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THE CORPORATE CRIMINAL DEFENDANT'S ILLUSORY RIGHT TO TRIAL: A PROPOSAL FOR REFORM

JOHN N. GALLO* & DANIEL M. GREENFIELD**

INTRODUCTION

As in civil lawsuits, corporate criminal liability for federal crimes is imposed using the respondeat superior standard: corporations are criminally liable for the wrongdoing of their agents as long as the act is committed within the scope of the agent's authority and with the intent to bestow at least some benefit to the corporation. For decades, scholars and practitioners have argued that imposing the tort concept of respondeat superior liability on corporations for purposes of criminal prosecution is not only practically ineffective but also, as a matter of theory, inconsistent with fundamental principles of moral culpability.

The low threshold for corporate criminal liability—which, although abandoned in some state jurisdictions, stubbornly persists within the federal common law—combined with the threat of being debarred or excluded from contracting with the federal government upon conviction, has all but closed the criminal courthouse door to sizable corporations in the United States. With the knowledge that such companies must avoid trial except in the most extreme circumstances, the Department of Justice, itself wary of the market fallout that can accompany the successful prosecution of a large corporation, has turned to enforcing the criminal code against companies through non-prosecution and deferred prosecution agreements.

To date, most scholarly contributions in this field have addressed the shortcomings of each component of the current regime—*i.e.*, respondeat superior liability, prosecutorial guidelines as a *de facto* liability standard, exclusion or debarment, and the enforcement of the criminal law through privately negotiated contracts—on an individual basis. The purpose of this Article is to connect the dots between these components of the corporate criminal regime, and to illustrate how they, taken together, infringe corporations' right to mount a defense in the criminal courts.

Part I of this Article describes the federal criminal justice system, from the perspective of corporate entities, as it exists today. This

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includes discussions of both the corporate criminal liability and debarment and exclusion regimes, which together contribute to the current imbalance of power between prosecutors and corporations.

Part II discusses how that imbalance and the government's disinclination to go to trial due to potential collateral consequences have given rise to deferred prosecution and non-prosecution agreements, which enable prosecutors to exact significant financial penalties and promises to modify business practices in exchange for refusing to bring a criminal indictment. The proliferation of these agreements effectively turns individual federal prosecutors into *ad hoc* regulatory agencies that mete out punishment without substantial congressional or judicial oversight. The prevalence of such out-of-court agreements also hinders the development of judicial precedent in the area of corporate criminal liability.

Part III begins with a brief discussion of some of the more influential proposals for reforming the current regime. Part III then sets forth this Article's proposals for reform: (1) limiting corporate criminal liability to cases in which the current common law elements are satisfied—*i.e.*, a corporation's agent's actions were within the scope of his or her duties and intended, at least in part, to benefit the corporation—and at least some member of senior management possessed the *mens rea* set forth in the underlying criminal statute; (2) allow an affirmative defense that would protect the corporate defendant from criminal liability where the defendant is able to show, by a preponderance of the evidence, that its senior management maintained and oversaw a robust compliance program designed to prevent the type of conduct charged; and (3) ensure that corporations always have a meaningful opportunity to challenge agency decisions to debar or exclude.

I. THE CURRENT REGIME

A. *The Common Law Rule: Respondeat Superior*

The standard for proving corporate criminal liability developed as courts "struggled to overcome the challenge of assigning criminal blame to fictional entities in a legal system designed to address individual culpability."¹ Before the early part of the nineteenth century, corporations, viewed as artificial creatures of the state, could not be held criminally liable.

However, in 1909, the United States Supreme Court decided *New York Central & Hudson River Railroad Company v. United States*, a case in which federal prosecutors convicted a railroad company based on the conduct of an assistant traffic manager who violated federal law while acting within the scope of his employment.² On appeal to the Supreme Court, the railroad argued that the provision of the law imposing vicarious criminal liability was unconstitutional because it "deprived the cor-

1. Michael Viano & Jenny R. Arnold, *Corporate Criminal Liability*, 43 AM. CRIM. L. REV. 311, 312 (2006).

2. *New York Central v. United States*, 212 U.S. 481, 490–92, 498 (1909).

poration of the presumption of innocence”³ The Court rejected these arguments, citing policy considerations:

[W]e see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. If it were not so, many offenses might go unpunished and acts may be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.⁴

The Court noted further that “the great majority of business transactions in modern times are conducted through” the corporate form and, accordingly, that permitting such entities to evade responsibility for the illegal actions of its agents and employees “would virtually take away the only means of effectually controlling [them].”⁵ Thus, as a means of giving effect to its policy preference, the Court relied upon the doctrine of respondeat superior liability, imported from tort law, to affirm the conviction:

Applying the principle governing civil liability, we go only a step further in holding that the act of an agent, while exercising the authority delegated to him . . . may be controlled, in the interest of public policy, by imputing his acts to his employer and imposing penalties upon the corporation for which he is acting⁶

This wholesale appropriation “forever changed the complexion of business crime prosecution and ushered in an age when government prosecutors would assume the role of regulators of commerce, manufacturing, and markets.”⁷

Vicarious liability is a form of secondary liability that arises when a relationship, such as agency, forms the basis for imposing liability on the defendant for the infringing acts of another.⁸ The doctrine of respondeat superior, also known as the “Master-Servant Rule,” is a common-law form of vicarious liability that holds a master liable for the torts of a servant that occur while the servant is acting within the scope of his employment.⁹ This rule is based on the notion that the employer, who profits from the employee’s activities, should also share the losses caused by those activities.¹⁰ Notwithstanding the fact that respondeat superior has its origin in tort law, which functions primarily to compensate a party for damage caused by another, since the Supreme Court’s holding in *New York Central*, courts have utilized it to

3. *Id.* at 492.

4. *Id.* at 494–95.

5. *Id.* at 495–96.

6. *Id.* at 494.

7. Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 61 (2007).

8. William H. Kuehnle, *Secondary Liability under the Federal Securities Laws—Aiding and Abetting Conspiracy, Controlling Person, and Agency: Common-Law Principles and the Statutory Scheme*, 14 J. CORP. L. 313, n.28 (1989).

9. RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

10. *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 807 (Tex. 1980).

impute both the guilty act, or *actus reus*, and the mental state, or *mens rea*, of a corporate agent to his or her corporate employer.

Under respondeat superior, corporate criminal liability attaches to conduct when a corporation's employee's or agent's actions are (1) within the scope of his or her duties and (2) intended, at least in part, to benefit the corporation. The first requirement is met if the employee had actual or apparent authority to engage in the act in question.¹¹ An employee acts with actual authority where the corporation, either "expressly or implicitly, gave the agent" authority to act on its behalf.¹² Apparent authority attaches if a third party reasonably believes the agent has authority to perform the act in question.¹³ The second element requires that the employee perform the action in question to benefit the corporation. Significantly, however, the corporation need not have actually received any benefit for criminal liability to attach;¹⁴ as long as it was the employee's intention to bestow benefits upon the corporation, the employee's conduct can be imputed to the corporate defendant. Furthermore, providing benefit to the corporation need not have been the employee's primary motivation in engaging in illegal activity—a corporation may be found criminally liable even where the miscreant employee acts primarily for his or her own personal gain.¹⁵

The doctrine of respondeat superior can expose the corporate defendant to criminal liability even where (a) the criminal behavior was perpetrated by a low-level, rogue employee; (b) the criminal conduct is undertaken without the knowledge of upper-level management; (c) the employee was explicitly instructed by the corporation not to engage in the conduct; (d) the conduct directly violated established company policy; (e) there was no actual benefit to the corporation; (f) the company had a robust compliance program in place at the time of the offense;

11. See, e.g., *United States v. Inv. Enter. Inc.*, 10 F.3d 263, 266 (5th Cir. 1998) ("[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.")

12. *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 85 (3d Cir. 1960).

13. See Joel M. Androphy et al., *General Corporate Criminal Liability*, 60 *Tex. B.J.* 121, 121–22 (1997) (discussing actual and apparent authority).

14. See, e.g., *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985) ("[B]enefit is not a 'touchstone of criminal corporate liability; benefit at best is evidential, not an operative fact.' Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation."); *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 129 (5th Cir. 1962) (noting that if an employee acts to benefit the corporation, "[t]he act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is indiscernible, or, for that matter, the result turns out to be adverse.")

15. *Automated Med. Labs., Inc.*, 770 F.2d at 407 (upholding corporation's conviction where corporation's agents acted "at least in part" to benefit corporation). However, acts committed by employees that are expressly contrary to the interests of the corporation and for which the corporation derives no benefit cannot subject the corporation to criminal liability. *Standard Oil Co. of Tex.*, 307 F.2d at 129 (reversing defendant Standard Oil's conviction because agents' criminal acts were intended to defraud company and were for benefit of a third party).

and (g) the conduct was exposed by the compliance program.¹⁶ In sum, the current regime requires virtually no nexus between the action and intention of the agent and the corporation. Once there is evidence that an employee engaged in criminal activity on the job, the criminal case against the company may be “virtually bulletproof.”¹⁷

Reliance on respondeat superior liability in the corporate criminal context was a pragmatic approach at the turn of the twentieth century. “In the absence of both regulatory agencies and a significant system of public enforcement of civil and administrative law, the criminal law was the bedrock of social control.”¹⁸ However, in light of the ascendance of a state and federal regulatory framework, the present refusal to move toward a more nuanced standard for corporate criminal liability cannot be justified.

While respondeat superior liability may, at least theoretically, further the deterrent goals of the criminal law, it does little to serve the retributive functions. With respect to deterrence, we write “theoretically” because the current regime’s imprecision makes it an awkward instrument for discouraging corporate malfeasance. Deterrence theory holds that the threat of punishment may discourage criminal activity by impacting the cost-benefit analysis in which a would-be criminal engages prior to performing a prohibited activity.¹⁹ In other words, “to justify [a] penalty on grounds of deterrence,” one must “[a]ssum[e] the offender behaves in a rational way” and avoids illegal conduct under circumstances where the risk of punishment overwhelms the potential for reward.²⁰ In the context of organizational liability, however, the respondeat superior approach upsets this cost-benefit calculus because it attaches criminal liability for conduct that even a diligent corporation may not be able to prevent.

With respect to the latter penological purpose, retributive punishment “appeals to notions of moral culpability or just deserts,” and thus we impose criminal sanctions where “it is morally proper to punish that person.”²¹ Yet respondeat superior liability fails to reflect this function of the criminal law because it allows corporations to be found guilty based on an individual employee’s conduct for which the company itself cannot reasonably be considered morally responsible. Notwithstanding that “corporation criminal law wears the garment of vicarious

16. Lucian E. Dervan, *Reevaluating Corporate Criminal Liability: The DOJ’s Internal Moral Culpability Standard for Corporate Criminal Liability*, 41 STETSON L. REV. 7 (2011); Bharara, *supra* note 7, at 76.

17. Bharara, *supra* note 7, at 76; *see also* Andrew Weissman, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1320 (2007); *Standard Oil Co. of Tex.*, 307 F.2d at 127 (“[A] corporation may be criminally bound by the acts of subordinate, even menial, employees.”).

18. William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1295 (2000).

19. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 561–62 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988).

20. *Kennedy v. Louisiana*, 554 U.S. 407, 445 (2008).

21. *Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions*, 92 HARV. L. REV. 1237, 1232 (1979).

liability somewhat like an ill-fitting hand-me-down,” our legal system continues to sacrifice legal coherence in exchange for what amounts to, at best, marginal advances in preventing criminal conduct in a business context.²²

B. *The De Facto System: Broad Prosecutorial Discretion as a Substitute for Substantive Law*

In practice, the respondeat superior liability standard authorizes prosecutors to indict both individual wrongdoers and their corporate employers, regardless of whether the corporation authorized, approved, acquiesced, or was even aware of the criminal activity. In recognition of this grant of extraordinary discretion, the Department of Justice (“DOJ”) has internally endeavored to prevent its own prosecutors from pursuing criminal charges against a corporate entity without first attempting to assess the culpability of the organization itself.²³ The guidance set forth in the “DOJ’s Principles of Federal Prosecution of Business Organizations” (“Principles”) reflects this perspective, and sets forth nine factors designed to guide corporate criminal charging decisions:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
3. the corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
5. the existence and adequacy of the corporation’s pre-existing compliance program;
6. the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. collateral consequences, including disproportionate harm to shareholders, pension holders, and employees not proven personally culpable, as well as impact on the public arising from the prosecution;
8. the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance; and

22. Bharara, *supra* note 7, at 63.

23. See Memorandum from Mark Filip, Dep. Att’y Gen., U.S. Dep’t of Jus., to Heads of Dep’t Components and U.S. Att’y’s, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS (2008), at 3–4, available at <http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf> [hereinafter Filip Memo.].

9. the adequacy of remedies such as civil or regulatory enforcement actions.²⁴

Indeed, the Principles and the commentary thereto recognize that the respondeat superior standard fails to account for basic characteristics of organizational behavior, corporate personhood, and entity culpability.²⁵ For example, the Principles acknowledge that corporate exposure to criminal liability is more appropriate where the misconduct is “undertaken by a large number of employees” or “condoned by upper management.”²⁶ Prosecutors are also instructed that, “[a] history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance program.”²⁷ Further, the Principles recognize that a properly enforced compliance program must inform any analysis of corporate culpability, advising that, “it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee.”²⁸

On paper, therefore, the Principles appear to mitigate much of the harm caused by the respondeat superior liability regime. That is, the Principles seem to signal—notwithstanding the absence of a corrective legislative rule or judicial holding—that the government has, in practice, “abandon[ed] the principles of vicarious liability” announced in *New York Central*, and “replace[d] th[at] substantive law with permissive guidance recognizing corporate personhood.”²⁹

For several reasons, however, the Principles are not an adequate substitute for legislative and judicial reform of the substantive law of corporate criminal liability. First, while the government’s consideration of the Principles may be mandatory, they neither create legal rights for corporate defendants nor are binding on federal prosecutors.³⁰ Indeed, the United States Attorneys’ Manual, in which the Principles are published, expressly disclaims any reliance on the guidelines contained within the Manual as a defense at trial:

The Manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in a matter civil or criminal. Nor are any limitations

24. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL: PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS (2008) [hereinafter, PRINCIPLES OF PROSECUTION], §§ 9-28.300–1100, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm; see also Filip Memo., *supra* note 23, at 3–4.

25. See Filip Memo., *supra* note 23, at 3 (noting that “due to the nature of the corporate ‘person,’” corporate charging decisions require analysis of factors generally inapplicable to individuals).

26. PRINCIPLES OF PROSECUTION, at § 9-28.500.

27. PRINCIPLES OF PROSECUTION, at § 9-28.600 cmt.

28. PRINCIPLES OF PROSECUTION, at §§ 9-28.500.

29. Laufer & Strudler, *supra* note 18, at 63.

30. See U.S. Dep’t of Justice, United States Attorneys’ Manual § 1-1.100 (updated May 2009), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/lmdoj.htm.

hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.³¹

Second, as the Filip Memorandum—an internal DOJ document authored to inform federal corporate charging decisions—and its predecessors, the Thompson and McNulty Memoranda, (collectively, “the Memoranda”), emphasize, individual prosecutors retain significant charging discretion notwithstanding the factors delineated in the Principles: “In making a decision to charge a corporation, the prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law.”³² Thus, neither the Principles nor the Memoranda provide “the predictable guidance [] or the protection to the accused of a binding liability standard.”³³ Third, both the Filip Memorandum and those Memoranda it supersedes cite cases supporting the broad liability regime set forth in *New York Central* and its progeny.³⁴ In sum, the DOJ’s pronouncements “present[] something of a paradox, given the attempt to outline appropriate limitations on the exercise of discretion, while simultaneously reserving the right to exercise the broadest possible discretion allowed under the law. It is therefore an expression of untrammelled power in theory, but also suggestive of reasonable restraint in practice.”³⁵

Given the breadth of discretionary power reserved in these documents, it is not difficult to see why defense attorneys take limited comfort in the nine factors set forth in the Principles or in cautionary language contained within the Memoranda notwithstanding the laudable intentions of prosecutors at Main Justice and within the individual branch offices. Moreover, in the event a corporate defendant elects to present a defense at trial, it is the respondeat superior standard that will govern and form the basis for jury instructions, not the considerations set forth in the Principles or the Memoranda. Thus, prosecutorial self-restraint alone does not—indeed, cannot—“provide the inherent or legal protection against the problem of over inclusiveness that a genuine theory of corporate culpability would provide.”³⁶

31. *See id.*

32. Filip Memo., *supra* note 23, at 4; Memorandum from Larry D. Thompson, Dep. Att’y Gen., U.S. Dep’t of Jus., to Heads of Dep’t Components and U.S. Att’y, U.S. Dep’t of Justice (2003), at 4, *available at* http://www.usdoj.gov/dag/cff/business_organizations.pdf [hereinafter Thompson Memo.]; Memo. from Paul J. McNulty, Dep. Att’y Gen., U.S. Dep’t of Jus., to Heads of Dep’t Components and U.S. Att’y, U.S. Dep’t of Justice (2006), at 5, *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf [hereinafter McNulty Memo.].

33. George R. Skupski, Note, *The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability*, 62 CASE W. RES. L. REV. 263, 296 (2011).

34. *See* Filip Memo., *supra* note 23, at 2–3 (citing cases); Thompson Memo., *supra* note 32, at 2 (citing cases); McNulty Memo., *supra* note 32, at 3 (citing cases).

35. Bharara, *supra* note 7, at 79.

36. Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 761 (1992).

Of additional concern, the discretionary *de facto* criminal liability standard is economically inefficient. First, legal uncertainty makes corporate planning difficult. That is, where “a corporation has no clear sense of what employee crimes will be imputed to the entity or what punishment those crimes might produce, the corporation will have difficulty properly allocating its resources.”³⁷ Second, respondeat superior liability may “overdeter” legitimate corporate activity, “compelling risk-averse corporations to steer employees away from borderline but permissible conduct out of uncertainty over punishment.”³⁸ What’s more, the over-deterrence of legitimate business practices creates inefficiencies without necessarily delivering a benefit to the public or the corporation in exchange. Typically, as in the case of rent ceilings, labor laws, and tariffs, to name a few, we bargain efficiency in exchange for a public benefit. In this instance, however, the cost-benefit calculation difficulty introduced by the respondeat superior corporate criminal liability regime begs the question of whether there is much public good to be gained in the bargain.

In sum, unenforceable aspirations on the part of the prosecuting entity fail to remedy fully the shortcomings in the common law test for corporate criminal liability. As one judge observed, “prosecutorial discretion is not an adequate substitute for statutes carefully drawn to prohibit only conduct that deserves criminal punishment. ‘Criminalize them all and let the prosecutors sort them out’ is not a particularly inspiring slogan for a penal code.”³⁹

B. *Debarment and Exclusion*

The low threshold for criminal liability embodied in the federal common law may render the chances of victory at a trial remote, even for the good corporate citizen who made a genuine effort to prevent the alleged malfeasance. This, however, is just one feature of a broader legal landscape that has narrowed the courthouse doors to large corporate defendants. Beyond the liability threshold itself lay a number of federal statutes and regulations that prohibit defendants found to have engaged in criminal misconduct from contracting with or being reimbursed by the federal government. Thus, not only is the morally blameless corporation faced with the very real risk of losing at trial, it also may, pursuant to the federal debarment and exclusion provisions, be subject thereafter to what is in effect a “corporate death penalty.”⁴⁰ In tandem with the respondeat superior liability, these consequences collateral to a loss at criminal trial place the corporate criminal defendant

37. Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1460 (2007).

38. *Id.* at 1449.

39. Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice”*, 13 CORNELL J.L. & PUB. POL’Y 167, 170 (2004) (emphasizing that the guidelines may be changed at any time and are not subject to judicial review).

40. See Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1134 (2006).

in a position “akin to so-called exceedingly vulnerable eggshell plaintiffs in tort law” who, “subject as they are to market pressures, may not be able to survive indictment, much less conviction and sentencing.”⁴¹

A corporation may be debarred or excluded in several ways. First, a corporation may be debarred at the discretion of a federal agency pursuant to the Federal Acquisition Regulations.⁴² The purpose of this type of debarment, commonly referred to as “administrative debarment,” is not to punish corporations, but rather “to protect the Government’s interest” by ensuring that agencies only deal with dependable companies.⁴³ Second, a corporation can be debarred pursuant to a statute that mandates a convicted corporation be debarred.⁴⁴ This is known as “statutory debarment.” The purpose of statutory debarment is to promote compliance with the law and is therefore punitive in nature.⁴⁵ Finally, a corporation may be excluded from the participation in federal programs such as Medicare.⁴⁶ While debarment or exclusion determinations typically do provide the subject entity an opportunity to appeal, the implicated review may not always be robust or meaningful.

Debarment and exclusion can be catastrophic. With an estimated \$535.3 billion spent in fiscal year 2010 alone, the United States government is by far the largest buyer of goods and services in the world.⁴⁷ While companies that do not depend on contracts with or reimbursement by the federal government for their livelihood may be able to weather a debarment or exclusion, for those corporations whose business models revolve around federal contracts—*e.g.*, those in the health care space—exclusion or debarment may amount to a “corporate ‘death penalty’ . . . effectively ending the ability of the company to remain in that regulated field.”⁴⁸ Of course, as the 2002 collapse of Arthur Andersen taught all too well, an agency decision to debar or exclude may not only impact management, but also may lead to financial catastrophe for the corporation’s hundreds, thousands, or even tens of thousands of employees, not to mention innocent stockholders,

41. Bharara, *supra* note 7, at 72.

42. 48 C.F.R. § 9.400 *et seq.*

43. 48 C.F.R. § 9.402(b).

44. *See, e.g.*, the Clean Air Act, 42 U.S.C. § 7606(a) (“No Federal agency may enter into any contract with any person who is convicted of any offense under section 7413(c) of this title for the procurement of goods, materials, and services to perform such contract at any facility at which the violation which gave rise to such conviction occurred if such facility is owned, leased, or supervised by such person.”); *see also* 2 C.F.R. § 1532.1130(a) (“[Clean Air Act] . . . disqualifications are exclusions mandated by statute.”).

45. KATE M. MANUEL, CONG. RESEARCH SERV., RL 34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS 2, 12 (2012).

46. *See* 42 U.S.C. § 1320a-7(b) (“The Secretary may exclude the following individuals and entities from participation in any Federal health care program.”).

47. Rena Steinzor & Anne Havermann, *Too Big to Obey: Why BP Should Be Debarred*, 36 WM. & MARY ENVTL. L. & POL’Y REV. 81, 111 (2011).

48. JAMES T. O’REILLY ET AL., PUNISHING CORPORATE CRIMES: LEGAL PENALTIES FOR CRIMINAL AND REGULATORY VIOLATIONS 256 (2009).

and, indeed, the public at large—even before such decision has been finally reviewed.⁴⁹

C. *Corporate Compliance Programs: Too Little Too Late*

Due to the untenable risk occasioned by those factors detailed above and by costs incurred through follow-on collateral civil litigation, most large corporations have instituted wide ranging and expensive compliance programs aimed at ensuring that their employees do not engage in criminal conduct. However, due to Congress's and the courts' unwillingness to incorporate a robust-compliance-program-defense into the substantive criminal law, these initiatives have paid few dividends to corporations seeking to defend themselves against allegations of criminal conduct. Because the respondeat superior liability regime views such efforts as legally irrelevant, corporations with sincere, first-rate compliance programs find themselves as defenseless at trial—and by extension as vulnerable to debarment or exclusion—as corporations that encourage or make no genuine effort to curb malfeasance.⁵⁰ Indeed, criminal courts routinely exclude from consideration by a jury evidence concerning the existence of a compliance program.⁵¹

To be sure, the United States Sentencing Guidelines for Organizations (the "Guidelines") recognize that a corporation's commitment to deter misconduct is a relevant factor for determining the degree of punishment to which a corporate defendant should be subject following conviction. Any downward departure at sentencing, however, can only palliate but never cure. Sentencing consideration is too little too late for the soon-to-be debarred or excluded corporation. In the end, the balancing efforts reflected in the Principles and the Guidelines fail to resolve the fundamental problem: the respondeat-superior-liability regime and the debarment and exclusion laws, together, may render a criminal indictment fatal for many a large corporation.

49. See, e.g., Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 109 (2006) (noting that by the end of 2002, only 3,000 of Arthur Andersen's 85,000 employees remained at the company and that "the public benefits generated by prosecuting [Arthur] Andersen criminally were minimal or, if they existed at all, were exceedingly subtle").

50. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1.

51. For example, in *United States v. Twentieth Century Fox Film Corp.*, the Ninth Circuit upheld the district court judge's decision to exclude from the jury evidence of the corporate defendant's extensive compliance program, reasoning that the "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." *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989), cert. denied, 493 U.S. 1021 (1990); see also *United States v. Gen. Motors Corp.*, 226 F.2d 745, 749 (3d Cir. 1955) (approving jury instruction stating: "It does not matter that the specific acts involved were not expressly authorized by the Corporation, nor is it material [that] the Corporation by general policy or otherwise may have expressly instructed the officers and agents not to perform the specific acts which were in fact done if acts were in the course of employment."); *C.I.T. Corp. v. United States*, 150 F.2d 85, 90 (9th Cir. 1945) (holding that "it was proper to exclude evidence that [the employee's] . . . causing of the false statements was contrary to the instructions to use care in their preparation").

II. THE RISE OF THE MANDATORY PUNISHMENT REGIME: DEFERRED AND NON-PROSECUTION AGREEMENTS

The characteristics of the corporate criminal law result in an unusual state of affairs: neither a corporation nor a federal prosecutor has an incentive to take a corporate criminal case to trial. From the corporation's perspective, respondeat superior may render remote the odds of a not-guilty verdict. From the prosecutor's perspective, debarment and exclusion upon conviction risk substantial injury to innocent third parties—*i.e.*, employees, stockholders, and consumers—and to the national economy as a whole. In recognition of this risk generally, and specifically in the wake of criticism following the conviction and resulting collapse of Arthur Andersen, the DOJ has increasingly turned to non-prosecution agreements (“NPAs”) and deferred prosecution agreements (“DPAs”) as a means to enforce corporate criminal law. While preferable to the result for Arthur Andersen, this development itself has collateral consequences.

NPAs embody the government's agreement with a defendant *not to file* criminal charges in exchange for compliance with negotiated conditions during the term of the agreement, typically one to three years. DPAs, in contrast, reflect the government's agreement to defer prosecution of *filed charges* in exchange for complying with specified conditions for a term of years, again, typically one to three years, at the expiration of which the charges are dropped. While in certain respects the difference is material, such differences are beyond the scope of this Article, so for ease of reference we refer to DPAs and NPAs collectively as “N/DPAs.”

Although corporate N/DPAs vary with the circumstances, they reflect some combination and at times all of the following corporate concessions in exchange for an agreement not to prosecute: (1) acknowledgement that the government will, in fact, prosecute should the agreement—in the government's sole discretion—be breached;⁵² (2) an admission to specific conduct that, if subsequently admitted into evidence upon breach of the agreement, effectively constitutes an admission of guilt;⁵³ (3) substantial cooperation from the corporation in the investigation and subsequent prosecution of individual employees;⁵⁴ (4) institution of extensive remedial programs, frequently with a

52. See, e.g., Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 919 (2007) (“The vast majority of agreements (eighty-three percent) permit the DOJ, in its sole discretion, to find an agreement has been breached and then pursue a prosecution.”).

53. *Id.* at 867 (noting that admissions in the KPMG DPA “would have nearly certainly resulted in conviction” had DOJ prosecuted the company in the event of a breach of the agreement).

54. *Id.* at 880–81 (noting that cooperation is essential in the investigation of corporate crime because “[o]rganizational prosecutions require a substantial investment due to their complexity” among other reasons).

robust and expensive monitoring component;⁵⁵ and (5) substantial financial penalties (of late often greater than nine figures).⁵⁶

N/DPAs first came into wide use during the 1960s as a penologically-useful alternative to prosecuting first-time offenders and juveniles.⁵⁷ It was understood by social scientists at the time that such individuals were more likely to be rehabilitated through an agreement mandating reform than through conviction and incarceration with its attendant collateral consequences.⁵⁸

Then, in 1992, the DOJ and the Securities and Exchange Commission began to investigate the Salomon Brothers brokerage house for violations of the securities laws.⁵⁹ After the company paid substantial fines, instituted a robust compliance program, and undertook other far-reaching remedial measures, the government declined to prosecute it.⁶⁰ And thus the era of the corporate N/DPA was born.⁶¹

As has been well-chronicled, the dramatic ascendance of the DPA was non-linear. While N/DPAs were employed sparingly in the 1990s and early 2000s, their usage has exploded of late.⁶² Indeed, since 2010, the government has entered into more than one hundred N/DPAs.⁶³ It is no mystery why: both corporations and the government are virtually required to rely upon them in order to circumvent the unfairness created by the combination of respondeat superior liability and the collateral consequences of a conviction, including debarment and exclusion.

From the perspective of the corporation, the mere announcement by prosecutors that they are investigating a corporation can cause extraordinary reputational and financial harm.⁶⁴ That is, even the “threat of indictment” is “a matter of life and death to many compa-

55. *Id.* at 863–64 (describing reforms required of KPMG in exchange for entering into a DPA).

56. *See, e.g., id.* at 899 (2007) (noting that as of 2007, the average DPA fine was \$141 million).

57. *See, e.g.,* Allen R. Brooks, Comment, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 147 (2010); Matt Senko, Note, *Prosecutorial Overreaching in Deferred Prosecution Agreements*, 19 S. CAL. INTERDISC. L.J. 163, 169 (2009); Benjamin M. Greenblum, Note, *What Happens to A Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1866 (2005).

58. *See, e.g.,* Greenblum, *supra* note 57, at 1866.

59. *See, e.g.,* Peter Spivack & Sujit Raman, *Regulating The 'New Regulators': Current Trends In Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 163–64 (2008).

60. *See, e.g.,* Brooks, *supra* note 57, at 149.

61. *See, e.g., id.* at 149; Greenblum, *supra* note 57 at 1872–73.

62. *See, e.g.,* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1311 (2013).

63. Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, UNIV. OF VA. SCH. OF L. (Apr. 10, 2014, 11:45 P.M.), http://lib.law.virginia.edu/Garrett/prosecution_agreements/home?destination=home.suphp&order=field_date&sort=as. *See also* Kristie Xian, Note, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 631, 633 (2014) (discussing how how the U.S. government uses DPAs in context of Iranian sanctions).

64. *See, e.g.,* F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 VA. L. REV. IN BRIEF 121, 129 (2007)

nies.”⁶⁵ Were indictment to follow, the damage could become irreparable as “[s]tock prices plummet, lines of credit dry up, and clients are scared off.”⁶⁶ A conviction, of course, can be a virtual death sentence for a corporation: excluded or debarred from federal programs, mistrusted by consumers and suppliers, overlooked by investors, it may cease to exist.⁶⁷ These collateral consequences are so potent that they have become “coercive forces” virtually rendering “the adversary system a myth in the context of corporate criminal liability.”⁶⁸ Thus to a corporation, in most cases, an N/DPA may be the only way to survive absent a prosecutorial declination.

For its part, the government, wary of precipitating the sort of collateral damage that accompanied the Arthur Andersen conviction, endeavors to punish corporate misconduct *ex post* while limiting the risk of harm to innocent third parties such as shareholders, employees, and other market participants.⁶⁹ As one commentator has noted, “prosecutors have their slingshot: they wield the threat of an indictment, which results in potentially catastrophic collateral and reputational consequences to a corporation,” but “it is a threat that prosecutors can ill afford to carry out due to those consequences.”⁷⁰ Moreover, the government believes that the N/DPA framework—which prioritizes evidence of voluntary disclosure of misconduct and the aggressive institution of compliance measures when determining whether to grant a N/DPA—also provides a mechanism to incentivize appropriate corporate conduct *ex ante*.⁷¹

That both the government and the corporation are primarily interested in out-of-court resolution, however, does not render the parties

(noting that “[e]mpirical studies have shown that the mere announcement of a criminal investigation triggers a significant drop in a company’s stock price”).

65. *United States v. Stein*, 435 F. Supp. 2d 330, 381 (S.D.N.Y. 2006) (emphasis added).

66. Paulsen, *supra* note 37, at 1456; *see also* Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Exclusion Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 PUB. CONT. L.J. 547, 586–87 (2009); Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. LAW REV. 271, 279–80 (2008).

67. *See, e.g.*, Uhlmann, *supra* note 62, at 1310 (discussing the collapse of Arthur Andersen LLP following its corporate prosecution by the DOJ).

68. Julie R. O’Sullivan, *The Last Straw: The Department of Justice’s Privilege Waiver Policy And The Death of Adversarial Justice in Criminal Investigations of Corporations*, 57 DEPAUL L. REV. 329, 338 (2008) (noting that the collateral consequences of conviction make it “nearly impossible for public companies, especially those in regulated industries or those who do significant business with the government” to go to trial).

69. *See, e.g.*, Garrett, *supra* note 52, at 880 (noting that in the wake of the Arthur Andersen prosecution “prosecutors face great incentives to avoid an indictment that can destroy a corporation and as a result harm employees, shareholders, and customers”).

70. Brandon L. Garrett, *United States v. Goliath*, 93 VA. L. REV. IN BRIEF 105, 105 (2007).

71. *See, e.g.*, Garrett, *supra* note 52, at 887 (noting that the DOJ considers DPAs to a be a “model” for “structural reform litigation”).

equals at the bargaining table.⁷² The corporation, in contrast to the government, may not survive an indictment, let alone a conviction.⁷³ Indeed, as one student commentator aptly noted, “[t]he corporate offender’s unique vulnerability to adverse publicity and collateral consequences sets the stage for a deferral negotiation that stacks the decks against the defendants and calls into question whether the choice to enter into deferral is really a choice at all.”⁷⁴ This imbalance of power leaves prosecutors virtually unconstrained with respect to the severity and breadth of concessions that they will exact from the corporation.⁷⁵ That is, as Professor Brandon Garrett has noted, “prosecutors will typically have enormous negotiating leverage by threatening the ‘nuclear’ option of an indictment, and it shows in the terms of the agreements.”⁷⁶ Although at least in part born of a desire to provide a degree of protection to corporations from the harsh respondeat superior and debarment/exclusion framework, the N/DPA regime has, in effect, become a mandatory punishment mechanism.

In response to criticism from lawmakers, corporate executives, the criminal bar, and the federal courts, the government’s approach to such agreements has evolved over time, but primarily at the margins.⁷⁷ Although such changes have been welcome, they have done little to address the fundamental imbalance of power between the government and the corporation in this context. That is, notwithstanding modifications to the government’s approach to granting N/DPAs, the corporation often still must agree to significant financial and remedial terms if it is to continue to thrive.⁷⁸

Nor have these reforms addressed the structural and normative problems presented by reliance on N/DPAs as a means of policing corporate conduct. First, the discretionary nature of the form and scope of N/DPAs places individual United States Attorney’s Offices, decentralized throughout the nation,⁷⁹ in the role of the *ad hoc* regulator, a task

72. See, e.g., Garrett, *supra* note 70, at 108 (explaining that even though prosecutors cannot “abide the collateral consequences of seeking convictions,” they still enjoy significant leverage when negotiating DPAs).

73. See, e.g., Warin & Boutros, *supra* note 64, at 129 (noting that “companies may not be able to weather the storm of an indictment” which is “likely” to bring “downgrading of creditworthiness, loss of market share, diminution of stock value, market and reputational damage, [and] debarment from certain industries”).

74. Greenblum, *supra* note 57, at 1885.

75. See Warin & Boutros, *supra* note 64, at 123–24 (noting that prosecutors’ “unbridled discretion . . . produces bizarre corporate criminal resolutions and DPA terms, including terms that are seemingly unrelated to the company’s wrongdoing”).

76. Garrett, *supra* note 70, at 108.

77. See, e.g., Spivack & Raman, *supra* note 59, at 168–70 (discussing the Thompson, McNulty, and Filip Memoranda, and noting that the DOJ’s approach to cooperation evidence as a condition of granting DPAs has evolved through the years).

78. See, e.g., Warin & Boutros, *supra* note 64, at 122 (noting that “the addition of DPAs to DOJ’s playbook has caused real and consequential economic, reputational and (at times) life-changing harm to companies”).

79. See, e.g., Spivack & Raman, *supra* note 59, at 171–72 (explaining that “whether a company is offered a DPA, and what the terms of that agreement are, could very likely turn on the luck of the draw regarding which office happens to handle the prosecution”).

better suited to centralized administrative agencies and the Congress.⁸⁰ Moreover, regulations are designed to take into account the policy preferences of all relevant stakeholders, not merely the policy preferences of Main Justice or a single DOJ branch office.⁸¹ Similarly troubling from a structural standpoint, DPAs remove judicial oversight from the punishment of criminal offenders,⁸² a circumstance unfamiliar to the American criminal justice system.

Second, the prevalence of DPAs retards the development of judicial precedent relevant to corporate criminal liability.⁸³ Usually, the case law advances through an adversary process (notwithstanding the ubiquity of plea agreements, which themselves are subject to a degree of judicial supervision). That is, through public trials and judicial review, the law continuously develops. However, the new N/DPA regime represents a significant departure from this model.⁸⁴ Instead of reflecting the traditional norm-developing criminal adversary process, N/DPAs are contracts privately negotiated by individual prosecutors on one hand and individual private attorneys on the other hand, and typically are not subject to meaningful judicial review. Thus, a body of corporate criminal law does not develop as it otherwise might.⁸⁵ As one commentator has explained, N/DPAs “subvert” the development of precedent by “preventing courts from analyzing legal and factual issues and subsequently publishing judgments defining specific points of law.”⁸⁶ That the growth of the corporate criminal law is stunted as a result of the N/DPA regime also deprives legislatures of “signaling” as to gaps in the law.⁸⁷

Without a growing body of case law, corporate actors are deprived of judgments “clarify[ing] the boundaries of permissible legal conduct” and thus are unable to tailor their conduct with precision.⁸⁸ This complication cannot be remedied through the examination of past N/DPAs as a benchmark to gauge appropriate behavior for each United States Attorney’s Office has significant discretion to enter into and negotiate

80. See, e.g., Garrett, *supra* note 70, at 867 (noting that DPAs can “create industry-wide effects in a regulatory manner”).

81. See, e.g., the Social Security Act, 42 U.S.C. § 1302(b) (2012) (explaining that when a final rule or regulation may have a significant impact on a substantial number of stakeholders, a regulatory impact analysis must be prepared and made available to the public for their review and input).

82. See Uhlmann, *supra* note 62, at 1328 (observing that there is “little or no judicial oversight of [DPAs]” but that judicial involvement “would help ensure the fairness of the agreements and provide the accountability the public deserves”).

83. See, e.g., Brooks, *supra* note 57, at 139; Paulsen, *supra* note 37, at 1455–56.

84. See, e.g., Greenblum, *supra* note 57, at 1865 (noting that “the corporate deferral process . . . is currently an extrajudicial area of white collar crime prosecution”).

85. See, e.g., Uhlmann, *supra* note 62, at 1342 (noting that the government “erodes corporate criminality by using deferred prosecution and non-prosecution agreements as a substitute for criminal prosecution”).

86. Brooks, *supra* note 57, at 155.

87. *Id.*

88. *Id.*

the terms of N/DPAs.⁸⁹ From a penological perspective, this lack of certainty is troubling. First, corporations face the prospect of being punished for conduct they did not recognize as prohibited. Second, as described above, this lack of clarity is also economically inefficient because corporations must invest human and financial capital—that could otherwise be put toward higher and better uses—into “attempt[ing] to decipher the correct legal framework.”⁹⁰

The rise of the N/DPA, while an understandable response to the forces unleashed by a criminal regime organized around respondeat superior liability and exclusion/debarment determinations, has introduced additional complications without addressing root causes. In the end, those origins must be addressed; any other approach merely risks inventing new problems. After all, “if society truly believes that the adversary system is the best and fairest way to test criminal charges when individuals are in the government’s cross-hairs, it is not at all clear why legal entities such as corporations should be denied its benefits.”⁹¹

III. PROPOSED REFORMS

A. *Eliminate Respondeat Superior Liability as a Basis for Corporate Criminal Liability and Incorporate a Robust Compliance Program Affirmative Defense*

Given the shortcomings of the respondeat superior liability standard, the collateral consequences of debarment and exclusion, and the problems introduced by the N/DPA regime that ascended in response, there is no shortage of proposals aimed at narrowing the standard for corporate criminal exposure.⁹² Indeed, one oft-cited article commences its discussion of the subject by stating, “We start with the premise that vicarious liability is an inferior rule for determining corporate responsibility.”⁹³ Others have criticized the current standard for “wholly ignor[ing] a fundamental tenet of criminal jurisprudence present in crimes applicable to individuals: moral culpability.”⁹⁴ While a detailed discussion of the merits and shortcomings of each proposal is beyond the scope of this Article, observations regarding some of the more influential proposals for reforming the current standard provide context for the proposal set forth below.

In an influential and widely-cited article, Professor Pamela Bucy argues that corporations have distinct and identifiable personalities—in

89. See, e.g., Garrett, *supra* note 70, at 932–33; Warin & Boutros, *supra* note 64, at 122 (noting that the “DOJ has failed to provide guidelines to prosecutors on when to employ a guilty plea, DPA, or NPA” and “[a]s a result, companies, shareholders, and employees suffer from much needless and painful uncertainty”).

90. Brooks, *supra* note 57, at 156; see also Paulsen, *supra* note 37, at 1460–61.

91. O’Sullivan, *supra* note 68, at 338.

92. See, e.g., Lucian E. Dervan, *Reevaluating Corporate Criminal Liability: The DOJ’s Internal Moral Culpability Standard for Corporate Criminal Liability*, 41 STETSON L. REV. 7 (2011); Bharara, *supra* note 7, at 63; Podgor, *supra* note 39, at 170 (emphasizing that the guidelines may be changed at any time and are not subject to judicial review).

93. Laufer & Strudler, *supra* note 18, at 1298.

94. Dervan, *supra* note 92, at 9.

her parlance, an “ethos”—and that only organizations with an ethos that encourages employees or agents to commit criminal acts should be held criminally accountable under the law.⁹⁵ Professor Bucy advanced the following eight factors for consideration in determining whether a corporate ethos encouraged criminal conduct:

1. Was the corporation organized in a manner that encouraged the criminal conduct?
2. Did goals set by the corporation encourage illegal behavior?
3. Were corporate employees educated about legal requirements?
4. Were legal requirements monitored?
5. Who was involved in the criminal conduct, and was it “recklessly tolerated” by higher echelon officials?
6. How has the corporation reacted historically to both violations of the law and individual violators?
7. Was legally inappropriate behavior incentivized by the corporate compensation policy?
8. Are there indemnification practices that encourage criminal conduct?⁹⁶

According to Professor Bucy, corporate criminal liability should attach where these factors indicate that the corporation’s ethos encouraged the employee’s or agent’s criminal conduct.

Reliance on a corporate-ethos analytical model for assigning criminal liability does not, however, adequately remedy the shortcomings of the respondeat superior liability. First, the corporate-ethos test overlooks the mens rea standard contained within the particular criminal statute at issue. A statute’s mens rea standard reflects the legislature’s judgment regarding the appropriate degree of “culpability required for conviction.”⁹⁷ The corporate-ethos approach ignores that legislative determination by disregarding the difference between statutes subjecting corporate persons to liability based on, for example, criminal negligence on one hand and willfulness on the other.

Second, the test calls on a finder of fact to consider multiple factors for purposes of making a culpability determination, but does not describe the relative weight to accord each variable or define the threshold required for a finding that the corporation is morally responsible for the offense at issue. Thus, from a practitioner’s perspective, the corporate-ethos theory can be criticized as amounting to little more than a “smell test.”⁹⁸ That is, without familiar benchmarks or clear principles guiding its application, the corporate-ethos test lacks the predictability that corporations and practitioners require of an effective liability standard.

The American Law Institute’s approach, codified as § 2.07(1)(c) of the Model Penal Code (“MPC”), another influential alternative, pro-

95. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099 (1991).

96. *Id.* at 1129–46.

97. Skupski, *supra* note 33, at 300.

98. *Id.*

poses to limit corporate criminal liability to the following circumstances:

[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 on behalf of the corporation within the scope of his office or employment.⁹⁹

“High managerial agent” is defined by the MPC as an officer “or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.”¹⁰⁰ This approach is based on the notion that the acts of higher-level agents are better “reflective of the character of the corporate body.”¹⁰¹ Although § 2.07 does not itself set forth a mens rea requirement, the MPC, unlike Professor Bucy’s corporate-ethos approach, incorporates the mens rea requirement from the underlying criminal statute. Specifically, the MPC provides that “a person is not guilty of an offense unless he acted purposefully, knowingly, recklessly, or negligently, *as the law may require*, with respect to each material element of the offense.”¹⁰² Finally, the MPC provides for an affirmative defense if a corporate defendant can show, by a preponderance of the evidence, “that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.”¹⁰³

Several state jurisdictions, either by statute¹⁰⁴ or through common law doctrine,¹⁰⁵ have adopted the standard set forth in the MPC. Others have announced that criminal liability for corporations is limited to those provisions where the legislature has expressly provided for corporate criminal liability.¹⁰⁶ Still others have adopted standards even stricter than those set forth in the MPC.¹⁰⁷ Thus, it is the minority of

99. MODEL PENAL CODE § 2.07(1)(c).

100. *Id.* § 2.07(4)(c).

101. WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS 11 (2006).

102. MODEL PENAL CODE § 2.02(1) (emphasis added).

103. *Id.* § 2.07(5).

104. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-305 (2004); MONT. CODE ANN. § 45-2-311 (2009); ALASKA STAT. § 11-16-130 (2004).

105. *See, e.g.*, State v. Smokey’s Steakhouse, Inc., 478 N.W.2d 361, 362 (N.D. 1991).

106. *See, e.g.*, State v. St. Paul Fire & Marine Ins. Co., 835 So. 2d 230, 233–34 (Ala. Crim. App. 2000).

107. *See, e.g.*, Com. v. Beneficial Finance Co., 275 N.E.2d 33 (Mass. 1971) (holding that a corporation could be held liable for any criminal offense committed by an employee who had been given the power by the corporation to handle the business engaged in at the time of the criminal act); West Valley Estates, Inc. v. State, 386 So.2d 208, 209 (Fla. Dist. Ct. App. 1973) (holding that a corporation may be criminally liable “for the acts of an agent who has been vested with the authority to act on behalf of the corporation in the sphere of corporate business in which he commits the criminal act”); State v. Adjustment Dep’t Credit Bureau, 483 P.2d 687, 691 (Idaho 1971) (adopting standard modeled after the Model Penal Code but refusing to adopt the respondeat superior liability provision set forth in Model Penal Code § 2.07(1)(a)). For a detailed discussion of the law governing corporate criminal liability in each of the fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands, see Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 126–42 (2006).

state jurisdictions that have retained a form of respondeat superior liability in evaluating allegations of corporate criminal conduct.¹⁰⁸ The federal common law, however, stubbornly clings to that flawed regime.

This Article builds upon these and similar proposals for reform. Specifically, an employee's malfeasance should expose the corporation to criminal liability only where the current common law elements are satisfied *and* at least some member of senior management possessed the mens rea set forth in the underlying criminal statute. Our proposal also incorporates an improved affirmative-compliance-program defense, permitting the corporation to establish by a preponderance of the evidence that the body of individuals comprising senior management maintained and oversaw a robust compliance program designed to prevent the type of conduct charged. Thus, under our proposal, the complete liability standard would read as follows:

A corporation shall be criminally liable for the criminal acts of its employees or agents when:

- (1) the employee's or agent's criminal acts were
 - (a) within the scope of their duties, and
 - (b) intended to benefit the corporation; and
- (2) at least some member of senior management—defined as those individuals having substantial control over the corporation or a substantial role in the making of policy—possessed the requisite mens rea.

It is an affirmative defense that the corporation establishes by a preponderance of the evidence that the body of individuals comprising senior management maintained and oversaw a robust compliance program designed to prevent the type of conduct charged.

By limiting criminal liability to those circumstances where a member of senior management possesses the requisite mens rea, this proposal limits criminal liability to those instances where the corporation itself can fairly be said to be guilty of misconduct. In so doing, the proposal remedies the respondeat superior deficiencies catalogued above.

The robust-compliance-program defense is also an improvement upon the existing standard. First, the affirmative defense would encourage corporate self-regulation and good citizenship. Second, the affirmative defense shifts the evaluation of a corporation's compliance program away from prosecutors, who often have "little or no experience in corporate governance matters," but nevertheless are "charged with evaluating whether a company's compliance program is ade-

108. See John M. Darley, Kevin M. Smith, & Paul H. Robinson, *The Ex Ante Function of the Criminal Law*, 35 L. & SOC'Y REV. 165 (2001) (estimating that at least than 36 states have adopted the MPC approach, at least in part); see, e.g., *Sea Horse Ranch, Inc. v. People*, 30 Cal. Rptr. 2d. 681, 687 (Cal. Ct. App. 1994) ("[A] corporation may be criminally liable for the conduct of its officer or agents or employees."). But see Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 630 (1988) (noting that only six of the twenty-one states that had adopted § 2.07 of the MPC had recognized a due diligence defense to liability).

quate.”¹⁰⁹ The proposal set forth in this Article ensures that the effectiveness of a corporation’s compliance program will be judged in the public sphere by factfinders rather than within the individual United States Attorney’s Offices.

While the reforms advanced by Professor Bucy and the MPC reflect significant improvements upon the current state of the law, this proposal provides additional and important benefits. First, unlike Professor Bucy’s model, which discounts the mens rea requirement set forth in the underlying federal criminal statute, the proposal calls for fidelity to duly enacted mental state requirements. Second, the proposal avoids the unnecessary implementation difficulties that could arise if factfinders were forced to make culpability determinations under Professor Bucy’s eight-factor corporate-ethos test. Third, unlike the factors set forth by Professor Bucy’s inquiry, which present a theoretical framework for organizational culpability but no threshold for satisfaction, the elements in our proposal call for the sort of factual inquiries familiar to judges and juries.

By improving upon the scope of the affirmative defense available to corporations maintaining robust compliance programs, our proposal also offers an advantage over the MPC reforms. Although the “due diligence” affirmative defense proposed by the MPC represents a step in the right direction, it remains inadequate. First, it is unfortunate that the MPC proposal is limited in the scope of its focus on only those efforts made by “the high managerial agent *having supervisory responsibility over the subject matter of the offense deployed*.”¹¹⁰ Such an approach reflects a somewhat antiquated view of corporations in which it is “easy to trace responsibility for conduct from a lower-level worker to a member of senior management whose oversight of employees can be assessed to determine whether ‘due diligence’ was in fact exercised.”¹¹¹ Because modern corporations typically contain several “layers of management and different lines of responsibility that often cut across product and geographical lines,”¹¹² a narrow inquiry into the due-diligence efforts of specific supervisors, as opposed to senior management as a whole, leaves the potential for corporations with robust compliance programs to be stripped unfairly of an affirmative defense where a single official fails to exercise appropriate oversight. In contrast, our proposal calls for an analysis of the compliance efforts of the corporation’s senior management as a whole, thereby reflecting modern organizational realities.

109. Bharara, *supra* note 7, at 112; see also 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, 678–84 (1995).

110. MODEL PENAL CODE § 2.07(5).

111. Peter J. Henning, *Be Careful What You Wish For: Thoughts on a Compliance Defense Under the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 883, 904 (2012). For a discussion of the willful blindness standard under the Foreign Corrupt Practices Act, see generally Christina M. Sindoni, Note, Global-Tech’s “Patent” Failure: *Why Congress Must Reverse the Foreign Corrupt Practices Act’s Mens Rea After Global-Tech*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 605 (2014).

112. Henning, *supra* note 111, at 904.

Of course, the liability-limiting proposals set forth in this Article do not purport to eliminate every complication that may arise in evaluating corporate conduct. For example, under our framework it is necessary in each case as a predicate matter to determine which individuals compose senior management. Given that corporate hierarchies and organizational structures vary based on an entity's size, industry, geographic reach, and other factors, a bright-line standard drawing the line around an appropriate senior management group for every case is not realistic. For example, in a closely-held organization with only a handful of senior managerial positions, focusing on only top-tier management seems appropriate. In contrast, with respect to a multinational corporation operating numerous autonomous divisions, all of which have multiple subdivisions, tiers of high-level management, and profit centers, it makes little sense to focus solely on the highest echelon of managers in the parent corporation. Ultimately, the inquiry here must strike a balance—on one hand, it must capture individuals that truly drive the corporation's behavior, while avoiding casting too small of a net; on the other hand, we must not return to a watered-down vicarious liability approach that would result if prosecutors were permitted to impute liability to corporate defendants based on the intent of individuals far down the organizational ladder.

Some commentators have also expressed concern that instituting a robust compliance affirmative defense might enable companies to immunize themselves from liability by creating “sham” programs.¹¹³ But under this proposal, the defendant corporation would carry the burden of proof. And, in order to discourage organizations from seeking to hide behind “cosmetic compliance” programs,¹¹⁴ the government need only present evidence indicating that a program is, in substance, inadequate.¹¹⁵

113. See Bharara, *supra* note 7, at 110–11 (citing Robert E. Bloch, *Compliance Programs and Criminal Antitrust Litigation: A Prosecutor's Perspective*, 57 ANTITRUST L.J. 223, 226, 229–30 (1988) (arguing against corporate compliance defense because it would provide too much protection to misbehaving corporations); Samuel Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 529 (2006) (suggesting that such an approach “may be mostly a boon to compliance professionals” because “[a] firm might formalize practices in part to mask that it does not really practice them”); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1372 (1999) (“[S]urvey research suggests that in some . . . corporations, the role of compliance has more to do with maintaining the appearance of a compliant reputation than that of a meaningful culture of ethical awareness and law abidance.”). For a discussion on how corporate culture affects white collar crime generally, see Cynthia A. Koller, Laura A. Patterson & Elizabeth B. Scalf, *When Moral Reasoning and Ethics Training Fail: Reducing White Collar Crime Through the Control of Opportunities for Deviance*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 549 (2014).

114. Garrett, *supra* note 52, at 890. For example, Enron had a compliance program entitled “Respect, Integrity, Communication, and Excellence,” which, despite the lofty title, existed only on paper. *Id.*

115. Skupski, *supra* note 33, at 297.

B. *Ensure Meaningful Review of Debarment and Exclusion Agency Determinations*

As a further or alternative response to the inequities described above, entities subject to debarment or exclusion should be afforded an opportunity to engage in meaningful advocacy before any agency determination takes effect. While the precise quantum of reform necessary with respect to each individual statute and regulation is well beyond the scope of this Article, as a general matter the provision of an opportunity for robust challenge and meaningful review prior to the imposition of debarment or exclusion in all but a handful of cases—*e.g.*, those presenting the threat of imminent, serious, and irreparable harm—would “totally alter the underlying bargaining relationship between corporations and prosecutions.”¹¹⁶ That is, in a regime where corporations could mount robust challenges to agency determinations and be afforded meaningful review prior to the effective date of exclusion or debarment, a corporation, no longer facing a significant risk of extinction upon conviction, could rationally choose to defend itself at trial instead of submitting to the demands of a N/DPA. With the knowledge that a guilty verdict is less likely to result in the demise of a corporation, the government would occupy a comparatively modest negotiating position. Of course, reforms that provide for a robust-challenge and meaningful-review regime where either or both is lacking would also incentivize voluntary disclosure of malfeasance, a circumstance that should be welcomed by both enforcement agencies and debarring and exclusion officials.

CONCLUSION

At present, federal corporate crime is punished by a regime that is relatively suspect from both a penological and a philosophical perspective, notwithstanding the admirable intentions of those tasked with its enforcement. The proposals for reform enumerated within this Article would do much to remedy the defects inherent in and collateral to a liability mechanism imported intact from the law of torts. Through such improvements, the federal corporate criminal law could become an efficient yet moral instrument, one that effectively deters corporate misconduct without compromising our cherished right to a criminal trial.

116. Garrett, *supra* note 70, at 112.

