.S. jurisdictions have supplanted the common law *M'Naghten* test<sup>59</sup> for the insanity defense, which focuses exclusively on the moral understanding of the individual—did she know the difference between right and wrong—with a two-pronged approach that takes into account both the moral understanding of the accused *and* her ability to control her actions to conform with the law. The oldest manifestation of this in American law is the irresistible impulse defense that has been referenced in

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57. Memorandum from Larry D. Thompson, Deputy Attorney Gen. to Heads of Dep't Components, U.S. Attorneys, Principles of Fed. Prosecution of Bus. Orgs. 8–9 (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/business\\_organizations.pdf](http://www.usdoj.gov/dag/cftf/business_organizations.pdf) [hereinafter Thompson Memorandum]; U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (cautioning that the fact that a crime occurs does not “necessarily mean that the program is not generally effective”).

58. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934, Exchange Act Release No. 44,969, Accounting and Auditing Enforcement Act Release No. 1470, 76 SEC Docket 220 (Oct. 23, 2001).

59. Under the rule in the famous *M'Naghten* case, a defendant may only be found not guilty by reason of insanity if he was “labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.” 8 Eng. Rep. 718, 722 (H.L. 1843).

state court decisions at least as far back as the mid-nineteenth century.<sup>60</sup> Jurisdictions following the irresistible impulse rule recognized the fallacy of convicting defendants who, “by reason of the duress of such mental disease . . . had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.”<sup>61</sup>

In the mid-twentieth century, two new ways of thinking about the insanity defense emerged, each emphasizing that volition is a necessary precursor to the imposition of criminal liability. The first was Judge Bazelon’s short-lived but oft-discussed test, announced in *Durham v. United States*,<sup>62</sup> providing that “an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.”<sup>63</sup> The second—and ultimately more influential—was the Model Penal Code’s approach, which put volition and cognition side-by-side for purposes of a criminal insanity defense, stating, “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.”<sup>64</sup>

As commentators have recognized, the insight that the drafters of the Model Penal Code brought to the insanity defense was as much moral as it was policy based. When defendants, because of a mental illness, lack the ability to conform their conduct to the law, there is simply no moral basis for punishing them.<sup>65</sup> As the Second Circuit stated when it became an early adopter of this test, “society has recognized over the years that none of the three asserted purposes of the criminal law—rehabilitation, deterrence, and retribution—is satisfied when the truly irresponsible, those who lack substantial capacity to control their actions, are punished.”<sup>66</sup>

A corporation that has taken all practical efforts to prevent the conduct that underlies its criminal charge is similarly lacking in volition. The DOJ itself has recognized the inability of corporations to control every action of their employees and that they should not be held responsible for all such actions. In each and every deferred prosecution agreement with the DOJ since the fall of Enron in late 2001, the DOJ has included a provision that evidences its own recognition of the unjust nature of strict vicarious liability. In the typical post-Enron deferred prosecution agreements, the defendant company agrees to a statement of facts and also agrees that it will not

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60. See Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 16 (1988) (“*State v. Thompson*, decided in 1834, was the first reported use of a control formulation.”). See generally Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1415–26 (1986).

61. *Parsons v. State*, 2 So. 854, 866 (1887) (emphasis in original).

62. 214 F.2d 862, 874–76 (D.C. Cir. 1954), *overruled by* *United States v. Brawner*, 471 F.2d 969, 991 (D.C. Cir. 1972) (eliminating the *Durham* rule but retaining lack-of-volition as a basis for an insanity defense).

63. *Id.* at 874–75.

64. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962) (alteration in original).

65. Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 196 (1983) (“Few people would dispute the moral predicate for the control test—that a person who ‘cannot help’ doing what he did is not blameworthy.”); Sendor, *supra* note 60, at 1384–85.

66. *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966).

contradict that set of facts, through any of its employees or other agents. An employee's statement contradicting the agreed-upon statement of facts can be imputed to the defendant company and constitute a breach of the agreement. Notably, if an employee does contradict the statement of facts the company has a set period of time—typically 48–72 hours—to repudiate the statement of the employee and thus cure any breach.<sup>67</sup>

Such a caveat is a recognition of the basic fact that an organization and an individual are different for purposes of imposition of criminal liability—an organization cannot control the actions of its employees in the manner that an individual typically can control her own actions. Accordingly, even the DOJ has adopted in these agreements a provision that recognizes that a corporation can only do so much and that imposition of criminal liability is inappropriate where the company has done all that it can reasonably be expected to control its employees' conduct.

In addition, the history of corporate criminal prosecutions since the demise of Enron makes plain that where a company has already instituted effective mechanisms that reasonably deter and detect crime by its employees then the goals of criminal corporate law are satisfied. In a series of corporate settlements of criminal investigations post-Enron, the DOJ has required as part of deferred prosecution agreements a series of internal reforms. Those agreements set forth a variety of specific and general measures that the DOJ believes are warranted for companies whose employees committed crimes.<sup>68</sup>

Where a corporation, internalizing the guidance gleaned from such agreements, has already effectively implemented the measures imposed by the DOJ deferred prosecution agreements at the time of the criminal conduct by an employee, then the goals of the criminal law have been satisfied. After all, the DOJ is the lead agency responsible for enforcing compliance with the criminal laws. Where a company has already implemented the measures that the DOJ itself has viewed as demonstrating responsible corporate behavior, then the purpose for criminal action has been negated.

Far from furthering the goals of the criminal law, the current system of strict corporate vicarious liability removes an important incentive for corporations to implement effective compliance programs. Such programs serve both to thwart crime and detect it if it occurs. Under the parameters of criminal corporate liability articulated in this Article, an effective compliance program can act as a sword in preventing criminal conduct by employees as well as a shield against corporate criminal prosecution if such criminal conduct by an employee nevertheless occurs. Under the current legal regime, a corporation is given no benefit at all under the law for even the best internal compliance program if such crime nevertheless occurs.<sup>69</sup> A

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67. See, e.g., Deferred Prosecution Agreement ¶ 3, *United States v. N.Y. Racing Ass'n*, Cr. No. 03-1275 (E.D.N.Y. Dec. 11, 2003), available at <http://www.corporatecrimereporter.com/documents/nyra.pdf>; Agreement Between Symbol Technologies, Inc. and the U.S. Attorney's Office for the Eastern District of New York, *supra* note 44, ¶ 16; CIBC Letter, *supra* note 44, ¶ 8; Letter from David N. Kelley to Robert S. Bennett, *supra* note 44, ¶ 15.

68. For a detailed description of the requirements in such agreements, see *infra* Part III.B.

69. Prosecutors may as a matter of *discretion* accord corporations credit for having an effective compliance program. However, having such a program is merely a factor under existing internal DOJ guidelines and its absence is not a prerequisite to prosecution. The weight

corporation operating under the current regime of course still has an incentive to create such a program since preventing, or at least diminishing, the incidence of employee crime still redounds to the company's benefit and lessens the risk of corporate prosecution. That incentive would be all the greater, however, where the establishment of an effective compliance program would serve to shield the company from criminal prosecution and the vagaries of individual criminal prosecutors.

### *B. Civil Law Limitations on Corporate Vicarious Liability*

One of the more surprising phenomena in current corporate liability law is the unexpected variance between criminal corporate liability and civil corporate liability. Although one might imagine that corporate liability might be broader in civil cases than criminal ones, in fact the opposite at times is true. This is not a result of design: the Supreme Court has yet to wrestle with the parameters of criminal corporate liability in the modern era and consequently to determine what limits should be placed on agency principles. By contrast, the Court has tackled, albeit in preliminary steps, the issues posed by application of strict agency principles in the civil corporate liability context.

As we have seen, corporations are currently criminally liable under a vicarious liability analysis. The requirements are clear and simple: if an employee has committed a criminal act within the scope of her employment and intended at least in some measure to benefit the company, then the acts and intent of the employee can be imputed under agency principles to the company. And that is true no matter how many company policies are in place to thwart such criminal conduct, no matter how large the company, and no matter how low the employee is in the corporate hierarchy.

The Supreme Court has, however, not adopted such an approach for civil corporate liability. The Supreme Court has cut back on the application of strict vicarious liability in two telling circumstances: the application of Title VII in certain sexual harassment cases and the imposition of punitive damages against corporations. The Supreme Court's analysis strongly supports the thesis that the current scope of the law with respect to the parameters for imposition of vicarious liability in the criminal corporate setting should be narrowed.

#### 1. The Title VII Sexual Harassment Decisions

The first major retrenchment on application of agency principles began in a pair of cases decided in 1998 interpreting Title VII in the context of workplace sexual harassment suits. In *Faragher v. City of Boca Raton*<sup>70</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>71</sup> the Supreme Court carved out an exception to reliance on agency principles in a subset of sexual harassment cases. *Faragher*, for instance, alleged that the City was responsible for the sexual harassment of supervisory lifeguards who had sexually harassed her. The City contended that it had a policy against such harassment and that it should not be liable for the conduct of its employees. The Court determined that where an employee alleged sexual harassment, but not any direct adverse action by

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to be given to this factor is left exclusively to the State to determine. See Thompson Memorandum, *supra* note 57, at 3-4, 8.

70. 524 U.S. 775 (1998).

71. 524 U.S. 742 (1998).

a supervisor (commonly referred to as “quid pro quo” harassment), the employer could assert an affirmative defense that it had reasonable policies in place to deter sexual harassment and that the employee had not availed herself of the employer’s system for redress. The Court “[held] that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer’s conduct as well as that of a plaintiff victim.”<sup>72</sup>

The Court determined that agency principles were intended to apply to Title VII cases because that statute included reference to an employer’s “agents” in the statutory definition of an employer.<sup>73</sup> Nevertheless, the Court, citing dicta in *Meritor*, stated that not all agency law principles may be transferable to the Title VII context.<sup>74</sup> This notable caveat paved the way for the holdings in *Faragher* and *Ellerth*, which limited the application of agency principles to corporate civil liability. This willingness to curtail application of agency doctrine is all the more striking in that the Court in *Faragher*, *Ellerth*, and *Meritor* was interpreting Title VII, a congressional statute that by its terms applied principal-agent language.

In determining the scope of corporate civil liability in sexual harassment cases involving action by a supervisory employee, the Court astutely observed that the issue was one of determining a condign result and working backward to set forth a principle that would provide the narrowest integument between the desired result and the theory that was to be applied. The Court noted that lower courts had applied varying theories to determine whether an employer was responsible for such harassment, including whether the supervisor’s alleged harassment was within the scope of his employment, whether the supervisor was aided by his employment in conducting the harassment, and whether the employer was negligent in connection with the alleged harassment.<sup>75</sup> As the Court correctly observed, these cases used these requirements as a proxy for whether the employer *should* as a matter of “fairness” be found liable for the conduct of the supervisor.

Here it is enough to recognize that [the] disparate results [of the lower court case] do not necessarily reflect wildly varying terms of the particular employment

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72. *Faragher*, 524 U.S. at 780.

73. *Id.* at 791–92 (relying on the Court’s prior decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)); *see also* *Pa. State Police v. Suders*, 542 U.S. 129, 144 (2004); *Ellerth*, 524 U.S. at 751 (“Congress has left it to the courts to determine controlling agency law principles in a new and difficult area of federal law.”).

74. *Faragher*, 524 U.S. at 792, 803 n.3.

75. *Id.* at 793–95. The typical civil case could be based on a negligence theory, because the employer had indirectly adopted or condoned the offending conduct. As the Court stated:

There have, for example, been myriad cases in which District Courts and Courts of Appeals have held employers liable on account of actual knowledge by the employer, or high-echelon officials of an employer organization, of sufficiently harassing action by subordinates, which the employer or its informed officers have done nothing to stop. In such instances, the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer’s adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer’s policy.

*Id.* at 789 (citations omitted). In any case, the Court noted that it was not being asked to reevaluate its prior and only decision regarding corporate civil liability in *Meritor*.



contracts involved, but represent differing judgments about the desirability of holding an employer liable for his subordinates' wayward behavior. In the instances in which there is a genuine question about the employer's responsibility for harmful conduct he did not in fact authorize, a holding that the conduct falls within the scope of employment ultimately expresses a conclusion not of fact but of law.<sup>76</sup>

The Court thus examined the reasons that would support or defeat imposition of employer liability for the acts of sexual harassment by a supervisor of an employee. Although giving some weight to the notion that the employer should bear the cost of such discrimination, the Court ultimately limited the application of vicarious liability to the tortious acts of supervisors.<sup>77</sup>

The Court noted that lower courts have uniformly found employers not subject to respondeat superior for harassment by a co-worker, as opposed to harassment by a supervisor. Instead, in co-worker harassment cases, the courts have required the employer to have been at least negligent—did it “know or should it have known” of the harassment?—and then allowed the employer to assert a defense of having policies in place to prevent such conduct.<sup>78</sup> For harassment by supervisors, however, the Court found such a standard inappropriate because, among other reasons, an employer can better take action to prevent such conduct by its supervisory personnel.

Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.<sup>79</sup>

The Court counterbalanced the need for employers at times to be liable for supervisor misconduct, with the purpose of Title VII and the desirability of encouraging an employer to prevent the harm prohibited by the statute. Notably, in

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76. *Id.* at 796. The Court noted that even under agency principles one could rationalize such a methodology since respondeat superior was defined fluidly in the Restatement (Second) of Agency as encompassing that conduct for which an employer should fairly be held responsible as part of the cost of doing business. See *Faragher*, 524 U.S. at 797 (citing RESTATEMENT (SECOND) OF AGENCY § 229 cmt. a (1957)).

77. The Court considered two different agency principles: liability of an employer for acts of agents undertaken within the “scope of their employment” and “vicarious liability on employers for tortious acts committed by use of particular authority conferred as an element of an employee's agency relationship with the employer.” *Id.* at 799–801.

78. *Id.* at 799–800.

79. *Id.* at 803. The Court recognized as well that harassment by a supervisor is likely to be more pernicious than that by a co-worker. As the opinion explained:

When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose “power to supervise—[which may be] to hire and fire, and to set work schedules and pay rates—does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion.”

*Id.* (internal citations omitted).

justifying the employer affirmative defense, the Court found that it was in keeping with the purpose of the statute. The Court acknowledged but downplayed Title VII's purpose to make victims whole. Instead of serving as a means to redress individual grievances, the statute's "primary" purpose, the Court held, was to influence behavior in a way that "avoid[s] harm."<sup>80</sup>

The Court found that the affirmative defense would provide employers an incentive to prevent and correct harassment and consequently serve to further the government's enforcement efforts. Thus, if an employer could demonstrate by a preponderance of the evidence "reasonable care to prevent and correct promptly" any harassment and that the plaintiff unreasonably failed to mitigate any harm, by for instance failing to take part in any prevention or corrective measures by the employer, then the employer would establish the affirmative defense.<sup>81</sup> In *Suders*, the Court again noted that "tying the liability standard to an employer's effort to install effective grievance procedures would advance Congress' purpose to promote conciliation rather than litigation of Title VII controversies. At the same time, such linkage of liability limitation to effective preventive and corrective measures could serve Title VII's deterrent purpose by encourag[ing] employees to report harassing conduct before it becomes severe or pervasive."<sup>82</sup>

The *Faragher* and *Ellerth* decisions demonstrate the anomaly between criminal and civil corporate liability standards. This anomaly is all the more striking given the supposed greater severity criminal sanctions are supposed to carry than civil ones. As the Supreme Court remarked in *Suders*, a harsher claim should be more difficult to prove than an easier one. In *Suders*, the Court rejected the Third Circuit's conclusion that the *Faragher-Ellerth* affirmative defense was inapplicable where sexual harassment led to the constructive discharge of the employee, but was available when the harassment led to lesser consequences. As *Suders* noted, "placement of the line [by the Third Circuit], anomalously, would make the *graver* claim of hostile-environment constructive discharge *easier* to prove than its lesser included component, hostile work environment."<sup>83</sup>

But as the law currently stands, an employer can more readily defend a civil claim than a criminal one. In civil harassment cases, vicarious liability is not automatic. In cases of co-worker harassment, negligence is required at the very least. And in cases of supervisory harassment where a threat of harassment has not been acted upon, an affirmative defense is available to the employer. No such limitations, however, apply in the criminal context where an employer is liable so long as the conduct was within the

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80. *Id.* at 805–06; *see also Ellerth*, 524 U.S. at 764 ("Title VII is designed to encourage the creation of antiharassment [sic] policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect [sic] Congress' intention to promote conciliation rather than litigation in the Title VII context.").

81. *Faragher*, 524 U.S. at 807 (noting that the defense accommodated "the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees"); *see also Ellerth*, 524 U.S. at 764.

82. *Suders*, 542 U.S. at 145 (citation omitted) (internal quotations omitted).

83. *Id.* at 148 (italics in original).

broad scope of the employee's duties and motivated at least in part by a desire to benefit the employer.<sup>84</sup>

## 2. The Supreme Court's Punitive Damages Decision

The Court's willingness to limit the application of vicarious liability where it would lead to results at odds with the goals of the underlying law is most evident in *Kolstad v. American Dental Ass'n*.<sup>85</sup> In *Kolstad*, the Court limited vicarious liability agency principles to shield employers from liability for punitive damages under Title VII.

Carole Kolstad claimed that she had been passed over for promotion by her employer, the respondent, in favor of a "sham" selection process that was a pretext for sexual discrimination. The jury found in her favor, but the trial court, disagreeing with the verdict, held that she was not entitled to send the issue of punitive damages to the jury.<sup>86</sup>

Under the Civil Rights Act of 1991, punitive damages are limited to cases in which "the employer has engaged in intentional discrimination and has done so 'with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'"<sup>87</sup> Thus, the Court determined that the statutory scheme made plain that Congress sought to impose two standards of liability, "one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award."<sup>88</sup>

In a holding initially favorable to the plaintiff, the Court held (7-2) that the statute did not require the employee to show that the employer in fact discriminated in an "egregious" or "outrageous" manner. The statute focused on the intent of the employer and did not require in addition that the employer's conduct be egregious, although the latter conduct could be proof of the requisite intent by the employer.<sup>89</sup> As for the requisite intent by the employer, the Court found that the intent required by the statute focused not on the employer's intent to engage in the act of discrimination, but rather the employer's intent to engage in an act that it knows may violate federal law. "Applying this standard in the context of § 1981a, an employer must at least

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84. Under current criminal law doctrine, the actions of a coworker, no matter how low-level, can be imputed to the employer with no distinction between supervisory and non-supervisory personnel for purposes of application of vicarious liability. Moreover, although sexual harassment may often be undertaken exclusively to benefit the harasser and not the employer—and thus not meet the current criminal law requirement regarding motive—that is not always the case. As the Supreme Court recognized in *Faragher* and *Ellerth*, harassment can be performed to benefit the company, even if the employee is misguided in that belief. See *Ellerth*, 527 U.S. at 756 (finding that discrimination by supervisor may be intended to benefit the employer); *Faragher*, 524 U.S. at 791, 794-95, 798-99 (same).

85. 527 U.S. 526 (1999).

86. *Id.* at 530-32.

87. *Id.* at 529-30, 534 (citation omitted).

88. *Id.* at 534.

89. *Id.* at 534-35, 538-39.

discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages.”<sup>90</sup>

The Court went further, however. Although not fully briefed by the parties, the Court determined (5–4)<sup>91</sup> that it would set forth the applicable law regarding when it was appropriate to impute knowledge to the employer for imposition of punitive damages. The Court noted various general principles of agency law that generally govern application of vicarious liability and then rejected their strict application to imposition of punitive damages. “In light of the perverse incentives that the Restatement’s ‘scope of employment’ rules create, we are compelled to modify these principles to avoid undermining the objectives underlying Title VII.”<sup>92</sup>

Its analysis is telling. The Court cited the Restatement (Second) of Agency, which provides:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:

- (a) the principal authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal was reckless in employing him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the principal or a managerial agent of the principal ratified or approved the act.<sup>93</sup>

The Court noted that under this definition an employer could be subject to punitive damages even if the employer had acted in good faith and established policies to prevent discrimination. “On this view, even an employer who makes every effort to comply with Title VII would be held liable for the discriminatory acts of agents acting in a ‘managerial capacity.’”<sup>94</sup>

The Court was troubled by the fact that imposition of vicarious liability in such circumstances was at odds with the notion that punitive damages should apply only to

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90. *Id.* at 536. Thus, not all intentional discrimination would result in eligibility for punitive damages. As noted by the Court, employers would not be subject to punitive damages where the employer is unaware of the relevant federal prohibition; where the underlying theory of discrimination is novel or otherwise poorly recognized; or where an employer reasonably believes that its discrimination satisfies a statutory exception to liability. *Id.* at 536–37.

91. The dissent did not oppose the majority’s determination on the merits. Instead, it objected to the Court deciding an issue that it did not view as properly raised. *See id.* There is reason to believe that Justice Stevens, in light of his decision in *Bennis*, would agree with the majority’s analysis. *See Bennis v. Michigan*, 516 U.S. 442 (1996).

92. *Kolstad*, 527 U.S. at 545.

93. *Id.* at 542–43 (quoting RESTATEMENT (SECOND) OF AGENCY § 217(c) (1957)).

94. *Id.* at 544. The Court noted the expansive definition of “scope of employment” under common law agency principles. Intentional torts are within the scope of an agent’s employment if the conduct is “the kind [of task the employee] is employed to perform,” “occurs substantially within the authorized time and space limits,” and “is actuated, at least in part, by a purpose to serve the” employer. If these prerequisites are met, an employer can be liable even if the employee engages in acts “specifically forbidden” by the employer and uses “forbidden means of accomplishing results.” *Id.* at 543–44.

those who are not personally innocent.<sup>95</sup> Moreover, application of agency vicarious liability would serve as a disincentive to employers to enact anti-discrimination policies. “Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII.”<sup>96</sup> The Court, citing both *Faragher* and *Ellerth*, reiterated that Title VII was not intended primarily to provide redress, but to prevent harm by encouraging the creation of anti-discrimination “policies and effective grievance mechanisms.”<sup>97</sup> Shielding employers who establish those procedures in good faith should “motivate” employers to “detect and deter Title VII violations.”<sup>98</sup>

As Justice Stevens has recognized, resort to a strict liability standard is not the best means to promote the deterrent value in the criminal law.<sup>99</sup> In *Bennis*, the state forfeited a car, jointly owned by husband and wife, used by the husband to solicit a prostitute. The Court analogized to civil tort law in allowing the state not to allocate to the wife a share of the forfeited proceeds, even though the wife had taken all reasonable precautions with respect to the use of the car. As Justice Stevens observed, the Court upheld the state action because it was more akin to a civil action, than “punitive.” As the Court held in *Phile v. Ship Anna*:

The law never punishes any man criminally but for his own act, yet it frequently punishes him in his pocket, for the act of another. Thus, if a wife commits an offence, the husband is not liable to the penalties; but if she obtains the property of another by any means not felonious, he must make the payment and amends.<sup>100</sup>

*Kolstad* should bode ill for the continued vitality of the broad scope of criminal corporate liability for corporations. Even more so than the civil punitive damages at issue in *Kolstad*, criminal punitive sanctions should apply only to those who are personally guilty. And the goal of encouraging effective procedures to “detect and deter” violations applies at least as much to corporate policies aimed at criminal acts by employees as to discrimination by employees barred by civil statute. Yet, under current criminal corporate liability standards an employer would be liable for the conduct of even a low-level employee, in spite of management being unaware of such conduct, having acted in good faith, and having implemented extensive mechanisms to prevent such conduct. That same employer, however, would not be subject to punitive civil damages under *Kolstad*.<sup>101</sup>

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95. *Id.* at 544 (citing RESTATEMENT (SECOND) OF TORTS, § 909 cmt. b (1977)).

96. *Id.* at 545.

97. *Id.*

98. *Id.* at 545–46 (internal quotations omitted).

99. See *Bennis v. Michigan*, 516 U.S. 442, 469 (1996) (Stevens, J., dissenting) (“Even on a deterrence rationale, moreover, that goal is not fairly served in the case of a person who has taken all reasonable steps to prevent an illegal act.”).

100. 1 U.S. 197, 207 (1 Dall. 1787).

101. One potential oddity in the Court’s *Kolstad* decision is the standard of intent required to find punitive damages. The standard articulated by the Court is akin to the willfulness standard in the criminal law which, unlike the “knowing and intentional” standard, often requires the government to prove that the defendant knew what she was doing was wrong or even against the law. See *Kolstad*, 527 U.S. at 549 (Stevens, J., dissenting). The punitive damage intent standard is thus higher than the intent required by many criminal statutes.

### C. *The Benefits of Limiting Criminal Corporate Liability*

Limiting criminal corporate liability to those situations where a company reasonably could have taken steps to thwart the criminal action of its employee redounds to the benefit of both the government and corporations. As corporate criminal law—indeed, law in general—is a creation of the state, and not immutable law that exists in the natural sciences, these benefits are reasons to alter the law so that the thinnest integument exists between our view of justice and the requirements of the law.

The benefits to the government would be palpable from a theory of criminal corporate liability that takes into account the actions of the corporation to prevent and remedy criminal conduct by corporate actors. Prosecutors cannot be everywhere, and cannot monitor the activities of all of corporate America, even if society viewed that as desirable.

A standard of corporate criminal liability that is tied to whether the company has taken all reasonable steps to prevent and detect crime by its employees would strongly incentivize meaningful and necessary self-regulation. A company that sought to avoid criminal prosecution would have strong reasons to implement an effective compliance program, both to deter criminal activity at the outset and to use as a shield in the event criminality nevertheless occurred. The DOJ and outside compliance monitors cannot and should not be in every boardroom in America. The DOJ has a small number of criminal prosecutors and cannot effectively scrutinize potential criminality at every corporation in America. The utility of such a liability standard would be at least as great as that under the anti-discrimination statute at issue in *Faragher*, *Ellerth*, and *Suders*. As the Supreme Court recognized in those cases addressing Title VII, a theory of liability that encourages responsible corporate compliance serves to foster the purpose of a statute intended primarily to prevent harm, and not to make plaintiffs financially whole.<sup>102</sup> Criminal statutes, no less than Title VII, are not intended primarily to make victims whole financially. They are meant to punish the wrongdoers and deter similar crime.

The fear that companies will seek to implement mere “show” programs that will fool courts and regulators is unrealistic. A company that had an ineffective system, including a mere “paper” system that existed on the books of the company but was not effectively implemented, would not be entitled to the protection the law would offer. And any effort to pass off intentionally a fake program as a real one would risk the company obstructing justice.<sup>103</sup> Prosecutors and courts are called on now to assess the effectiveness of such compliance programs in connection with deferred criminal prosecutions, as well as in civil contexts including under anti-harassment programs. For a company to succeed at such a ruse, it would need to implement an inadequate program, pass it off as sufficient, not otherwise be subject to criminal liability because of the pervasiveness of the criminal conduct at issue which would undermine establishing the adequacy of any program, and fool prosecutors, the court, and jurors. Such a scenario is particularly fanciful since in white-collar investigations of

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102. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 145 (2004); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806–08 (1998).

103. *See, e.g.*, 18 U.S.C. §§ 1001, 1503, 1519 (2000).

corporations the mere whiff of a criminal investigation can be devastating to the company and its stock price. In any event, while one cannot say that some foolhardy individuals will not attempt such a daring deception, the ability of such a crime to occur does not warrant rejection of the new liability standard.<sup>104</sup>

For corporations, the new criminal liability standard will greatly increase the reasons for implementing an effective compliance system, because such a system could assist in rooting out fraud as well as serve as a potential shield from the government.<sup>105</sup> This latter function is particularly important in the field of criminal corporate liability, where corporations, as a practical matter, cannot afford to take criminal cases to trial and routinely become arms of the prosecution. The new corporate criminal liability standard will not eliminate the government's awesome power to indict a corporation or eliminate all abuse of power. It will serve, however, to reduce it in situations where a corporation can demonstrate its establishment of an effective compliance system.<sup>106</sup>

### III. DEFINING AN EFFECTIVE COMPLIANCE PROGRAM

The Supreme Court provided little guidance in the civil arena for determining a reasonably effective compliance program in the Title VII context. The courts and the

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104. In her article, *Corporate Decisionmaking: Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571 (2005), Professor Kimberly D. Krawiec correctly observes that the American legal system is moving away from a strict liability system toward a duty-based system. *Id.* at 572. Such a movement, however, has not yet affected the standard for criminal corporate liability, as is advocated herein. Professor Krawiec argues in general that companies may well seek under *Faragher* and *Ellerth* to have mere paper programs and that courts and agencies are not adept at evaluating compliance programs, which *may* not empirically serve to deter conduct. She thus advocates resort generally to a strict compliance system. *Id.* at 577, 580, 588–89, 591–96, 614. She does not, however, address the increased incentive for corporations by a *criminal* standard of liability that takes into account an effective compliance program, or the fact that post-Enron, courts and prosecutors have routinely evaluated corporate compliance programs as part of corporate investigations and deferred prosecution agreements. Indeed, her article, while questioning generally the evidence of the efficacy of compliance programs, does not focus on the unique attributes of criminal law, including the different goals of the criminal law. Finally, her criticism that it is difficult to evaluate the effectiveness of a compliance program is a charge that can be made with respect to the modified strict liability standard proposed by Professor Krawiec, who advocates ameliorating the faults of a strict liability system by encouraging an evaluation of the utility of internal compliance systems. *Id.* at 578–79. In any event, even if correct in the civil context, in the setting of criminal corporate liability her thesis would not warrant imposition of strict liability for a company that had undertaken all reasonable measures, including a state-of-the-art compliance program, since the company would have taken all actions that could possibly be asked of it.

105. *Cf.* Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 710–11 (2002) [hereinafter Murphy] (then-chair of the U.S. Sentencing Commission noting that sentencing guidelines, by giving reduction in sentence to a corporation that has an effective compliance program, has encouraged companies to adopt effective compliance systems).

106. The unethical and insufficiently supervised prosecutor could, of course, ignore such evidence and threaten to charge the corporation, knowing that in all likelihood the company will not call her bluff. But the risk of such conduct would be reduced by the new criminal standard.

EEOC were left to fill in the details. In the criminal corporate liability arena, by contrast, there already exist various sources for determining what the parameters of an effective system should encompass. Ultimately, what in fact is a reasonably effective system will be left to a jury and judge, but the guidance noted below will assist the finders of facts in making the factual determination in light of prevailing norms.

Since the collapse of Enron and the numerous corporate scandals that emanated from that singular event, a virtual cottage industry has grown up regarding effective corporate compliance measures. Specific guidance can be found in DOJ memoranda and the numerous deferred prosecution agreements reached by the DOJ and corporations as well as in the Sentencing Guidelines governing corporations. These sources provide guidance as to the measures that are appropriate for a company to take in order to adequately deter and detect criminal conduct by corporate employees. Moreover, both Congress and the DOJ could promulgate additional guidance, if necessary, just as the EEOC could implement such guidance to implement the Title VII anti-harassment compliance measures that were the subject of *Faragher*, *Ellerth*, and *Suders*.

#### A. The DOJ's Internal Approach: The Thompson Memorandum

First, the DOJ has itself issued guidance regarding attributes of an effective program. As the agency principally tasked with the enforcement of the federal criminal laws, its assessment deserves particular weight. In 2003, the DOJ issued revised guidelines (the Thompson Memorandum) for its prosecutors as to the factors to be considered in connection with whether or not to bring a criminal case against a corporation.<sup>107</sup> The so-called Thompson Memorandum, named after the then-Deputy Attorney General of the United States, enumerates a series of factors to be considered by federal prosecutors before instituting criminal action against a corporation.<sup>108</sup> These factors include the criminal history of the corporation, the likely collateral consequences of prosecution, the level and role of criminal conduct of the corporate employees, and the existence of an effective corporate compliance program.<sup>109</sup> The Thompson Memorandum places particular emphasis on analysis of the *concrete* steps taken by the corporation to cooperate. In short, it sought to put teeth in corporations'

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107. The Thompson Memorandum, *supra* note 57, was a retooling of the guidelines promulgated in 1999 by the DOJ. The prior set of guidelines listed eight factors for deciding whether to prosecute a corporation: (1) the nature and seriousness of the offense, (2) the pervasiveness of the wrongdoing, (3) the corporation's history of similar conduct, (4) any voluntary disclosure of wrongdoing and ensuing cooperation, (5) the existence and adequacy of a compliance program, (6) efforts at remediation, (7) the potential for collateral consequences that could harm innocent third parties, and (8) the availability of civil or regulatory remedies. Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, to Component Heads and U.S. Attorneys, Fed. Prosecution of Corps. (June 16, 1999), at Part II, *available at* <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html#Federal%20Prosecution%20of>. The latest iteration of the Memorandum by Deputy Attorney General Paul McNulty in December 2006, does not alter in any material respects these criteria, for purposes of this Article.

108. Thompson Memorandum, *supra* note 57.

109. *Id.*



common refrain to the DOJ that they were committed to being “good corporate citizens.”

Although the Thompson Memorandum lists an effective compliance program as only one factor to consider, as opposed to giving it conclusive weight,<sup>110</sup> the memorandum nevertheless provides a useful guide as to the criteria for an effective program, particularly since the government itself defines the parameters of a compliance program that satisfies the goals of the criminal justice system that it is tasked with enforcing.

The Thompson Memorandum makes clear that a corporate compliance program that is not effectively internalized by corporate personnel and made a part of the corporate culture will not be deemed effective. A paper tiger will not suffice. Thus, a corporation seeking leniency before the DOJ must demonstrate “the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.”<sup>111</sup> Under the DOJ guidelines, a compliance program must be “adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees.”<sup>112</sup> The program must then be effectively implemented because, according to the DOJ, prosecutors evaluating such programs should ask, “does the corporation’s compliance program work?”<sup>113</sup> Notably, the DOJ concedes that the mere fact that an employee commits a crime that is motivated in part to benefit the corporation is insufficient to conclude that a program is ineffective.<sup>114</sup>

In assessing a corporate compliance program, a prosecutor is to ask a series of sensible questions, such as: do the company’s directors exercise independent and informed review over proposed actions; are there internal audit systems in place to ensure independent evaluation of corporate transactions; is there a reporting system within the company that provides management and the board of directors with timely and accurate information about the company’s compliance with the law; does the compliance program address detection of the types of misconduct “most likely” to occur in the company’s particular business; are employees adequately informed about the corporation’s compliance program and do they have faith that it reflects the values of the corporation and its management; and has the company adequately staffed the compliance program “sufficient[ly] to audit, document, analyze, and utilize the results of the corporation’s compliance efforts.”<sup>115</sup>

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110. *Id.* at 8 (“However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents.”). The Thompson memorandum can be rightly criticized for not always recognizing the differences between corporate and individual liability. *See, e.g., id.* at 3 (“Corporations are ‘legal persons’ . . . Generally, prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals.”). This standard fails to recognize that individuals can control their own conduct and are thus deemed responsible when they transgress the criminal laws. Corporations, by contrast, cannot control the actions of all their employees to the same extent that an individual can.

111. *Id.* at 1.

112. *Id.* at 9.

113. *Id.* at 10.

114. *Id.* at 9.

115. *Id.* at 10.

*B. Deferred Prosecution Agreements*

In addition to these general precepts set forth by the DOJ in the Thompson Memorandum, there are other useful benchmarks to determine the attributes that the government believes are appropriate for an effective compliance program. These benchmarks can be found in the numerous deferred prosecution agreements entered into post-Enron between the DOJ and corporations seeking to avoid indictment. Moreover, since these measures are those that were required by the DOJ of companies that had been investigated criminally, they are a particularly useful source for determining the attributes of a program that would, by definition, satisfy criminal prosecutors.

These agreements put additional flesh on the bones regarding measures that can evidence that a corporation is “maximizing” its ability to “prevent and detect” crime.<sup>116</sup> For instance, in the first major corporate deferred prosecution agreement entered into by the government post-Enron, the DOJ and Merrill Lynch & Co., Inc. agreed to a series of specific compliance measures set forth in detail in the deferred prosecution agreement.<sup>117</sup> Those measures included the establishment of a committee to review all proposed transactions in specific high-risk areas, defined to include year-end transactions and back-to-back transactions designed to offset in whole or large measure any risk.<sup>118</sup> The deferred prosecution agreement banned all transactions that the company knew or believed were intended “to achieve a misleading earnings, revenue or balance sheet effect.”<sup>119</sup> In addition, it banned all oral agreements, a measure that served to address the problem identified at Merrill Lynch of executives entering into or

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116. *Id.* at 9.

117. Merrill Lynch Letter, *supra* note 44, ¶ 8, ex. A. The format of the agreement consists of a set of “Policies and Procedures” set forth as an addendum to the agreement; implementation of those measures is made a condition of the corporation’s compliance with the agreement. *Id.* ¶ 8. Subsequent DOJ agreements follow a similar format. *See, e.g.*, CIBC Letter, *supra* note 44, ¶ 9, app. B. Other agreements empower the monitor to evaluate the firm’s compliance system and make appropriate alterations. *See, e.g.*, United States v. America Online, Inc., No. I:04 M 1133, ¶ 13 (E.D. Va. Dec. 2004), at <http://www.corporatecrimereporter.com/documents/aol.pdf>.

118. Eichenwald, *supra* note 3; Merrill Lynch Letter, *supra* note 44, *supra* note 44, ex. A at 1–5. A similar requirement was imposed with respect to CIBC. *See* CIBC Letter, *supra* note 44, app. B, ¶ 5. The agreement with Symbol Technologies, Inc., established a new “disellosure” committee to review filings with the SEC. Symbol Technologies, Inc., Agreement, ¶ 9(e) (June 3, 2004), <http://www.corporatecrimereporter.com/documents/SymbolAgreement.FINALwpd.pdf>; United States v. N.Y. Racing Ass’n, Inc., No. illegible, ¶¶ 5(g), 6 (Dec. 11, 2003), <http://www.corporatecrimereporter.com/documents/nyra.pdf> (creating new “Special Oversight Board” and two new chief operating officer positions). Subsequent deferred prosecution agreements also contain various record-keeping requirements so as to be able to document to auditors and regulators that the compliance program is working. *See, e.g.*, CIBC Letter, *supra* note 44, app. B, ¶ 5 (requiring written communication to the outside auditor); Letter from David N. Kelley, U.S. Attorney, S. Dist. of N.Y., to Robert S. Bennett, Esq., Skadden, Arps, Slate, Meagher & Flom LLP, ¶ 6(i)(V1) (Aug. 26, 2005), [http://www.corporatecrimereporter.com/documents/kpmgdeferred\\_000.pdf](http://www.corporatecrimereporter.com/documents/kpmgdeferred_000.pdf).

119. Merrill Lynch Letter, *supra* note 44, ex. A, at 1; *see also* CIBC Letter, *supra* note 44, app. B, ¶ 2.

proposing oral agreements that would negate written agreements that were supposed to reflect the entire deal, and thus avoid scrutiny by inside or outside lawyers, accountants, and regulators.<sup>120</sup>

The agreement also empowered back-office compliance personnel by giving them absolute veto power over any transaction reviewed by the committee. This provision served to address the common phenomenon of executives in the profit centers of a firm ignoring personnel perceived as less significant to generating income for the firm.<sup>121</sup> The agreement also required Merrill Lynch to notify the outside auditor of its client of the proposed terms of a contemplated transaction. This measure served to assure that all participants in the proposed transaction had the same understanding of the deal terms and were not being given misinformation so as to gain approval by accountants and lawyers—the purported gatekeepers and watchdogs.<sup>122</sup> Finally, the agreement mandated a series of training, anonymous reporting, and anti-retaliation provisions to assure that the new procedures were effectively communicated to employees and integrated into the firm.<sup>123</sup>

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120. Merrill Lynch Letter, *supra* note 44, ex. A, at 1. A similar requirement was imposed with respect to CIBC. See CIBC Letter, *supra* note 44, app. B, ¶ 2(a). An oral side deal was at the heart of the illegal transaction between Merrill Lynch and Enron that was charged by the government. Four Merrill Lynch executives were indicted and convicted of participating in a parking transaction, which allowed Enron to book sufficient earnings for 1999 to meet Wall Street analyst expectations. In reality, an oral side deal pursuant to which Enron guaranteed Merrill Lynch a return on its “investment” negated the transaction being a true sale. See *United States v. Bayly*, No. 05-23019 (S.D. Tex. 2003). An oral side deal was also at the heart of the illegal deals between CIBC and Enron that served to inflate artificially Enron’s reported earnings. See CIBC Letter, *supra* note 44, app. A ¶ 6 (describing oral agreement by Enron to guarantee CIBC’s supposed equity investment in Enron vehicle, which negated the investment being sufficiently at risk to constitute “equity”).

121. Merrill Lynch Letter, *supra* note 44, ex. A at 2–3; see also CIBC Letter, *supra* note 44, app. B, ¶ 5. In another innovation intended to decentralize power, the deferred prosecution agreement with Symbol Technologies required that the Chairman and CEO functions be split between two people. Symbol Technologies, Inc., Agreement, ¶ 9(f) (June 3, 2004), <http://www.corporatecrimereporter.com/documents/SymbolAgreement.FINALwpd.pdf>.

122. Merrill Lynch Letter, *supra* note 44, ex. A at 3; see also CIBC Letter, *supra* note 44, app. B, ¶ 5. In the parking transaction between Merrill Lynch and Enron, trial evidence demonstrated that Enron had lied to its own outside auditors about the terms of the deal. The provision in the DOJ agreement sought to lessen the ability of a company to portray a transaction differently depending on the audience being addressed. By breaking down the heretofore sacrosanct wall between the parties to a deal and their respective outside auditors, the ability to pull off such prevarication was viewed as diminished since it greatly expanded the number of institutions, with varying interests, who would have to go along with the deception. A similar requirement was imposed with respect to CIBC.

123. Merrill Lynch Letter, *supra* note 44, ex. A at 3–5 (setting forth requirements for, inter alia, training, confidential reporting, establishment of a hotline, and anti-retaliation provision); see also Canadian Imperial Bank of Commerce Agreement, app. B ¶¶ 6, 9–12, (Dec. 22, 2003), <http://www.corporatecrimereporter.com/documents/cibc.pdf>; *United States v. New York Racing Ass’n, Inc.*, No. illegible, ¶¶ 5(g) & 6 (Dec. 11, 2003), <http://www.corporatecrimereporter.com/documents/nyra.pdf>; Symbol Technologies, Inc., Agreement, ¶¶ 9(i) & 10 (June, 2004), <http://www.corporatecrimereporter.com/documents/SymbolAgreement.FINALwpd.pdf>; Letter from David N. Kelley, U.S. Attorney, S. Dist. of N.Y., to Robert S. Bennett, Esq., Skadden,

*C. The Sentencing Commission's Guidance*

The United States Sentencing Commission, like the DOJ, has also promulgated guidance regarding the attributes of an effective compliance system. Revised in May 2004 in light of a Congressional directive resulting from the series of national white-collar scandals, Chapter 8 of the Sentencing Guidelines details specific components of an effective compliance system that are necessary before a corporation can receive a reduction in sentence based on its compliance measures.<sup>124</sup> The Guidelines provide a sentence reduction for corporations that have an effective policy: “[i]f the offense occurred despite an effective program to prevent and detect violations . . . subtract 3 points.”<sup>125</sup> Under the guise of effectuating this provision, the Sentencing Commission has actively participated in the promulgation of standards for evaluating an effective compliance program.<sup>126</sup>

The Sentencing Guidelines by their terms apply only to the sentencing phase of a corporation, which would be long after the damage from a criminal indictment has occurred. Further, the Guidelines’ authority, post-*Booker*,<sup>127</sup> comes more from their persuasive ability than their continued force as law. Nevertheless, the Guidelines are still widely relied on by corporations and their advisors for the model they provide for an effective internal control system.<sup>128</sup> Indeed, the DOJ itself has looked to them as setting appropriate criteria for an effective program, further enhancing their authoritative weight.<sup>129</sup> As one of the few sources of a systematic treatment by a

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Arps, Slate, Meagher & Flom LLP, ¶¶ 16, 18(e)(III) (Aug. 26, 2005), [http://www.corporatecrimereporter.com/documents/kpmgdeferred\\_000.pdf](http://www.corporatecrimereporter.com/documents/kpmgdeferred_000.pdf).

124. Scott N. Carlson & Paula J. Desio, *Chapter Eight of the U.S. Federal Sentencing Guidelines and the OECD Standards of Corporate Conduct: The Next Harmonic Convergence?*, in *Advanced Corporate Compliance Workshop 2005*, at 24, 31 (PLI Corp. L. & Practice, Course Handbook Series No. 6607, 2005) [hereinafter “PLI Article”] (on file with the *Indiana Law Journal*). Ms. Desio is the deputy general counsel of the Sentencing Commission and provides insights, including the impetus for the 2004 reforms, in the PLI Article. For the history of the Sentencing Commission’s Chapter 8 organizational guidelines, see Murphy, *supra* note 105, at 699–702.

125. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)(1) (2004).

126. The Sentencing Guidelines thus embody the principles advanced herein to the extent that they serve to encourage the development of good corporate governance through rewarding corporations for implementation of such measures. See Murphy, *supra* note 105, at 699, 703; PLI Article, *supra* note 124, at 22; *In re Caremark Int’l, Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996) (noting incentive created by Guidelines for corporations to implement effective ethics and compliance programs). The incentive created by the Sentencing Guidelines are not, however, sufficiently strong to promote corporate action. It is the rare company that will devote the substantial financial and personnel resources to an effective program solely to be able to argue for a three-point reduction under the Sentencing Guidelines. Indeed, by the time a company has been indicted, the greatest harm that can befall the company has already occurred. The force of Chapter 8 of the Guidelines comes from its detailed model of an effective compliance system, which companies can use as guidance from a respected governmental source.

127. *United States v. Booker*, 543 U.S. 220, 258 (2005).

128. PLI Article, *supra* note 124, at 16 & n.84.

129. KPMG LLP Agreement, ¶ 16 (Aug. 26, 2005), [http://www.corporatecrimereporter.com/documents/kpmgdeferred\\_000.pdf](http://www.corporatecrimereporter.com/documents/kpmgdeferred_000.pdf) (requiring KPMG to maintain a compliance and ethics

governmental agency of the attributes of an effective compliance system, the Guidelines are widely consulted by corporations that seek to conform their conduct to government expectations.<sup>130</sup>

In 2004, the Sentencing Commission promulgated Section 8B2.1, the most detailed description to date of the Commission's views of the criteria that should be used to judge a corporate compliance program.<sup>131</sup> Section 8, like its antecedents and the Thompson Memorandum, emphasizes that a company must exercise due diligence to prevent and detect criminal conduct. However, like the Thompson Memorandum, it recognizes the proposition that the mere fact that a crime then occurs at the company does not "necessarily mean that the program is not generally effective."<sup>132</sup> Section 8 then lists seven criteria for evaluating a program, including the establishment of standards and procedures to prevent and detect crime:

- having managers who are knowledgeable about the program and who exercise reasonable oversight of the program;
- adequately staffing the day-to-day operation of the program with direct reporting to senior personnel with oversight responsibility;
- training both the personnel who implement the program and the company's employees on the compliance and ethics standards and procedures;
- monitoring and auditing periodically the effectiveness of the program;
- having and publicizing a system of anonymous and confidential reporting of potential and actual criminal conduct without fear of retaliation;
- consistently enforcing the program, including disciplining those who fail to abide by the rules and procedures;
- and after criminal conduct has been detected, taking reasonable steps to prevent further such conduct and responding appropriately to the wrongdoing.<sup>133</sup>

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program that fully adheres to the criteria set forth in section 8B2.1 of the Sentencing Guidelines).

130. See, e.g., Walsh & Pyrich, *supra* note 6, at 675–76 & n.308.

131. PLI Article, *supra* note 124, at 22–23 & n.115.

132. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2004).

133. *Id.* § 8B2.1(b)–(c) (2004); PLI Article, *supra* note 124, at 21–28. The Sentencing Commission in commentary provided amplification on these basic criteria. For instance, the size of the organization is correlated to the degree of formality required of the program. A larger organization should have written procedures, while smaller organizations may not need to be as formal. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. application note 2(C). The Supreme Court has also recognized that larger organizations will need to have a formal mechanism for training employees than smaller companies. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808–09 (1998) (“Unlike the employer of a small work force, who might expect that sufficient care to prevent tortious behavior could be exercised informally, those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure.”).

A compliance program must also be tailored to the specific business. If because of the nature of an organization's business there is a substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses and must periodically reexamine its evaluations and procedures. See PLI Article, *supra* note 124, at 24, 28 & n.134; U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(C) (“[T]he organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design,

*D. The SEC's Approach: The Seaboard Report*

Finally, in the civil arena, the SEC has reached corporate resolutions akin to the DOJ deferred prosecution agreements that provide additional insight into what it considers to be an effective compliance program. The seminal example is the so-called Seaboard Report,<sup>134</sup> in which the SEC determined not to sue a corporation based in large measure on the actions of the corporation in self-policing its own conduct. The SEC noted that the corporation had undertaken significant measures, including the following:

The company also strengthened its financial reporting processes to address Meredith's conduct—developing a detailed closing process for the subsidiary's accounting personnel, consolidating subsidiary accounting functions under a parent company CPA, hiring three new CPAs for the accounting department responsible for preparing the subsidiary's financial statements, redesigning the subsidiary's minimum annual audit requirements, and requiring the parent company's controller to interview and approve all senior accounting personnel in its subsidiaries' reporting processes.

Our willingness to credit such behavior in deciding whether and how to take enforcement action benefits investors as well as our enforcement program. When businesses seek out, self-report and rectify illegal conduct, and otherwise cooperate with Commission staff, large expenditures of government and shareholder resources can be avoided and investors can benefit more promptly.<sup>135</sup>

The criteria noted by the Sentencing Commission and the SEC track in large measure the Thompson Memorandum and DOJ deferred prosecution agreement provisions. Together, they all set forth common sense, reasonable measures that companies can implement to deter and detect crime. It is not a great leap from the criteria noted above to a jury instruction that would provide guidance to a criminal jury in determining whether the government had established that the company had failed to have an effective compliance program to deter and detect the employee conduct at issue.

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implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.”). Further, the organization's own experiences will affect the evaluation of whether it should have anticipated the crime and taken further precautions. In addition, courts will look to current industry practices and any applicable government regulations to evaluate the adequacy of an organization's compliance program. See U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. application note 2(B) (“An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program.”).

134. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934, Exchange Act Release No. 44,969 (Oct. 23, 2001). The report, in listing the various factors that the SEC relied on in deciding not to charge the corporation, has become within the SEC its own version of the DOJ Thompson Memorandum.

135. *Id.* (stating that among the questions to be considered in determining whether to bring civil enforcement action are “[W]hat assurances are there that the conduct is unlikely to recur?” and “Did the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct?”).

## IV. THE BURDEN OF PROOF

The burden of establishing that the defendant corporation failed to have an effective policy to deter and detect the employee's crime should rest with the government. It has been suggested by one commentator that the burden of establishing the efficacy of a compliance program should be placed on the defendant corporation.<sup>136</sup> The rationale usually relied on for allocation of burdens of proof is that the party with greater or unique knowledge of the facts should properly bear the burden of proof.<sup>137</sup> Under that rationale, clearly a corporation is in the best position to know the parameters of its program. Thus, for instance, the Supreme Court in *Faragher*, *Ellerth*, and *Suders* placed the burden of proof on the corporation to establish an effective program to detect and deter violations of Title VII.<sup>138</sup>

The traditional rationale makes great sense in the civil context but cannot be so easily incorporated into criminal law precepts. In civil proceedings, the plaintiff does not have any discovery available to it under the law prior to instituting an action. Burdens of proof quite correctly take into account this basic fact, which is central to how a party can establish her case. In the civil arena, it would unduly hamper meritorious suits if the law required a plaintiff to have obtained, prior to filing a complaint, sufficient facts to allege a failed compliance program. For instance, in placing the burden on a defendant in a civil case, the Supreme Court in *Suders* relied on this basic civil law doctrine regarding which party had better access to the information to establish the facts at issue.<sup>139</sup>

Criminal procedure is wholly different. Prior to seeking a grand jury vote on an indictment, a prosecutor has access to information that a civil plaintiff would relish. The prosecutor has at her disposal the strongest means of discovery known to our legal system: the grand jury. The prosecutor by way of grand jury subpoena has access to a wide range of discovery.<sup>140</sup> She can subpoena any and all corporate records relevant to

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136. Walsh & Pyrich, *supra* note 6, at 684–85 & n.345. The authors provide no governing principle for their position or against the view that the burden should be borne by the government. Instead, they correctly note that allocating the burden to the defendant would not violate due process because the government would still bear the burden of proving all the essential elements of the crime. *Id.* at 685 n.345. The authors do not, however, articulate a principle warranting the placement of the burden on the defendant. Moreover, placing the burden on the defendant to establish these facts undercuts the view that a corporation that has taken all reasonable measures to detect and deter the employee's criminality has not committed a crime at all since the employee's actions cannot be imputed to the company.

137. *See* Pa. State Police v. Suders, 542 U.S. 129, 146 n.7 (2004).

138. *Id.* at 146.

139. *Id.* at 146 n.7 (“The employer is in the best position to know what remedial procedures it offers to employees and how those procedures operate.”); *see also* 9 J. WIGMORE, EVIDENCE § 2486 (J. Chadbourn rev. 1981) (“[T]he burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false.”) (emphasis omitted).

140. *See* FED. R. CRIM. P. 6, 17 (setting forth rules governing use of the grand jury and power to require witnesses to produce documents). *See generally* Chavez v. Martinez, 538 U.S. 760 (2003) (holding that the government has an expansive power to subpoena witnesses to the grand jury); Kastigar v. United States, 406 U.S. 441, 443 (1972) (noting that the government

a compliance program, and even records that are irrelevant if they could lead to relevant evidence.<sup>141</sup> She can bring to the grand jury myriad corporate officers to testify about the efficacy of the program.<sup>142</sup> Failure to comply with a grand jury subpoena can be punished by both criminal and civil contempt of court, and can result in both fines and jail.<sup>143</sup> In short, there is simply no comparison between the tools available to civil plaintiffs and criminal prosecutors. In practice, the government will be able to meet this burden of proof. In *Arthur Anderson, LLP v. United States*,<sup>144</sup> the most notorious corporate prosecution in recent history, the government amassed ample evidence regarding the company's failed compliance program.<sup>145</sup>

Aside from this important practical difference between criminal and civil practice, placing the burden on a defendant to prove the efficacy of a compliance program gives the government a presumption that the corporation has failed to act and undercuts the reasons for criminal corporate liability. Under the theory articulated herein, the corporation that has taken all reasonable measures to prevent employee crime is not deserving of criminal liability. The government should have to prove that failure in order to have the benefit of imputing the employee's conduct to the corporation. Presuming the opposite flies in the face of the basic precept that the government should bear the burden of proof of the essential elements.<sup>146</sup> The state may not relieve the government of its burden of proof by requiring the defendant to establish an affirmative defense to negate an essential element of the crime.<sup>147</sup> Placing the burden on the defendant to establish an effective compliance program, however, will do just that, since it presumes liability for both the actions and intent of the employee absent the employer establishing the defense.<sup>148</sup>

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can compel testimony by a person who has asserted a valid Fifth Amendment claim by conferring immunity to that person).

141. See *United States v. R. Enterprises*, 498 U.S. 292, 300 (1991).

142. The corporation and its custodians, moreover, cannot refuse to comply based on the corporation's Fifth Amendment right since they do not enjoy that privilege. *Braswell v. United States*, 487 U.S. 99, 104, 117–19 (1988).

143. See 18 U.S.C. § 401 (2005) (setting forth criminal sanction for contempt); 28 U.S.C. § 1826(a) (2005) (providing for civil confinement of grand jury witness for life of grand jury or eighteen months, whichever is shorter).

144. 544 U.S. 696 (2005).

145. *Id.*

146. *In re Winship*, 397 U.S. 358, 364 (1974).

147. See *Mullaney v. Wilbur*, 421 U.S. 684, 703–04 (1975) (holding as unconstitutional a statute requiring defendant to establish that killing was in the heat of passion in order to reduce the crime to manslaughter, since the statute otherwise presumed malice; government must prove absence of heat of passion); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *Patterson v. New York*, 432 U.S. 197, 212–16 (1977).

148. An interesting question arises as to whether the government should also have to establish an intent element with respect to the defendant company's compliance program. In other words, could a defendant corporation defeat vicarious liability imputation if the company believed it had an effective compliance program, although in fact it did not? Although a full discussion of this issue is beyond the scope of this Article, imposition of such an intent element would be unwise for two reasons. First, to establish a corporation's "intent," the prosecutor would need to use vicarious liability, which would render the analysis absurdly circular. Second, it would appear to increase the burden of the government dramatically and risk a corporation's promulgating a minimal program in order to claim that it believed that it was sufficient under the law.



## CONCLUSION

In the wake of Enron's demise and the subsequent series of corporate scandals, Congress and the U.S. Sentencing Commission acted quickly to pass innovative and stiff laws and guidelines to deter white-collar crime by individuals and corporations. The Department of Justice also aggressively pursued not just individual white-collar criminals, but corporations as well, using the new-found tools at its disposal. The confluence of justified public outrage at unchecked greed by corporate crooks, new sweeping legal tools, and aggressive prosecutions has had many societal advantages. But this recent increased scrutiny of corporate malfeasance has also served to bring to light a fissure in the current legal system. Corporate criminal liability has been stretched past the breaking point where it no longer serves the purposes of the criminal laws. It is time for further reform, this time giving renewed clarity and focus to the goals of criminal corporate liability and the prosecutor's role in pursuing corporate fraud. Far from giving corporations a shield to commit fraud, a system that ties criminal liability to the lack of an effective compliance program will do what the practical limitations on a prosecutor's time and resources could never permit— incentivize boardrooms around the country to devise, implement, and monitor compliance measures. Conversely, by placing the burden on the government to prove that a company's program was inadequate as a prerequisite to criminal corporate liability, this reform will provide a systemic check on prosecutors who seek to institute such actions in the future, helping to ensure that they do so only where the company should be justifiably responsible for the criminal conduct of its employees. The precepts that ground this Article's proposal have been endorsed by the Supreme Court in civil cases and have proved workable. The incorporation of these civil corporate liability parameters into the criminal context is both warranted and overdue.

