Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior

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EXECUTIVE SUMMARY

Under the prevailing legal rule in federal court and in most states, corporations can be held criminally responsible for any act committed by an employee as long as that act is committed within the scope of employment and with some intent to benefit the employer. In the federal system, this rule derives from the common law, as there is no generally applicable criminal statute embodying this standard. In practice, this rule means that a corporation has little legal defense against prosecution when a single rogue employee commits a crime, even if the crime is committed in violation of every rule in the employee handbook and in the face of a strict and well functioning compliance program. For many corporations, a criminal indictment is tantamount to a corporate death penalty and thus the current standard for corporate criminal liability places disproportionate power in the hands of the government.

Few people dispute that a corporation should be civilly liable to a customer if one of its employees commits a fraud. Civil liability for damages assures that victims are not left without compensation if the true wrong-doer is insolvent or difficult to locate. Making corporations criminally liable for the acts of employees, however, implicates a wholly different set of concerns. Corporations that have taken all reasonable actions to detect and deter fraudulent activity by their employees have done nothing worthy of criminal sanction. Indeed, currently they are being held liable for conduct that they cannot even control, and it is shareholders that end up bearing the burden of an employee’s misconduct.

Moreover, the current doctrine is not founded on either an act of Congress or Supreme Court precedent. Unlike other criminal laws, which are embodied in statutes approved by Congress, the current doctrine has not been commanded by Congress, but instead created by courts through the common law. Its judge-made genesis is based on a fundamental misreading of the sole Supreme Court precedent to address the issue, which dates from 1909. The current system of corporate criminal liability also evolved at a time before the advent of the regulatory state. It makes little sense in our era of specialized regulatory agencies and a system of civil laws designed to police the marketplace. The gap in enforcement that criminal law once helped to fill has long been addressed in other ways, and the harm it causes to shareholders far outweighs its positive effects. Especially in times of economic instability, corporations across the United States are put at risk by an outdated, counter-productive and unjust standard of criminal liability.

Most important in a time of economic crisis is the fact that the current standard makes no distinction between responsible corporations and those that fail to take compliance seriously. The current standard actually reduces the incentives for corporate deterrence. Thus, now is a critical time to question the current standard of corporate criminal liability. Every day, the country is waking up to more financial failures and suggestions of widespread white collar malfeasance. The current system of corporate criminal liability does not adequately serve the purpose of detection and deterrence of such wrongdoing.

There are alternatives to the current regime that continue to hold corrupt executives and irresponsible corporations liable for criminal acts while making sure that responsible corporations are not penalized. Companies that have taken all reasonable measures to detect and deter wrongdoing by their employees may still be civilly liable but will not be held criminally liable for the actions of employees who nevertheless violate strictly enforced corporate rules. Indeed, the logic of such a system is supported by a series of recent Supreme Court cases that have restricted the scope of vicarious corporate liability in an effort to promote responsible corporate behavior.

This paper discusses the origins of our flawed system of corporate criminal liability, the growing consensus on the need for change, and the leading alternatives to our current system. This paper recommends the following:
• A greater recognition of the harmful and counter-productive consequences of our current system of strict vicarious corporate criminal liability;

• A broader understanding of the flawed origins of the current theory of corporate criminal liability;

• The adoption by Congress and the courts of a liability system that imposes corporate criminal liability only when the corporation has failed to carry out a reasonable compliance program; and

• The pursuit of court actions seeking to require a system of corporate liability that promotes the goals of the criminal law, such as deterrence, while opposing the expansion of a system that is justified by neither Supreme Court precedent nor legislative enactment.

THE CURRENT STANDARD FOR CORPORATE CRIMINAL LIABILITY

The present legal framework, which is applied almost universally in the federal courts, holds that corporations are liable for the criminal acts of their employees so long as they are done within the scope of employment and with at least the partial intent to benefit the employer. The threshold for showing that an act was done within the scope of employment and with intent to benefit the corporation is low: generally, if a crime was committed on the job and had any actual positive monetary effect on the corporate coffers (as opposed to, for instance, a teller stealing money from the till), the standard is met.1

When a crime committed by a low-level employee is an isolated occurrence, or is against clear and well-enforced company policies, the case for vicarious corporate criminal liability is at its nadir. The case for vicarious corporate criminal liability is difficult to justify when the act imputed to the corporation is wholly contrary to the instructions of the corporation.2 Yet, in most federal circuit courts of appeal, courts automatically impute liability to the corporation regardless of the station of the employee or the extent of corporate instructions. The current approach, which predominates in most states as well as in all federal courts, also holds that the “corporation may be criminally bound by the acts of subordinate, even menial, employees,” and even at times the acts of independent contractors.3 Whereas alternative approaches to vicarious corporate criminal liability stress the role of high-level, managerial involvement and give weight to the due diligence of the company to prevent the employee’s offending conduct, the current approach holds the corporation accountable for any act by employees, regardless of their station or the instructions and training provided by the company.4

As one commentator has noted, the fact that corporations may be held criminally liable for the

1. For example, a broker who commits fraud against a customer with the primary intent to increase her own commissions falls within the scope of this rule, because the fraud also serves to increase commissions to the company. Not only is the corporation potentially liable in a civil case but the corporation is potentially liable in a criminal case as well. While the current legal theory for holding the corporation liable is the same in both cases, the possible consequences to the corporation are wildly different. See generally Daniel R. Fischel & Alan O. Sykes, Corporate Crime, 25 J. LEGAL STUD. 319 (1996).

2. Some have extended this as well to actions taken by an employee without managerial authority. Gerald E. Lynch, The Role of Criminal Law in Policing Corporate Misconduct, 60 LAW & CONTEMP. PROBS. 23, 39 (1997) (“When corporations are held liable for the acts of relatively low-level managers, even acting in violation of express corporate policy, it becomes difficult to sustain the idea that ‘the corporation’ as an entity is blameworthy in any way that is easily analogized to the intentional actions of a natural person.”).


4. The federal circuit courts of appeal all adhere to this conventional view of corporate criminal liability. 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. Am. Radiator & Standard Sanitary Corp., 433 F.2d 174 (3d Cir. 1970); Apex Oil Co. v. United States, 530 F.2d 1291 (8th Cir. 1976); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972); Cont’d Baking Co. v. United States, 281 F.2d 137 (6th Cir. 1960).
isolated acts of low-level employees often comes to the “shock, incomprehension and outrage of senior management.” That reaction is understandable given the extent to which many corporations have devoted substantial resources, both in terms of time and expense, to instructing their employees regarding compliance with applicable laws and regulations and company policies, and the extent to which perfect compliance is impossible. Everyone understands that there will be bad apples in the corporation, but few would suggest that the penalty for a bad apple should be to cut down the tree.  

### A. The Genesis of the Current Doctrine

The current legal doctrine of corporate criminal liability is generally the creation of the courts. Congress has clearly determined that corporations can be deemed capable of committing crimes but with rare exceptions has not chosen to legislate how the courts are to impute to a corporation the necessary action and state of mind of its employees or other agents. In a handful of instances in the context of regulatory regimes, Congress has explicitly set out the method of imputing the acts of an employee to the corporation for criminal purposes. But most federal statutes are silent on this issue and thus it has been up to the courts to determine how vicarious liability should be applied.

The judicial misreading of a single Supreme Court precedent from almost 100 years ago, *New York Central & Hudson River Railroad Co. v. United States*, is largely to blame for the genesis and persistence of the current legal standard. Lower federal courts have mistakenly relied on this Supreme Court decision from 1909 as if it instructed the trial courts that they must apply a strict *respondeat superior* rule in the criminal context. *New York Central* decided no such thing. Instead, the Court considered a constitutional challenge to a particular statute, the Elkins Act, which created criminal liability for common carriers for illegal rebates granted by their agents and officers. The statute explicitly imposed vicarious criminal liability on a company by providing that whenever an employee was acting within the scope of employment, the employee’s acts or omissions would be imputed to the corporation for purposes of liability under the act.

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6. Various countries, by contrast, require a far greater showing to impose corporate liability, placing the United States at a competitive disadvantage. These countries include Germany (administrative liability), Italy (deterrence-oriented emphasis on corporate compliance), Spain (no corporate criminal liability), and England (corporate liability only when the criminal act was committed by an individual who can be identified as a “directing mind” of the corporation as a whole).

7. Unless the statute indicates otherwise, the words “person” and “whoever” in any federal statute are defined to include corporations. 1 U.S.C. § 1 (2000), and accordingly Congress has indicated that corporations may be liable for committing a wide variety of crimes. See e.g., 18 U.S.C. § 371 (2000) (“If two or more persons conspire . . . each shall be fined under this title or imprisoned not more than five years, or both.”) (conspiracy statute); 18 U.S.C. § 1519 (2000) (“Whoever knowingly alters . . . or makes a false entry in any record . . . with the intent to impede, obstruct, or influence the investigation . . . of any matter . . . shall be fined under this title, imprisoned not more than 20 years, or both.”) (obstruction of justice statute).


10. *Id.* at 492.
Although the Supreme Court cited state common law cases holding that corporations could be vicariously liable for the criminal acts of employees, the Court noted that it was only addressing the issue of whether Congress had the constitutional authority to impose vicarious corporate liability if Congress so chose.\(^\text{11}\) Not at issue was whether in all cases—even in the absence of explicit statutory mandate—federal common law required that corporations be held responsible for the acts of their employees.

The erroneous reading of *New York Central* has repeatedly been made by federal circuit courts.\(^\text{12}\) Under the prevailing appellate federal standard of *respondeat superior*, a company could be held criminally responsible for the conduct of a single low-level employee even if he or she acted in direct contravention of corporate policy and a robust compliance program. All that is necessary is that the employee acted within the scope of employment and acted with the intent, at least in part, to benefit the organization.\(^\text{13}\)

For example, the Sixth Circuit reads *New York Central* to require, rather than permit, corporate criminal liability. In *Continental Baking Co. v. United States*, the panel cited *New York Central* when declaring: “There is an officer or agent of a corporation with broad express authority, generally holding a position of some responsibility, who performs a criminal act related to the corporate principal’s business. Under such circumstances, the courts have held that so long as the criminal act is directly related to the performance of the duties which the officer or agent has the broad authority to perform, the corporate principal is liable for the criminal act also, and must be deemed to have ‘authorized’ the criminal act.”\(^\text{14}\) The same is true in the District of Columbia: “Where there is adequate evidence for imputation (as here), the only thing that keeps deceived corporations from being indicted for the acts of their employee-deceivers is not some fixed rule of law or logic but simply the sound exercise of prosecutorial discretion.”\(^\text{15}\)

In *U.S. v. Basic Construction Co.*,\(^\text{16}\) a jury in the Fourth Circuit convicted the corporation of intentionally violating antitrust regulations, notwithstanding the fact that the corporation had introduced evidence to show that it had a “longstanding, well known, and strictly enforced policy against bid rigging.”\(^\text{17}\) The evidence showed that the illegally rigged bids were perpetrated “by two relatively minor officials … without the knowledge of high level corporate officers.”\(^\text{18}\) But the jury was not instructed that “it could consider the evidence of Basic’s antitrust compliance policy in deciding whether the company had the requisite intent to violate the Sherman Act” or that a vigorous compliance policy was a defense.\(^\text{19}\) Instead, the jury was instructed only that it could “consider Basic’s alleged antitrust compliance policy solely in determining whether the employees were acting for the benefit of the corporation.”\(^\text{20}\) The court was unwilling to credit compliance programs any further.

In short, every circuit has either explicitly held or simply assumed that vicarious corporate criminal liability is required in all cases of employee wrongdoing. That misguided view must change.

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11. *Id.* at 496–97.
12. *New York Central* itself has been repeatedly cited for this erroneous proposition. See e.g. *United States v. Blood*, 435 F.3d 612 (6th Cir. 2001) (cited in passing for the conventional misreading); *United States v. Carter*, 311 F.2d 934 (6th Cir. 1963) (cited for the conventional misreading); *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960) (cited for the conventional misreading).
13. *Id.*
14. 281 F.2d 137, 149 (6th Cir. 1960).
16. 711 F.2d 570 (4th Cir. 1983).
17. *Id.* at 572.
18. *Id.*
19. *Id.*
20. *Id.* at 573.
B. The Misapplication of New York Central is Contrary to the Goals of Criminal Law.

None of the traditional goals of the criminal law or its basic concern for individual determinations of guilt supports 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 is reserved for conduct that society finds so repugnant as to warrant the severest sanction. The goals of the criminal law are to deter and punish such conduct. Where nothing more can be expected of a corporation than actions it has already undertaken, the goals of the criminal law are satisfied.21

Finding an individual guilty of a crime involves basic precepts requiring an assessment of individual intent, action, and voluntariness. Where an employee has been encouraged or directed to engage in the crime by the corporation, the analysis is simple. But 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. There is no additional marginal deterrence to be obtained by criminal punishment;22 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. Moreover, the conviction of companies with effective compliance programs sends the message that no good deed on their part will go unpunished. In short, there is no valid rationale for 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.

Imposing criminal liability upon a corporation based on the actions of its employees—regardless of the level of the employee and the steps the corporation has taken to prevent such acts—has been criticized as an excessive weapon in the hands of the government.23 Because of the profound impact of an indictment and the lack of a defense to vicarious liability, the mere threat of criminal sanctions based on the actions of an individual employee has been enough to compel corporations to settle non-meritorious claims and has forced shareholders to bear the burden of penalties never approved by a judge or a jury. Indeed, for many corporations, a criminal indictment is equivalent to the death penalty and can literally put an end to its artificial life.24


The problem is not limited to the circumstance of an unethical or politically motivated prosecutor. The availability of the current corporate criminal liability doctrine itself creates severe threats for corporations that have done everything in their power to have their employees comply with state and federal requirements. The doctrine puts corporations that have done everything they can to deter and detect crime at risk.

In sum, none of the traditional goals of the criminal law supports the application of agency principles of vicarious liability to corporations that have taken all reasonable measures to prevent employees from engaging in illegal activity. The criminal law has always focused on punishing the guilty and deterring illegal conduct, but it has not traditionally punished one person for another person's crime. Moreover, there has been a movement across nearly every field of jurisprudence to ensure that internal compliance efforts by corporations are properly incentivized. Unlimited corporate liability is plainly at odds with that movement because strict liability encourages companies not to report misconduct if the effect of revealing it creates the potential for criminal liability. Despite these flaws, this regime has endured in the face of the objections of academics and practitioners of all stripes. It is long past time to explore the consequences of the current legal doctrine of corporation criminal liability and how to change it.

C. The Misapplication of New York Central is Inconsistent with Modern Supreme Court Rulings in the Civil Context.

Remarkably, the Supreme Court has never addressed how vicarious criminal liability should be determined for corporations in the absence of a statute that explicitly includes instructions for imputing the liability of an employee to the corporation. The Supreme Court has addressed how vicarious liability should be applied to corporations in the civil context in cases that are highly instructive. The Supreme Court has made clear that unlimited vicarious corporate liability is both unwarranted by civil agency principles and undesirable as a matter of optimal deterrence. This trend in civil law deserves greater attention, as it offers specific pathways to reforming corporate criminal liability at the federal level.

Recent Supreme Court decisions have appropriately limited civil liability to actions of management-level employees and allowed corporations a defense based on compliance measures. One of these decisions took place within the context of punitive damages. There are two important and useful parallels between laws limiting civil liability and punitive damages and the need for corporate criminal liability reform. First, courts often analogize punitive damages to criminal punishment, and so changes in the law affecting punitive damages should be persuasive precedent in addressing criminal liability. Second, vicarious liability principles developed first in the context of civil law. Given that one of the original reasons for applying corporate vicarious liability in the criminal context was because judges did not differentiate vicarious liability in civil and criminal contexts, the continued evolution of vicarious liability in the context of civil cases should be influential in the criminal realm.

In Kolstad v. American Dental Association, a discrimination case under Title VII of the Civil Rights Act of 1964, the Supreme Court undermined the notion that strict vicarious liability principles should be applied to organizations. The Court held that punitive damages are not available in Title VII cases where the offending employee's actions were taken contrary to the employer's good faith efforts to comply with Title VII.

25. Numerous judges, legislative counsel, and even former prosecutors have criticized the current system. See, e.g., citations collected in Andrew Weissmann with David Newman, Rethinking Criminal Corporate Liability, 82 Ind. L.J. 411 nn. 6-10 (2007) (collecting numerous articles and speeches by academics, former prosecutors, and practitioners criticizing the current system of corporate criminal liability); see also Brief of Amici Curiae at 18 n. 8, United States v. Ionia Management S.A., No. 07-5801-CR (2d Cir. 2008) (same).
27. Id. at 546.
The Court clearly worried that holding corporations liable for the conduct of employees in instances where the corporation had attempted to comply with the law “would reduce the incentive for employers to implement antidiscrimination programs . . . . [and] likely exacerbate concerns among employers that . . . [the] standard penalizes those employers who educate themselves and their employees on Title VII’s prohibitions.” The Court was concerned that attempts by employers to inform their employees about Title VII’s requirements could be used against the company, that is, “even an employer who makes every effort to comply with Title VII would be held liable for the discriminatory acts of agents acting in a managerial capacity.”

The Court found that Title VII was not designed solely to provide redress for plaintiffs but to prevent discrimination through the creation of effective deterrence mechanisms policies and grievance systems. Accordingly, the Kolstad Court concluded that “giving punitive damages protection to employers who make good-faith efforts to prevent discrimination in the workplace accomplished Title VII’s objective of motivating employers to detect and deter Title VII violations.” The Court explicitly rejected a more common approach to punitive damages as too broad, reasoning that “[a]pplying the Restatement of Agency’s ‘scope of employment’ rule in the Title VII punitive damages context . . . would reduce the incentive for employers to implement antidiscrimination programs.” It determined that the “scope of employment” rule, even if limited to imputing conduct of managerial level agents, would create “perverse incentives” for a corporation to avoid taking remedial measures if such measures provide no defense and may expose the corporation to liability. This is precisely the disincentive responsible corporations face in the criminal context: the current criminal liability standard fails to properly incentivize internal deterrence by refusing to distinguish companies that actively engage in compliance from those that do not.

The Supreme Court’s decision in Kolstad is important because it makes clear that the Court will alter and amend vicarious liability rules where they are contrary to statutory aims of compliance and deterrence within corporations. The Court rejected the idea that strict vicarious liability was necessary to promote deterrence and responsible corporate behavior.

Equally important, the Court has described punitive damages as “quasi-criminal” in nature because they share the two purposes of criminal law to punish and deter. Accordingly, a company that has undertaken all reasonable measures to deter and detect an employee’s criminal actions has done all that can be legally expected of it under the criminal law. Kolstad makes clear that the law is ill-served by undermining corporate attempts to deter and punish wrongdoing by imposing strict vicarious liability.

Kolstad confirms the trend begun in the Supreme Court’s decisions in Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). In Faragher and Ellerth, both hostile workplace cases under Title VII, the Court narrowed the scope of vicarious corporate liability, rejecting the usual rule in civil cases that vicarious liability arises from all acts of employees acting within the scope of their employment. The Court restricted liability to the acts of supervisors, Faragher, 524 U.S. at 799-801, Ellerth, 524 U.S. at 762, and determined that an employer is entitled to an affirmative defense if

28. Id. at 544.
29. Id. at 544 (quotation omitted).
30. Id. at 545.
31. Id. at 545-46 (quotations omitted).
32. Id. at 528.
33. Id at 545.
35. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (stating that punitive damages “punish[] unlawful conduct and deter[] its repetition.”); Philip Morris USA v. Williams, 127 S. Ct. 1057, 1062 (2007) (same); see also Model Punitive Damages Act, § 1(2) (1996) (“Punitive damages’ means an award of money made to a claimant solely to punish or deter a defendant or to deter others.”).
it has reasonable policies in place to deter the offending employee’s conduct, and if the aggrieved employee has not availed herself of the employer’s system of redress. The Court reached this result even though Congress had explicitly defined “employer” to include “agents” and even though the Court determined that Congress intended for common law principles to apply to Title VII.

As it would later do in *Kolstad*, the Court reached its decisions primarily based on the purpose of the statute. The Court viewed the statute as an attempt by Congress to create incentives that would prevent sexual harassment. This is significant, because the purpose of a typical civil case is to award damages to a plaintiff. The Court’s view of Title VII shares important aspects with the criminal law, particularly in that both are designed to encourage lawful behavior.

*Faragher* and *Ellerth* were the Court’s first attempts at limiting a corporation’s responsibility for the acts of its employees to situations in which the employee was a supervisory agent and the corporation had not acted in good faith to ensure compliance. In *Kolstad*, the Supreme Court extended this reasoning to the context of punitive damages, further clarifying that the principle of limiting corporate liability has relevance to the criminal, as well as the civil, realm. As the Supreme Court would later write in *Exxon Shipping Co. v. Baker*, the similarity between the aims of criminal liability and punitive damages is “obvious.” Punitive damages and the criminal law share the same underlying purpose and legal theory—punishment and deterrence. Theoretically then, they should also share the same theory of vicarious corporate liability.

When the corporation has taken all actions that can be expected, the application of punitive damages via vicarious criminal liability results in the “perverse incentives” rejected by the Supreme Court in *Kolstad*. *Kolstad*’s logic must be extended—otherwise the decision will result in a legally untenable position in which a corporation has greater ability to defend itself in a civil setting than to defend against a criminal indictment.

The availability of punitive damages for corporations has been further highlighted by the recent Supreme Court’s decision in *Exxon Shipping Co. v. Baker*, which addressed arguments in favor of limits on vicarious corporate criminal liability. There were two important rulings in *Exxon*; the more widely commented upon was about the scope of punitive damages in maritime cases. On that question, the Court imposed a 1-1 ratio between punitive damage awards and compensatory awards. The other important ruling—less commented upon—was the Court’s 4-4 split on whether punitive damages for the acts of managers were available at all in maritime cases.

Justice Souter addressed the issue of the availability (as opposed to the scope) of punitive damages against corporations for the actions of their managerial agents in maritime cases. Justice Souter laid out the arguments presented by both sides, noted the 4-4 division on this question, and specifically recognized Exxon’s argument that even if two Supreme Court cases from the 1800s did not bar punitive damages in this case, “the Court [should] fall back to a modern-day variant adopted in the context of Title VII of the Civil Rights Act of 1964 in *Kolstad v. American Dental Assn.*, that employers are not subject to punitive damages for discriminatory conduct by their managerial employees if they can show that they

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36. *Ellerth*, 524 U.S. at 765 (“Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer’s effort to create such procedures, it would affect Congress’ intention to promote conciliation rather than litigation in the Title VII context . . . .”).


38. See Christopher R. Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law*, 87 Neb. L. Rev. 197, 214 n. 72 (2008) (“The [Kolstad] Court’s rationale for adding a good-faith defense for punitive damages is not based on anything special about Title VII. Whatever sort of misbehavior is at issue, if that misbehavior is contrary to corporate good-faith efforts to comply with the law, there is an equally strong argument against punishing a corporation.”).

maintained and enforced good-faith antidiscrimination policies.” Thus, Kolstad again took center stage in issues involving corporate liability and the role of compliance.

The Court also reinforced the helpful analogy between the goals of punitive damage law and criminal law, citing several cases for the proposition that “[p]unitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law.” The Court further noted that “[t]he points of similarity are obvious” and favorably cited a prior case declaring that the purposes of punitive damages and fines upon criminal conviction were the same. The Court’s discussion of the similarities between punitive damages and criminal law only serves to make the Kolstad decision increasingly important in undermining the application of strict corporate criminal liability principles.

On the question of the amount of punitive damages available, much of the “problem” Justice Souter focused on was not that punitive damages awards are too great, but that they are too unpredictable:

Thus, a penalty should be reasonably predictable in its severity, so that even [a] “bad man” can look ahead with some ability to know what the stakes are in choosing one course of action or another. . . . And when the bad man’s counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage.

The focus on predictability has a natural parallel with alternative approaches that anchor liability to particular (and well-defined) tiers within the corporation and allow corporations (by creating real compliance regimes) to make predictions about the likelihood of future judgments.

The Supreme Court’s recent civil liability and punitive damages decisions point the way towards corporate criminal liability reform by offering a due diligence defense and limiting liability to the acts of supervisory employees. Reform of the current system of corporate criminal liability would do well to follow the recent reforms of the civil system.

D. The Current Standard Gives Federal Prosecutors Unwarranted Powers

In practice, the standard of unlimited vicarious corporate criminal liability transfers powers from federal judges operating publicly to federal prosecutors operating via private agreements. A recent study has shown that corporate prosecutions reached even higher peaks from 2002 to 2005 and declined slightly in 2006 and 2007. Post-Enron, there has been an overall surge in corporate prosecutions. The FBI’s “Financial Crimes Report” for the fiscal year 2007 reported that the number of pending corporate fraud cases had doubled since 2003, bringing in over $13 billion in restitution and fines in 2007 alone. Meanwhile, press releases from the Justice Department during 2007 and into 2008 logged a stream of corporate guilty pleas and fines from major companies.

40. Slip op. at 9, 2008 U.S. LEXIS 5263 at *22 (citation omitted).
41. Id. at 31 (citation omitted).
42. Id. at 31-32.
43. Slip op. at 29, 2008 U.S. LEXIS 5263 at *56.
The cases that DOJ pursued both before and during this recent state of investigations and prosecutions all relied on strict corporate vicarious liability. They illustrate the problem, namely, the unjust punishment of companies for actions they could not and did not control. One of the clearest examples of an earlier, problematic prosecution that resulted in a verdict is *United States v. Twentieth Century Fox Film Corp.* \(^{48}\) In 1951, Twentieth Century Fox (“Fox”) had entered an agreement with the government in which Fox agreed not to bundle movies together and force movie theaters to license two or three or more movies, when the theater really only wanted one. \(^{49}\) Over 30 years later, Fox was charged with violating the agreement based on the actions of Leila Goldstein, a branch manager. \(^{50}\) Fox was charged despite evidence that Fox did everything possible to deter employees from violating the agreement. The District Court noted that every Fox employee who testified, including defendant Goldstein, admitted filing a written acknowledgment with Fox attesting to knowledge of the agreement forbidding them to bundle movies together. Furthermore, the court noted that the employees further swore to comply with the agreement. \(^{51}\) The court refused to admit any evidence of the corporation’s extensive program of compliance with a decades-old agreement as a defense against charges stemming from the actions of a single branch manager of a nationwide film production corporation. Nevertheless, “[r]elying on the principle that a corporation is criminally liable for the conduct of its managerial employees acting within the scope of their authority” the court found Fox “guilty of criminal contempt and imposed as a penalty a fine of $500,000 plus $40,397 in costs.” \(^{52}\)

The conviction was affirmed because the Court of Appeals imposed strict vicarious liability. The Appellate Court’s reasoning, however, has since been repudiated by the Supreme Court. \(^{53}\) The court refused to recognize that some employee acts are truly “wayward,” and that corporate compliance mechanisms can help distinguish acts for which the corporation should bear responsibility from those it should not. Many other cases follow this pattern. \(^{54}\)

### E. The Current Standard Facilitates Unjust Deferred Prosecution Agreements

The phenomenon of criminal cases brought against companies even where an employee’s criminal actions are committed in spite of strong compliance programs is only part of the story. The examples noted above are from court cases, but they do not give the complete picture of the true reach of governmental power provided by the liability. The use of private settlements prior to the government instituting a criminal court proceeding has grown immensely and is subject to far less public scrutiny and no judicial oversight.

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47. The Department of Justice issues regular press releases related to corporate crime. Those press releases are available at the Department of Justice website and are summarized in the United States Department of Justice Fact Sheet: President’s Corporate Fraud Task Force Marks Five Years of Ensuring Corporate Integrity, July 17, available at http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html. Some noteworthy examples include everything from deferred prosecution agreements for violations of the Foreign Corrupt Practices Act to guilty pleas related to importing falsely labeled fish.

48. 882 F.2d 656, 660 (2d Cir. 1989).

49. *Id.* (quoting decree).

50. *Id.* at 658.


52. *Twentieth Century Fox Film Corp.*, 882 F.2d at 659 (citation omitted).

53. *Id.* at 661.

Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior

The rise of these deferred-prosecution and non-prosecution agreements represents a shift away from court adjudication, without any prior judicial approval. These agreements are entered into between corporations and the government, on terms set by prosecutors, in order for a corporation to avoid indictment.

To begin with, the prosecutor’s ability to bring an indictment, and therefore force a deferred prosecution agreement, is broadened immeasurably by the liberal standard for corporate criminal liability. As one commentator has noted, prosecutors (prior to even appearing before judges) rely on the fact that “the criminal case against a corporation, once there is evidence that even a single low-level employee engaged in criminal activity on the job, is virtually bulletproof.” The result is that corporations are exposed to the possibility of criminal prosecution with little defense except to plead for the mercy of prosecutors. “Under current practice, apart from DOJ internal guidelines, there is little by way of systemic checks on the overly-aggressive, misinformed, or unethical prosecutor.”

Even the current internal DOJ guidelines make clear that prosecutorial discretion is often all that stands in the way of a criminal conviction:

[I]n certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation. 57

Thus, in light of the recognition of that power imbalance, numerous corporate cases are resolved now without resort to a formal charge. Following DOJ’s 2003 guidance set forth in the “Thompson Memorandum” which set guidelines for criminal prosecutions of corporations, federal prosecutors increasingly resorted to seeking enforced cooperation and corporate self-regulation via deferred prosecution and non-prosecution agreements, which contained numerous stringent provisions and frequently imposed hefty fines. 58 The 2007 Annual Corporate Pre-Trial Agreement Update shows that from 2006 to 2007 the number of pre-trial agreements between federal prosecutors and corporations nearly doubled, from 20 in 2006 to at least 37 in 2007—compared to just five in 2003 and only eleven during the decade from 1992-2001. 59

Academics have viewed the emphasis on such agreements as a form of “compelled cooperation,” which pits companies beleaguered by threats of indictment against federal prosecutors wielding unprecedented

56. Weissmann, supra note 25, at 427.
58. Deferred and non-prosecution agreements have become so pervasive that they have given rise to a secondary industry with corruption concerns of its own. Recent news media reports that consulting companies had allegedly received lucrative no-bid contracts to monitor corporations’ compliance with DPAs, including a reported $52 million contract (with the charged corporation footing the bill) awarded to former attorney general John Ashcroft’s firm by a prosecutor who once served under Ashcroft at the Justice Department, raised public outcry against the perceived abuse of DPAs by prosecutors at the expense of alleged corporate wrongdoers. In response to the public outcry, in March 2008 the DOJ issued a memorandum from Acting Deputy Attorney General Craig Morford—the “Morford memo”—urging prosecutors to avoid actual or potential conflicts of interest in the selection of monitors and requiring them to seek the DOJ’s approval for each monitor selected. See Craig S. Morford, Acting Deputy Attorney General, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, Memorandum to Heads of Department Components United States Attorneys (Mar. 7, 2008), available at http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.
power in pursuit of a wide-reaching “structural reform” agenda without guidelines or accountability. While this new policy may bring a decrease in the actual number of criminal indictments filed against corporations, that is only because corporate pre-trial agreements enable prosecutors to obtain a greater numbers of “victories” (without ever going to court) while also reaping greater penalties even as they transfer the bulk of enforcement costs to the corporations themselves.

Given the hair-trigger for corporate liability even for the most responsible corporate citizen, many corporations forego any defense in order to resolve a threatened prosecution. As Judge Gerald E. Lynch has explained:

If a corporation is criminally liable for the unauthorized acts of mid-level managers, the corporation will often not have a viable defense, despite legitimate questions about the justice of punishing it. . . . Such defendants are increasingly relegated to making their most significant moral and factual arguments to prosecutors, as a matter of “policy” or “prosecutorial discretion,” rather than making them to judges, as a matter of law, or to juries, as a matter of factual guilt or innocence.

Moreover, the current strict vicarious liability rules have created a de facto administrative system in which the power of conviction and punishment effectively rests with an agency that is not designed for the task. In essence, the country has seen a shift towards a system in which corporations are prosecuted and convicted solely at the hands of prosecutors instead of at the combined hands of prosecutors, judges, and juries. Former prosecutors have noted this imbalance of power:

One of the problems with the process of negotiating a deferred prosecution agreement is that it is not really a negotiation. Any pushback 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 claim[ed] contrition is not genuine.

Given the imbalance of power between prosecutors and corporations, a significant amount of corporate criminal practice occurs entirely in private, with no judicial oversight (DPAs are not subject to judicial review). Further, the DPAs permit the prosecutor’s office effectively to supervise corporate activities by placing requirements upon the corporation, allowing a governmental agency (that was not designed for the purpose of supervising corporations) to take on a role that should fall within the province of regulators.

Deferred prosecution agreements have often contained unwarranted provisions not related to the particular investigation. For example:

• A 2006 pre-indictment agreement required Roger Williams Medical Center in Rhode Island to provide four million dollars of free medical services to the public—even though the crimes charged, which involved illicit campaign contributions, were entirely unrelated to the provision of medical care.

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• A 2004 deferred prosecution agreement with MCI on charges of defrauding Oklahoma pension funds required MCI to expand its Oklahoma operations to create 1600 new jobs over ten years, 160 jobs per year.  

• As part of a deferred prosecution agreement with respect to a securities fraud investigation, Bristol-Myers Squibb (BMS) was required to endow a chair in business ethics at Seton Hall Law School—an institution that just happened to be the alma mater of the prosecuting U.S. Attorney, Christopher Christie.  

• In addition to paying almost half a billion dollars in fines, restitution, and disgorgement, prosecutors required the accounting and consulting firm KPMG to “agree” to shut down its tax practice permanently and also to provide virtually perpetual cooperation in future governmental investigations.  

• An agreement reached by prosecutors and the New York Racing Association (NYRA) on charges of tax fraud in 2003 gave the NYRA 18 months to make “all commercially reasonable efforts” to install video slot machines at each of its racing facilities—a measure designed to support a state revenue initiative that had little or no connection to NYRA’s federal tax fraud charges.  

• A deferred prosecution agreement reached with medical device manufacturer Zimmer Inc. over charges of paying kickbacks to doctors included a provision requiring the corporation to accept a no-bid contract to hire former Attorney General Ashcroft as a corporate monitor at a potential cost of $30-$50 million.  

These examples illustrate how the current system has undermined the delicate balance between prosecutor, judge, and jury that traditionally supports our criminal justice system. A doctrinal change is needed to curb abuses that can result not just from overzealous prosecutors acting in the absence of guidelines, but from the corporate criminal liability jurisprudence itself.

F. The Current Standard of Strict Vicarious Criminal Liability Has Outlived Its Historical Justification

The current legal regime did not always exist. Vicarious criminal corporate liability evolved to address a regulatory system ill-equipped to prevent widespread public harms and a legal regime equally ill-suited to addressing that harm once it occurred. With the phenomenal growth of the regulatory state in the 20th Century, this goal is no longer paramount.

Early criminal prosecutions of corporations, while not common, existed as early as the seventeenth century in England, but were seen as a way of enforcing the performance of a public duty, not as true criminal prosecutions. In these early cases, corporations were generally prosecuted for their failure to

65. Id.
The earliest corporate criminal prosecutions in the United States followed a similar progression. Early cases involved holding corporations criminally liable for failing to prevent a nuisance. These cases were followed by cases holding corporations liable for strict liability crimes involving misfeasance, such as a corporation that permitted gambling to occur on fair grounds in violation of state law. But even as corporations were being held responsible for misfeasance, corporations in the United States remained incapable of committing crimes involving intent.

There were two main reasons for the erosion of the distinction between misfeasance and nonfeasance. From 1850 to approximately 1970, states began to allow corporations to incorporate without a limited charter which meant that corporations were, theoretically, capable of committing any act in furtherance of corporate business. Similarly, courts began to recognize that larger corporations were capable of inflicting “great inconvenience” upon the public through acts of misfeasance. The solution was to modify the traditional common law principles to ensure that someone, even if it was a corporation, was responsible for harm caused to the public.

As the size of corporations grew, courts became concerned that the limited discovery available in civil litigation during the late nineteenth century was not adequate to address the widespread harm corporations caused. Expansive fact discovery in civil cases is a relatively recent phenomenon, and the growing size of corporations made it difficult to discover information using the limited discovery tools then available in civil litigation. The information-gathering powers of the criminal system, however, were much more expansive and gave the state the tools necessary to investigate a corporation as opposed to relying on investigations of individual wrong-doers.

Similarly, the government’s regulatory powers and oversight were still in their early stages. Regulation is perhaps the strongest weapon in the government’s corporate crime-fighting arsenal. Regulation allows the government and corporations to enter into a dialogue to improve compliance before wrong doing occurs, and regulators have the power to punish compliance failures after they are discovered. But pervasive, modern regulation is a relatively recent phenomenon. In the late nineteenth and early twentieth century,
courts looked to the criminal system to handle the kind of enforcement that regulators provide today.\(^8^0\) As the chart below shows, many of the agencies that we consider critical to ensuring responsible corporate conduct did not exist at the time of *New York Central*, and it is not surprising that the courts turned to the common law to fill the gap.

**Figure 1. The Growth of Federal Agencies**

Finally, civil and criminal law serve different purposes, and it is not the case that vicarious liability in the criminal context should mirror pre-*Kolstad* vicarious liability in the civil context. Civil law serves the purpose of compensating victims for their loss. As frequently noted, the criminal law’s purpose is to punish and deter. Nevertheless, commentators agree that one of the reasons vicarious liability was imported into the criminal system was that courts had a difficult time articulating a theory for why developing civil principles of vicarious liability in the civil system should not apply in the criminal context.\(^8^1\)

In the early twentieth century, the growing power of a vicarious liability theory combined with a misreading of *New York Central* led to the current system of strict vicarious criminal corporate liability. The need for such a system, if it ever existed, has been severely undermined by the growth of the regulatory state.

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80. The number of regulatory agencies increased substantially between 1900 and 1940. Prior to the civil war, 11 major governmental agencies had some sort of regulatory power. By 1940, that number had climbed to 51. *Final Report of the Attorney General’s Committee on Administrative Procedure*, S. Doc. No. 8, (1941). While even the Office of Management and Budget credits the New Deal with the boom in regulation, even these numbers understate the effect that New Deal era regulation had on the ability of the government to correct corporate behavior without resorting to criminal sanctions. For example, almost all of the quintessentially “regulatory” agencies that corporations deal with on a regular basis were formed during or after the new deal. The SEC and FDIC were established in 1933, the FCC was established in 1934, and the NLRB was established in 1935. While the FDA was officially established in 1906, it did not gain real regulatory authority until 1938. The EEOC was not established until 1965 and the EPA, OSHA, and the FEA were not established until the 1970s. Similarly, the Department of Transportation and all of its associated agencies such as the Federal Highway Administration and the Federal Railroad Administration were established in the 1960s. September 30, 1997 *Report to Congress on the Costs and Benefits of Federal Commerce*, Office of Management and Budget at Chapter 1, available at: www.whitehouse.gov/omb/inforeg/chap1.html.

81. Brickey, *supra* note 21, at 414; Charles A. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?* 47 Rutgers L. Rev. 605, 615–16 (1995). Commentators have since noted the quite different purposes of the criminal and civil law and the anomalous results that have arisen by the wholesale adoption of civil agency principles in criminal cases. Weissmann, *supra* note 25, at 436–37.
Important alternatives to unlimited vicarious corporate liability have received currency in the business world and in legal academia.

A “due diligence” approach takes as its basic aim the enhanced role of corporate compliance programs and seeks to ensure that these programs are given a formal status in the liability decision. Such programs are the corporation’s efforts to deter and prevent crime and other improper behavior. Under the current rules, they receive insufficient weight because they are not recognized as a full or even partial defense to criminal allegations. Currently, corporate compliance programs only help the corporation’s cause at sentencing—far too late to be meaningful—or in the discretionary decision by the government whether to charge a company. But one alternative to unlimited corporate criminal liability gives corporate compliance additional legal significance as a defense to criminal liability being imputed to the company. This model, applied by a significant minority of states, gives corporate compliance programs their due, and properly incentivizes corporations to prevent and deter crimes internally.

Similarly, the Model Penal Code (“MPC”) adheres to the view that penalties for the corporation should be limited to situations in which a high managerial agent has not made appropriate efforts to prevent illegal conduct. In the context of corporate criminal liability, Model Penal Code § 2.07(5) provides a “due diligence” defense to the corporation, based upon proof by the corporation by a preponderance of the evidence that a high managerial agent having supervisory responsibility over the subject matter of the offense exercised due diligence to prevent its commission.” The MPC was developed by the American Law Institute with the help of some of the country’s leading practitioners and academics. Although the MPC does not have the force of law, it was designed to be a guide to courts as to what the law should be, and many of its sections have been adopted, often word-for-word, by several states.

A. The Due Diligence Approach

The due diligence approach would create either an obligation for prosecutors to demonstrate that a given corporation has not taken all reasonable measures to prevent employee crime or, alternatively, would make such a showing an affirmative defense to criminal liability. Under this approach, the government would have to prove the corporation’s failure to prevent a crime in order to have the benefit of imputing the employee’s conduct to the corporation.

Notably, this due diligence approach strongly encourages effective self-policing while at the same time ensuring that corporations and shareholders are not liable for the acts of rogue employees who commit crimes despite a corporation’s best efforts. As noted above, the Supreme Court recognized in Kolstad that respondeat superior principles are misplaced in situations where a company has done its best to prevent the offending employee’s actions. Additionally, a central goal of the United States Sentencing Guidelines is the promotion of successful compliance programs. Those programs are considered indispensable to corporations seeking to prevent scandals of the ilk that brought down several major companies early...
this decade, as well as to ensure adherence to the legislative requirements enacted in the wake of those scandals. The due diligence approach further rewards corporations’ efforts to engage in robust compliance.

A similar approach is embraced by the MPC, which provides an affirmative defense for corporations whose officers “exercised due diligence to prevent [the crime’s] commission.” Several states, including Illinois, Montana, New Jersey, Ohio, and Pennsylvania, have incorporated the due diligence defense contained in MPC § 2.07(5) into their state laws.

To avoid criminal liability, the company’s internal compliance program would need to be an effective one, not merely a “paper” program. As a result, application of a criterion for imputing criminal liability that turns on the existence of effective measures to avoid misconduct would not have exonerated the likes of Enron, Worldcom, or other recent enterprises whose compliance programs were more “façade” than real.

Future legislation could also expand upon the due diligence defense to require the prosecution to prove that the corporation failed to exercise reasonable diligence to prevent the commission of the crime by, for example, failing to have a reasonable compliance program in place. At a minimum, future legislation should allow corporations to offer evidence of the existence of an effective compliance program as an affirmative defense.

B. Limitation of Corporate Criminal Liability to High Level Managers

Many states have already limited corporate criminal vicarious liability by adopting the MPC or enacting a slight variation. At least 19 states have imposed these or similar limits on vicarious corporate criminal liability. Certain states, such as Arizona, Kentucky, Pennsylvania, and Texas, have patterned laws after the MPC approach. Pennsylvania, for example, patterns its criminal statute on the MPC almost word for word. The MPC offers a blueprint for corporate criminal liability upon which states can rely. Section § 2.07 limits corporate criminal liability to the following circumstances:

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

BUT: with regard to the above to circumstances:

“it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.” This paragraph does not apply when it is

86. See The Ethics and Compliance Handbook (Ethics and Compliance Officer Ass’n 2008) (assembling compliance standards and benchmarks from the business organizations that must apply them).
89. See generally Linda Klebe Trevino, Corporate Misbehavior by Elite Decision-Makers, 70 Brook. L. Rev. 1195, 1202 (2005); Richard F. Ziegler, New Obstacles in Setting the Tone at the Top . . . and Some Solutions 7 (2008) available at www.cebc-global.org/KnowledgeCenter/Publications/EthicalLeadership/ NewObstaclesInSettingTheToneAtTheTop.pdf.
“plainly inconsistent with the legislative purpose in defining the particular offense.”

2) “[T]he offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law.”

3) “[T]he commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.”

Model Penal Code § 2.07(1)-(5) (emphasis added).

The clear import of the MPC is that corporate hierarchy matters in assessing corporate criminal liability. Accordingly, future legislative initiatives should follow and expand upon the corporate hierarchy approach as well as the compliance approach. Legislation should, at minimum, limit vicarious criminal liability to instances where high managerial agents failed to exercise reasonable diligence to prevent the commission of the crime.

**NEXT STEPS: EFFORTS IN THE LEGISLATURE, THE BAR, AND THE COURTS**

The receptivity of federal courts to the legal reform arguments noted herein is worthy of continued attention. In June, Jenner & Block filed on behalf of The Association of Corporate Counsel, The U.S. Chamber of Commerce, The National Association of Criminal Defense Lawyers, The New York State Association of Criminal Defense Lawyers, The National Association of Manufacturers, and the Washington Legal Foundation an *amicis curiae* brief supporting reversal of a criminal conviction of a shipping management company, Ionia Management, S.A. The company had been precluded from arguing to the jury that the actions of its low-level employees should not be imputed to the corporation, nor was it allowed to cite its compliance program for the same point. The appeal is pending before the Second Circuit and will be argued this November.

Another route for change is the Restatement of Agency, which is a codification of the prevailing agency principles that have emerged through the jurisprudence of state and federal courts and is relied upon frequently by courts to determine the rules for determining when a principal should be held responsible for the acts of an agent. Despite the Supreme Court’s rejection of the application of the Restatement of Agency in *Kolstad*, courts still rely on the Restatement in deciding criminal cases. Successfully amending the Restatement of Agency—which currently does not specifically deal with the unique problem of corporate criminal liability at all—to embody the alternatives noted above for vicarious criminal liability could pay significant dividends in changing the current doctrine as applied in the courts.

Another issue worth watching closely is the Supreme Court’s punitive damages jurisprudence. As noted, the Court has recently given strong indications that it may be receptive to arguments that corporate criminal liability law should be aligned with the principles it has articulated for imposition of punitive damages. In *Exxon*, the Court reiterated its position that punitive damages and criminal punishment serve the same purposes, calling “[t]he points of similarity . . . obvious.” Additionally, with Justice Alito not participating in *Exxon*, the Court deadlocked 4-4 on the issue of the availability of punitive damages against corporations for the actions of their managerial employees in maritime cases. In the next case involving punitive damages, the Supreme Court may take the step it could not in *Exxon* and bar punitive damages against corporations when the wrongdoing is not higher than the captain’s level. This would have important implications for attempts to restrict any criminal punishment of a corporation to actions of employees of that same level.

CONCLUSION

Changing the current vicarious liability rules will promote effective compliance programs within companies, and redirect to a more condign track a legal doctrine that has gone far off course. Practitioners and academics have offered practical solutions for balancing society’s need for punishing the guilty and making a victim whole against society’s interest in resorting to criminal sanctions only when a defendant has done something wrong. Given the nearly 100-year long misreading of a single Supreme Court precedent and recent pronouncements from that Court, it is high time to reform the standard for vicarious criminal corporate liability. As described above, the current doctrine is not founded on either an act of Congress or Supreme Court precedent. Compliance-based and hierarchy-based alternatives to the current regime would continue to hold lawless corporations liable for criminal acts, while ensuring that responsible corporations are not unfairly penalized. It is incumbent upon legislators, academics, and practitioners to press the case for a greater recognition of the harmful and counterproductive consequences of the current system and to seize the opportunities for reform outlined herein.