THE VIRTUES OF THE DUE DILIGENCE DEFENSE FOR CORPORATIONS IN CRIMINAL CASES: SOLVING THE PROBLEMS OF A CORPORATION'S VICARIOUS LIABILITY FOR THE CRIMES OF ITS AGENTS AND EMPLOYEES

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I. INTRODUCTION

Recent events, especially those surrounding the financial crisis of 2008, have provided diverse examples of serious misconduct by large and powerful corporations. Entities as diverse as Enron, J.P. Morgan Chase, and Bank of America, among others, have been accused of violating both civil and criminal rules governing the conduct of business activities. But, on the federal level, many of these same entities have not been subject to formal criminal prosecutions. Instead, they have reached settlements with federal prosecutors that have precluded formal criminal prosecutions. Rather than face formal criminal judgments in these settlements, the corporations have paid fines and provided other remedies to the victims of their wrongful conduct.

This trend in prosecution strategy coincides with an increasing criticism of the legal structure of criminal law as it applies to corporations. That structure was first established more than a century ago when the Supreme Court held that corporations could be vicariously liable for crimes committed by their agents and employees.[1] That fundamental principle for establishing corporate criminal liability was developed to solve a particular problem in the legal context at the turn of the twentieth century; nonetheless, it has persevered ever since, even

[1] New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909) [hereinafter, *New York Cent.*].

though the scope and purposes of the criminal statutes applicable to corporations have greatly expanded.

This paper addresses the question of whether principles of vicarious liability should still be at the center of corporate criminal law. To do this, it begins by considering the purposes of criminal law, and the nature of corporate personhood to help identify the fundamental objectives that should be accomplished when corporations are subject to criminal prosecution. Then, the paper will examine how the principles of vicarious liability were injected into the criminal law, as applied to corporations to show what purposes those principles were designed to serve. Next, it reviews various approaches to modify the principles of corporate criminal law and determine which of them are consistent with the fundamental objectives that corporate criminal law should serve. Finally, it concludes that those objectives are best served if principles of vicarious liability are preserved while corporations are permitted to deny vicarious liability with an affirmative defense of due diligence, in which they can show that they took affirmative steps to prevent the criminal conduct of their agents and employees.

Such a modification of the current standards for corporate criminal liability would prevent corporations from being held responsible for the truly independent wrongdoing of their agents and employees. If prosecutors have declined to pursue formal criminal proceedings against corporations because they feared the principles of vicarious liability would lead to unjust results, this modification would remove a barrier to such proceedings. And if that barrier is removed, there will be more opportunities to use the instrumentalities of the criminal justice system as a formal expression of moral judgment about the conduct of some of the most powerful and influential people in the United States.

II. THE PURPOSES OF CRIMINAL LAW

Any understanding of how corporations should be regulated by the criminal law must begin with an understanding of the purposes that criminal law serves. In general, criminal law has the purpose of protecting society from wrongful conduct by establishing a moral standard for conduct —that is, distinguishing between right and wrong— and by punishing those who fail to meet that standard.[2] This broad objective is often described more specifically in terms of the concepts of *retribution* and *deterrence*.[3] Criminal law seeks to express society's moral judgments by taking retribution against wrongdoers, and it seeks to deter wrongful conduct as a means of protecting the community.[4]

Prosecution and punishment through the criminal justice system is a means of effecting retribution against those who violate the moral principles expressed through criminal statutes. "What actions are deemed to be *criminal* is a judgment by society as to what is out of bounds of acceptable societal behavior.

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[2] Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 401–11 (1958).

[3] *Id.*; *see also* Andrew Weismann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1325–26 (2007).

[4] Hart, *supra* note 3; Weismann, *supra* note 3.

The transgression of that boundary is itself a harm that society has determined warrants its harshest condemnation."[5] In this respect, the retributive aspect of criminal law pertains to the assessment of the voluntariness and intent behind wrongful conduct.[6] That is, the criminal law directs society's retributive impulse against blameworthy decision-making —*mens rea*— as well as against harm-causing conduct.[7] Thus, the criminal law expresses a moral judgment, and establishes a standard for making moral judgments.

Of course, criminal law is about more than expressing a moral judgment of wrongful conduct; it is also about protecting the community from harmful conduct. In this respect, criminal law also aims to deter such harmful conduct. Deterrence involves both discouraging individuals from making the choice to commit crimes and protecting the community from individuals who have chosen to commit crimes, usually by restricting their liberty through criminal punishment.[8]

In this regard, the deterrence rationale for criminal law consists of two primary components: specific deterrence and general deterrence.[9] "Specific deterrence refers generally to incapacitating the criminal to prevent or dissuade future conduct in that individual. For a real person, that incapacitation comes usually in the form of imprisonment. It can also include restrictions on one's liberty and even employment during a period of supervised release."[10] General deterrence is the effect created from public awareness of the criminal penalties imposed on specific individuals.[11] This kind of deterrence is regarded to be especially important with respect to crimes requiring deliberation and calculation, as opposed to crimes of passion.[12] "General deterrence is particularly apt with respect to corporate criminal conduct, which tends to be the antithesis of crimes of passion. Corporations—through boards, inside and outside counsel, and formal deliberative processes—generally pay particular attention to precedent in determining the risks and rewards of contemplated action."[13]

III. THE NATURE OF CORPORATE PERSONHOOD

The criminal law regulates the conduct of persons. Of course, the law has long recognized that a corporation is a *person* just as an individual is.[14] This recognition leads to the conclusion that corporations are subject to the requirements of criminal law, just like any other person is. Accordingly, criminal statutes that do not specifically refer to liability for entities are governed by the

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[5] Weismann, *supra* note 3, at 1326.
[6] Id.
[7] *Id.*
[8] Id.
[9] *Id.* at 1325-26.
[10] *Id.* at 1325.
[11] *Id.* at 1325-26.
[12] Weismann, *supra* note 3, at 1325-26.
[13] *Id.* at 1325.
[14] Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 881 (1985) (It is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment).

definitional provisions of the United States Code, which state "unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies as well as individuals."[15]

But recognizing a corporation as a person for the purposes of criminal law is not as simple as asserting a definition. There is no doubt that corporate personhood is a unique phenomenon. The differences between the personhood of individual human beings and the personhood of disembodied business entities is important for understanding how criminal law applies to corporate persons.

Among corporate law scholars, there are three leading conceptions of the nature of the corporation: (1) as a fictional person; (2) as an entity or piece of property owned by its shareholders; or (3) as a nexus of contracts.[16] The concept of the corporation as a *person* is a legal fiction designed to convey the idea that the corporation has the authority to do things that persons do, especially to make contracts and own property. The power to own property is especially useful because it permits corporations to partition their own assets from the assets of their owners, thus insulating the owners from any liability for the corporation's debts.[17] The conception of corporations as legal entities is another way of explaining the reality of corporate existence, especially the insulation of shareholders from the corporation's own assets and liabilities. Under this conception, corporations are entities in the sense that corporate property is entirely distinct from the property of the owners and even in corporations that have a single owner, the owner, as an individual, have no standing to enforce the property rights of the corporation.[18] The *nexus of contracts* concept is useful because it effectively explains how the corporation acts through the individuals of which it is comprised, —the directors, managers, and employees. In this sense, the corporation is purely abstract, a conceptual locus for a variety of contractual relationships —contracts between the shareholders and the corporation, the employees and the corporation, the corporation and its creditors, the corporation and its customers and suppliers, and so on.[19]

Under each of these conceptions, the corporation is a *being* constituted by a set of legal rules. This set of rules has three principal elements: (1) the state statutory law that defines the framework in which it can operate; (2) its charter, by-laws, and other constitutional documents that determine how it will operate within that framework; and (3) any contractual agreements among its owners that determine their rights and duties to each other with respect to the framing of the corporate constitutional documents. These legal rules are all essential to the corporation's existence because they define the scope of agency that individual human beings have in connection with the corporation's action. These rules can

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[15] 1 U.S.C. § 1 (2012); *See also* Rowland v. California Men's Colony, Unit II Advisory Council, 506 U.S. 194, 199–200, 210–11 (1993) (noting that, as a general rule of statutory interpretation, corporations can be criminally liable unless the establishment of such liability would be inconsistent with the statutory scheme).

[16] Stephen Bainbridge, The New Corporate Governance in Theory & Practice 25–30 (2008).

[17] *Id*. at 25–26.

[18] *Id*. at 26–27.

[19] *Id*. at 28–30; *see also* William A. Klein, *The Modern Business Organization: Bargaining under Constraints*, 91 YALE L. J. 1521 (1982) (describing the corporation as a nexus of contracts).

prescribe the set of values and objectives for which the corporation's directors, managers, employees, and other agents must account in discharging their duties to the corporation. By controlling the actions of the human beings who act on the corporation's behalf, these legal rules define who the corporation is.

The legal structure that determines the framework for corporate decision-making makes corporations similar to individuals because this structure gives them an identifiable persona and the capacity to make moral judgments.[20] The fact that corporations must make decisions according to a particular set of rules, —which can be substantive as well as procedural— means that the corporation has its own independent *ethos* and is not merely the reflection of the personal preferences of its owners and managers.[21] Indeed, the independent personhood of corporations has been recognized by the Supreme Court when it has held that corporations have, among other rights, the constitutional right to freedom of speech.[22] It would not make any sense for the Court to hold that corporations had this right, if they were not capable, of expressing their own unique views that were different from their constituents.

IV. THE PROBLEM OF APPLYING THE CRIMINAL LAW TO CORPORATE PERSONS

Because corporations are abstract entities that act only through the conduct of their agents, the fundamental problem of corporate criminal liability arises in determining when the conduct and mental state of an agent of the corporation, —one of its directors, managers, or employees—, can be attributed to the corporation as corporate conduct. There is a wide spectrum of opinion on how to solve this problem. At one end of the spectrum lies the argument that it is impossible to ever attribute the criminal conduct of an agent to a corporation because the legal rules that constitute the corporation's existence make it impossible for the corporation to ever authorize criminal conduct by an agent.[23] In this connection, criminal conduct is always *ultra vires* action by the agent for which he or she alone must be responsible. At the other end of the spectrum, is the contention that a corporation must be responsible for all of the conduct and decision-making of its agents as long as such conduct and decision-making were undertaken within the ostensible scope of agency and as long as the conduct redounded to the corporation's benefit.[24] According to this viewpoint, agents must be presumed to be acting on behalf of the corporation and at its direction,

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[20] Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 846 (2000).

[21] Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 MINN. L. REV. 1095, 1099 (1991); see also Eli Lederman, Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity, 4 BUFF. CRIM. L. REV. 694 (2000).

[22] *See* Bank of Boston v. Bellotti, 435 U.S. 765, 787–95 (1978).

[23] *See* Michael Moore, Placing Blame: A General Theory of The Criminal Law 596-617 (1997).

[24] *See* United States v. Hilton Hotels, Inc., 467 F.2d 1000 (9th Cir. 1972), *cert. den.*, 409 U.S. 1125 (1973)). (holding that a corporation could be liable for criminal violations of the Sherman Antitrust Act that were committed by a manager, even though the manager's conduct was expressly contrary to corporate policy).

unless it can be conclusively shown that they were acting on their own, perhaps because they were violating an express directive or policy issued by management.

In the United States, the law governing corporate criminality currently stands at the latter end of this spectrum, imposing criminal liability under a theory of vicarious liability. But this approach to corporate criminal liability was developed over a century ago and served the purposes of a rather specific legal framework. Numerous fundamental changes occurring since this principle was established have raised serious questions about whether reform is warranted in the fundamental principles for determining corporate criminal liability.

V. VICARIOUS LIABILITY PRINCIPLES AND CORPORATE CRIMINAL LIABILITY

The foundational statement of the existing principles for establishing corporate criminal liability comes from the Supreme Court's decision in *New York Central & Hudson River Railroad Co. v. United States*,[25] which was decided in 1909. This was the first case in which the Court expressly held that a corporation could be liable for criminal conduct, and it concluded that such liability could be established by a theory of vicarious liability or *respondeat superior*, in which the criminal conduct of the individual agents of the corporation, such as its managers or its employees, would be imputed to the entity. Although this mode of analyzing corporate criminal conduct has persisted for more than a century, the ruling in *New York Central* was the product of several historically unique circumstances.

The question of corporate criminal liability did not arise until 1909 because, in a very real sense, there were simply no criminal statutes that a corporation could violate until the end of the nineteenth century. At that point, as the federal government made its first efforts to regulate corporate behavior, the possibility arose of using the criminal law as an aspect of the regulation of industry.[26] Thus, the imposition of criminal liability on corporations began as an instrument for supplementing the regulation of corporations through civil law.

With industrialization and the expanded use of the private business corporation during the middle and late nineteenth century came concerns about monopolistic economic behavior by corporations, especially by railroad corporations. The corporate form was especially well-suited for use by railroad enterprises, given the large capital investment that was required to pay for purchasing the property rights needed to lay lines, constructing the lines, and purchasing rolling stock, among other things.[27] Because railroads made such enormous investments in their capital stock, they were willing to slash their carriage rates to win business, even if such low rates meant operating at a loss for an extended period of time.[28] Operating losses were a relatively small price to pay for staying in business and preserving the long-term value of the company's

[25] New York Cent., 212 U.S. 481.
[26] Lawrence M. Friedman, Crime & Punishment in American History 282–86 (1993).
[27] Lawrence M. Friedman, A History of American Law 511-25 (2d ed. 1985).
[28] *Id.*

original capital investment.[29] Thus, railroads often engaged in predatory pricing, cutting their rates to levels substantially below cost, hoping to drive competitors out of business by forcing them to accept operating losses.[30] The ultimate objective of these practices was to destroy competition and obtain monopoly power in a particular geographic market, at which point, the railroad could raise prices to recoup its previous losses and earn monopoly profits going forward.[31]

The federal government sought to control these practices with legislation. As a means of controlling railroad rates, Congress enacted the Interstate Commerce Commission Act of 1887,[32] which was the first federal law to regulate private industry.[33] It prohibited price discrimination against smaller markets, such as farmers, and it required that railroad rates be "reasonable and just."[34] To enforce these regulations, it established an administrative agency, the Interstate Commerce Commission (ICC).[35] Along similar lines, in 1890, Congress sought to directly prohibit monopolistic conduct by enacting the Sherman Act,[36] which outlawed attempts to create monopolies and conspiracies to restrain commerce.[37]

After a short time, it was clear that the ICC Act and the Sherman Act were not enough, in themselves, to avoid the problems caused by monopolistic and other kinds of anti-competitive behavior. As early as 1891, the ICC recommended that Congress enact a statute imposing criminal liability on corporations, to supplement the statute creating individual criminal liability for violations of the ICC Act and Sherman Act.[38] The ICC reasoned that, according to established judicial precedent, corporations could not be classified as persons for the purpose of enforcing the criminal statutes for anti-competitive behavior.[39] It further argued that imposing criminal liability directly upon the corporations themselves was necessary for several reasons.[40] First, prosecuting individual corporate agents alone might not be effective when the violations of federal statutes benefitted only the railroad, but not the agents themselves because both jurors and the general public would oppose the punishment of individuals who did not personally gain from corporate action.[41] Second, when the corporation, that is, the real beneficiary of a criminal violation, "not only goes unpunished, but is adjudged incapable of criminal wrongdoing, the law is effectively nullified and brought into 'general discredit.'"[42] Third, even if it would be effective and just to direct prosecutions solely at individuals, it could be difficult in many cases to

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[29] *Id.*
[30] FRIEDMAN, *supra* note 26, at 282-86.
[31] Id.
[32] Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379.
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[34] *Id.*, § 1.
[35] See id.
[36] Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as 15 U.S.C.).
[37] FRIEDMAN, *supra* note 26, at 282-86.
[38] Interstate Commerce Comm'n, Fifth Annual Report, Dec. 1, 1891, S. Misc. Doc. No. 52-31 at 16 (1892).
[39] *Id.*
[40] *Id.* at 16-17.
[41] *Id.*
[42] *Id.*

identify particular persons who would be appropriate targets of prosecution because the corporation action was the joint effort of so many different individual employees or managers, many of who acted independently.[43]

While these requests lay dormant for a decade, they were revived when Theodore Roosevelt became president in 1901. Long known for his strong support of anti-trust law and commitment to controlling monopolistic practices, he called on Congress to act under the authority to regulate interstate commerce under the Commerce Clause and to enact various new statutes to control corporate conduct.[44] One such statute was the Elkins Act of 1903,[45] which created corporate criminal liability for railroads in connection with the ICC Act. It provided:

> That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act, with reference to such persons, except as such penalties are herein changed. . . .
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> In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person.46

The Supreme Court's decision in *New York Central*[47] arose from the prosecution of a railroad company for giving illegal rebates. The railroad had published a rate for shipping sugar from New York City to Detroit of twenty-three cents per one hundred (100) pounds. Its general traffic manager and assistant traffic manager reached an agreement with two sugar refiners to provide a rebate of five cents per one hundred (100) pounds on all sugar shipped on the railroad to the refiners' consignee in Detroit.[49] The rebate was offered to induce the refiners to ship via rail instead of by ship, up the Hudson River and across the Great Lakes.[50] The Supreme Court noted that the rebate helped the railroad respond to "severe competition with other shippers and dealers."[51] The railroad

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[43] *Id.*
[44] Theodore Roosevelt, First Annual Message to Congress (Dec. 3, 1901), http://www.presidency.ucsb.edu/ws/?pid=29542 (last visited Jan. 7, 2015).
[45] Act of Feb. 19, 1903, ch. 708, 32 Stat. 847.
[46] *Id.* at § 1.
[47] *New York Cent.*, 212 U.S. at 489.
[49] Id.
[50] See id.
[51] *Id.* at 491.

itself and its assistant traffic manager were convicted of a criminal violation of the Elkins Act.[52]

In challenging the conviction, the railroad argued that the Elkins Act was unconstitutional "because Congress has no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution by reason of the things charged."[53] The railroad made other constitutional arguments as well:

> The argument is that to thus punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without due process of law. And it is further contended that these provisions of the statute deprive the corporation of the presumption of innocence, a presumption which is part of due process in criminal prosecutions. It is urged that as there is no authority shown by the board of directors or the stockholders for the criminal acts of the agents of the company, in contracting for and giving rebates, they could not be lawfully charged against the corporation.[54]

The Court began its analysis of these arguments by acknowledging the long-standing authority by several prominent treatise authors that a corporation could not commit a crime. In this connection, the Court quoted Blackstone, summarizing the well-established rule that "A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may in their distinct individual capacities."[55]

Notwithstanding, the Court asserted that "[t]he modern authority, universally, so far as we know, is the other way."[56] The Court explained the reasoning behind this modern authority:

> Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.57

The Court also noted that several states and England had all concluded that corporations could be liable for criminal offenses, even if they could only be punished by fines or by the seizure of property.[58] And it noted that its own case law had held that corporations could be liable for torts under a theory of vicarious liability.[59]

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[52] *Id.* at 489.
[53] *Id.* at 492 (discussing the petitioner's argument).
[54] *Id.* at 492.
[55] *Id.* (quoting BLACKSTONE, COMMENTARIES, ch. 18, § 12).
[56] *Id.*
[57] *Id.* at 492–93 (quoting BISHOP'S NEW CRIMINAL LAW § 417).
[58] *Id.* at 493.
[59] *Id.* (citing Lake Shore & Mich. Southern R.R. v. Prentice, 147 U.S. 101, 109–11 (1893)).

This led the Court to conclude that the same principles of vicarious liability could also apply in criminal law as well as in tort law. As the Court explained:

> A corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act.60

The Court also pointed out that such vicarious liability was necessary to effectuate the regulation of corporate conduct.

> Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.61

The Court stopped short of holding that any and all criminal statutes could be applied to corporations. Rather, it concluded that the criminal liability of corporations would be limited to particular classes of offenses.

> It is true that there are some crimes, which in their nature cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we 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. 2 Morawetz on Corporations, § 733; Green's Brice on Ultra Vires, 366. If it were not so, many offenses might go unpunished and acts 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.62

It also reasoned that Congress intended to impose criminal liability on corporations themselves when enacting the Elkins Act.

> It is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions ensured to the benefit of the corporations of which the individuals were but the instruments. This situation, developed in more than one report of the Interstate Commerce Commission, was no doubt

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[60] *Id.* at 493–94 (citation omitted).
[61] *Id.* at 494.
[62] *Id.* at 494-95.

> influential in bringing about the enactment of the Elkins Law, making corporations criminally liable.63

When viewed solely within the relatively narrow context of legal efforts to prevent anti-competitive behavior, it made sense for the Court's to decide to adopt principles of vicarious liability into criminal law. The civil statutory rules prohibiting anti-competitive conduct were an extension of existing principles of tort law. And the criminal rules established by the Elkins Act essentially created a criminal penalty for the same conduct that was already prohibited by the civil statutory rules. Moreover, ruling that the Elkins Act applied only to individual agents of the corporation but not the corporation itself would have put corporations in a position to insist that their managers or employees engage in anti-competitive conduct without any fear of direct consequences to the corporation itself. Finally, as one commentator has pointed out, "[g]iven the absence of widespread public civil enforcement prior to the early 1900s, corporate criminal liability appears to have been the only available option that met both the need for public enforcement and the need for corporate liability."[64] As another commentator has noted:

> Corporate liability deters crime; it moves the risk of loss away from risk averse officers and directors toward the firm; it efficiently distributes liability risk between the firm and employees. Without significant entity liability or even shared liability, some argued, incentives would be seen as too weak to ensure an organizational commitment to law abidance.[65]

The fact that adopting principles of vicarious liability made sense in the context of the law prohibiting anti-competitive conduct does not, however, mean that vicarious liability makes sense in every context where the criminal law might be applied. As government regulation of business conduct has expanded in scope and intensity over the past century, especially in the wake of the New Deal, the legal context for imposing corporate criminal liability has changed greatly. There is a very real question of whether and under what circumstances corporations should be liable for all of the criminal acts committed by their agents within the scope of their agency. And, if such a universal application of vicarious liability principles is not warranted, a question also arises about what alternative principles can be applied to determine when corporations can and should be criminally liable.

Even now, more than a century after *New York Central*, the Court has not imposed any significant limitations on the kinds of crimes for which vicarious liability can be found. Even in *New York Central*, the Supreme Court conceded that

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[63] *Id.* at 495.

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

[65] William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1364 (1999) (footnotes omitted).

there are "some crimes which, in their nature, cannot be committed by corporations," [66] but, in the decades following that statement, neither the Supreme Court nor any other federal court has imposed a significant limitation on the scope of the application of vicarious liability. In fact, corporations have been held criminally liable for a wide variety of federal offenses that require specific intent.[67] Consequently, even though the adoption of vicarious liability principles for corporate criminal law was the product of a particular regulatory context, and even though the *New York Central* Court acknowledged that the context was a dispositive factor in its decision, those principles still find universal application.

VI. THE DIMINISHING PROSECUTION OF CORPORATIONS: IS VICARIOUS LIABILITY THE PROBLEM?

In recent years, there have been many high-profile examples of corporate misconduct, especially in connection with the collapse of the mortgage-backed securities market in 2008. Even so, there have been a substantial number of prominent cases in which federal prosecutors have chosen to avoid a full-scale prosecution and trial and, instead, have entered into deferred prosecution agreements or non-prosecution agreements, or outright settlement agreements with corporations. [68] In these agreements, corporations undertake remedial measures as a substitute for criminal punishment.[69] Some have suggested that the use of such agreements is on the rise because there are increasing doubts about whether it is appropriate to impose criminal liability on corporations.[70]

The fact that settlements produce remedial measures that look like civil penalties tends to reinforce these suggestions. In many settlements, corporations accept civil liability as a substitute for criminal liability and pay fines instead of being subjected to other forms of punishment available under criminal law.[71] For example, in 2009, Pfizer Inc. and one of its subsidiaries were alleged to have engaged in health care fraud arising from the illegal promotion of certain

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[66] *New York Cent.*, 212 U.S. at 494.

[67] Kathleen F. Brickey, Corporate Criminal Liability: A Treatise on the Criminal Liability of Corporations, Their Officers & Agents § 2.09 (2d ed. 1992) (describing extension of corporate criminal liability to a variety of specific intent crimes including contempt of court and various forms of conspiracy, including conspiring to violate state and federal antitrust laws). In this three-volume treatise, Brickey discusses such subjects as corporate criminal liability for conspiracy, racketeering, various forms of fraud, foreign corrupt practices, violations of the election laws, bribery, tax offenses, currency reporting offenses, money laundering, obstruction of justice, perjury, and false statements.

[68] Gibson, Dunn Crutcher LLP, 2014 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) (July 8, 2014), available at http://www.gibsondunn.com/publications/pages/2014-Mid-Year-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx (last visited January 7, 2015).

[69] See id.

[70] See id.

[71] *See, e.g.*, Matthew Goldstein, *Bank of America to Pay $131.8 Million Penalty in Mortgage Deals*, N.Y. TIMES (December 12, 2013), available at http://dealbook.nytimes.com/2013/12/12/bank-of-america-to-pay-131-8-million-penalty-in-c-d-o-deals/ (last visited January 7, 2015).

pharmaceutical products.[72] As a means of settling all civil and criminal liability in connection with these allegations, Pfizer and its subsidiary agreed to pay a settlement of $2.3 billion, the largest health care fraud settlement in the history of the Department of Justice. The settlement included a fine of $1.195 billion, which was technically denominated as a criminal penalty, and the companies agreed to the forfeiture of $105 million, along with a payment of $1 billion to resolve allegations under the civil False Claims Act and provide $102 million to civil claimants.[73] Notwithstanding, the characterization of a portion of the settlement amount as a criminal fine, this agreement has all of the characteristics of a civil remedy, especially because it lacks the formal accusation of guilt and a corresponding admission or judicial finding of such guilty. While this kind of agreement may accomplish important material objectives, especially with respect to the compensation of the victims of the company's misconduct, it lacks the same kind of moral judgment that would be included in a criminal prosecution.

The increasing prevalence of this kind of outcome in cases of serious corporate misconduct could suggest that prosecutors are reluctant to initiate formal criminal proceedings against corporations because criminal liability is too forceful or too blunt an instrument. If this is the case, the perseverance of vicarious liability principles in corporate criminal law could be understood as a factor in prosecutorial reluctance to seek formal criminal sanctions against corporations. In other words, it is possible that the existing legal structure for imposing criminal liability on corporations has outlived its usefulness and that something new is required.

VII. CRITIQUES OF THE APPLICATION OF VICARIOUS LIABILITY PRINCIPLES TO CORPORATE CRIMINAL LIABILITY

There is no shortage of contemporary commentary calling for reform in the legal structure of the criminal law as it applies to corporations. Many scholars and other commentators argue that the approach to corporate criminal liability that was set forth in *New York Central* is not appropriate for many, if not most, of the circumstances in which corporations are charged with misconduct. These writers offer suggestions about how to reform the legal structure of criminal law as it is applied to corporations. Their perspectives are valuable in understanding the shortcomings of relying only on vicarious liability as a basis for corporate criminal liability.

The fundamental critique of using principles of vicarious liability to establish corporate criminal responsibility is that such liability is simply incompatible with the fundamental presumptions of criminal law.[74] This critique focuses on the assertion that an *artificial person* such as a corporation lacks the

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[72] Department of Justice, Office of Public Affairs, Justice Department Announces Largest Health Care Fraud Settlement in Its History, (September 2, 2009), available at http://www.justice.gov/opa/pr/justice-department-announces-largest-health-care-fraud-settlement-its-history (last visited January 7, 2015).

[73] *Id.*

[74] Sara Sun Beale & Adam G. Safwat, What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability, 8 BUFFALO CRIM. L. REV. 89, 97–98 (2004).

kind of real mental capacities that would permit it to have any of the forms of *mens rea* that are essential for the overwhelming majority of criminal offense.[75] These capacities include rationality, autonomy, and emotionality, including the capacity to choose and cause the realization of one's choice and mental states such as joy, fear, and anger.[76] Without these crucial aspects of mental capacities, corporations lack the basis for being assigned moral responsibility.[77] This critique has special resonance within the retributivist purposes of criminal law, because, to the extent that criminal law seeks to sanction morally blameworthy decision-making, the corporation does not engage in any kind of moral reasoning, much less the blameworthy moral reasoning that is the object of criminal sanctions.

This critique also engages the idea that corporate criminal liability is inappropriate because it involves imputing guilt from one person to another artificial *person*. Corporations only act through their officers and employees, making an entity vicariously liable for the conduct of its agents and employees. This idea is inconsistent with the principle that an actor is responsible only for his own conduct and, most importantly, for his own intent. This vision is extended to attack the idea of imposing any kind of punishment on corporations. According to this, the actual effect of any criminal penalty for a corporation primarily falls on innocent shareholders, and, indirectly, on innocent employees who had no connection to the criminal conduct; as well as other innocent parties, such as the entities who rely on the corporation's business and profitability, the parties with whom it contracts, and, most broadly, the community as a whole.[78]

Indeed, in a very real sense, this critique of the current approach to corporate criminal liability is not just aimed at the reliance on principles of vicarious liability but, more broadly, on any form of criminal liability for corporations. If the premises of this critique are accepted —especially the idea that corporations lack any of the mental capacities to establish *mens rea*— then it would never be appropriate to impose criminal liability on a corporation, under a vicarious liability theory or any other theory that permitted a connection between the corporation and the actions of its agents.

This critique is problematic, however, because it disregards the fact that corporate decision-making can and does have all of the characteristics necessary for moral responsibility except emotionality. This makes it less than persuasive, both in its challenge to the existing theory for imposing corporate criminal liability but also its implicit challenge to the entire concept of corporate criminal liability. By engaging in the decision-making processes specified in their organizational rules, corporations act with autonomy, make decisions according to rational methods, because the law requires them to make rational decisions in the interests of their shareholders, and have the capacity to understand the

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[75] *See* MOORE, *supra* note 23 at 596–617; see also John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386 (1981).

[76] *Id.*

[77] See id.

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

decisions by issuing orders to and through managers and employees. Because corporate decision-making has so many of the attributes of individual decision-making, corporations can have the kind of *mens rea* required for the imposition of ordinary criminal liability. Moreover, making corporations morally responsible will serve the retributive purposes of criminal law because corporations do engage in decision-making processes that can be an appropriate objection of moral condemnation.

Another problem with this critique is that it utterly disregards the reality of the corporation as an independent entity with a meaningful legal existence. By assuming that the corporation is nothing more than the actions of its agents and the interests of its individual shareholders, it is premised that the corporation is a kind of empty nexus where corporate agents and shareholders somehow intersect with each other with no mediating entity between them. This idea directly contradicts foundational principles of corporate law, especially the idea that the entity creates a *veil* separating the shareholders from the parties with whom the corporation does business. If punishing the corporation really is the same thing as punishing the shareholders, then, by the same reasoning, the shareholders should not be able to escape personal liability for the corporation's debts.

Finally, critique's discussion of the collateral effects of corporate criminal liability sweeps far too broadly, unintentionally providing an argument against criminal liability for anyone. As noted above, this critique complains that punishing corporations has unwarranted ill effects on employees removed from the criminal activity, on shareholders, and on other parties who rely on the corporation in one way or another. But if this kind of argument was a reason for avoiding criminal punishment, it would apply to every defendant, whether it was a *real* or *artificial* person. Even those guilty of the most heinous crimes have connections with family members and other innocent members of the community, all of whom will suffer if the guilty are jailed or otherwise subject to criminal punishment. In the end, the absurdity of this aspect of the critique demonstrates the fundamental problem with disregarding the reality of the corporation as an independent entity and of assuming that it is nothing more than an invisible meeting ground for a collection of individuals.

The law-and-economics scholarship is the source of another critique of the current regime for imposing criminal liability on corporations. In accordance with the prevailing analytical approach of law and economics theory, this critique asserts that corporations should not be subject to criminal liability because such liability is an inefficient way of responding to corporate misconduct.[79] Because law-and-economics scholars maintain that financial incentives are the only meaningful ones —for individuals and business entities alike— they conclude that criminal liability for corporations is, at best, redundant of civil liability, creating a double liability that is simply inefficient.[80] By this reasoning, the *redundant* criminal penalty is nothing more than a symbolic gesture that imposes real costs on the corporation and others but confers no concomitant benefits.[81]

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

[80] *See, e.g.*, V. S. Khanna, *supra* note 61 (examining the reputational and procedural costs in the corporate context).

[81] *Id.*

Moreover, the risk of this purported double penalty may result in over-deterrence, a situation in which the corporation behaves with less than optimal efficiency because it is unduly concerned with avoiding the double penalty.[82] Also, the additional legal procedure associated with criminal prosecution as a supplement to civil litigation increases litigation expenses, a form of transaction cost.[83]

Others in the law and economics school have suggested that the risk of criminal liability is so destructive of the proper incentive structure that it can create conflicting incentives, or even perverse incentives, that lead law-abiding corporations to engage in grossly inefficient decision-making and actions.[84] In particular, these commentators contend that criminal liability for corporations will create an incentive to engage in cover-ups rather than to avoid the conduct proscribed by criminal law.[85] In addition, the risk of criminal liability may actually provide corporations with a disincentive for imposing compliance programs and conducting internal reviews or investigations to assure that such compliance programs are working.[86] In other words, these commentators conclude that the risk of criminal liability for corporations may create powerful economic incentives for those corporations to bury their heads in the sand about the actions of their own officers or employees that might be construed as criminal.[87]

Current responses to these critiques focus on the importance of understanding the corporation itself as a legally significant actor. Some have taken the position that the law must impose some criminal liability on corporations because the corporation itself is capable of engaging in criminal conduct that would not be possible for any of its agents, officers, or employees acting entirely in their individual capacities. According to this position, the actions and decisions of individual employees may be aggregated, and this aggregation can be attributed to the corporation as a whole.[88] Thus, a court may find that a corporation has knowledge of a particular fact when "one part of the corporation has half the information making up the item, and another part of the entity has the other half."[89] By this approach, the corporation may have the *mens rea* required to establish an offense even if none of its individual employees or agents would have that culpable mental state.[90] This approach has the advantage of preventing the corporation from trying to escape responsibility for a company-wide decision by compartmentalizing information in small, independent units.

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[82] Fischel & Sykes, *supra* note 76, at 321.
[83] Id.
[84] Jennifer Arlen, The Potentially Perverse Effects of Corporate Criminal Liability, 23 J. LEGAL STUD. 833, 836 (1994).
[85] See generally Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L. REV. 687 (1997).
[86] *Id.*
[87] *Id.*
[88] United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987), *cert. denied* 484 U.S. 943 (1987).
[89] *In re WorldCom, Inc. Securities Litigation*, 352 F. Supp. 2d 472, 497 (S.D.N.Y. 2005) (citation and internal quotation marks omitted).
[90] *Bank of New England*, 821 F.2d at 847.

Acknowledging that the criminal justice system has an expressive function provides another reason for imposing criminal liability on corporations. In this respect, the symbolic value of criminal liability is not merely inefficiency, as argued by law and economic scholars, but rather has an important moral value, albeit one that is not quantifiable. Imposing criminal liability on corporations has the value of showing that no person, real or artificial, is above the law.[91] By contrast, when a corporation is involved in criminal conduct, relieving it of any criminal liability under any circumstances communicates the message that the wrongdoer has a greater moral value than its victims, as well as all other persons.[92] Making corporations subject to prosecution and punishment has the symbolic value of reinforcing social norms, and, in some cases, such prosecution and punishment can promote the change or evolution of those norms.[93] In addition, precluding the criminal prosecution and punishment of corporations would be the practical equivalent of giving them immunity, which would violate social norms and diminish the public perception of the legitimacy of the legal system.[94]

Preserving criminal liability for corporations serves the expressive function of the law in another way. The legal system has a unique, and pre-eminent, role in making moral judgments and in conveying their weight.[95] The punishments, including criminal sanctions imposed in connection with these moral judgments have an essential value in shaping the community's ideas of moral principles.[96] These moral judgments also have a material value in the marketplace, not just in abstract matters or moral principle. When a corporation is convicted of a crime, the market is informed that the corporation may be "flawed, unreliable, and apt to generate future harm."[97] While this information may not be capable of precise valuation in quantifiable terms, it is nevertheless an important element of market organization and economic function.

Finally, criminal liability for corporations provides a means of regulating their conduct that cannot be matched by other means. Regulating corporations through civil proceedings, often in administrative forums, may not be as effective as regulating them through criminal proceedings in the judiciary branch. Adequate administrative regulation can be undermined by regulatory capture.[98] Moreover, changes in federal securities law have made it harder for investors to assume the role of private attorneys general and impose civil sanctions on corporations through derivative suits.[99] Similarly, it can be difficult to use civil actions for breach of fiduciary duty to hold executive management or directors

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[91] Andrew E. Taslitz, *Reciprocity and the Criminal Responsibility of Corporations*, 41 STETSON L. REV. 73, 91–94 (2011).
[92] *Id.* at 94.
[93] Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L. J. 1, 49 (2012).
[94] Id.
[95] Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 494–497 (2006).
[96] *Id.*
[97] *Id.* at 501.
[98] Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1426 (2009). For a discussion of regulatory capture, see generally Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741 (2008).
[99] Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 379 (2008).

personally responsible for directing unlawful corporate action or other forms of wrongdoing.[100] These restrictions on the availability of civil alternatives suggest a need for caution in eliminating or reducing the possibility of criminal liability.
In assessing the need for deterrence and retribution, a corporation is fundamentally different than an individual in an important and overlooked respect that warrants limiting imposition of criminal liability for the actions of employees. Companies, unlike most individuals, cannot control absolutely the people's conduct for which they can be criminally liable. It is commonplace that the criminal law's moral basis is called into question whenever individuals with no practical ability to comply with its obligations are punished for their actions. Indeed, this is one of the most basic tenets of modern theories of the insanity defense, and its logic is instructive in the corporate criminal context.[101]

Another approach to re-shaping the nature of corporate criminal liability focuses on the idea that corporations should be liable only when their alleged misconduct is the product of a deliberate decision made at the highest levels, either by the board of directors or executive management, and reflected in some kind of formal corporate policy to which the misconduct can be traced.[102] This approach seeks to cure the most significant problems with the imposition of vicarious liability while preserving the ability of the criminal law to impose moral judgments and attendant punishments directly on the corporation itself and not merely on its directors or executives in their individual capacities.

One of the first and most influential examples of this approach can be found in the Model Penal Code (MPC), which was drafted under the auspices of the American Law Institute. The MPC generally rejects vicarious liability as the dispositive principle in determining corporate criminal liability. It permits corporations to be criminally liable for the conduct of their employees and other agents on a theory of *respondeat superior* only if the offense is one outside the MPC and "a legislative purpose to impose liability on corporations plainly appears."[103] Instead of relying on vicarious liability principles, the MPC provides that corporate criminal liability can be found when "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."[104] Given the significance of the role of these actors within the entity, the MPC concludes that it is "reasonable to assume their acts are in some substantial sense reflective of the policy of the corporate body,"[105] and shareholders are likely to be in a position to bring pressure to bear to avoid liability. The MPC also provides a defense that

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[100] Lisa M. Fairfax, On the Sufficiency of Corporate Regulation as an Alternative to Corporate Criminal Liability, 41 STETSON L. REV. 117, 117–18 (2011).
[101] Weissman, *supra* note 3 at 1327.
[102] *See* Bucy, *supra* note 21, at 1099.
[103] MPC § 2.07(1)(a). The MPC also permits liability whenever the "offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law." § 2.07(1)(b). This latter rule could be understood as permitting a form of vicarious liability because corporations could be liable for the criminal omissions of their agents.
[104] MPC § 2.07(1)(c).
[105] *Id.* at § 2.07 cmt. 2(c) at 339.

corporation can employ: the high managerial agent having supervisory authority "*employed due diligence* to prevent its commission."[106] Since the purpose of a corporate fine is to encourage diligent supervision, where that diligence can be shown the entity should be exculpated absent a contrary legislative purpose.[107] Although it has not been adopted by Congress, several states have drawn on the principles of the MPC to limit the scope of criminal liability for corporations, as compared to federal law.[108]

Along similar lines, some scholars have attempted to define a standard of corporate liability based on the entity's own conduct and intent, aiming to align criminal responsibility with the features of corporations that induce or inhibit criminal conduct. One example of this approach would make corporate criminal liability dependent upon specific findings about the *corporate ethos*.[109] One of the principal advantages of this approach is that it is framed with a clear recognition of the distinct nature of corporate personhood. It depends upon the assumption that, through its constitutional documents and its formal policies and practices, a corporation creates a distinct and identifiable personality for itself, one that is entirely independent of the specific individuals who control or work for the organization.[110] If corporate criminal liability were framed in terms of this approach, the government could convict a corporation only if it proved that the *corporate ethos* encouraged agents of the corporation to commit the criminal act.[111]

Another scholar has advanced a similar idea for how to assign criminal liability to corporations, one focusing on constructive corporate fault.[112] According to this scholar, the fundamental inquiry in determining corporate criminal liability should be whether "aspects of the organization, such as policies, goals, and practices, that reflect not merely the sum total of individual agents' intentions, but instead attributes and conditions of the corporation that make it possible for these agents to cooperate and collaborate in legally problematic ways."[113] Under this standard, the question is whether the primary act was authored by the corporation in a meaningful sense, such as whether the agent's acts can be fairly said to be the actions of the corporation based on objective factors such as the size, complexity, formality, functionality, decision making process, and structure of the corporate organization.[114]

Like the MPC, these proposals seek to limit corporate liability to conduct that can be attributed to the corporation's own foundational decision-making processes –its personality– but they identify a wider range of relevant factors than under the MPC. The MPC limits liability to conduct that was specifically authorized, performed, or recklessly tolerated by the board of directors or a

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[106] *Id.* at § 2.07(5) (emphasis added).
[107] *Id.* at § 2.07 cmt. 6.
[108] *Id.* § 2.07 cmt. 2(a).
[109] Bucy, *supra* note 21.
[110] *Id.* at 1099.
[111] *Id.*
[112] See William S. Laufer, Corporate Intentionality, Desert, and Variants of Vicarious Liability, 37 AM. CRIM. L. REV. 1285 (2000).
[113] *Id.* at 1309.
[114] *Id.*

member of executive management. This standard would not permit liability encouraged by clear corporate policies absent direct participation by the board or a high managerial agent. Indeed, the MPC standard may create a perverse incentive for senior managers; it encourages ignorance rather than diligence because liability attaches only if the manager was aware of and recklessly tolerated the conduct.[115]

There are, of course, problems with these approaches. Some critics have doubted that they are based on a realistic assessment of how corporations and their individual agents actually collaborate to bring about criminal conduct.[116] Under the MPC standard, which limits liability to behavior directed or recklessly tolerated by directors or executive managers, there is a perverse incentive for those in positions of corporate control to ignore criminal conduct by subordinates rather than be diligent in uncovering it.

Another way to preserve the forcefulness of the vicarious liability approach while accounting for the corporation's own efforts at due diligence can be found in the idea that corporations could assert their own due diligence as an affirmative defense to any criminal allegation arising from principles of vicarious liability.[117]Advocates of a due diligence defense contend that it can assure that corporate liability would be imposed only in cases where the corporation itself had actually engaged in wrongful conduct.[118] In addition, the availability of such a defense could provide an incentive for corporations to monitor their agents and employee's conduct, thereby preventing or at least deterring criminal acts. Finally, a due diligence defense would be consistent with fulfilling the expressive function of criminal law by preserving the ability of the criminal law to directly sanction morally blameworthy decision-making processes, regardless of whether they were made by real or *artificial* persons.[119]

VIII. CONCLUSION

In recent years, the criminal prosecution of corporations at the federal level has too often turned into another form of civil regulation, as prosecutor's substitute settlement agreements of one kind or another for actual criminal prosecutions. Because criminal law has expressive functions that are essential to establishing and confirming the community's moral standard, and because corporations are important and powerful actors in the community, corporations must be subject to criminal prosecutions to the same extent that *natural* persons are.

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[115] Bucy, *supra* note 21 at 1104–05.
[116] Buell, *supra* note 92, at 527–28.
[117] *See generally* Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537 (2007); *see also* Ellen S. Podgor, *Educating Compliance*, 46 AM. CRIM. L. REV. 1523, 1529 n. 39 (2009) (summarizing different formulations of how a good faith defense could work).
[118] *See* Podgor, *supra* note 114.
[119] *See* Gilchrist, *supra* note 90, at 45–46 (discussing the expressive aspect of criminal law).

There are good reasons to conclude that this trend in criminal enforcement is the product of an outdated standard for imposing criminal liability, one that was set forth in a specific legal context over a century ago and that has not changed since, even though the nature and extent of the criminal laws applicable to corporations have changed greatly. This standard, first set forth in *New York Central*, makes the corporation vicariously liable for all of the criminal conduct of it agents and employees as long as they were acting within the scope of agency or employment. This standard can have the effect of making corporations criminally liable for conduct that they never knew about, much less authorized, because it sweeps so broadly. It should not be surprising if prosecutors preferred settlement agreements to formal prosecutions whenever they thought that the more-or-less independent actions of corporate agents were be unfairly attributed to the corporation as a whole.

There are a variety of proposals for modifying the legal structure of corporate criminal liability to avoid this problem. But the best of these involves preserving the basic principles of vicarious liability as established by *New York Central* while creating an affirmative defense of corporate due diligence in which the corporation would bear the burden of proving that the criminal acts of individual agents or employees were directly contrary to corporate policies and that the corporation had undertaken substantial efforts to enforce those policies and prevent individual wrongdoing. With such a defense available, it is more likely that prosecutors will seek formal criminal prosecutions against corporations and, just as importantly, that corporations will not merely accede to settlement offers in criminal cases but will defend themselves when they think they can carry the burden imposed by the due diligence defense. With this modification of the principles of criminal liability in place, wrongful conduct by corporate persons can be subjected to the moral judgments of the community, judgments that can only be conveyed through the procedures of criminal law.